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President's Message



Romney B. Cullers

It is a great time to be a trial lawyer, precisely because it is a time of great need. Connie Schultz touched on this theme during her remarks at our recent inauguration dinner, and her message was inspiring to us all. There are people who appreciate the great service we provide. Our work transcends the obnoxious clamor of partisan politics.

Here's some light in the fog. On July 14, 2005, the Supreme Court of Wisconsin struck down caps on non-economic damages in medical malpractice cases. The statute failed to survive rational basis scrutiny in *Ferdon v. Wisconsin Patients Compensation Fund* (2005), No. 2003 AP 988. The Court determined that caps denied equal protection of the law to a small group of people – those who are seriously injured. The Court's analysis was straightforward. Any first-year law student would have arrived at the same conclusion. Obviously, caps are a violation of equal protection. Thankfully, the Supreme Court of Wisconsin stepped out of the stampede and did the right thing.

The Supreme Court of Wisconsin actually considered the truth. Caps have no impact on malpractice insurance premiums. The New York Times published an article on July 7, 2005 detailing the results of a recent study conducted by The Center for Justice and Democracy. The study confirms what we have known for a long time. Jury verdicts have nothing to do with the surging costs of malpractice insurance. During this so-called "crisis," the business of medical malpractice insurance has been highly profitable. Although net claims paid by 15 leading companies have remained flat over the past five years, premiums have increased 120 percent. If you would like a copy of the article, please call and I will send it to you.

Edited by
Stephen T. Keefe, Jr.
and
Stephen S. Vanek

We have a couple of announcements. This is the last CATA Newsletter edited by Steve Keefe. He and co-editor Steve Vanek have done a great job on the CATA Newsletter for years. Steve has now become an officer and we want to thank and congratulate him. Replacing "the Steves" as Editors of the CATA Newsletter are newly inducted CATA Board Members, Alison Ramsey and Andrew Thompson. We wish to congratulate them as well.

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Please be sure to attend the golf outing at Spring Valley Country Club on Thursday, September 1, 2005. If you would like to make reservations, please contact David Goldense at 216-241-0300.

Thanks for supporting the Academy. We look forward to continuing success.

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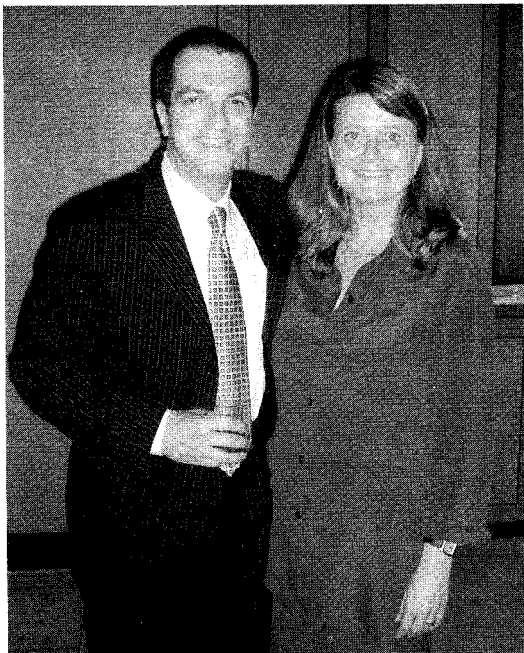
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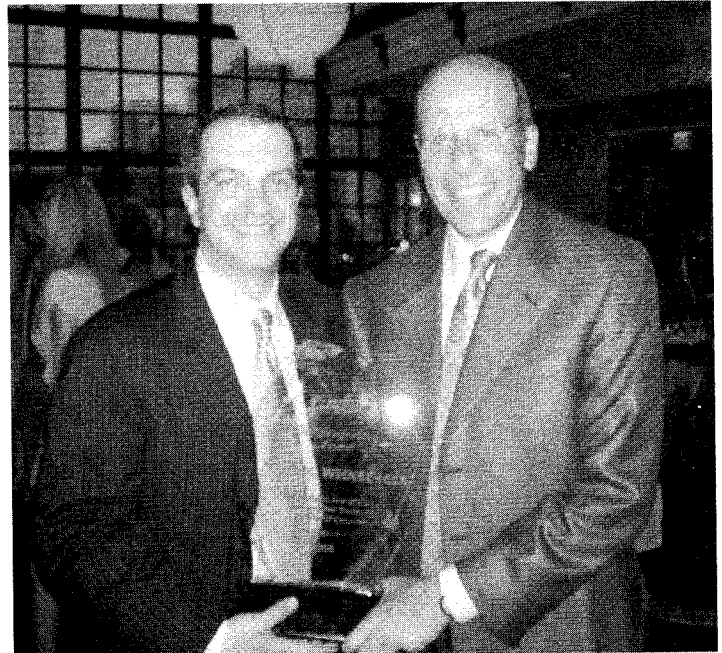
Inauguration Dinner



