CATA News
Cleveland Academy of Trial Attorneys
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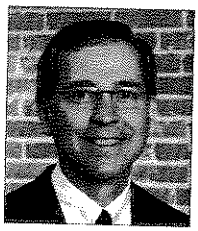
President's Message



Dennis R. Lansdowne

Cata Now More Than Ever

The mission of the Cleveland Academy of Trial Attorneys is to serve the plaintiffs' bar so that justice can be obtained for our clients. That was the mission before the election of November 2, 2004, and that remains our mission today. The pursuit of justice has gotten more difficult, but the pursuit continues.

In the present circumstances, it is wise to ask ourselves why we became trial lawyers. For most of us, a big part of the answer is we believed we could make a difference in the lives of people who had been injured or harmed. That belief, although it will be tested, has not changed.

As the impediments to justice increase, our clients will likewise increasingly need our counsel, advocacy, and guidance. This is not to say we can ignore reality. If the forces at work in our legislatures prevail we may not be able to obtain full justice for all of our clients. We can, however, be prepared to represent our clients zealously within the bounds of the law and constitution.

Whatever the result of the latest attempts to trample liberty, CATA will remain an important institution for those who represent the injured. For example CATA provided a luncheon seminar on *Northern Buckeye Education Council v. Lawson* less than a month after the decision was rendered. If you were unable to attend and want the materials, please contact me.

CATA will continue to provide timely seminars addressing any changes in the law that affect our practices. Throughout the year, CATA will provide information, strategy and advice regarding constitutional challenges to treasonous legislation. And CATA will continue to provide this newsletter and our extensive expert bank. Work on the website is ongoing to provide greater and easier access.

Only by working together can we hope to represent our clients in these dangerous times. CATA is our vehicle for working together.

If you have a topic you would like to present at a seminar or in an article, please let us know.

Finally, it bears mentioning that political change is constant. Today's overreaching majority becomes tomorrow's failed minority. The principles of justice, fairness and due process, however, are immutable.

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Victory At Youth Challenge Race Day

by Kenneth Knabe

On August 14, 2004, Youth Challenge held its Annual Race Day Event at Lakewood Park. Youth Challenge provides adapted sports activities for the physically challenged. CATA, through private donations from its members, has sponsored Youth Challenge for many years and is one of the proud sponsors of this race.

For weeks before this 5K race, I traded e-mails with fellow CATA Member and Trustee, Jack Landskroner. We both predicted victory in no uncertain terms. Jack and I had squared off at this race two years ago; he beat me by 200 feet. I promised Jack this year would be different.

An arch injury left me a little out of shape, and in pain every time I ran. Despite the pain, I ran Wednesday and Friday before this Saturday race, completely overdoing it. In the meantime, a mutual friend told me that Jack ballooned up to 250 pounds and was snacking at Dunkin' Donuts every morning. I was thrilled; Jack had lost it; I would easily beat the "poe" boy, despite my injury.

When I woke up Saturday morning for the race, a sixth sense told me Jack was baiting me. Actually, I saw him at the CATA Golf Outing two days before and quickly realized that he didn't look anywhere near 250 pounds.

Nevertheless, I had grandiose visions of keeping up with Jack until the last couple hundred yards - then digging deep to beat him anyway. I went to bed early and was feeling good. When I arrived at the race, sure enough, Jack was looking svelte, but still professed to be out of shape. When Jack turned around, I saw a number "36" written on the back of his leg. I quickly inquired. He calmly replied that the number was from his "last triathalon." At that point, I knew I was set up.

I then went over to watch the start of the physically challenged one mile race. The physically handicapped children were smiling, happy, laughing; despite their disability, they were eager to compete. I felt fortunate to participate in an event that brought them such happiness and satisfaction. After that race started, I turned

back to reality. I had my own "challenge" ahead of me - somehow I had to beat Jack in the 5K - the underdog would prevail! I had a plan.

We calmly waited at the start line. Jack brought his brother-in-law, Scott Kern, with him - a 21-year old from the University of Dayton. We both conceded that Scott would beat us; he did.

The race started, and I kept up with Jack, trying to divert his attention from pulling ahead by talking about anything and everything. Jack eventually, however, smelled the bait. Just before the halfway turn, he turned it up a notch. Despite my best efforts, I could not keep up, always trailing about 500 yards behind him. I saw him look back twice, and I yelled that I was still going to beat him and to "stop the man in the red hat." My pleas fell upon deaf ears. This psychological warfare had no affect on Jack, who trudged along, never slowing his pace.

At one point, I was inspired for a catch up run. Instead, I got mustard. I couldn't catch up. The race was coming to a close. I saw Jack make the turn off Lake Road into Lakewood Park, now 700 yards ahead of me. At that point, I knew it was over. Should I just quit and cry on the curb like the British Marathoner in the Olympics? No, I dug deep and finished the race to the cheers and encouragement of a very few.

As I trudged across the finish line, somewhere over 28 minutes, Jack was there with a big smile. I told Jack I would buy him breakfast if he won. I noticed there was a free breakfast for the runners, so I invited Jack in to fulfill my obligation. (Later, I bought Jack a fu fu drink at Caribou to make up for it.)

Even though Jack prevailed, we just ran 3.2 miles on a Saturday for a very good cause. As a CATA member, sponsoring the Youth Challenge Race Day was the real victory.

Does a Plaintiff Seeking To Challenge The Constitutionality Of A Tort Reform Statute Need To Assert That Challenge In The Complaint And Serve It On The Attorney General?

by Toby Hirshman

Senate Bill 281, the most recent attempt by the legislature to limit medical malpractice claims, was signed by Governor Taft on January 10, 2003. By its terms it seeks to limit the non-economic damages that are available in medical claims; it attempts to abrogate the collateral source rule under somewhat different circumstances than previous 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 of arbitration agreements between healthcare providers and patients. Its effective date is April 11, 2003. Any medical claims in which the act or omission which constitutes the alleged basis of the claim occurs on or after April 11, 2003 will be governed by this new law.[1] Likewise, other pieces of tort reform legislation have been passed. The likelihood is that various provisions of these bills will be asserted by defendants in tort actions to prevent or limit recovery by plaintiffs.

Conventional wisdom has it that a plaintiff wishing to assert a constitutional challenge to the provisions of a bill must assert those challenges in his complaint and serve a copy of the complaint on the Attorney General if he or she wishes to avoid a waiver of his rights to assert those constitutional infirmities. Under current Ohio law, however, service upon the Attorney General is necessary only when a plaintiff seeks a declaration under R.C. §2721.12, the declaratory judgment statute, that a statute is unconstitutional. Though the law may once have been otherwise, it no longer appears to be. Further, if we include assertions in the complaint that these recently-enacted statutes violate federal constitutional provisions we are setting ourselves up for removal based on federal question jurisdiction.[2] Once we find ourselves in federal court, we, of course, run the risk of having constitutional questions presented to the Ohio Supreme Court as a certified questions of state law without any factual context. Even without federal constitutional allegations, raising state constitutional challenges in the complaint creates the risk that these important issues will be decided on the pleadings alone –

serve the Attorney General with a copy of his complaint. The Supreme Court held that "[f]ailure to serve the Attorney General under R.C. §2721.12 with a copy of the proceeding in a declaratory judgment action which challenges the constitutionality of an ordinance precludes a court of common pleas from rendering declaratory relief in that action."[4]

Fourteen years later, the Court made it clear in *Ohioans for Fair Representation, Inc. v. Taft*[5] that where declaratory relief is sought in the complaint as to the unconstitutionality of state election laws, that although the Attorney General must be served with a copy of the proceedings, R.C. §2721.12 does not require that the Attorney General be named as a party.

Both *Sebastiani* and *Ohioans for Fair Representation, Inc.* dealt with plaintiffs' actions which were pleaded as declaratory judgment actions asserting the unconstitutionality of a state statute. Under those circumstances, the Court had no problem finding a requirement in §2721.12 that the Attorney General be served. The holdings appear to remain good law as applied to complaints formally making a claim for a *declaratory judgment* as to the constitutionality of a state statute.

From this point on, however, the case law, at least for a while, became somewhat murkier, in large part because of Justice Lundberg Stratton's attempts to turn the declaratory judgment statute into a statute of general application. In *Cicco v. Stockmaster*,[6] a personal injury action for damages was brought by plaintiff arising out of a motor vehicle accident. It was the plaintiff's contention that Richard Cicco was injured in a motor vehicle accident caused by Benjamin Stockmaster. Stockmaster had liability insurance issued by Grange Mutual Casualty Company with limits of $25,000 per person and $50,000 per accident. At the time, Cicco had UM/UIM coverage with Colonial Insurance Company of California also with limits of $25,000 per person and $50,000 per accident. The Ciccos subsequently amended their complaint to add a claim against their own insurer, Colonial Insurance, for UM/UIM coverage claiming that they were each entitled to the per person limits of their UM/UIM policy. Stockmaster's insurer, Grange, paid $25,000 in settlement of Mr. Cicco's claim against Stockmaster. Thereafter, Cicco filed a second amended complaint which added a claim against Grange for the wife's loss of consortium claim contending that she was entitled to a separate set of per person liability limits. At the same time, the Ciccos also filed a motion for summary judgment against both insurance again without the benefit of any factual context. Thus, it would appear to be in a plaintiff's best interest to avoid making constitutional challenges to tort reform legislation in the initial pleadings if this can be done without waiving the opportunity to raise those issues at a later time.

1. The Ohio Supreme Court's Rulings Regarding Constitutional Challenges – A History Of Contradictions

Section 2721.12 of the Ohio Revised Code, the declaratory judgment statute, has been cited as the statutory basis for the assumed obligation to set forth constitutional challenges to a statute in the complaint. It has also been cited as the statutory basis for the further obligation to serve a copy of the complaint on the Attorney General. That section reads in relevant part as follows:

> ... when declaratory relief is sought under this chapter in an action or proceeding, all persons who have or claim any interest that will be affected by the declaration shall be made parties to the action or proceeding. Except as provided in subdivision(B) of this Section, a declaration shall not prejudice the rights of persons who are not made parties to the action or proceeding. In any action or proceeding that involves the validity of a municipal ordinance or franchise, the municipal corporation shall be made a party and shall be heard, and, if any statute or the ordinance or the franchise is alleged to be unconstitutional, the Attorney General also shall be served with a copy of the complaint in the action or proceeding and shall be heard...

R.C. §2721.12(A).

It has been held in the past that this statute, and its predecessor, require that a plaintiff in a declaratory judgment action assert a constitutional challenge to a state statute in his complaint and serve the attorney general. In *Sebastiani v. Youngstown*,[3] a plaintiff trucker brought an action under R.C. §2721.12 against the City of Youngstown seeking a declaration that a Youngstown ordinance prohibiting truck traffic on certain side streets was either inapplicable to plaintiff or, in the alternative, unconstitutional. The plaintiff failed to

companies. In doing so, they sought a judgment against Grange on Mrs. Cicco's loss of consortium claim or, in the alternative, if she was not entitled to coverage under the Grange policy, then judgment for UM/UIM coverage from Colonial. In so doing, they sought a "declaration" that they had UM/UIM coverage through Colonial over and above the liability limits from the Grange policy.

In their motion for summary judgment, the Ciccos, for the first time, raised the issue of the constitutionality of former R.C. §3937.44 (which allows insurers to treat all claims arising out of bodily injury to one person as a single claim) and former R.C. §3937.18(A)(2) and (H) (which allow a UIM carrier to deduct any amounts paid by a liability carrier from its limits of liability for UIM coverage). The Supreme Court, in an opinion written by Justice Lundberg Stratton, held that "a party who is challenging the constitutionality of a statute must assert the claim in the complaint (or other initial pleading) or an amendment thereto, and must serve the pleading upon the Attorney General in accordance with the methods set forth in Civil Rule 4.1 in order to vest a trial court with jurisdiction under...R.C. §2721.12."[7]

According to Justice Lundberg Stratton (whose opinion in *Cicco* was joined by Chief Justice Moyer, Justice Sweeney and Judge Robert A. Nader sitting by assignment for Justice Resnick), the fact that the constitutional challenge was raised for the first time in a motion for summary judgment did not relieve the plaintiff of the obligation of asserting the claim in an original pleading and serving it on the Attorney General. In order for the Common Pleas Court to have jurisdiction, it was held that the constitutional issue needed to be raised in the initial pleading or an amendment thereto which was served on the Attorney General. Cicco's failure to do so was said to deprive the Court of the capacity to address the constitutional claims.

Justice Deborah Cook dissented from the majority in *Cicco*, and within her dissent can be found the seeds of the law as it subsequently developed to rectify the *Cicco* Court's attempt to rewrite the declaratory judgment statute. Justice Cook began her dissent by refuting the assertion of the majority that R.C. §2721.12 requires that the constitutionality of a statute be raised in an initial pleading. According to Justice Cook,

> [t]he statute . . . cannot fairly be read to require constitutional issues to be raised in the initial pleading - - its scope extends no further than the requirement that service be made on the Attorney General in declaratory judgment actions involving constitutionality.[8]

According to Justice Cook's dissent, the majority interpretation in *Cicco* "modifies well-settled procedural practice [allowing constitutional issues to be raised late in the proceedings] and does so without statutory support."[9] Justice Cook went on to argue that constitutional challenges to statutes should be allowed during the later stages of proceedings and that R.C. §2721.12 should be read to require no more than that the Attorney General be served with a copy of the pleading or motion actually raising the constitutional issue. Justice Cook was joined in her dissent by Justices Douglas and Pfeifer.

It was no more than six months after the decision in *Cicco* that the Court's retreat from its *Cicco* holding began. On December 29, 2000, the Court issued its opinion in *Mayer v. Bristow*.[10] In that action, a prison inmate who had been adjudicated a vexatious litigator pursuant to R.C. §2323.52 appealed an order denying him leave to proceed with a civil action. On appeal, the Court of Appeals, *sua sponte*, held that the vexatious litigator statute was unconstitutional as violative of the Ohio Constitution, Article I, Section 16. In light of *Cicco*, *supra*, the Supreme Court inquired as to whether the Court of Appeals lacked jurisdiction to consider the constitutionality of R.C. §2323.52 since the Attorney General had not been served in accordance with R.C. §2721.12. The Supreme Court concluded that the Court of Appeals *did* have jurisdiction to consider the statute's constitutionality. However, the majority's attempts to reconcile its holding in *Mayer* with the *Cicco* opinion were not particularly convincing. Although the majority in *Cicco* had rationalized that the initial pleading and service requirement were necessary so that the Attorney General might be given "a reasonable amount of time in which to evaluate the issues and determine whether to participate in the case,"[11] the *Mayer* majority failed to offer an explanation as to why it was appropriate for the Attorney General to be denied a similar opportunity in that case. Rather, the Court opted to simply assert, in a conclusory fashion, that "[a] decision favoring jurisdiction in this case does not conflict with our holding regarding the timing and method of service in *Cicco*."[12] According to the *Mayer* Court, the *Cicco* holding was meant to protect the Attorney General's interests "in cases where the constitutionality of a statute is ***challenged***."[13] (emphasis added). The Court, somewhat unconvincingly, reasoned that since *Mayer* involved a situation where the lower court had addressed the issue of constitutionality *sua sponte*, no

notice to the Attorney General was needed. Essentially, since neither ***party*** was challenging the constitutionality of the statute, the Court reasoned that no notice to the Attorney General was required. As the Court wiggled to find consistency with its *Cicco* decision, it asserted (somewhat unconvincingly) that "... our decision here is entirely consonant with the decision in *Cicco*; the two decisions simply represent the application of the same principles to different procedural circumstances."[14]

The next episode in the saga played out some two months later when the case of *George Shima Buick, Inc. v. Ferencak*[15] was decided on February 7, 2001. No opinion was written by the Court. Rather, the Court's majority simply agreed to a one paragraph order dismissing the case, *sua sponte*, on authority of *Cicco* because a pleading was not served upon the Attorney General. Justice Lundberg Stratton, however, in a concurring opinion in which she was joined by no one, sought to expand the application of R.C. §2721.12 even further by explicitly arguing that the initial pleading and service requirements of the declaratory judgment statute should be applied to *all* civil actions where a State statute's constitutionality was being brought into question.[16] As the basis for this expansive interpretation of R.C. § 2721.12, Justice Lundberg Stratton argued that "each time that a party legally challenges the constitutionality of a statute, the party is, in essence, requesting the Court to enter a declaratory judgment that the statute is unconstitutional."[17]

Once more, in dissent, Justice Cook took Justice Lundberg Stratton to task for her expansive reading of §2721.12.. As Justice Cook saw it, "the majority states that 'the judgment of the Court of Appeals is vacated for want of jurisdiction' because '[a] pleading was not served upon the Attorney General per *Cicco*.' *Cicco*, however, is wholly inapplicable to this case." The *Cicco* majority stated that '[t]he issue before us is what constitutes proper service upon the Attorney General for purposes of former R.C. §2721.12 ***in a declaratory judgment action.***'"[18] (emphasis in original). As Justice Cook saw it, "the Court's longstanding, consistent precedent interprets former R.C. § 2721.12 as applicable only in declaratory judgment actions."[19] Justice Cook then criticized the majority for taking "the special service requirement from the declaratory judgment statute and demand[ing] that it be met in non-declaratory judgment actions" though "no sound legal reasoning [was] offered for doing so."[20]

II. *Cleveland Bar Association v. Picklo*: The Contradictions Are Resolved

Until 2002, two very different interpretations of the pleading and service requirements set forth in R.C. § 2721.12 were reflected in Ohio Supreme Court case law – the one set forth in Justice Cook's dissents, in which R.C. § 2721.12 is taken at face value, and its pleading and service requirements applied only to declaratory judgment actions, and the other exemplified in Justice Lundberg Stratton's concurring opinions, in which the pleading and service requirements applied to *all* actions in which constitutional issues were raised by the parties, regardless of whether a declaratory judgment was being sought. In 2002, however, the Court adopted Justice Cook's narrower interpretation of the statute, and rejected Justice Lundberg Stratton's attempts to make the pleading and service requirements of R.C. §2721.12 the law for all actions, regardless of whether a claim for declaratory relief has been asserted.

Cleveland Bar Association v. Picklo[21] arose from an action brought by the Cleveland Bar Association against a layperson who, according to the Bar Association, had engaged in the unauthorized practice of law by filing a number of actions in Cuyahoga County's Housing Court on behalf of a local landlord. Picklo defended herself by claiming that her actions were authorized by the terms of R.C. §1923.01(C)(2) and R.C. §5321.01(B), both of which define "landlord" to include a landlord's agents.[22] The Board of Commissioners on the Unauthorized Practice of Law found the statutes unconstitutional to the extent that they purported to authorize the practice of law by non-attorneys, and subsequently so asserted in proceedings before the Supreme Court without serving the Attorney General.

On appeal, the Supreme Court assumed jurisdiction and affirmed the Board's position. In adopting the Board's conclusion that the statutes were an unconstitutional invasion of the Court's power to define the practice of law, however, the Supreme Court was forced to reconcile its opinion with its prior holdings in *Cicco* and *Ferencak*. In so doing, the Court expressly overruled the broad interpretation of R.C. § 2721.12 it had recently adopted in *Ferencak*:[23]

> *Cicco* recognizes that R.C. §2721.12 imposes a notice requirement on parties contesting the constitutionality of a statute in a declaratory judgment action filed pursuant to R.C. Chapter 2721. That statute requires that the Attorney

> General be notified in every such action by service of the pleading in accordance with Civ.R. 4.1. Neither *Ferencak* nor this case is a declaratory judgment action filed pursuant to R.C. Chapter 2721. *Ferencak* began as a small claims action to recover damages stemming from a customer's decision to stop payment on a check for automobile repairs. This case is an action to enforce our constitutional responsibility to oversee the practice of law in this State. *Cicco*, therefore, does not require service on the Attorney General as a prerequisite to invoking our jurisdiction. For this reason, *Ferencak* is overruled.[24]

Picklo has now been followed by a rather long line of cases that, almost universally, refuse to transplant the pleading and service requirements imposed on declaratory judgment actions by R.C. §2721.12 into other litigation contexts. The issue was addressed succinctly in a footnote by the Ohio Supreme Court in *Pinchot v. Charter One Bank*,[25] in which the Court simply stated that "since this case is not a declaratory judgment action filed pursuant to R.C. Chapter 2721, service on the Attorney General is not required as a prerequisite to invoking the court's jurisdiction."[26] Most courts of appeals have also understood *Picklo* to mean that "[t]here is no rule of general applicability requiring a party to serve the Attorney General with notice to vest the trial court...with jurisdiction to declare a statute unconstitutional."[27]

To date, the First, Fourth, Seventh and Tenth Districts have held that R.C. § 2721.12 does not apply unless a declaratory judgment claim has, in fact, been pleaded, and that it does not divest a trial court of jurisdiction to consider constitutional issues raised in later motions and pleadings.[28] The lone exception to the general rule set forth in *Picklo* and the court of appeals opinions that have followed is the Eighth District's opinion in *Williamson v. Bechtel*.[29] In *Williamson*, plaintiffs had brought an action against the City of East Cleveland seeking damages resulting from a collision with a police vehicle. The City claimed political subdivision immunity under Chapter 2744 of the Ohio Revised Code. Plaintiffs challenged the constitutionality of Chapter 2744 for the first time when they responded to a motion for summary judgment filed by the City. No service had been made upon the Attorney General.

In affirming the trial court's order granting the City's summary judgment motion, the Eighth District took note of *Picklo*, but nevertheless held that plaintiffs' failure to raise their constitutional challenge to the statute in the form of a declaratory judgment action deprived both the trial court and the court of appeals of jurisdiction to rule on the issue. Acknowledging *Picklo*, but relying instead on an unreported Ninth District court of appeals opinion issued before *Picklo* was decided, the Eighth District held that plaintiffs had waived their constitutional challenge by failing to raise it in their pleadings in the form of a declaratory judgment action.[30]

Williamson appears to be an aberration. Nevertheless, the *Williamson* opinion is a factor that plaintiffs, at least in Cuyahoga County, will have to consider in determining how, or whether, to raise their challenges to Ohio's most recent tort reform efforts.

III. Conclusion

In light of the above case law, it appears well settled that a Plaintiff filing a tort action to which tort reform legislation applies need not assert a constitutional challenge to the legislation in the body of his complaint. Whether a different approach should be taken in Cuyahoga County in light of the wrongly decided *Williamson* case is worthy of consideration.

ENDNOTES

[1] *See* Section 6(A) of SB 281.

[2] 28 U.S.C. §1441(b) provides in relevant part as follows:

Any civil action of which the District Courts have original jurisdiction founded on a claim or right arising under the Constitution Treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties.

In order to be removable based on federal question jurisdiction, a claim must, accordingly, "arise under" federal law. The rule of thumb for determining whether a claim "arises under" federal law for jurisdictional purposes is known as the "well-pleaded complaint rule." "[W]hether a case is one arising under the constitution or a law or treaty of the United States...must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose." *Taylor v. Anderson* (1914), 234 U.S. 74, 34 S.Ct. 724, 58 L.Ed. 1218. What this rule means, in

practical terms, however, is often far from clear. There certainly is case law which suggests that a Federal Court does not have jurisdiction over a case in which the the complaint presents a state-law cause of action, but also asserts that Federal law deprives the defendant of a defense he may raise (such as that S.B. 281 in providing damage caps deprives plaintiffs of due process or equal protection, for example). *See Franchise Tax Board of the State of California v. Construction Laborors' Vacation Trust of Southern California* (1983), 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed. 2d 420. However, there is also case law which suggests that removal is proper where the viability of plaintiff's state law causes of action turns on a Federal constitutional issue. *Merrell Dow Pharmaceuticals v. Thompson* (1986), 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed. 2d 650. According to Wright, Miller and Cooper, the *Merrell Dow* case "preserves cases such as *Smith v. Kansas City Title and Trust Co.* [255 U.S. 180, 41 S.Ct. 243, 65 L.Ed. 577 (1921)] which held that claims created by state law "arise under" a law of the United States when a determination is required as to the meaning or application of Federal law - in that case the constitutionality of a statute." Wright, Miller and Cooper, *Federal Practice and Procedure*: Jurisdiction 3d Section 3722. Wright, Miller and Cooper go on to assert that both before and after *Merrell Dow* "lower Federal Courts have held that removal is proper when a state cause of action set forth by the plaintiff necessarily turns on a limited set of important federal issues." Id. Since the law is ambiguous as to whether removal jurisdiction is created when a plaintiff asserts that an anticipated defense under a state statute violates the United States Constitution, why take the chance of asserting such a federal claim in one's complaint when, as this article argues, there is no need to do so? Once one has embedded such a federal constitutional assertion into one's complaint, it becomes exceedingly difficult to credibly argue that there is no important or necessary federal issue to resolve when drafting one's motion for remand to state court.

[3] (1979), 60 Ohio St. 2d 166.

[4] *Id.* at 167, citing *Malloy v. Westlake* (1977), 52 Ohio St. 2d 103 (syllabus).

[5] 67 Ohio St. 3d 180, 1993-Ohio-218.

[6] 89 Ohio St. 3d 95, 2000-Ohio-434.

[7] *Cicco, supra*, at syllabus.

[8] *Cicco, supra*, at 106.

[9] *Cicco, supra*, at 106.

[10] (2000), 91 Ohio St. 3d 3.

[11] *Cicco, supra*, at 99.

[12] *Mayer, supra*, at 8.

[13] *Mayer, supra*, at 8.

[14] *Id.* It is worthwhile noting that Justice Lundberg Stratton, the author of the *Cicco* opinion, did not participate in the *Mayer* decision.

[15] 91 Ohio St.3d 1211, 2001-Ohio-238.

[16] The *Ferencak* case arose out of a small claims action brought by George Shima Buick, Inc. through a non-attorney representative as allowed by R.C. §1925.17. Ferencak challenged the constitutionality of R.C. §1925.17 in a motion to dismiss asserting that the section, which permits a corporation to appear in small claims court through a non-attorney officer or salaried employee, violates the separation of powers doctrine inasmuch as it constitutes an attempt by the General Assembly to make rules governing the unauthorized practice of law. The Attorney General was not served.

[17] *Ferencak, supra*, at 139.

[18] *Id.* at 139.

[19] *Id.* at 140.

[20] *Id.*

[21] 96 Ohio St. 3d 195, 2002-Ohio-3995.

[22] As the Court noted in *Picklo*, "R.C. 1923.01(C)(2) . . . defines 'landlord' for the purpose of invoking a county, municipal, or common pleas court's jurisdiction in most forcible entry and detainer actions as 'the owner, lessor, or sublessor of the premises [or] the agent or person the landlord authorizes to manage premises or to receive rent from a tenant under a rental agreement,'" and "R.C. 5321.01(B) . . . similarly defines 'landlord' as 'the owner, lessor, or sublessor of residential premises, the agent of the owner, lessor, or sublessor, or any person authorized by the owner, lessor, or sublessor to manage the premises or to receive rent from a tenant under a rental agreement.'" *Picklo, supra* at 196. Picklo had argued that these broad definitions were sufficient to permit her, as an agent of the landlord, to file pleadings in the Cuyahoga County Housing Court.

[23] *Id.* at 197.

[24] *Picklo, supra* at 197. Justice Lundberg Stratton filed a lone dissent, in essence sticking to her guns and insisting that any constitutional challenge to a statute must be joined in the complaint and served upon the Attorney General.

[25] 99 Ohio St.3d 390, 2003-Ohio-4122.

[26] *Id.* at n. 1 (citing *Picklo*).

[27] *In re Cameron* (1st Dist.), 153 Ohio App. 3d 687, 2003-Ohio-4304 (§2721.12 applies only to declaratory judgment actions, following *Picklo*): *see Tonti v. Tonti* (10th Dist.), 2004-Ohio-2429 (notice requirements in R.C. § 2721.12 apply "only when the constitutionality of a statute is raised in a declaratory judgment action and not when the issue is raised in a motion filed in an ordinary civil action."); *Thorp v. Strigari* (1st Dist.), 155 Ohio App. 3d 245, 2003-Ohio-5954, *discretionary*

appeal not allowed, 101 Ohio St.3d 1469, 2004-Ohio-819 (same); *Ruble v. Ream* (4th Dist.), 2003-Ohio-5969, *appeal not allowed*, 101 Ohio St. 3d 1489, 2004-Ohio-1293 (same); *Napier v. Adoption Parents of Cameron* (1st Dist.), 153 Ohio App. 3d 687, 2003 Ohio 4304 ("there is no rule of general applicability requiring a party to serve the Attorney General with notice in order to vest the trial court (and, by implication, the appeals court) with jurisdiction to declare a statute unconstitutional;" citing *Picklo*); *Walker v. Jefferson County* (7th Dist.), 2003-Ohio-3490 (obligation to serve the Attorney General is limited to declaratory judgment actions, citing *Picklo*).

[28] *See In re Cameron*, *supra*: *see also Tonti v. Tonti* (10th Dist.), 2004-Ohio-2429 (notice requirements in R.C. § 2721.12 apply "only when the constitutionality of a statute is raised in a declaratory judgment action and not when the issue is raised in a motion filed in an ordinary civil action."); *Thorp v. Strigari* (1st Dist.), 155 Ohio App. 3d 245, 2003-Ohio-5954, *discretionary appeal not allowed*, 101 Ohio St.3d 1469, 2004-Ohio-819 (same); *Ruble v. Ream* (4th Dist.), 2003-Ohio-5969, *appeal not allowed*, 101 Ohio St. 3d 1489, 2004-Ohio-1293 (same); *Napier v. Adoption Parents of Cameron* (1st Dist.), 153 Ohio App. 3d 687, 2003 Ohio 4304 ("there is no rule of general applicability requiring a party to serve the Attorney General with notice in order to vest the trial court (and, by implication, the appeals court) with jurisdiction to declare a statute unconstitutional;" citing *Picklo*); *Walker v. Jefferson County* (7th Dist.), 2003-Ohio-3490 (obligation to serve the Attorney General is limited to declaratory judgment actions, citing *Picklo*).

[29] 2003-Ohio-5385, *appeal denied,* 101 Ohio St.3d 1488, 2004-Ohio-1239.

[30] *Williamson* at paras. 19, 20. The Eighth District apparently decided to follow the Ninth District's opinion in *Rutan v. State Farm Fire & Cas. Co.*, (9th Dist. July 12, 2001), No. 19879, unreported, which was issued before the Ohio Supreme Court decided *Picklo*.

Law Updates

by Stephen T. Keefe, Jr.
Sam Butcher
Stephen S. Vanek
Mark Ruf

Civil Procedure - Civ. R. 15(C) & (D); Motion to Amend for Misnomer Does Not Relate Back Under Civ. R. 15(C); Failure of Service

***Jason Martz v. Field Development Group, et al.*, 2004-Ohio-4066; 2004 Ohio App. LEXIS 3707**

Jason Martz filed a lawsuit against Field Development Group, Margarita Mamma's, Banana Joe's, and John Doe 1 through 10 in the Summit County Court of Common Pleas on February 14, 2003. Summons were served on the Defendants at 391 Neil Avenue, Columbus, Ohio 43215. Less than three weeks later, an entity named Columbus Hospitality advised the Summit County Court by letter that "[a]s of Thursday, October 24, 2002, Columbus Hospitality is the new management company for the Margarita Mamma's business located at 391 Neil Avenue, Columbus, Ohio" and that all the correspondence related to business prior to that date should be directed to Field Development Group, 6611 Liggett Road, Dublin, Ohio 43017.

On April 30, 2003, Martz re-mailed the summons to all Defendants at the Dublin address. On the same date, however, he filed a Motion for Default Judgment alleging that service was completed when notices were mailed to the original Columbus address and that default judgment was the appropriate remedy. Attached to the motion was a copy of the letter from Columbus Hospitality and copies of the summons sent to the Dublin address along with the Complaint. On June 18, 2003, the trial court granted default judgment after ruling that all Defendants had been served at the Columbus address on February 18, 2003, and it scheduled a hearing on damages for July 31, 2003. On July 28, 2003, Plaintiff moved to amend for misnomer under Civ. R. 15(C) to correct the names of the Defendants to Banana Joe's of Akron, Inc. (Banana Joe's) and Joel and John Field (the Fields).

The Fields and Banana Joe's entered a special appearance for the limited purpose of opposing the Motion to Amend for Misnomer. On September 30, 2003, the trial court granted the motion and again entered an Order holding that the Defendants "had failed to file an Answer or otherwise Plead to [Martz'] Complaint." In essence, the court found that service of summons on Field Development Group, Margarita Mamma's, and Banana Joe's was tantamount to service of summons based on a misnomer upon Defendants Banana Joe's and the Fields. The court referenced the fact that the correctly named Defendants were described with particularity in the Complaint and opined that they knew or should have known that they were the real parties in interest and should have filed a response to Plaintiff's Complaint. In failing to do so, the court deemed that Defendants had waived any defect. When granting Plaintiff's Motion to Amend, the court relied on Civ. R. 15 and ordered that the amendment relate back to the date of the original Complaint. It then entered judgment against Banana Joe's and the Fields for $350,000 in compensatory damages and $350,000 in punitive damages.

Defendants appealed, claiming that the trial court erred when it found that it had jurisdiction over Banana Joe's and the Fields. The Ninth District Court of Appeals considered the applicability of Civ. R. 15(C) and noted that the rule is not considered until the specific requirements of Civ. R. 15(D) have been met. Civ. R. 15(D) requires that when a correct name of a Defendant is discovered, the pleading must be amended accordingly. In addition, the Plaintiff must aver in the Complaint the fact that he could not discover the Defendant's name. The summons must contain the

words, "Name Unknown," and a copy thereof must be served personally upon the Defendant. Here, the reviewing court found that the trial court improperly applied Civ. R. 15(C). Specifically, amending a Complaint to correct the party's name does not accomplish service. Moreover, although the "relation back" feature of Civ. R. 15(C) applies to the statute of limitations, personal service does not "relate back" when erroneous parties are properly served and the correct parties are not properly served. In light of the foregoing, the trial court's judgment was vacated and the case was remanded for resolution of the remaining issues.

Civil Procedure - Civ. R. 15(D); Relation Back of Common Pleas Action Not Permitted to Defeat Statute of Limitations in Separate Court of Claims Action

***Deborah Partin, et al. v. Ohio Department of Transportation, et al.*, 2004-Ohio-4038; 2004 Ohio App. LEXIS 3687**

On April 14, 2000, Plaintiffs were injured in an auto accident in Toledo, Ohio on the Greenbelt Parkway, State Route 25. Three lawsuits were filed in the Lucas County Court of Common Pleas, and "ABC Corporation" (ABC Corp.) was named as a Defendant. This fictitious name was used by Plaintiffs to designate the unknown Defendant who allegedly designed and implemented the intersection where the accident occurred. The Complaint alleged that ABC Corp. designed, implemented, and/or created a nuisance that existed at the intersection of the Greenbelt Parkway and I-280 entrance ramp and that its name and address was unknown despite due diligence. The lawsuits were filed just days before the expiration of the statute of limitations.