Outgoing CATA President Dennis Landsdowne, along with his wife Kim and 8th District Court of Appeals Judge Diane Karpinski at the 2005 CATA Inauguration Dinner.



CATA President Romney Cullers with Inauguration Keynote Speaker and Pulitzer Prize Winning Plain Dealer Columnist, Connie Schultz.



CATA President Romney Cullers presents CATA's Spangenberg Award to CATA Member and former CATA President, Peter Weinberger.

Law Updates

by **John R. Liber, II**
Stephen Vanek
Chris Carney
Cathleen Bolek
Andrew Thompson
Alison D. Ramsey

Civil Procedure - Rule 56(F) Continuances, Sudden Emergency Defense

Kawona Timberlake v. Quadri Jennings, et al., 10th Dist. App. No. 04AP-462, 2005-Ohio-2634, 2005 Ohio App. LEXIS 2462.

On April 26, 2001, Quadri Jennings was driving a Volvo that belonged to his father, John Jennings. Quadri stopped at a red light at the intersection of Morse and Chesford Roads. When the light turned green, he attempted to make a right hand turn. The vehicle's back tires lost traction causing it to "fishtail." Quadri lost control of the vehicle and drove across the center into a vehicle being operated by Kawona Timberlake. Both parties sustained injuries in the collision. After the accident, the investigating officer determined that the Volvo lost traction because of fluid on the roadway left by a third, unidentified vehicle. Quadri was not cited in connection with the accident. Timberlake ultimately sued Quadri for negligently causing her injuries. She also sued his father, alleging that Quadri was acting as his agent at the time of the accident. The common pleas court issued an original case scheduling order which required the parties to file dispositive motions by January 15, 2004 and to finish discovery by January 29, 2004.

On January 8, 2004, Defendants moved for summary judgment. In their motion, they argued that the sudden emergency doctrine excused their negligence. Defendants further argued that Quadri was not acting as John's agent at the time of the accident. In support of their motion, Defendants attached the police report and Quadri's affidavit. Timberlake filed a motion for a continuance so that she could conduct further discovery, pursuant to Civil Rule 56(F). The motion stated that Timberlake's counsel needed additional time to secure her affidavit and from the driver of the vehicle that left the fluid on the roadway, but did not state any reason as to why counsel had not obtained these affidavits in the nine months since suit was filed. In addition, no affidavit was attached to the motion in support of the allegations contained therein. On January 20, 2004, Timberlake

filed a supplemental motion, reiterating her request for a continuance under Civil Rule 56(F), and arguing that the sudden emergency doctrine did not apply. On February 15, 2004, the trial court issued a decision and entry which extended the time that Timberlake had to oppose the dispositive motion until February 12, 2004. However, the trial court refused to extend the discovery cut-off date, which had already expired, and stated that it would only consider discovery materials properly submitted with the summary judgment materials obtained on or before the discovery cut-off.

Two weeks after the trial court's February 12, 2004 deadline for filing a brief in opposition, Timberlake filed a supplemental memorandum opposing Defendants' motion for summary judgment. In reality, the memorandum was only Timberlake's affidavit, signed by her on the date it was filed, February 26, 2004. Defendants moved to strike Timberlake's affidavit as untimely. Timberlake responded by filing a motion for leave to file her affidavit, stating that she was previously unavailable to sign her affidavit and arguing that the Defendants would suffer no prejudice. On March 1, 2004, the trial court issued an entry striking Timberlake's affidavit and granting summary judgment in favor of the Defendants. The trial court also found that the sudden emergency doctrine precluded Quadri from being liable for negligence and that Quadri was not acting as John's agent at the time of the collision.