Discovery ensued, and it was determined that the State of Ohio (ODOT) was responsible for the construction of the Greenbelt Parkway. Thus, ABC Corp. was actually ODOT. On March 21, 2003, within one year of filing the original Complaint in Common Pleas Court, Plaintiffs filed a Complaint against ODOT in the Court of Claims. Plaintiffs did not dismiss their Lucas County Complaint. They did, however, file an amended Complaint on March 25, 2003, without naming ODOT as a Defendant.

ODOT filed a Motion to Dismiss the Court of Claims' Complaint on the ground that Plaintiffs' claims were barred by the two year statute of limitations under R.C. 2743.16. The Court of Claims considered ODOT's

Motion to Dismiss as one for Summary Judgment and thereafter granted the motion. The court ruled that the savings statute, R.C. 2305.19, was inapplicable since the Lucas County Complaint had never been dismissed. Plaintiffs appealed to the 10th District Court of Appeals, which affirmed.

R.C. 2305.19 provides, in part, that if a judgment for the Plaintiff is reversed, or if the Plaintiff fails otherwise than upon the merits, and the time limit for the commencement of such action at the date of reversal or failure has expired, the Plaintiff may commence a new action within one year after such date. ODOT maintained that for the savings statute to apply, Plaintiff's action must have failed for a reason other than upon the merits such as a voluntary dismissal. Since there was no dismissal of the Lucas County Complaint, ODOT maintained that the Complaint filed in the Court of Claims was time barred by the two year statute of limitations and not saved under the savings statute. Appellants argued that they could not dismiss the original Complaint in Lucas County, because there were Defendants other than ODOT that could be sued in that Court. They further asserted that once they identified ODOT as the proper Defendant, they had no choice but to file in the Court of Claims. Plaintiffs, in essence, argued that the Court of Claims' Complaint should be construed as an amendment to the Lucas County lawsuit.

The 10th District considered Civ. R. 15(D), which specifically requires that when the name of an unknown Defendant is discovered, the pleading or proceeding must be amended accordingly. In addition, the Plaintiff must aver in the Complaint the fact that he could not discover the name, the summons must contain the words "Name Unknown," and the copy must be served personally upon the Defendant. The 10th District found that the filing of the Complaint against ODOT in the Court of Claims was insufficient to constitute an amendment to the Lucas County lawsuit under Civ. R. 15(D). Appellants would have had to have filed an Amended Complaint naming ODOT in the Lucas County Court of Common Pleas which would subsequently have been dismissed for lack of subject matter jurisdiction. Since they did not do so, there was no "dismissal" of the action against ODOT, and therefore no failure of the action "otherwise than upon the merits" as required by the savings statute. Finally, there was no further opportunity for Appellants to amend their Lucas County Complaints since, subsequent to the filing of the Complaint against ODOT in the Court of Claims, the City of Toledo (the Defendant in the Lucas County action) petitioned the Court for removal of those actions against the remaining Defendants to the Court of Claims. Those actions, therefore, remain pending in the Court of Claims and the Lucas County actions were no longer pending.

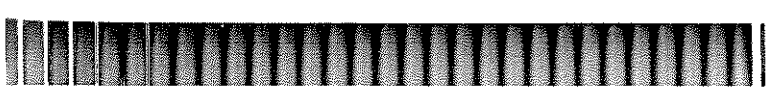
Federal Preemption

***Darby v. A-Best, et al.*, 102 Ohio St.3d 410, 2004-Ohio-3720**

Plaintiff-Appellant, Forest Darby, along with multiple other plaintiffs, filed a lawsuit against manufacturers, sellers or installers of asbestos-containing products. There were nearly 60 named defendants in the original Complaint, as well as 100 John Does. Plaintiffs alleged that they were exposed to asbestos while working in the railroad industry in Ohio and contracted asbestos-related diseases. Plaintiffs sought damages under multiple state causes of action, including the assertion that Defendants produced, sold, or otherwise put into the stream of interstate commerce asbestos and asbestos-containing materials.

Nearly two years after filing the original complaint, Plaintiffs moved to amend the Complaint to include 11 new party-defendants, including Viad Corporation. The trial court held an oral hearing on the motion, and counsel for Viad Corporation was permitted to participate and oppose the motion. At the hearing, Viad's counsel argued that the Federal Locomotive Boiler Inspection Act, §20701 et seq., Title 49, U.S. Code (BIA), preempted any state law tort claim against Viad under the doctrine of federal preemption. Viad then argued that Plaintiffs' motion should be denied, because "[t]here is no possibility, statutory or common law, that Plaintiff could allege a valid cause of action, a cause of action that could withstand attack as a matter of law against these defendants." The court then overruled Plaintiffs' motion for leave to add Viad and its successors-in-interest as new party defendants, while permitting Plaintiffs to add the remaining entities named in the motion.

Plaintiffs appealed this ruling, asserting that the Locomotive Boiler Inspection Act does not preempt state law claims. The court of appeals disagreed and affirmed the trial court's denial of the motion. The intermediate court concluded that state law claims were indeed barred under the doctrine of federal preemption since the BIA "completely preempted state law on requirements imposed upon locomotive parts, or material used in such parts.



Plaintiffs appealed the appellate court's decision to the Supreme Court of Ohio. In its holding, the Supreme Court discussed the Supremacy Clause of the United States Constitution, which provides that Congress may deprive the states of power to regulate in a field of commerce that Congress intended to occupy exclusively. Additionally, the Court noted that there are three principles that govern the determination of whether federal preemption applies: (1) the critical question is whether Congress intended state law to be superceded by the federal law, (2) there is a presumption against preemption, and (3) preemption applies when Congress has occupied and controlled the entire area.

In affirming, the Court noted that Plaintiffs not only failed to identify a reversible abuse of discretion by the trial court, but also that the claims against Locomotive Manufacturers were "wholly futile." In an opinion written by Chief Justice Moyer, the court noted that the Federal Locomotive Boiler Inspection Act preempts state law tort claims against manufacturers of railroad locomotives when the claim asserts injury caused by exposure to asbestos contained in the railroad locomotives. Justices Sweeney, Lundberg Stratton, O'Connor, and Young (sitting for J. O'Donnell) concurred with the opinion. Justices Resnick and Pfeifer dissented. Justice Pfeifer, in his dissent, noted that plaintiffs' tort action would have no effect on the design, construction, or material of locomotives now in use and there is not a danger of state common-law intruding into the federal domain. As a result, he argued, the federal preemption doctrine should not apply here.

Insurance Law - Subrogation - Make Whole Rule

***Northern Buckeye Education Council Group Health Benefits Plan v. Lawson*, 103 Ohio St.3d 188, 2004-Ohio-4886**

In this tragic 4-3 opinion, the Ohio Supreme Court holds as follows at the syllabus to its decision:

> 1. A provider of health-insurance benefits and an insured who has been injured by an act of a third party may agree prior to payment of medical benefits that the insured will reimburse the insurer for any amounts later recovered from that third party, third party's insurer, or any other person through settlement or satisfaction of judgment upon any claims arising from the third party's act. A clean and unambiguous agreement so providing is not unenforceable as against public policy, irrespective of whether the settlement or judgment provides full compensation for the insured's total damages.
>
> 2. A reimbursement agreement between an insured and a health-benefits provider clearly and unambiguously avoids the make-whole doctrine if the agreement establishes both (1) that the insurer has a right to full or partial recovery of amounts paid by it on the insured's behalf, and (2) that the insurer will be accorded priority over the insured as to any funds recovered.

The Northern Buckeye Education Council Group Health Benefits Plan (Plan) is a self-funded governmental health-care plan sponsored by the Northern Buckeye Education Council. The Plan provided Karen Lawson and her dependents with health insurance by virtue of her employment. Section 3.7 of the contract provided that:

> Any payments made by this plan for injury or illness caused by the negligent or wrongful act of any third party are made with the agreement and understanding that the covered person will reimburse the Plan for any amounts which are later recovered from the third party by way of settlement or in satisfaction of any judgment. The amount which must be reimbursed to the Plan will be the lesser f the payments actually made by the Plan, or the amount received by the covered person from the third party. As security for the Plan's rights to reimbursement, the Plan will be subrogated to all of the covered person's rights of recovery against a third party (or the party's insurers) to the extent of any payments made by the Plan. The Claims Administrator will withhold payments of claims made under this Plan, to the extent that the Claims Administrator has actual knowledge of a negligent or wrongful act of a third party, until the covered person or the covered person's legal representative executes a subrogation reimbursement agreement.

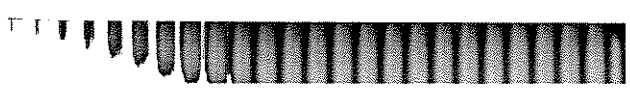
Lawson's minor daughter was injured in an auto accident and suffered serious injuries. In accordance with the foregoing Plan language, the Plan refused to pay her medical bills until Lawson signed a subrogation and reimbursement agreement providing as follows:

> I am a Covered Person under the Northern Buckeye Education Council Employee Benefits Plan and have applied or will apply for benefits under the Plan. I acknowledge and agree that my right to have benefits paid from the Plan on my behalf is subject to certain terms of the Plan which provide that the Plan shall be entitled to reimbursement from third parties, the Plan shall have certain subrogation rights, and the Plan shall not pay any benefits on my behalf unless and until I execute this Reimbursement and Subrogation Agreement. Accordingly, I agree that if benefit payments are made on my behalf under the Plan and such payments are or may have been for treatment required due to the act of any third party, I will reimburse the Plan....for any amounts which are later recovered from any third party, third party's insurer, or any other person, by way of settlement or in satisfaction of any judgment or upon any claims arising from said act, irrespective of whether any such settlement or judgment may or may not provide reimbursement to me for all injuries, illnesses, or other damages (including, without limitation, pain and suffering, consequential, punitive, exemplary or other damages, whether alleged, proven in a court of law or otherwise substantiated); that the Plan is subrogated to my rights of recovery against any third party's insurer, or any other person to the extent of any of the benefit payments made by the Plan or the amount of recovery whichever is less.

After signing the agreement, the Plan paid more than $85,000 in medical expenses. Lawson recovered $100,000 in insurance from the tortfeasor and $150,000 from her own UIM carrier. She refused to reimburse the Plan for medical payments, claiming that Emily had not been made whole. The trial court entered summary judgment in favor of Lawson, specifically finding that the language in the Plan did not specifically state that the Plan's right would take priority over the participant's right to be made whole. The court of appeals reversed but found the Plan language ambiguous to the extent that it provided that the Plan was to be reimbursed in an amount representing "the lesser of the payments actually made by the Plan, or the amount received by the covered person from the third party." Since the latter phrase could be construed to mean the net amount the injured person received, the reviewing court held that the costs of prosecuting the action, including attorney fees, would be deducted from the liability amount of $100,000, resulting in $66,666 that the Plan could be entitled to. The court of appeals also insulated the plan from going after any portion of the $150,000 Lawson received from her own UM/UIM carrier. Finding its decision to be in conflict with the 5th District's case in *Cent. Res. Life Ins. Co. v. Hartzell* (Nov. 30, 1995), 1995 Ohio App. LEXIS 6027, it certified the following issue to the Ohio Supreme Court: "Is a subrogation and reimbursement clause which attempts to give an insurer claim priority over the insured's claim against a third party or other insurer, regardless of whether the insured has received full compensation for her injuries, against public policy and unenforceable?"

Here, the Ohio Supreme Court answered that question in the negative and held that a health insurance provider and insured may agree prior to medical payments that the insured will reimburse the insurer even when the insured is not yet made whole for his/her injuries. In reaching this conclusion, the Court held that the principles of equitable subrogation, including the make whole doctrine, do not override clear and unambiguous contract provisions pertaining to subrogation and reimbursement. The majority expressed no opinion regarding the court of appeals' insulation of the underinsured benefits from subrogation or its deduction of the contingency fee claimed by Lawson's attorney in connection with recovery of funds from other sources since the Plan did not cross-appeal.

In a dissenting opinion authored by Justice Pfeifer, Justices Resnick, Sweeney and Pfeifer would have answered the certified question in the affirmative, seeing no reason to "abandon or limit a legal precedent that has been protecting injured Ohioans for 125 years." They also noted their concern over the fact that the majority left open the question of whether an insurance company can be subrogated for the gross amount of recovery. In their opinion, "an insurance company should not be able to exact more in subrogation than its insured receives net



of costs associated with a lawsuit or settlement. To rule otherwise would enable insurance companies to reach into their insured's pockets."

Insurance Law - No Conflict Between Former R.C. 3937.18(J) & (K)

***Kyle v. Buckeye Union Ins. Co.* (2004), 103 Ohio St.3d 170, 2004-Ohio-4885**

On June 11, 2000, appellant Kathryn Kyle was injured as a passenger in a car driven by her sister Andrea when Andrea negligently collided with another vehicle. Andrea and Kathryn were both insured under their parents' Buckeye Union policy which contained liability and UM/UIM limits of $100,000/$300,000. The auto Andrea was driving was covered, but the policy contained a clause purporting to exclude liability coverage for an insured for bodily injury sustained by any named insured or resident family member. Since Kathryn and Andrea were living with their parents at the time of the accident, Kathryn could not collect under the liability portion of the policy. According to the Court, appellants did not contest the validity of the liability exclusion. Instead, appellants claimed that since Andrea was not entitled to liability coverage, she was an uninsured driver. Buckeye Union moved for summary judgment on the basis that its policy language and former R.C. 3937.18(K)(2) excluded from the definition of an uninsured motor vehicle a motor vehicle owned by any family member. Plaintiff argued that a conflict existed in former R.C. 3937.18(K)(2) and (J)(1), such that an ambiguity arose and (J)(1) controlled.

The trial court granted summary judgment for Buckeye Union, and the court of appeals affirmed, finding no conflict between 3937.18(K)(2) & (J)(1). As quoted by the Ohio Supreme Court, "the appellate court determined that former subsection (J)(1) is limited by former subsection (K)(2) so that former (J)(1) applies only when the insured is driving a vehicle not covered by the policy and the tortfeasor is not the named insured, spouse or resident relative."

The Ohio Supreme Court affirmed on a discretionary appeal. In affirming, the Court expressed its belief that former subsections R.C. 3937.18(K)(2) & (J)(1) are not in conflict. According to the Court, Paragraphs (J) & (K) do not regulate the same thing. "Where paragraph (J) states circumstances in which an insured can be denied UM/UIM protection, paragraph (K) articulates when a tortfeasor will not be considered uninsured or underinsured. These provisions may function in the alternative or together." After setting forth several hypotheticals to support its reasoning, the Court held that (K)(2) operates to exclude UM/UIM coverage for Kathryn. Here, her sister Andrea was at fault, and Andrea's vehicle, occupied by Kathryn, was insured under the same policy from which Kathryn sought coverage. The Court also deemed (J)(1) inapplicable because the vehicle Kathryn occupied was insured under the policy.

Justices Resnick, Sweeney and Pfeifer dissented and would have found the provisions in conflict. Moreover, after construing the statute to give effect to the General Assembly's intent, they would find that UM coverage was available under the insurance policy as written. According to Justice Sweeney, the majority, by refusing to find coverage, undermines the laudatory goal embodied in former R.C. 3937.18 to protect persons for losses that, because of the tortfeasor's lack of liability coverage, would otherwise go uncompensated. Justice Pfeifer's separate dissenting opinion is illuminating as well:

> Assume that a person bought insurance to protect his or her family in the event of an automobile accident. Further assume that when that accident occurred, the insurance company explained, "Yes, you have insurance, and yes, it covers your family, and yes, you paid all the premiums, but because you caused the accident (however unintentionally), your family is excluded from liability coverage." Your natural response would be "But that's why I bought insurance." To continue this hypothetical, the insurance company would respond, "We were so concerned that you or another named insured on your policy would intentionally injure someone in your family that we specifically excluded your family from coverage." Insurance companies apparently have an exceedingly low opinion of their own policy holders, the citizens of Ohio.

While noting that the General Assembly has amended the statute to do away with this unfair result, Justice Pfeifer notes that there is approximately a three year window in which people are left without liability insurance that they thought they had purchased to protect their families.

Insurance Law - Ohio Insurance Guaranty Association - R.C. 3955.01(2)(b)

***Katz v. Ohio Ins. Guaranty Assn.*, 103 Ohio St.3d 4, 2004-Ohio-4109**

This is a case where the plaintiff doctor and intervening decedent's estate (Plaintiffs) sought a declaration of the OIGA's limits of responsibility for malpractice liability under the Ohio Insurance Guaranty Association Act (Act), R.C. chapter 3955. The underlying medical malpractice action included a survival claim and three wrongful death claims. The doctor's underlying primary policy provided liability coverage of up to $200,000 per claim with an aggregate limit of $600,000. The insolvent insurer had also issued an excess policy providing an additional $1 Million per claim with an aggregate limit of $1 Million.

Plaintiffs claimed that the survival claim and three wrongful death claims amounted to four covered claims, whereas the OIGA asserted that its exposure was limited to one payment of $300,000. The trial court ruled for Plaintiffs, finding that the primary policy provided coverage of up to $200,000 for each claim, with a total aggregate of $600,000. It declared OIGA liable to the same extent, grounding its decision in part on the Ohio Supreme Court's decision in *Savoie v. Grange Mut. Ins. Co.* (1993), 67 Ohio St.3d 500, wherein the Court held that liability provisions which purport to consolidate wrongful death damages suffered by individuals into one "each person" limit are unenforceable. Regarding the excess policy, the trial court concluded that "[i]f any 'covered' claim under the primary policy exceeds $200,000, that claimant is entitled to an additional 'covered' claim under the excess policy up to $300,000 with a total aggregate amount of coverage available to plaintiffs under the excess policy of $1,000,000." The Lucas County Court of Appeals affirmed the judgment of the trial court.

The Ohio Supreme Court reversed the judgment of the court of appeals in part. First, it limited the holding of the first paragraph in *Savoie* to cases presenting similar facts, i.e., cases involving claims against *automobile* insurance policies that contain "each person" limits. Thus, according to the Court, "a medical doctor and a professional liability insurer may agree that the insurer's liability for all damages sustained from the death of one person is subject to the monetary limit declared for 'each claim,' irrespective of the number of wrongful-death claimants." The Court explicitly held that the first paragraph of the *Savoie* decision has no application to claims made against professional liability insurance policies.

Citing to R.C. 3955.08, the Court next concluded that under no circumstances is the OIGA liable in an amount exceeding the amount for which the insolvent insurer would have been contractually liable. It was thus required to interpret the insolvent insurer's policy to determine the application of its limits of liability to the case at bar. Once again, the Court refused to extend the rational of the first paragraph of *Savoie* beyond the context of automobile insurance cases. Here, Section V(A) of the insolvent insurer's policy stated that "[t]he Limit of Liability stated in the General Declarations, as applicable to 'each claim' is the limit of The Company's liability for all damages because of any one claim or suit or all claims or suits first made during the policy period because of injury or death to any one person...." The Court held that this clause provides a monetary limit on the insolvent insurer's obligation under the policy, but it did not believe that Section V(A) was a *consolidation* clause for purpose of counting how many "claims" exist under the policy. The was no language in the clause indicating that all claims recognized as lawful under the wrongful death statute are consolidated into "one claim" under the policy. Instead, the Court believed that it "imposes a valid and enforceable $200,000 *limit of liability* on *all* claims resulting from the death of a single person, irrespective of the number of people recognized under law as having a wrongful-death claim." The Court went on to note that "[i]n short, there remain at least four claims under the [insolvent insurer's] policy. Each of those claims is a "covered claim" as defined in R.C. 3955.01(D)(1). But had [the insolvent insurer] remained solvent, it would have been liable up to only a total maximum of $200,000 for all of those claims pursuant to Section V(A). OIGA, per statute, is not obligated to pay more than that maximum."

Regarding the excess policy, the Court agreed with the OIGA that the fact that there are two separate policies does not affect the number of claims. However, the Court noted that it does affect the amount of the insolvent insurer's exposure under the two policies and thus also the extent to which OIGA's statutory maximum liability will be invoked. Contrary to the OIGA's contention, the Court ruled that the two policies cover not one claim, but four claims. Hence, the OIGA's *statutory* exposure is $1.2 million, i.e., the statutory maximum of $300,000 per covered claim multiplied by four claimants. Had the insurer remained insolvent, according to the Court, it would have been liable for excess coverage up to a limit of $1 million under the excess policy. To the extent that the claims arising from the doctor's malpractice exhaust the $200,000 under the primary policy, those claims are afforded additional coverage of up to $1 million under the excess

policy. "Because OIGA steps into the shoes of [the insolvent insurer], its exposure under the [insolvent insurer's] excess policy is $1 million....Pursuant to R.C. 3955.01(D)(2)(b), however, OIGA's exposure is limited to $300,000 per covered claim. Because four covered claims are presented in this action, OIGA's statutory exposure is $1.2 million."

In summary, the Court held that Section V(A) of the insolvent insurer's policy is not a consolidation clause. What it does is provide a limitation on the insolvent insurer's total exposure for all claims under the primary policy. Thus, under R.C. 3955.08(A)(1), the OIGA's maximum exposure under the primary policy is $200,000. When the $200,000 available under the primary policy is combined with the $1,000,000 maximum exposure under the excess policy, the total liability under both policies is $1.2 million. Under R.C. 3955.01(D)(2)(b), however, OIGA is not liable to pay any individual claimant an amount in excess of $300,000.

Insurance Law - Consolidation of Loss of Consortium Claims in Medical Malpractice Action

***Thomson v. OHIC Ins. Co.*, 103 Ohio St.3d 119, 2004-Ohio-4775.**

Plaintiff James Thomson, D.O. and Camden Medical Building, Inc. filed a Complaint for Declaratory Judgment under Civ. R. 57 and R.C. 2921.01 asking the court to interpret a professional liability policy issued by OHIC Insurance Company and to declare the rights and status of the parties, including those of John Watkins and his wife and son. The Watkins family members were Plaintiffs in an underlying medical malpractice action in Butler County. Thomson and Camden were insureds under a claims made policy issued by OHIC with shared limits of $1,000,000 "Each Person" and $3,000,000 total for claims made during each policy year. From April to July of 1999, Dr. Thomson provided "professional services" as defined by the policy to John Watkins, but no to Watkins wife or son. Suit was filed and included loss-of-consortium claims filed by the wife and son. As the Court frames the facts of the case, in order to be covered under the policy, a claim must involve an allegation of injury or death to a person because of professional services provided by the insured. Moreover, the policy expressly required any derivative claims to share in the "Each Person" limit of coverage. Thomson, Camden and the Watkins family argued that the restriction on coverage for derivative claims to the "Each Person" limit was unenforceable pursuant to *Schaefer v. Allstate Ins. Co.* (1996), 76 Ohio St.3d 553, which was an uninsured motorist case. They asked the trial court to apply *Schaefer* and declare that the negligence and loss-of-consortium claims of the Watkins family members were separately covered, subject to separate "Each Person" limits under the policy. By contrast, OHIC argued that *Schaefer* had been legislatively overruled in 1994 by R.C. 3937.44 and that the "Each Person" limit should be enforced.

The trial court concluded that R.C. 3937.44 did not apply to insurance policies involving medical negligence or professional services. Thus, the trial court applied *Schaefer* and ruled that each plaintiff asserting a loss-of-consortium claim had a separate claim subject to a separate "Each Person" limit of coverage. The court of appeals reversed and upheld the policy's limitation of coverage under R.C. 3937.44. The Ohio Supreme Court thereafter accepted a discretionary appeal.
As the Court framed the issue in its opinion, Appellant's sole proposition of law asks the Court to apply *Schaefer* to a professional liability policy so that each person who asserts a derivative claim has a separate claim subject to a separate per-person policy limitation of liability. As is did in *Katz*, summarized *supra*, wherein the Court refused to apply *Savoie* in the context of professional liability policy, the Court once again ruled that *Schaefer* does not extend beyond the context of *automobile* liability insurance policies. Thus, the Court held that it need not determine whether R.C. 3937.44 applies to malpractice insurance.

After holding that *Schaefer* has no application, the Court deemed this a case of contract interpretation. Based on policy language to the effect that "[a]ny derivative 'claims' share in the Each Person Limit," the Court held that the Watkins family members were not entitled to separate per-person limits of coverage for their loss-of-consortium claims.

Justices Resnick, Sweeney and Pfeifer dissented, noting that the majority misapplied *Katz*, which is characterized as "a wrongful-death case wrongfully decided." The dissent would have decided this case based on an analysis of R.C. 3937.44 and whether it applies to medical-malpractice cases. In addition, the dissent would have found R.C. 3937.44 inapplicable since malpractice should not be included in the tort category of "accidents."

Insurance Law - Mother of Decedent Daughter Entitled to Recover Her Own Uninsured Motorist Policy Limits

***Carol Kotlarczyk, et al. v. State Farm Mutual Automobile Insurance Company*, 2004-Ohio-3447, 2004 Ohio App. LEXIS 3097**

On August 18, 1999, Michelle Kotlarczyk was killed in a motor vehicle accident with one Wilburn Reeder, Jr. The accident occurred in Michigan. At the time of the accident, Michelle resided with her mother, Carol Kotlarczyk and her two minor daughters, Taylor and Lauren Kotlarczyk. Michelle was the named insured on a policy issued to her by State Farm. Carol was also a named insured on a separate policy also issued by State Farm. Both policies had single limits of $100,000.

Reeder's liability carrier tendered its limits of $100,000 to Michelle's estate and, after attorneys' fees and expenses, Michelle's two minor daughters each received $35,000.00. Carol Kotlarczyk received none of the tortfeasor's insurance proceeds.

Carol filed a complaint for declaratory judgment, individually and as the legal custodian of Taylor and Lauren against State Farm, claiming a right to underinsured motorist benefits in her State Farm policy. Another complaint was later filed by Carol seeking coverage under Michelle's policy for her two minor children. The actions were consolidated in the trial court.

State Farm moved for summary judgment, citing the policies anti-stacking and set-off provisions in the policies and arguing that no coverage was owed. The trial court granted State Farm's motion, holding that the anti-stacking language of the policies limited recovery to only one policy, and further, because that policy had limits matching the tortfeasor, no coverage was available due to setoff.

On appeal, the appellate court found that Carol, Michelle, Taylor and Lauren all qualified as insureds under Carol's policy since the basis for recovery was wrongful death claim and each of the survivors were presumed to have suffered damages a result of the death. In reviewing the anti-stacking language in the State Farm policies, the court analyzed the case using the Supreme Court's most recent decision in *Wallace v. Balint*, 2002-Ohio-480, 94 Ohio St.3d 182, wherein the Court held that "stacking occurs when *one* insured seeks coverage under *more than one* policy issued to himself or other family members." The court held that while Carol could not recover under more than one policy, since she had no recovery under Michelle's policy, the anti-stacking provisions did not preclude her from recovering under her own State Farm policy.

State Farm then argued that Carol was precluded from recovery under the "other owned vehicle" exclusions in its policy. State Farm argued that because Michelle was killed while in a vehicle that was not insured under Carol's policy, the other owned vehicle exclusion prevented her recovery under her policy. However, the appellate court pointed out that Carol's claim was not for bodily injury to an insured, rather, her claim arose because of the wrongful death of her daughter, therefore applying the holding in *State Automobile Insurance Company v. Moore*, 88 Ohio St.3d 27, 2000-Ohio-264, she was not required to sustain bodily injury in order to recover under her own policy.

With regard to State Farm's set off argument, the appellate court applied the holding in *Clark v. Scarpelli*, 91 Ohio St.3d 271, 2001 Ohio 39 to find that the proper reduction comparison is not limits to limits (tortfeasor vs. insured) but rather the amount available for payment to

the insured as compared to the tortfeasor's liability limits. In this case, since Carol had not received any of the tortfeasor's liability proceeds, she was entitled to the full limit of her State Farm policy.

Insurance Law - UM/UIM Coverage Implied by Law Where Rejection of Matching Limits Failed to Comply with *Linko*

***Tobin Borger v. Utica National Insurance Group*, 2nd Dist. App. No. 20213, 2004-Ohio-3782, 2004 Ohio App. LEXIS 3400**

Tobin Borger was injured in a motor vehicle/truck collision on March 7, 2000. On that date, a vehicle driven by Jessica Finklea collided with the truck operated by Borger, who was within the course of his employment. Borger collected Finklea's liability limits from her carrier, Nationwide Insurance Company.

Borger then filed a complaint against Utica Insurance Company seeking underinsured motorist coverage. Utica insured Borger's employer, R&J Trucking, under a commercial policy with a liability limit of $1,000,000 and Ohio UM/UIM coverage of $25,000. Utica denied the claim arguing that Borger was not injured by an underinsured motorist since its policy only provided $25,000 in UIM coverage. Borger claimed that the reduction in UM/UIM limits was not compliant with the holding in *Linko v. Indemnity Ins. Co. of N. Am.*, 90 Ohio St.3d 445, 2000-Ohio-92, and that coverage arose by operation of law in the amount of $1,000,000.

Utica submitted two affidavits from the vice president of R&J Trucking indicating that the company had knowingly and expressly opted to select Ohio UM/UIM coverage in the amount of $25,000.

The trial court agreed with Utica and, following the court's decision in *Manolo v. Lumberman's Mut. Cas. Co.*, Montgomery App. No. 19391, 2003-Ohio-613, the court held that extrinsic evidence was permissible in order to satisfy the requirements set forth in *Linko*.

On appeal, Utica urged the appellate court to follow its prior decision in *Manolo*. However, the court indicated that its decision in the later case of *Hollon v. Clary*, 155 Ohio App.3d 195, 2003-Ohio-5734 overruled its prior decision in *Manolo*. In addition, on at least three separate occasions since the decision in *Hollon*, the court had declined to reaffirm the outcome on *Manolo*.

The court stated that the Supreme Court clearly stated in *Linko* that extrinsic evidence may not be used in order to determine whether an offer and rejection of matching UM/UIM limits was validly made and obtained. The validity of any rejection must be apparent from the contract itself. The court discarded Utica's argument that the *Linko* holding had been modified by the Supreme Court's answer to the certified questions posed in *Kemper v. Michigan Millers Mut. Ins. Co.*, 98 Ohio St.3d 162, 2002-Ohio-7101, 781 N.E.2d 196.

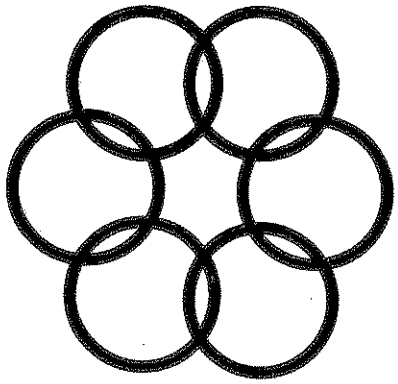
Ultimately, the court held that the rejection obtained by Utica from R&J Trucking was invalid as it failed to contain the premium information for UM/UIM coverage. The trial court's grant of summary judgment in favor of Utica was reversed and the matter was remanded for further proceedings.

Insurance Law - Applicability of *Linko* - Invalidity of Nunc Pro Tunc Entry to Make Substantive Changes of Prior Decision

***Kathy Miller, et al. v. Watkins, et al.*, 2004-Ohio-3132, 2004 Ohio App. LEXIS 2809**

On September 6, 1998, Aaron Morrison was attempting to cross the street when he was struck and killed by a car driven by Defendant Jackie Watkins, who was uninsured. Morrison was survived by his mother, Kathy Miller (Miller), whom he lived with at the time of his death along with his son Christopher. Miller was employed by US Food Service, Inc., which provided her with a company car. US Food Service was insured by United States Fidelity and Guarantee (USF&G). Miller filed suit seeking damages for the wrongful death of Aaron Morrison. Her Amended Complaint included claims for UM benefits under the USF&G policy. The trial court granted default judgment against Watkins on the issue of liability, and the remaining Defendants filed dispositive motions.

On June 20, 2002, Miller moved to amend her Complaint to include her individual claim for uninsured motorist benefits pursuant to *Moore v. State Automobile Mutual Insurance Company*, 88 Ohio St.3d 27 and *Sexton v. State Farm Mutual Automobile Insurance Company*, 69 Ohio St.2d 431. On that same date, the court granted USF&G's Motion for Summary Judgment. On July 23, 2002, notwithstanding the foregoing judgment in favor of USF&G, the trial court granted Miller's motion to amend. The court thereafter granted the dispositive motions filed by U.S. Food Service and State Auto Mutual Insurance Company. On



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October 11, 2002, the trial court journalized a "Nunc Pro Tunc Entry" stating that "[this] entry is to correct a previously filed entry. This Court's entry filed on July 23, 2002, granting Plaintiff's Motion to Amend Pleadings to include personal claim of Kathy Miller was filed erroneously. Plaintiff's Motion is NOT well taken and Plaintiff's Motion to Amend is denied." The Court entered a final judgment on January 15, 2003 and granted Miller compensatory and punitive damages against the uninsured Watkins. Miller appealed to the 1st District Court of Appeals.

The 1st District first considered Miller's assignment of error alleging that the trial court erred in using a Nunc Pro Tunc Entry to reverse its prior order granting her motion to amend to include her individual claim for UM benefits. The reviewing court opined that the purpose of a Nunc Pro Tunc Entry is to make the record "speak the truth." The function of such order is essentially clerical, to record officially an action of the court actually taken, but not duly recorded. Such entries are limited in use to reflecting what the court actually decided, not what the court might have decided or intended to decide. A Nunc Pro Tunc Order may not be used to correct an error in the judgment or modify the judgment or render a judgment when one had not been made in the first instance. A Nunc Pro Tunc Entry is inappropriate when it reflects a substantive change in the judgment. The 1st District found that the trial court exceeded its power in entering the Nunc Pro Tunc Order denying Miller's motion to amend. The lower court's use of a Nunc Pro Tunc Order to make substantive changes regarding the disposition of Miller's motion to amend was improper and rendered invalid.

Miller also argued that the trial court erred in (1) failing to find that she had uninsured motorist coverage by operation of law under the USF&G policy issued to US Food Service, and (2) failing to find that Aaron Morrison was a UM/UIM insured under the policy. Specifically, Miller argued that the rejection of uninsured/ underinsured motorist coverage by U.S. Food Service did not meet the requirements of *Linko v. Indemn. Ins. Co. of N. Am.*, 90 Ohio St.3d 445, and that, therefore, such coverage arose by operation of law pursuant to former R.C. 3937.18.

In ruling in Miller's favor, the 1st District relied on the requirements of an express and knowing rejection of UM/UIM coverage set forth in *Linko*. In order to constitute a valid waiver of such coverage, the policy has to demonstrate that the insurer informed the insured of the availability of UM/UIM coverage, set forth the premiums, described the coverage, and expressly stated the coverage limits. USF&G argued that it satisfied those requirements when it completed a "supplemental auto application" that purported to reject such coverage in Ohio. The Court examined the "supplemental auto application" and held that it did not comply with the *Linko* requirements. It did not set forth the premiums for the rejected coverage, and the requisite information was not contained within the "four corners of the policy." Since the rejection was invalid, coverage arose by operation of law under former R.C. 3937.18.

The court then went on to consider whether Aaron Morrison and Kathy Miller were insureds under the USF&G policy. The declarations page listed "covered autos" for liability coverage as symbol 41, which was described elsewhere in the policy as "any auto." Insureds were defined as (1) "you for any covered auto" and (2) "anyone else while using with your permission a covered auto you own, hire or borrow." The policy also contained an "Employees as Insureds" endorsement and provided that "any employee of yours as an insured while using a covered auto you don't own, hire, or borrow in your business or your personal affairs." The policy also contained a broadened coverage for named individuals endorsement which added to the definition of an insured. The schedule in the endorsement listed the "name of the individual" as "any employee furnished with a company car," which included Kathy Miller. The USF&G policy also provided UM/UIM coverage in states where the law did not permit US Food Service to reject such coverage. The broadened coverage for named individuals endorsement added to the definition of an "insured" any individual named in the schedule and his or her "family members...while occupying or while a pedestrian when being struck by an auto you don't own..." Further, the policy stated that "as used in this endorsement...'family member' means a person related to the individual named in the schedule by blood, marriage, or adoption who is a resident of the individual's household, including a ward or foster child."

The court reasoned that if the UM/UIM coverage in the USF&G policy had been effective in Ohio, Aaron Morrison would clearly have been an "insured" for purposes of UM/UIM benefits. Miller, as an employee furnished with a company car, was an individual named in the schedule. Aaron was a family member, because he was related to Miller by blood and resided in her household at the time of his death. He was struck while a pedestrian by an auto that was not owned by him, by any "family member," or by US Food Service. The court held that the terms and conditions of the uninsured

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motorist coverage in the USF&F policy that were in effect for states in which uninsured motorist coverage could not be rejected were applicable to the uninsured motorist coverage that arose by operation of law in Ohio. Here, the parties intended the terms and conditions of the uninsured motorist coverage set forth in the policy to apply in states where US Food Service's uninsured motorist coverage was effective. The court held that those same terms and conditions arose by operation of law in Ohio pursuant to former R.C. 3937.18.

In rendering its decision, the court distinguished this case from *Westfield Insurance Company v. Galatis*, 100 Ohio St.3d 216. *Galatis* involved a situation where the employee of a corporation was not a named insured under a commercial automobile policy issued to the employer. Here, Miller was an employee furnished with a company car and was therefore a named insured in the USF&G policy. In light of its decision, the reviewing court vacated the Nunc Pro Tunc Entry of October 11, 2002, reversed the trial court's grant of summary judgment in favor of USF&G, and remanded the case for further proceedings consistent with its decision.

Insurance Law - Insurer May Not Apply a Notice of Cancellation By Its Insured Retroactively If There Is An Intervening Accident

***John Loxley v. Joseph Pearson*, 2nd Dist. App. No. 20156, 2004-Ohio-3771, 2004 Ohio App. LEXIS 3389.**

On September 13, 2001, Joseph Pearson was driving a vehicle owned by his grandfather, Ronald Payne, when he was involved in an accident with two separate vehicles driven by John Loxley and Althena Golson. Loxley was insured by State Farm, who paid him $1,797.22 in damages, less his deductible. Golson was insured by Geico, which paid her $8,117.75.

The vehicle owned by Payne and operated by Pearson was insured by Motorists Insurance Company under a policy which commenced on February 28, 2001 and ran until August 28, 2001. The policy had originally been issued on August 28, 2000. Payne died on March 24, 2001, and the premium for the Motorists policy had been paid Pearson's mother on April 3, 2001. The policy was subsequently held by the "Estate of Ronald K. Payne." The executor of Payne's estate was Key Bank.

Both State Farm and Geico asserted subrogation liens against the Motorists policy for the damages they had paid to their own insureds. No further premiums were paid on the Motorists policy after the expiration date of August 28, 2001. On September 5, 2001 Motorists sent Key Bank a letter indicating that the policy premiums were overdue and that the policy would be canceled on September 17, 2001 unless the premiums payments were made prior to that date. On September 6, 2001, Motorists sent the fiduciary at Key Bank ("Goelz") a Policy Request Form requesting that she sign and return the form if the policy was to be canceled. Goelz returned the form on October 2, 2001, allegedly canceling the policy effective August 28, 2001. Motorists became aware of the accident on October 12, 2001 when Pearson's mother contacted the agent to report the loss.

State Farm and Geico (and their insureds) sued Pearson and Motorists, and Pearson also sued Motorists claiming that he was covered under the Motorists policy and that Motorists had to pay State Farm and Geico's subrogation claims.

Motorists filed a motion for summary judgment arguing that the policy had been canceled effective August 28, 2001 by virtue of the Policy Request Form, such that it was not in effect on the date of the accident. Pearson argued that the policy contained a cancellation provision which required Motorists to give ten days notice of impending cancellation, and that Motorists' letter to Key Bank on September 5, 2001, stating that coverage would end on September 17, 2001, extended coverage on the policy until that date.

The magistrate overruled Motorists motion for summary judgment, finding that Motorists extended the policy until September 17, 2001, the date given in the notice of cancellation. The magistrate also found that the Change form which was returned in October, 2001 and which purported to cancel the policy effective August 28, 2001, was a nullity, since by that date, the policy was already canceled, i.e., on September 17, 2001. Motorists appealed the trial court's decision adopting the Magistrate's findings.

On appeal, the decision of the trial court was affirmed. The reviewing court found that under R.C.§3937.31(A), all automobile policies are to be issued for a period of not less than two years or guaranteed renewable for successive policy periods totaling not less than two years. Where renewal is mandatory, a refusal to renew is treated as a cancellation. The court found that under the statute, notice of cancellation must also include the date the cancellation would become effective. In this case, because the letter from Motorists to Key Bank indicated that cancellation would occur on September 17, 2001, and because the cancellation fell within the

mandatory two year period, Motorists had to continue coverage until the stated date of cancellation, i.e., September 17, 2001. The court rejected Motorists argument that the notice was merely an offer to renew.

The appellate court did disagree with the trial court's finding that an insured listed on the policy did not send a notice of cancellation. The appellate court held that Goelz, an employee of Key Bank with apparent authority to act as a fiduciary for the bank, which was the administrator of Payne's estate, had authority to send the notice of cancellation, which she did in October, 2001. However, the court stated that given the disposition of the case, the trial court's error was harmless.

Finally, Motorists argued that advance notice requirements of a policy's cancellation by an insured are for the benefit of the insurer and may be waived by the insurer. Motorists argued that it had the right to waive the notice of cancellation provision by its insured, and that once canceled, the insurer could not extend the effectiveness of the policy. Motorists argued that it accepted the retroactive notice of cancellation in this case. However, the appellate court stated that while parties may generally agree to modify the cancellation date of a policy, the occurrence of the accident precluded Motorists and Payne's estate from validly canceling the policy retroactively to a date prior to the accident. This interpretation, the appellate court held, was supported by public policy which is to prevent insureds from suffering lapses in insurance coverage through inadvertence and to safeguard the rights of insureds against insurers.

Insurance Law - Motorist Standing Next To Her Vehicle Was "Occupying" The Vehicle For Purposes of Uninsured Motorists Coverage

***Joei Williams v. Safe Auto Insurance Company, et al.*, 8th Dist. App. No. 83882, 2004-Ohio-3741, 2004 Ohio App. LEXIS 3368**

On November 11, 2000, Joei Williams ("Williams") was injured while standing outside of her running vehicle. Williams had exited her vehicle to speak with two other drivers who had pulled to the side of the street behind her car. As Williams was walking back to her vehicle, a car driven by Thomas Ware collided with her car and the car parked behind her. She was struck by debris and was injured. Ware was an uninsured motorist. Williams sued both Ware and Safe Auto, her own carrier, seeking uninsured motorist benefits.

Safe Auto denied the claim on the grounds that Williams was not "occupying" her vehicle when the accident occurred. The trial court granted Williams' motion for summary judgment and set the matter for trial. The parties agreed on damages of $12,500, and the court awarded Safe Auto $12,500 in its default against Ware.

Safe Auto appealed the court's grant of summary judgment in favor of Williams. On appeal, the court held that the term "occupying" should be given a liberal interpretation, not the strict interpretation argued by Safe Auto. Safe Auto's position was that coverage should not be available since Williams was not in the vehicle and she was not performing a task intrinsically related to the use of the vehicle at the time of the accident. Safe Auto's policy defined "occupying" as "in, on, getting in, or getting out of a covered auto."

In ruling in Williams' favor, the court cited with approval to the Ohio Supreme Court's decision in *Joins v. Bonner* (1986), 28 Ohio St.3d 398, 504 N.E.2d 61 for the following proposition of law:

> In construing uninsured motorist provisions of automobile insurance policies which provide coverage to persons

> 'occupying' insured vehicles, the determination of whether a vehicle was occupied by the claimant at the time of the accident should take into account the immediate relationship the claimant had to the vehicle, within a reasonable geographic area.

Here, the court held that Williams had an "immediate relationship" to the car, such that coverage was applicable. Not only was she the driver, but the car itself contributed to her injuries. Moreover, Williams was returning to it to continue travel, the vehicle was still running, and she was struck by debris from her vehicle, such that she was deemed to be "occupying" her vehicle at the time of the collision. In so holding, the court also rejected Safe Auto's 'intrinsically related' argument based on the facts presented.

Insurance Law - *Sexton* Claim Was Not Eliminated By A Change In The Law Occurring Within Two Year Guarantee Period

***Melba Sue Sloane v. Allstate Insurance Company*, 5th Dist. App. No. 2004CA0021, 2004-Ohio-3990, 2004 Ohio App. LEXIS 3625**

On May 27, 2001, Glenn Brady, Melba Sloane's half-brother, was struck and killed by an automobile while he was a pedestrian.

On May 23, 2003, Sloane filed a declaratory judgment action against Allstate Insurance Company, her own automobile carrier, seeking uninsured/underinsured motorist coverage for the death of her half-brother. Allstate defended the claim arguing that language in the policy precluded coverage. Specifically, Allstate argued that the policy was controlled by changes to R.C.§3937.18 which became effective on September 21, 2000 as a result of House Bill 267. Sloane argued that the court was applying changes in the law which were not incorporated into the policy on the date of the accident due to guaranteed renewal periods, during which coverage could not be changed.

The parties filed motions for summary judgment and the trial court granted Allstate's motion. Sloane appealed the trial court's decision. On appeal, the Fifth District found that the last two year renewal of the Allstate policy occurred on February 5, 2000, and that the policy, under the holding in *Wolfe v. Wolfe*, 88 Ohio St.3d 246, 2000 Ohio 322 could not be altered except by agreement of the parties. Therefore, the changes in the statute effective on September 21, 2000 would not be incorporated into the policy until February 5, 2002, well after the accident.

Prior to September 21, 2000, the holding in *Sexton v. State Farm Mut. Auto. Ins. Co.* (1982), 59 Ohio St.2d 431, 433 N.E.2d 555 prohibited an insurer from requiring that an insured suffer bodily injury in order to recover UM/UIM benefits. Moreover, if such language existed in the policy, it was void and unenforceable.

Based upon the foregoing, the court reversed the trial court's grant of summary judgment in favor of Allstate.

Medical Malpractice - Directed Verdict - No Need to Plead Loss of Chance Claim Separately

***Heath v. Steven Teich, M.D.* (June 29, 2004), 10th Dist. App. No. 03AP-1100, 2004-Ohio-3389, 2004 Ohio App. LEXIS 3009**

This case establishes that in a medical malpractice case the plaintiff does not need to separately plead a loss of chance cause of action under *Roberts* and progeny.

The case also establishes that once an expert properly states his professional opinion to a properly formed question as to probability, he or she has established a *prima facie* case as a matter of law. Erosion of that opinion due to effective cross-examination does not negate that opinion; rather it only goes to weight and credibility. This instance would not usually be suitable for application of directed verdict. The exception would be when the expert actually recants the opinion on cross-examination.

Stephanie Kramer, who was 4 years old at the time of her death, suffered from an aggressive form of cancer. Stephanie was admitted to Children's Hospital to undergo a heart catheter placement procedure to be performed by Dr. Teich, a pediatric surgeon at Children's. During placement of the catheter into Stephanie's heart by Dr. Teich, Stephanie's heart was punctured, causing blood to flow through her coronary sinus into her pericardium. Stephanie went into cardiac arrest as a result of the accumulation of blood in her pericardium, which is referred to as pericardial tamponade or cardiac tamponade. Stephanie was pronounced dead approximately 43 minutes later.

A jury trial commenced, but at the close of the plaintiff's case-in-chief, Dr. Teich and Children's moved for directed verdict. The trial court granted the motion.

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The party moving for a directed verdict must show that the testimony was resolved in its favor by direct contradiction, negation, or recantation of the testimony given by the witness on direct examination. If no such contradiction, negation, or recantation is shown, the testimony given on cross-examination only arouses speculation regarding the witness's testimony on direct and leaves a question of fact for the jury to determine. In other words, subsequent recantations of certainty on cross-examination do not destroy the admissibility of the testimony, but act as impeachments of the expert's credibility.

On direct examination, plaintiff's expert testified with a reasonable degree of medical certainty that the failure to ascertain cardiac tamponade and perform a pericardiocentesis proximately caused Stephanie's death, but he later stated on cross-examination that he did not believe that it was possible to predict whether a pericardiocentesis would have prevented her death. Nevertheless, plaintiff's expert maintained on redirect examination that none of the questions asked during cross-examination caused him to change the opinions he had given on direct examination.

The Court of Appeals held that the trial court erred in granting a directed verdict in favor of the defendants on plaintiff's traditional medical malpractice claim. As such, the reviewing court deemed moot the issue of whether sufficient evidence was presented on plaintiff's loss-of-chance claim during the prior trial to create a factual question for the jury. The case was reversed and remanded.

Medical Malpractice - Nurse as Expert, Directed Verdict, No Application of *Res Ipsa Loquitur*

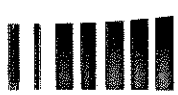
***Hager v. Fairview General Hospital* (July 29, 2004), 8th Dist. App. No. 83266, 2004-Ohio-3959, 2004 Ohio App. LEXIS 3604**

Decedent was scheduled for foot surgery. While being prepped for the surgery, decedent's son saw two nurses attempting to remove his dentures. The son advised the nurses that the father had dentures that could not be removed. Two days after the surgery, plaintiff saw his father and discovered his teeth were cracked and hanging down in his mouth. As he recuperated from his foot surgery, decedent had difficulty eating. He passed in May 2001. Plaintiff sued defendant for its nurses' negligence in attempting to remove his father's teeth. The case proceeded to trial. At the end of the plaintiff's case, the trial court granted defendant's motion for directed verdict. Plaintiff presented nurse Sharon Martino, R.N. as an expert on the standard of care for removing a patient's dentures. The central question on appeal was whether the court erred in prohibiting Martino from testifying as to the cause of decedent's injuries. The court held that the trial court did not error in excluding the testimony and affirmed.

There were two issues in the case: whether the nurses' actions constituted a breach of their duty of care and whether that breach was the proximate cause of decedent's loose teeth. The court held that before a breach of duty can be established, the facts must be clearly established as to what the nurses did. Plaintiff never called the nurses to testify. The only evidence in the record as to what the nurses did was provided by the son. The son was about 15 to 20 feet away from his father, who was on a gurney. There were two people standing above him. One of them seemed to have a grip on his shoulder and the other one seemed to be tugging at his mouth. The son said his teeth do not come out. At that point, they stopped.

The court held that the record did not establish how much force was used in the "tugging." The record did not indicate how long the nurse had been attempting to remove the dentures. She may have just begun. The court held the sketchy facts as to what occurred provided little basis for Martino to form an opinion on whether their was a breach of duty. A second problem with the facts was the lapse of time between the nurse's attempt to remove the dentures and the observation that decedent's teeth were cracked and loose - was 2 ½ days interval of time. Defense counsel properly observed that in the interval many other factors could have caused his condition: he could have bitten too hard and aggravated a pre-existing condition, for example. Without an examination of the mouth by an expert, any attempt to explain the cause of his dental condition would be speculative, especially because of the lapse of time between the nurse's actions and the report of the condition of the teeth.

The court held that the plaintiff's nurse expert, Martino, was not properly qualified to render an opinion on proximate cause. There was nothing in the record before the court establishing Martino as a qualified expert in dentistry. She could testify on how to remove dentures from a pre-operative patient. It was not established, however, that Martino had the necessary qualifications as a dental expert to analyze decedent's dental history in order to address proximate cause.



The court concluded that the causes of decedent's dental condition is reserved to the practice of dentistry and is, therefore, outside the knowledge, skill, and expertise of a nurse. Accordingly, the trial court did not error in precluding Martino from offering an expert opinion on the proximate cause of decedent's dental condition.

The court rejected the plaintiff's argument that the expert testimony was unnecessary since the alleged negligence was within the knowledge of the jurors. Decedent's dentist testified that decedent had a history of diabetes, teeth grinding, and dental decay and that these earlier conditions could have caused the teeth to loosen and crack. The court held that because of decedent's history before his surgery, the answer as to what proximately caused decedent's dental problems is simply not within the ordinary knowledge of a layperson and, therefore, expert testimony on causation was required.

The court also rejected the application of *res ipsa loquitur*. The court held that since decedent's dentist could not isolate the proximate cause of decedent's poor dental condition, the court could not conclude that the "instrumentality causing the injury" was ever under defendant's exclusive control. Thus, the trial court did not error in granting defendant's motion for directed verdict on the claim of *res ipsa loquitur*.

Medical Malpractice - Wrongful Birth, Wrongful Pregnancy, Wrongful Life

***Coleman v. Dogra, M.D.* (June 17, 2004), 8th Dist. App. No. 83522, 2004-Ohio-3109; 2004 Ohio App. LEXIS 2756**

The case holds that viable causes of action exists in Ohio for "wrongful birth" and "wrongful pregnancy." A claim for "wrongful life" does not exist in Ohio.

Dixie, a technician, conducted an ultrasound at UH pointing out the baby's spine, feet, and heart to the mother, Coleman, and informed her the baby was a girl. However, Dixie had "difficulty finding things she was looking for." She asked Coleman to empty her bladder to relieve pressure so she could evaluate the baby's head. Even after Coleman complied, Dixie had difficulty finding the baby's skull. She sought assistance from another technician, who changed the transducer on the ultrasound machine to provide deeper penetration. Coleman stated in her deposition that after the change in equipment, the technician told her that everything looked "fine" and that she had a healthy baby. Dr. Dogra stated that Dixie called him after the exam and told him that the organs were "suboptimally visualized," which meant that the organs were not clearly visible. Technician Raffis testified that where there is difficulty or inability in visualizing, the patient is usually sent to McDonald Woman's Hospital, which handles patients requiring more invasive ultrasounds. However, Coleman was never referred to McDonald after her ultrasound was deemed technically difficult and the images of the baby's head, brain, and face were suboptimally visualized.

Dr. Dogra admitted that the only conversation he had with Dixie was at that the ultrasound was technically difficult. Dr. Dogra testified in his deposition it was his responsibility to make sure that the technician does a sufficient job to provide him with the information needed to do an adequate "read," but that it was up to the physician who ordered the ultrasound to send the patient for an upper level ultrasound. A technician, Hanson, stated that she relied upon Dr. Dogra's expertise in interpreting the ultrasound. She admitted it was her responsibility to request further imaging if the report did not provide her with enough information to fulfill her duty to her patient. She also stated that Dr. Dogra did not recommend another ultrasound in his report, as other radiologists had done in the past when the ultrasound was technically difficult.

Technician Raffis stated that she probably communicated the results of the ultrasound to Coleman and probably told her that nothing abnormal was found. Hanson stated that she never told Coleman that some of the visualizations were suboptimal on the ultrasound. According to Coleman, the results of the ultrasound were not communicated to her, nor was a second ultrasound recommended or performed. Coleman gave birth to her daughter with facial deformity and irregular breathing. Medical tests revealed that the baby had alobar holoprosencephaly, a genetic condition in which the brain does not develop properly and usually results in death within a few months. Coleman testified that the doctors told her that a proper ultrasound could have detected the condition, although nothing could have been done to prevent it or to medically correct it.

The court reaffirmed the holding in *Flanagan v. Williams* (1993), 87 Ohio App. 3d 768, 772 that held that parents have a cause of action against physicians who fail to diagnose or inform, but declined to hold that a child born with defects can maintain a cause of action against the physician. An action for "wrongful pregnancy" refers to a suit brought by a parent for damages arising

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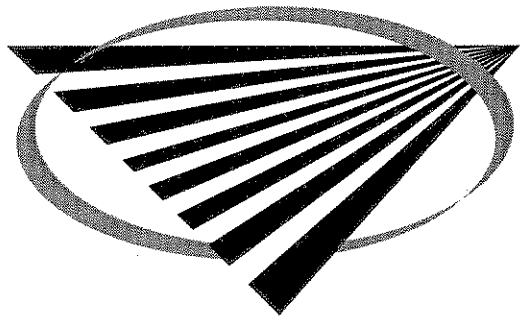

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from the birth of a child subsequent to an improper performed sterilization procedure. A "wrongful birth" action refers to the parent seeking damages for the birth of an impaired child when the physician or a healthcare provider failed to diagnosis or discover a genetic defect through prenatal testing or counseling, in time for the parents to avoid or terminate a pregnancy. A "wrongful life" action is brought by or on behalf of the child claiming damages due to a physician's negligence in a sterilization procedure.

The Court of Appeals noted that the Ohio Supreme Court has rejected a claim for "wrongful life" because these claims force courts to weigh the value of being versus non-being. Thus, the trial court properly granted summary judgment on that claim. The reviewing court noted that neither the Ohio Supreme Court nor the General Assembly has decided whether an action for "wrongful birth" is recognized in Ohio. It also noted that although there is a split among the states, several Ohio courts have recognized this prenatal tort. The 8th District relied on and adopted the holding in *Flanagan* that if a physician fails to provide the mother with the disconcerting test results, the mother can claim she was deprived of the choice to avoid medical expenses by terminating the pregnancy. The 8th District held that the *Flanagan* holding was still good law and they found it persuasive. Furthermore, the General Assembly had not acted in the 11 years since *Flanagan* to bar such a claim.

Coleman testified in her deposition that had she known that her child would have been born with a severe terminal illness, she would have terminated her pregnancy. Hanson stated at the time of her ultrasound, Coleman would still have been able to legally terminate her pregnancy. The reviewing court held that Coleman had presented sufficient evidence demonstrating genuine issues of material fact as to whether the ultrasound was properly conducted, read, and interpreted, and whether the information contained in the ultrasound report was sufficient conveyed to allow the mother to make an informed choice about her pregnancy or the need to seek counseling to prepare for the baby's condition. Thus, the trial court erred in granting summary judgment on Coleman's claims. Here, the appellate court held that a parent has a claim, but a child does not under Ohio law.

Medical Malpractice - Lack of Informed Consent, Directed Verdict

***Badger v. McGregor, M.D.* (August 3, 2004), 10th Dist. App. No. 03AP-167 2004-Ohio-4036, 2004 Ohio App. LEXIS 3684**

The plaintiff, Mrs. Badger, developed a spinal infection. She was transferred to the Ohio State University Hospital. Dr. Mangino prescribed coiandamycin and gentamicin for treatment of the spinal infection. Dr. Mangino testified at trial that she had recommended, in her consult note, 300 mg. of gentamicin to be administered intravenously per day. The order was written for 500 mg. of gentamicin per day. The plaintiff developed the side effect of a vestibular disorder resulting in the loss of balance and vertical and lateral head shaking. Plaintiff was unable to watch television, use a computer, read or drive an automobile.

The case proceeded to trial and the jury returned a verdict in the amount of $141,000.00. Despite finding that Dr. McGregor met the acceptable standard of care for a neurosurgeon, the jury found that Dr. McGregor had failed to obtain the plaintiff's informed consent when he failed to discuss potential side effects of gentamicin with her.

Plaintiff testified that Dr. McGregor did not come up and talk to her about gentamicin. No one did. Until her imbalance problems started, she did not have any knowledge that gentamicin could bring about a vestibular

disorder. If she had been aware that gentamicin would have brought on this kind of problem, she would not have allowed them to give her that drug.

The informed consent claim was pled in the complaint. Testimony in depositions and during the plaintiff's case-in-chief directly related to the claim of lack of informed consent. Plaintiff made reference to lack of informed consent in her opening statement and the defendant failed to object. Therefore, the defense's argument that the jury instruction on lack of informed consent was erroneous because the issue of informed consent was not properly raised was not well taken.

In its second assignment of error, the defense asserted that the court erred as a matter of law in charging the jury on lack of informed consent based on its claim that plaintiff had not presented sufficient expert testimony to establish the three elements of the tort of lack of informed consent. Pursuant to *Nickell v. Gonzalez* (1985), 17 Ohio St. 3d 136, plaintiff needed to present evidence showing: (1) that Dr. McGregor failed to disclose to Mrs. Badger and discuss with her the material risks and dangers inherently and potentially involved with respect to the use of gentamicin; (2) that the unrevealed risks and dangers "which should have been disclosed" by Dr. McGregor actually materialized and proximately caused her injury; and (3) a reasonable person in Mrs. Badger's position would have rejected the medication had these risks and dangers been disclosed to her.

The court held there was sufficient evidence to meet the first element of lack of informed consent, because the evidence clearly established that Dr. McGregor did not discuss the medication with her. Since Dr. McGregor was the attending physician that prescribed gentamicin at Mrs. Badger's discharge, he had a duty to inform Mrs. Badger as to any material risk relating to the gentamicin he prescribed. The fact that gentamicin may have been previously prescribed or recommended by another physician, such as an infectious disease specialist, does not element the duty to inform.

A physician only has a duty to disclose material information he knew or should have known. If the physician did not know of the risk, then expert testimony would be required to establish what he or she should have known. Dr. McGregor testified he was aware that gentamicin had certain side effects, and damage to the vestibular system was one of those side effects. However, none of the experts testified that the risks of gentamicin were those that should have been disclosed and that, by failing to inform Mrs. Badger of the risks of gentamicin, Dr. McGregor did not conform to the standard of care of a reasonably prudent physician in the same or similar circumstances as required by *Nickell*. The lack of expert testimony resulted in the failure to meet the burden of proof on the second element of the lack of informed consent as set forth in *Nickell*. Thus, the trial court erred in charging the jury on lack of informed consent, and the second assignment of error was sustained. Judgment of the trial court was reversed.

Medical Malpractice - Computer Prepared Exhibit, Cross-Examination with 18 Year Old Allegations, Learned Treatise

***Perry v. University Hospitals of Cleveland* (August 5, 2004), 8th Dist. App. No. 83034, 2004-Ohio-4098, 2004 Ohio App. LEXIS 3737**

The trial court reversed a defense verdict based on the admission of an electronically manufactured image which was not disclosed to plaintiff's counsel prior to trial, as well as cross-examination of plaintiff's expert with 18-year-old allegations which were unproven and unsubstantiated. The Court of Appeals held that the trial court abused its discretion in permitting the cross-examination of plaintiff's expert using inadmissible hearsay letters of which the doctor had no personal knowledge.

Here, plaintiff had an unborn child that died in utero from a cord accident and was delivered stillborn. Plaintiff's expert, Dr. Cardwell, testified that the care given to Perry did not meet the standard of care and that the management of her pregnancy and decision to attempt a vaginal birth, despite her prior C-section, was the cause of her baby's death. He testified the tragedy was predictable because the baby should have been delivered by repeat C-section because of her risk factors. Second, there were ultrasound findings of oligohydramnios, which is a bad sign and is predictable of certain complications, including cord accident. Had the doctors acted within the standard of care, the baby would have been delivered in a healthy condition. At the conclusion of trial, the jury returned a defense verdict.

The reviewing court held that the trial court committed reversible error and abused its discretion in admitting an electronically manufactured image which was not shown to plaintiff's counsel until the time of trial. This exhibit, which was used to perform a re-measurement of the amniotic fluid pocket depicted in the exhibit by inserting perpendicular calipers onto the image, was a critical piece of evidence that went to the heart of the

plaintiff's claim. The plaintiff should have been afforded the opportunity to review the exhibit prior to trial and provided the chance to conduct her own analysis, or to prepare a defense to the re-measurement of claims of the defendant. However, the plaintiff never saw the exhibit prior to trial and could not have anticipated its use or prepared to refute its conclusions with her own expert medical testimony. The jury was left merely to accept the defendant's assertion that the re-measurement performed with the aid of the inserted calipers produced an accurate result, without an effective challenge from the plaintiff. The court held that the plaintiff was clearly prejudiced and her substantial rights were impacted by the admission of the exhibit.

The Court of Appeals held that the trial court improperly permitted the defendant over the plaintiff's objection to cross-examine the plaintiff's expert witness, Dr. Caldwell, regarding allegations made against him in connection with his departure from a previous employer 18 years prior to trial. The defense asked Dr. Caldwell a series of questions implying that Dr. Caldwell's true reason for leaving his former employer was to avoid confronting allegations of drug abuse and mental incompetence. Dr. Caldwell denied the allegations were his reason for leaving his former employer. These allegations were contained solely in the wording of questions put to Dr. Caldwell by the defense. No evidence was admitted or even offered to substantiate these allegations. Following Dr. Caldwell's denial of the truth of these allegations, the defense failed to provide any connection between the allegations and Dr. Caldwell's expert opinion or his methods used to arrive at his expert opinion. The Court of Appeals held that the trial court abused its discretion in permitting this line of questioning under Evid. R. 403(A). The probative value, if any, was substantially outweighed by its unfair prejudice.

The reviewing court held that the trial court committed error in permitting cross-examination of Dr. Caldwell regarding the text of two letters that were not written by Dr. Caldwell or were not sent to Dr. Caldwell. Evid. R. 602 precludes a witness from testifying to a matter unless evidence is introduced sufficient to support a finding that he had personal knowledge of the matter. The reviewing court held that the letters did not meet any of the exceptions to Evid. R. 803, the hearsay rule. Therefore, it was error to permit the defense to question Dr. Caldwell about these exhibits.

In addition, the reviewing court held that the use of a medical text was properly excluded. Dr. Beigi referred to a chart. He made a measurement from the chart. Plaintiff established this chart was printed in a textbook on maternal-fetal machine authored by Creasy and Resnik. Plaintiff attempted to cross-examine Dr. Beigi about the information on a page in Creasy and Resnik, adjacent to the chart. An objection to the use of the textbook was sustained.

Evid. R. 106 provides when a party introduces a writing or a part thereof, the other party may require him to introduce any other part which out of fairness to be considered contemporaneously with it. The rule is known as the rule of completeness. Here, the reviewing court held that the chart was not used out of context. The chart was used by Dr. Beigi to determine whether Perry's amniotic fluid level fell within normal limits. The entire chart was introduced.

The reviewing court also held that the text was not admissible under Evid. R. 706 governing published treatises. Contrary to Perry's contention, it ruled that the transcript did not clearly reflect that Dr. Caldwell identified the Creasy and Resnik book as reliable authority. Dr. Beigi relied upon the chart in reaching his opinion that the plaintiff's amniotic fluid was within normal limits. The plaintiff's use of the Creasy and Resnik book was not to impeach Dr. Beigi's testimony concerning his reading of the chart or his finding that the measurement fell within normal limits on the chart. Rather, the plaintiff's sought to introduce the text as substantive evidence to establish that 75 mm. of amniotic fluid was indicative of oligohydramnios. Therefore the trial court did not abuse its discretion in prohibiting the use of the Creasy and Resnik text to cross-examine Dr. Beigi.

Political Subdivision Liability - Willful or Wanton Misconduct - R.C. 2744.02(B)(1)(a) & R.C. 2744.03(A)(6)(b)

***Carder v. City of Kettering*, 2nd Dist. App. No. 20219, 2004-Ohio-4260, 2004 Ohio App. LEXIS 3872**

This is a good Plaintiffs' case in the realm of political subdivision liability for a police officer's willful or wanton misconduct during a high speed pursuit. This case arises from a motor vehicle accident that occurred on June 25, 2001 at the intersection of Stroop and Stonehaven Roads in Kettering, Ohio. On that date, officer Aldrich was on patrol when he heard a report over his radio regarding a robbery at a store. The transmission indicated that the robbery suspect was on drugs, possibly armed, and

fleeing on foot toward a residential area. Although other officers were dispatched to the scene, Aldrich advised that he was also going to respond. He activated his lights and sirens and eventually turned west on Stroop Road, traveling at a speed of approximately 84 mph in an area with a posted speed limit of 35 mph. As Aldrich was proceeding on Stroop Road, the Carders were approaching the intersection of Stroop and Stonehaven. Mr. Carder stopped his vehicle at the stop sign at that intersection and looked both ways before going into the intersection. His car windows were up, and his air conditioning was on. The Carders did not see Aldrich's lights and did not hear his siren. When they entered the intersection, they were broadsided by Alrich, who had approached the intersection on a hill at an excessive rate of speed.

The trial court granted the Defendants' dispositive motion, ruling that Aldrich was on an emergency call and that he had not operated his cruiser in reckless or wanton manner. While affirming that Alrich was on an emergency call, the 2nd District reversed on the issue of reckless misconduct. Initially, the 2nd District held that there was no evidence that Aldrich's conduct was "wanton," since the Court believed that "wanton" connotes the absence of *any* care. Since Aldrich did activate his lights and sirens, the reviewing court believes that "some care" was used. On the issue of "reckless" misconduct, however, the reviewing court held that sufficient evidence was presented on this issue to overcome summary judgment. Here, Alrich was traveling over 80 mph in a 35 mph zone in a residential area. He was traveling so fast that he had less that two seconds from the moment he hit his brakes until impact. Moreover, he was traveling up a hill which limited his visibility, as well as the visibility of other motorists. Based on Alrich's speed, the limited visibility and residential character of the neighborhood, therefore, the 2nd District held that a reasonable juror could find that his conduct was reckless, thus supporting a basis for liability. The trial court's judgment was therefore reversed and the case remanded for further proceedings.

Premises Liability – Negligent Maintenance of Rental Property

***Janet Harris v. Richmond Park Apartments*, 8th Dist. App. No. 84067, 2004-Ohio-4081, 2004 Ohio App. LEXIS 3719**

On December 2, 2001, Plaintiff, Janet Harris, fell and injured her ankle while on Defendant's common area steps. In her complaint, Harris alleged that the Defendant landlord was negligent in maintaining the property. More specifically, she alleged that the Ohio Basic Building Code (OBBC) and RC §5321.04 required Defendant to install a handrail at the stairs on which she was injured. Negligence per se and failure to correct a dangerous condition were alleged. The trial court granted Defendants' Motion for Summary Judgment, and Plaintiff appealed to the 8th District arguing that Defendant's failure to install a handrail at the subject stairway was indeed negligence per se.

On appeal, the 8th District relied on *Sikora v. Wenzel* (2000), 88 Ohio St.3d 493, in which the Supreme Court held that RC §5321.04(A) "[r]equires landlords to conform to a particular standard of care, the violation of which constitutes negligence per se." Here, the reviewing court noted that defendant's representatives admitted that they knew of landscaping pebbles occasionally gathering on the steps of the stairway and that there was no handrail on the stairway. After reviewing R.C. §5321.04(A), the 8th District concluded that there exists a genuine issue of material fact as to whether Defendants' failure to install a handrail violated that statute.

It should be noted that the Defendants in this case did not contest the OBBC requirement that a handrail be installed in that location. Instead, Defendants claimed that they were entitled to summary judgment, because Plaintiff did not prove that the apartment was constructed *after* the effective date of the statute. The court held that there exists a genuine issue of material fact whether the absence of that handrail was a "serious hazard." If that absence was a serious hazard, the date of the apartment construction is irrelevant.

Defendants also relied on the open and obvious doctrine as a defense. The 8th District disagreed with Defendants' assertion on the ground that the open and obvious doctrine applies to the common law duty of ordinary care owed by a premises owner rather than the statutory duty which was the subject in this case.

Premises Liability - Genuine Issue of Material Fact On Open and Obvious Character of Defect

***Collins v. McDonalds*, 8th Dist. App. No. 83282, 2004-Ohio-4074, 2004 Ohio App. LEXIS 3714**

Plaintiff, John Collins, tripped on a hole in the sidewalk outside of a McDonald's fast food Restaurant. He had just finished holding the front door open for two women

as he was leaving the restaurant. At the time of his fall, Collins had a cup of coffee in his hands and was speaking to the two women. He fractured his left foot and injured his head during the fall.

Collins brought a negligence action against McDonald's Corporation for negligently maintaining the sidewalk and later amended his complaint to include JHG, the operator of that particular McDonald's Restaurant. On July 9, 2002, the trial court granted JHG's Motion for Summary Judgment, finding that the hole on the McDonald's property was an open and obvious danger as a matter of law, precluding Collins' recovery.

Finding that reasonable minds could differ as to whether the hole outside the McDonald's was open and obvious, the 8th District reversed and remanded. In its holding, the reviewing court noted that Collins had eaten at this particular McDonald's Restaurant a total of two times. The first time that he visited, he entered through the side door and exited through the same side door. During his second visit, Collins entered through the front door and exited through the same front door, at which time he tripped on the hole. In his deposition, Collins stated that he didn't notice the hole in the sidewalk on his way inside because he "never bothered looking down." The 8th District noted that in *Texler v. D.O. Summers Cleaners and Shirt Laundry Company*, 81 Ohio St.3d 677, the Ohio Supreme Court rejected the notion that an ordinary person would look constantly downward while walking on a sidewalk. In reversing the trial court's ruling, the court mentioned that Collins never saw the hole in the sidewalk and was distracted by people in front of him at that time that he fell. These were factors beyond Collins' control that contributed to his injuries. Collins, the court stated, "was not required to constantly look downward in order to avoid any potential dangers that may lie on or near the ground."

Verdicts & Settlements

(For members and educational purposes only)

Patricia A. Franklin v. Center for Skin Care and Permanent Make-Up, Inc., Denise Byrnes, Roman A. Ringel, M.D.
Type of Case: Negligence/Medical Malpractice
Verdict: $500,000
Plaintiff's Counsel: Susan E. Petersen/Dennis R. Lansdowne
Defendant's Counsel: Center for Skin Care/Byrnes - Jason Winter and Jane Warner; Dr. Ringel - Richard Rymond
Court: Cuyahoga County Common Pleas, Case No. CV02485103; Judge Ralph A. McAllister
Date: June, 2004
Insurance Company: N/A
Damages: $5,908 in medical specials; second and third degree burns to top of hands; permanent scarring; discoloration

Summary: Defendant cosmetologist was working out of the office of her former employer/surgeon. She established her own corporation with the doctor. As the medical director, she was providing a variety of skin care services, including chemical peels. She performed a 30% trichloroacetic acid peel on the hands of Plaintiff, resulting in second and third degree burns, necessitating nearly a year of treatment in the burn unit, as well as permanent scarring and hypopigmentation on both hands. The doctor testified that when she was employed in 1998, he had told her she was never to use a 30% TCA peel, as one of his partners had burned a client with this chemical and the cosmetologist had observed the incident. The cosmetologist testified that she did not remember the conversation and that it was her understanding that she could use 30% TCA. The judge dismissed all claims against the doctor, and the jury unanimously found the cosmetologist liable for negligence and proximately causing the Plaintiff's injuries.
Plaintiff's Experts: William Coleman, III, M.D. (Dermatology); Charles J. Yowler, M.D. (Burn specialist)
Defendant's Experts: Kenenth Arsham, M.D.; Michael Parker, M.D.

Baby Doe v. Hospital, Emergency Physician, Obstetrician and Auto Driver
Type of Case: Medical Negligence
Settlement: $3,840,000.00
Plaintiff's Counsel: David J. Guidubaldi, Daniel M. Sucher, Cathleen M. Bolek
Defendant's Counsel: Withheld
Court: Franklin County Court of Common Pleas
Date: July, 2004
Insurance Company: Withheld
Damages: Cerebral Palsy

Summary: Plaintiff, 36 weeks pregnant, was involved in a significant MVA. Her abdomen bent the steering wheel. Complaining only of abdominal pain, she was rushed to the local hospital, where she waited for 17 minutes to be seen. Using a hand-held Doppler, the ER physician listened for fetal heart tones. He could not tell if the heart tones he heard were fetal (and represented a fetus in distress) or maternal in origin. He admitted the patient to OB. The OB nurse notified the OB on-call, who was seeing patients in his office. The testimony differed as to whether she conveyed the urgency of the situation. He admitted that he could have been at the patient's side in less than seven minutes; he arrived 26 minutes after being called. Although the OB nurse noted normal fetal heart tones just 15 minutes earlier, by the time the OB arrived, the fetus was in severe distress, with heart tones in the 40s. He delivered the baby by emergency C-section without anesthesia. The baby suffers from cerebral palsy and is severely disabled.
Plaintiff's Experts: Richard Sweet, M.D. (Obstetrics and Gynecology); Max Wiznitzer, M.D. (Pediatric Neurosurgery); Charles Emmerman, M.D. (ER Physician); Raymond W. Redline, M.D. (Placental Pathologist); John Burke, Ph.D. (Economist); George Cyphers (Life Care Plan)
Defendant's Experts: Richard O'Shaughnessy, M.D. (Defendant Hospital OB); Mark Landon, M.D. (Defendant Obstetrician OB); Diana Ross, M.D. (Defendant Hospital Pediatric Neurologist); Elias Chalhub, M.D. (Defendant ER Pediatric Neurologist); Charles Eckerline, M.D. (Defendant ER ED physician); David Schwartz, M.D. (Placental Path.)

Wilson v. Nationwide Mutual Fire Insurance Co.
Type of Case: First-party fire insurance
Verdict: $88,100 plus interest
Plaintiff's Counsel: Bob Rutter
Defendant's Counsel: Chip Comstock
Court: Ashtabula County Court of Common Pleas, Case No. 03CV00314, Judge Gary Yost
Date: May, 2004
Insurance Company: Nationwide Mutual Fire Insurance Co.
Damages: Fire damage to plaintiffs'/insureds' home

Summary: Plaintiffs-insureds filed a fire insurance claim with their homeowner's carrier. Nationwide accused the husband of arson and denied the claim. The jury determined that the fire was intentionally set, but that the husband did not set the fire.
Plaintiff's Experts: Tom Conklin (Fire Cause and Origin); James Gerrity (Dwelling and Personal Property Values)
Defendant's Experts: N/A

John Doe v. Jack Doe Contractor
Type of Case: Action against contractors for unworkmanlike construction and first-party claim against plaintiffs' homeowner's carrier
Settlement: $425,000
Plaintiff's Counsel: Bob Rutter
Defendant's Counsel: David Orlandini, Mark Gams
Court: Knox County Common Pleas, Case No. 02 BR 110434, Judge Eyster
Date: May, 2004
Insurance Company: Grange Mutual
Damages: Mold and water damages; Allergic reactions

Summary: Mold and water damage to a newly constructed log cabin and allergic reactions to occupants.
Plaintiff's Experts: Mike Crandall (Indoor air quality); James Taylor (Wood Integrity)
Defendant's Experts: N/A

John Doe v. Doe Insurance
Type of Case: Insurance claim for water damage
Settlement: $500,000.00
Plaintiff's Counsel: Bob Rutter
Defendant's Counsel: N/A
Court: N/A
Date: December, 2003
Insurance Company: AIG
Damages: Water damage to commercial warehouse.

Summary: First-party claim for water damage to commercial warehouse. Carrier raised various coverage and damage arguments before agreeing to settle claim.
Plaintiff's Experts: Alex N. Sill Company (Public Adjuster)
Defendant's Experts: N/A

John Doe v. Doe Insurance
Type of Case: Fire damage to insured's home
Settlement: $145,639.00
Plaintiff's Counsel: Bob Rutter
Defendant's Counsel: N/A
Court: N/A
Date: January, 2004
Insurance Company: Allstate
Damages: Fire damage to residence.

Summary: First-party claim for fire damage to insured's home. Carrier investigated the insured's possible involvement and decided to pay the claim.
Plaintiff's Experts: Don Finnicum (Dwelling Repair Cost)
Defendant's Experts: N/A

Guardian of Jane Doe v. ABC physician
Type of Case: Medical Malpractice
Settlement: $2,500,000.00
Plaintiff's Counsel: Paul M. Kaufman
Defendant's Counsel: James Malone
Court: Cuyahoga County Court of Common Pleas
Date: February, 2004
Insurance Company: Self-insured defendant
Damages: Permanent neurological deficits

Summary: 56-year-old single Plaintiff, without children, over the course of at least two years presented to defendant with classic signs and symptoms suggesting a benign brain tumor known as a vestibular schwannoma or acoustic neuroma. The condition went undiagnosed until it became so large that the plaintiff began falling down frequently. An MRI diagnosed the condition which led to brain surgery. Shortly after the surgery, the plaintiff suffered a stroke which has left her permanently disabled and confined to a nursing home.
Plaintiff's Experts: Stephen Baum, M.D. (Internal Medicine); Robert Ratcheson, M.D., (Neurosurgeon); Mary Ann Boing (Life Care Plan); John Burke (Economist)
Defendant's Experts: Joung H. Lee, M.D. (Neurosurgery)

John Doe v. ABC Physician
Type of Case: Medical Malpractice
Settlement: $1,175,000.00
Plaintiff's Counsel: Paul M. Kaufman
Defendant's Counsel: Marc Groedel
Court: Cuyahoga County Court of Common Pleas
Date: June, 2004
Insurance Company: Self-insured defendant
Damages: Recurrence of cancer after delayed diagnosis. Probability of future recurrence.

Summary: 59-year-old Plaintiff was under care of defendant for several years. Because of complaints relating to GERD, plaintiff underwent endoscopy and subsequent medication treatment. Despite significant warning signs, no biopsy was done during initial or any subsequent endoscopies. Plaintiff was subsequently diagnosed with esophageal cancer requiring extensive surgery. He later developed lung cancer which required extensive treatment. He presently is disease free.
Plaintiff's Experts: John Fromkes, M.D. (Gastroenterologist)
Defendant's Experts: John Bond, M.D.

Est. Of Jane Doe v. XYZ Hospital, et al
Type of Case: Medical malpractice/wrongful death
Settlement: $567,500.00 (Partial - case continues against neurologist)
Plaintiff's Counsel: Paul M. Kaufman
Defendant's Counsel: Rita Maimbourg
Court: Cuyahoga County Court of Common Pleas
Date: October, 2003
Insurance Company: Hospital is self-insured
Damages: Death

Summary: 65-year-old single decedent, with one adult child, was admitted to defendant hospital with signs of minor stroke. Over the following two days, she was given anti-coagulants even after testing suggested she had suffered a bleed in her brain. All anti-coagulants should have been stopped pending her brain MRI results. Two days after admission she was found unconscious and was not able to be revived. She had suffered multiple, massive bleeds in her brain caused by the blood thinning drugs she received.
Plaintiff's Experts: None
Defendant's Experts: None

Estate of Jane Doe v. ABC Internist, et al
Type of Case: Medical Malpractice/Wrongful Death
Settlement: $1,000,000.00
Plaintiff's Counsel: Charles Kampinski, Laurel A. Matthews and Douglas Bloom
Defendant's Counsel: Withheld
Court: Cuyahoga County Court of Common Pleas
Date: March, 2004
Insurance Company: Withheld
Damages: Wrongful Death

Summary: Plaintiff, a 51-year-old married mother of two, owned and managed her own staffing company. In June of 2001, decedent presented to ABC internist complaining of recurrent episodic shortness of breath and chest pain. She was at a higher than average risk of venous thromboembolism because she was taking oral contraceptives. Decedent continued to see ABC Internist on multiple occasions with the same complaints. ABC Internist failed to diagnose that decedent's symptoms were due to recurrent pulmonary emboli. Eleven months later, when ABC Internist finally considered the possibility of pulmonary embolism, she ordered a spiral CT and VQ scan, which would have diagnosed the problem. However, she did not order them as stat tests and scheduled them to be done in two weeks. Decedent died from pulmonary embolism five days later. Had ABC Internist timely ordered the necessary diagnostic tests and begun appropriate treatment, decedent would be alive and well.
Plaintiff's Experts: E. P. Trulock, M.D.; Gregory Balko, M.D. (Pathologist)
Defendant's Experts: None

Sosa v. Schwemlein, M.D.
Type of Case: Medical Malpractice
Verdict: $100,000.00 (Motion for PJI pending)
Plaintiff's Counsel: Paul M. Kaufman
Defendant's Counsel: David Lockemeyer, Cincinnati, OH
Court: Hamilton County Common Pleas, Judge Nurre, Case No. A0206428
Date: July, 2004
Insurance Company: Farmers
Damages: Infertility

Summary: OB/GYN Defendant overscraped 39-year-old Plaintiff's uterus during post-delivery D&C, which caused Asherman's Syndrome, resulting in infertility. Plaintiff has had 4 IVF attempts, all of which have failed.
Plaintiff's Experts: Marcus Tower, M.D.
Defendant's Experts: Stephen DeVoe, M.D.

Robert Perisho, Jr. v. General Motors Corporation
Type of Case: Product Liability/Wrongful Death
Settlement: Confidential
Plaintiff's Counsel: James A. Lowe, William E. Winingham (Indianapolis, IN)
Defendant's Counsel: Withheld
Court: U.S. District Court, Southern District of Indiana, Indianapolis Division, Case No. 1:03-CV-00071 SEB/VSS
Date: December, 2003
Insurance Company: Withheld
Damages: Death

Summary: Plaintiff's decedent was the seatbelted driver of a 1995 Grand Am, which slid on an icy rural road, ultimately impacting the rear of the vehicle against several small trees. Although the impact speed was relatively low, decedent's seatback failed, and she was ejected. She impacted the rear seat, fracturing her spine, resulting in paraplegia. After four months of therapy, during an exercise to help her stand, decedent suffered a pulmonary thrombosis. Plaintiff brought a wrongful death action, alleging that the design of the 1995 Grand Am's seat was defective in that it was unreasonably weak and subject to failure in a foreseeable rear impact, allowing front seat occupants to be ramped up the seatback and out of their seatbelts, predictably resulting in severe spinal cord injuries.
Plaintiff's Experts: Todd Saczalski (accident reconstruction, seat testing ana analysis); Mark Pozzi (seat design and occupant kinematics); John Stilson (seat design)
Defendant's Experts: Robert Sinke (design history); David Viano, M.D. (seat design and biomechanics); Stanley Sangdahl, P.E. (seat design); Joe W. Kent (accident reconstruction)

Christyne Macho, et al v. Ford Motor Company, et al
Type of Case: Product Liability/Wrongful Death
Settlement: Confidential
Plaintiff's Counsel: James A. Lowe
Defendant's Counsel: Withheld
Court: Cuyahoga County Common Pleas, Case No. 453340/459511
Date: May, 2004

Insurance Company: Withheld
Damages: Death

Summary: Decedent Yoshio Mori, was the driver of a 1988 Mercury Marquis. Mr. Mori was picking up his grandson from school. He shifted from park into drive, and the vehicle suddenly and unexpectedly accelerated, causing him to lose control, go through a school parking lot, and ultimately impact a tree. Both occupants were fully seatbelted, but Mr. Mori died from blunt trauma injuries. Plaintiffs maintain that the vehicle was defectively designed in that it did not have a brake-shift interlock which would have prevented the inadvertent misapplication of the throttle when application of the brake had been intended.
Plaintiff's Experts: Gerald Rosenbluth (liability expert)
Defendant's Experts: Harry Fereshetian and Robert Cunitz (in-house engineers)

Saundra L. Gay/Jeanne Moore v. Bridgestone/ Firestone, et al
Type of Case: Product Liability
Settlement: Confidential
Plaintiff's Counsel: James A. Lowe, Gerald Thurswell, Detroit, MI and John R. Overchuck, Orlando, FL
Defendant's Counsel: Withheld
Court: Cuyahoga County Common Pleas, Case No. 440162
Date: April, 2004
Insurance Company: Withheld
Damages: Quadriplegia/closed head injury

Summary: Rev. Gary Gay was the operator of a 2000 Ford Explorer 4x4, which he had rented from Hertz for a trip from Detroit to Pittsburgh to conduct a service as a guest pastor. He had two passengers. Rev. Gay swerved to avoid a deer, and the Explorer rolled over on-road and into an embankment. Mrs. Gay was rendered a quadriplegic and the other passenger suffered a closed head injury. Plaintiffs claim that the Explorer was defective in design by reason of its poor stability and handling characteristics and its propensity to roll over from steering maneuvers alone.
Plaintiff's Experts: David Renfroe, Ph.D. (vehicle design); Robert Hooker (stability testing); Joseph L. Burton, M.D. (biomechanics); John Burke, Ph.D. (economist)
Defendant's Experts: Geoffrey Germane (accident reconstruction); Terry Thomas (vehicle design; Charles Hatsell, M.D. (biomechanics); William Wecker (statistics)

Robert J. Arena v. Ford Motor Company
Type of Case: Product Liability
Settlement: Confidential
Plaintiff's Counsel: James A. Lowe, Dennis P. Mulvihill, Claudia R. Eklund, Sara S. Ravas, and Thomas L. Brunn, Jr.
Defendant's Counsel: Withheld
Court: U.S. District Court, Northern District of Ohio, Eastern Division, Case No. 1:02CV1637
Date: April, 2004
Insurance Company: Withheld
Damages: Quadriplegia

Summary: Robert Arena was the seatbelted driver of a 1997 Ford Explorer 4x4, when he swerved to avoid another vehicle coming into his lane. Following his steering maneuvers to avoid the accident, the vehicle rolled over onto the highway and into the median, coming to rest on its roof. The roof collapsed, and Mr. Arena was compressed between the roof and his seat, resulting in quadriplegia. Plaintiff contended that the vehicle was defective in stability, handling and rollover resistance, and because its roof collapsed catastrophically.
Plaintiff's Experts: David Renfroe, Ph.D. (vehicle design); Robert Hooker (stability testing); Joseph Burton, M.D. (biomechanics); John Burke, Ph.D. (economist); Steve Forrest (roof design)
Defendant's Experts: Geoffrey Germane (accident reconstruction); Donald F. Tandy, Jr. (stability and handling); Larry Ragan (roof design); Catherine Ford Corrigan (biomechanics); Eddie R. Cooper (occupant restraints); and William Ecker, Ph.D. (designated on statistics but withdrawn by Ford prior to trial following the motion to exclude him)

John Doe v. The Home Depot USA, Inc.
Type of Case: Personal Injury - Slip and Fall
Settlement:: $23,000
Plaintiff's Counsel: Daniel M. Katz
Defendant's Counsel: Withheld
Court: Withheld
Date: April, 2004
Insurance Company: Sedgwick CMS (Defendant is self-insured)
Damages: Fractured eye socket, shoulder and jaw injuries; medicals $1,635.89

Summary: Slip and fall injuries at Home Depot in Fairborn, Ohio
Plaintiff's Experts: None
Defendant's Experts: None

John and Jane Roe v. ABC Radiologist Group, CDE Gastroenterologist, CDE Gastroenterologist Group and XYZ Hospital
Type of Case: Medical Malpractice
Settlement: $2,750,000
Plaintiff's Counsel: Charles Kampinski, Laurel A. Matthews, and Douglas Bloom
Defendant's Counsel: Withheld
Court: Cuyahoga County Court of Common Pleas

Date: July, 2004
Insurance Company: Withheld
Damages: Extreme pain and suffering, has a terminal disease, and will die prematurely.

Summary: Plaintiff presented to CDE Gastroenterologist in August 1998 with gastrointestinal symptoms including abdominal pain, nausea, regurgitation and heartburn. CDE diagnosed him with gastroespologhageal reflux and peptic ulcer disease. The question of a pancreatic lesion was raised. In 1999, Plaintiff's abdominal complaints worsened, and there was an alteration in his symptomatology. A CT scan was ordered by his family physician. This test was misinterpreted by ABC Radiologist and ABC Radiologist Group as normal when in fact there were abnormalities in the pancreas. In September, 2000 CDE ordered UGI contrast exam with small bowel follow through. This study demonstrated "widening of the duodenal C-loop, rule out pancreatic enlargement." A CT scan with special attention to the pancreas was recommended but not obtained for two months. That CT scan, done in December, 2000 demonstrates a respectable mass in the head of the pancreas suspicious for pancreatic cancer. Once again, this test was misinterpreted by ABC as normal. Despite the results of two discordant tests, CDE failed to follow-up with another imaging test. In July, 2002 Plaintiff was admitted to EFG Hospital where a repeat CT scan was correctly interpreted showing a 5cm pancreatic mass, which at the time was unresectable.
Plaintiff's Experts: Mark H. Kogan, M.D., (Gastroenterologist); Stephen J. Pomeranz, M.D., (Radiologist); John Burke, Ph.D. (Economist)
Defendant's Experts: Charles Yeo, M.D. (General Surgery); Barry Bates, M.D. (Radiology); Ross Donehowor, M.D. (Oncology); Avrum Cooperman, M.D. (General Surgery); John Baillie, M.D. (Gastroenterology)

Barbara Diaz v. Anthony Rucella
Type of Case: Automobile Accident
Verdict: $1,055,000.00
Plaintiff's Counsel: Mitchell A. Weisman
Defendant's Counsel: George Lutjen
Court: Cuyahoga County Court of Common Pleas, Judge Christopher Boyko, Case No. 500958
Date: June, 2004
Insurance Company: Motorist Insurance
Damages: $12,000 past medical; $5,000 lost wages

Summary: This was a failure to yield (red light) case. Ms. Diaz, a 38-year-old plaintiff, is a single female with three adult children who works as a hospice home health aid. She was a passenger in a car that was hit in the passenger door on her side of the car driven by the defendant who ran a red light. Plaintiff sustained a fracture of her left clavicle and fracture of left 2nd and 3rd ribs, chronic sprain/strain of the left shoulder and left hip/sacral iliac joint. She has chronic/permanent left shoulder and left hip pain. Offer before trial was $50,000 and $60,000 during trial. After only one hour of deliberation, the jury awarded as follows: Past Pain and Suffering ($55,000); Past Inability To Perform Usual Activities ($55,000); Past Medical ($12,208.00); Past Wage Loss ($5,043.00); Future Pain and Suffering ($440,000); Future Medical Bills ($48,000).
Plaintiff's Experts: Robin Hughes, M.D. (occupational medicine)
Defendant's Experts: None

Anesthesiology

David C.Brandon, M.D.
Briccio Celerio, M.D.
Timothy C. Lyons, M.D. */Cardiothoracic*
Amir Dawoud, M.D.
Charles J. Hearn, M.D.
Mary McHugh, M.D. */Resident*
Stephen W. Minore, M.D.
David S. Rapkin, M.D.
Kenneth E. Smithson, M.D.
Jeffrey S. Vender, M.D.
Jean-Pierre Jarned, 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.
Wayne Gross, M.D.
Alan Kamen, M.D.
Alfred Kitchen, M.D.
Alan Kravitz, M.D.
Raymond Magorien, M.D.
Steven Meister, M.D.
Michael Oddi, M.D. */Cardiothoracic Med*
George Q. Seese, M.D.
Bruce S. Stambler, M.D.
Sabino Velloze, M.D.
Thomas Vrobel, M.D. */Intern/Pulm*
Richard Watts, M.D.
Steven Yakubov, M.D.
Kenneth G. Zahka, M.D. */Pediatrics*
Christine M. Zirafi, M.D.
Benjamin Felia Zolta, M.D.

Cytopathology

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

Dentistry/Oral Surgery

Mitchell Barney, D.D.S.
John Distefano, D.D.S.
Michael Hauser, D.D.S.
Don Shumaker, D.D.S.
Pankaj Rai Goyal, M.D./*Oral Surgery*
John F. Zak, M.D. */Oral Maxillofacial Surg.*

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.
Mark Eisenberg, M.D.
Charles Emerman, M.D.
Cory Franklin, M.D.
Richard Frires, M.D. */Family Medicine*
Gayle Galen, M.D.
Howard Gershman, M.D.
Thomas Graber
Ginger A. Hamrick, M.D.
Mark Hatcher, M.D.
Bruce Janiak, M.D.
Gerald Geromin, M.D.
Allen Jones, M.D.
Samuel Kiehl, M.D.
Frederick Luchette, M.D.
Jeffrey Pennington, M.D.
Pradyumna Padival, M.D.
Norman Schneiderman, M.D.
Albert Weihl, M.D.
Robert C. Woskobnick, M.D.

ENT

Steven Houser, M.D.
Yunn W.Park, M.D.
Seth J. Silberman, M.D.
Barry Wenig, M.D.

Epileptology

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

Family Medicine

Arthur M. Amdur, M.D.
Robert T. Blankfield, M.D.
David M. Cola, M.D.
Mary Corrigan, M.D.
Julia Ann Heng, M.D.
John E. Hollin, M.D.
Joseph J. Kessler, Jr., M.D.
Jeffrey R. Kontak, M.D.
Kelly Oh, M.D.
Elisabeth Righter, M.D.
Michael Rowane, M.D.

Gastroenterology

Aaron Brzezinski, M.D.
Eric J. De Maria, M.D. */Gastric Surgeon*
Todd D. Eisner, M.D.
R. Kirk Elliott, M.D.
Kevin Olden, M.D.

General Internal Medicine

Thomas Abraham, M.D. */Pulmonology*
Bruce L. Auerbach, M.D.
Sharon Lynn Balanson, M.D.
Stephen Baum, M.D.
Frederick Bishko, M.D. */Rheumatology*
Garardo Cisneros, M.D.
Alan J. Cropp, M.D. */Pulmonology*
Carl A. Cully, M.D.
Douglas Einstadter, M.D.
Kirk R. Elliott, 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.
Neal R.Minning, M.D.
Darshan Mistry, M.D.
Hadley Morgenstern-Clarren, M.D.
Lorus Rakita, M.D.
Raymond W. Rozman, M.D.
Juan A. Ruiz, M.D.
James K. Salem, M.D.
Jeffrey Selwyn, M.D.
Vijaykumar Shah, M.D.
Patrick Whelan, M.D. */Pulmonology*
Michael Yaffe, M.D.
David Yana, M.D.

General Surgery

Manuel C. Abellera, M.D.
Samual Adornato, M.D.
Henry Bohlman, M.D. */Spinal*
Dean W. Borth, M.D.
Stanley Dobrowski, M.D.
William F. Fallon, Jr., M.D.
Daniel Goldberg, M.D.
Thomas H. Gouge, M.D.
Theodor F. Herwig, M.D.
Micheal Hickey, M.D. */Trauma*
Moises Jacobs, M.D.
Frederick Luchette, M.D. */Trauma*
Donald Malone, M.D. */Psycosurgery*
Jeffrey Marks, M.D.
Dilip Narichania, M.D.
Abdel Nimeri, M.D. */Resident*
Paul Priebe, M.D.
William Schirmer, M.D.

Geriatrics

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

Hematology

Vinodkumar Sutaria, M.D.
Alan Lichtin, M.D.
Roy Silverstein, M.D.

Infectious Disease

Keith Armitage, M.D.
Robin Avery, M.D.
Robert Flora, M.D.
George J. Gianakopoulos, M.D.
Steven M. Gordon, M.D.
Clark Kerr, M.D.
David Longworth, M.D.
Lawrence Martinelli, M.D.
Martin Raff, M.D.
Susan Rehm, M.D.
Raoul Wientzen, M.D.

Neonatology

Richard E. McClead, M.D.

Neurology

Nancy Bass, M.D. */Pediatrics*
Bennett Blumenkopf, M.D.
Elias Chalub, M.D. */Pediatrics*
Bruce Cohen, M.D. */Pediatrics*
Herbert Engelhard, M.D.
Joseph P. Hanna, M.D.
Mary Hlavin, M.D.
Dennis Landis, M.D.
Alan Lerner, M.D.
Donald Mann, M.D.
Sheldon Margulies, M.D.
James M. Parker, M.D.
David C. Preston, M.D.
Thomas R. Price, M.D. */Psychiatrist*
Tarvez Tucker, M.D.

Neurosurgery

Gene Barrett, M.D.
Frederick Boop, M.D. */Pediatrics*
John Conomy, M.D.
Thomas Flynn, M.D.
Neil R. Freidman, M.D. */Pediatrics*
Jaimie Henderson, M.D.
David Kline, M.D.
Frederick Lax, M.D.
Matt Likavec, M.D.
Mark Luciano, M.D. */Pediatrics*
Gary Lustgarten, M.D.
William McCormick, M.D.
Samuel Neff, M.D.
Charles Rawlings, M.D.
Ali Rezai, M.D.
Morris M. Soriano, M.D.

OB/Gyn

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William Bruner, M.D.
David Burkons, M.D.
Daniel Cain, M.D.
Michael S. Cardwell, M.D.
Ricardo Loret deMola, 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.
David M. Grischkan, M.D.
Michael Gyves, M.D.
William Hahn, M.D.
Hunter Hammill, M.D.
Nawar Hatoum, M.D.
Tung-Chang Hsieh, M.D.

David Klein, M.D.
Robert Kiwi, M.D.
Mark Landon, M.D.
Henry M. Lerner, M.D.
Andrew M. London, M.D.
Mark Lowen, M.D.
James Nocon, M.D.
John O'Grady, M.D.
John R. O'Neal, M.D.
Richard O'Shaughnessy, M.D.
Urmila J. Patel, M.D.
George Petit, M.D.
Stanley Robboy, M.D.
Anthony Tizzano, M.D.
Mark Turrentine, M.D.
Josephine Wang, M.D.
Louis Weinstein, M.D.

Occupational Therapy

Ellen Flowers

Oncology

Michael T. Lotze, M.D. */Surgical Oncology*
Howard Muntz, M.D. */GYN Oncologist*
Howard Ozer, M.D.
David Stepnick, M.D.

Ophthalmology

Thomas R. Hedges, M.D.
Gregory Kosmorsky, M.D.
Andreas Marcotty, M.D.
Peter J. Savino, M.D.
Robert Tomsak, M.D. */Neuro-Ophthalmologist*

Orthopaedic Surgery

William Barker, M.D.
William Bohl, M.D.
Malcolm Brahms, M.D.
James David Brodell, M.D.
Dennis Brooks, M.D.
Lawrence A. Cervino, M.D. */Hand Surgeon*
Robert Corn, M.D.
Ahmed Elghazawi, 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 S. Morris, M.D.
Andrew Newman, M.D.
Jeffrey J. Roberts, M.D.
Duret Smith, M.D.
Susan Stephens, M.D.
Glen Whitten, M.D.
Robert Zaas, M.D.
Faissal Zahrawi, M.D.

Otolaryngology

Joel D'Hue, M.D.
Chris J. Kaluces, M.D.
Wayne M.Koch, M.D.
Raphael Pelayo, M.D.

Otoneurology

John G. Oats, M.D.

Pathology

Robert D. Hoffman, M.D.
Sharon Hook, M.D.
Kenneth McCarty, M.D.
Richard Lash, M.D. */Surgical*
LaszloMakk, M.D.
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.
Timothy McKnight, 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*
Susan M. Vargo, M.D.
Lee M. Weinstein, M.D.
Keith Owen Yeates, M.D. */Neuropsychology*

Plastic Surgery

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

Podiatry

Anthony A. Matalvange, M.D.
Richard J. Rasper, M.D.
Gerald Yu, M.D.

Proctology

Henry Eisenberg, M.D.

Psychiatry

Richard Lightbody, M.D.
Stephen G. Noffsinger, 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
George Anton, M.D.
Marc Cooperman, M.D.
Delos M. Cosgrove, M.D. */Cardiothoracic*
Dennis Hernandez, M.D. */Cardiothoracic*
Gregory F. Muehlbach, M.D.
Mehmet C. Oz, M.D. */Cardiothoracic*
Thomas W. Rice, M.D.
Craig Saunders, M.D.
V.C. Smith, M.D. */Cardiac Surgeon*

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

Vascular Surgery
John J. Alexander, M.D.
Richard Paul Cambria, M.D.

General/Misc.
Walter Afield, M.D. */Unknown*
Mack A. Anderson */Counselor*
Lisa Ann Atkinson, M.D. */Staff Physician*
Stanley P. Ballou, M.D. */Unknown*
Elizabeth Barker */CT Technologist*
Ahmed Elghazawi */Independent Med Exam*
Nancy Holmes */Cert. Physicians Assistant*
Caroline Wolfe */M.EdLCP (Rehab Counselor)*
Karen Wolffe */Professional Counselor*
Arthur B. Zinn, M.D. */Medical Geneticist*

Nursing
Jennifer Ahl, R.N.
Debbie Bazzo, R.N. */Obstetrics*
Mary Ann Belanger, R.N.
Brenda Braddock, R.N.
Jill Castenir, R.N.
Danielle Coates, R.N.
Lois Cricks, R.N.
Linda DiPasquale, R.N. */Perinatal CNS*
Rita J.Freehorn */Home Health Aide*
Debra A. Gargiulo, R.N.
Phyllis Hayes, R.N.
Laura Hoover, R.N.
Denise Hrobat, R.N.
Mary Hulvalchick, R.N. */Obstetrics*
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Judith Wright Lott, R.N. */Neonatal N.P.*
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Lekita Nance, LPN
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Janet Pier, R.N.
Debra Seaborn, R.N.
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Penny Sonters, R.N.
Mary Jane Martin Smith, R.N. */Teacher*
Suzanne Smith, R.N. */Midwife*
Diane Soukup, R.N. */Geriatrics*
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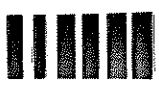

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1. ***Skill, interest and ability in trial and appellate practice.***
2. ***Service rendered or a willingness to serve in promoting the best interests of the legal profession and the standards and techniques of trial practice.***
3. ***Excellent character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

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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.):_____

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