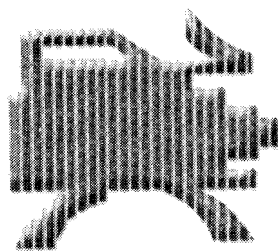
On appeal, Timberlake assigned five assignments of error, namely: (1) Defendants failed to set forth facts showing they were entitled to judgment as a matter of law; (2) Defendants failed to prove all elements of the defense of sudden emergency; (3) the trial court erred in considering the police report, when said report was not supported by an affidavit and contained alterations and notations not on the original report; (4) Defendants were not entitled to judgment under the Civil Rule 56 standard; and (5) the trial court abused its discretion in striking Plaintiff's affidavit where when she had been unavailable to sign it and where she had moved the court for additional time.

The appellate court, concentrating on the first and third assignments of error, first held that Timberlake waived the right to contest the police report submitted by the Defendants, because she failed to object to the police report in the trial court below. The court held that any objection Timberlake might have made below was not preserved, and was waived on appeal. Second, the court held that the trial court did not abuse its discretion in

striking the affidavit. The court noted that no affidavit was filed in support of the Rule 56(F) continuance motion, and that mere allegations that a continuance is needed for the purpose of further discovery is not sufficient. The party requesting the continuance must submit affidavits setting forth sufficient reasons why it cannot present facts supporting its opposition to the motion for summary judgment. A factual basis must be presented in the affidavit. Because Timberlake's counsel failed to state why additional time was needed to obtain Timberlake and the other driver's affidavit and presented no factual basis for the additional time, the trial court did not abuse its discretion in striking the affidavit. Moreover, Timberlake's affidavit was not even timely, having been filed after the extended deadline for opposing the dispositive motion. Because Timberlake did not file her affidavit until after that date, it was untimely and the trial court need not consider it.

However, the trial court did sustain the third assignment of error, finding that Defendants failed to meet their burden on the sudden emergency defense. The court noted that a defendant arguing sudden emergency has a heavy

burden because, under most circumstances, whether a defendant acted as a reasonably prudent person is a jury question. The court cited five elements of the defense of sudden emergency: (1) compliance with a specific safety statute was rendered impossible; (2) by a sudden emergency; (3) that arose without the fault of the party asserting the excuse; (4) because of circumstances over which the party asserting the excuse had no control; and (5) the party asserting the excuse exercised such care as a reasonably prudent person would have under the circumstances. The appellate court held that Quadri had arguably met the first requirement but failed as to all of the other elements because he had not submitted sufficient evidence on those issues. The court held that the first and fourth assignments of error were rendered moot by the court's other findings. The court affirmed in part and reversed in part the decision of the trial court and remanded the case for further proceedings.



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Civil Procedure - Rule 60(B) Motion, Excusable Neglect

***Thomas Sieja v. Ted D. Sinclair*, 6th Dist. App. No. F-04-030, 2005-Ohio-2494, 2005 Ohio App. LEXIS 2371.**

Ted Sinclair and Thomas Sieja were involved in a traffic accident on February 26, 2003. Sinclair was driving a tractor-trailer and turned left in front of Sieja's vehicle. Sieja attempted to avoid a collision and his vehicle left the roadway and rolled over several times. The vehicles did not actually make contact. Sinclair was cited for failure to control. The Siejas sued Sinclair on July 18, 2003. Service was obtained on Sinclair on August 18, 2003, but he never answered the complaint. A motion for default judgment was filed on October 15, 2003. Sinclair failed to respond to the motion. On October 27, 2003, the trial court granted a default judgment in favor of the Siejas in the amount of \$200,000. Seven months later, on July 2, 2004, Sinclair filed a motion to vacate the default judgment, arguing that he was not responsible for the accident, that he had attempted to get his two insurance carriers to provide a defense, and that his failure to answer the complaint was due to excusable neglect. Sinclair argued that he was being penalized for his failure to understand the judicial system, that he had a limited education, and that Sieja's speed contributed to the accident. The trial court denied the motion to vacate.

On appeal, Sinclair argued that he had satisfied the requirements set forth in *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146 for a party to prevail on a motion under Civil Rule 60(B), as he had a meritorious defense to present if relief was granted. The *GTE* case held that a movant must demonstrate: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ. R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken. Sinclair argued that his affidavit and the police report demonstrated that Sieja's speed was the proximate cause of the accident; that his failure to answer the complaint was due to excusable neglect as he was attempting to secure a defense from his insurers, and that his motion to vacate was timely as it was filed within a year of the judgment.

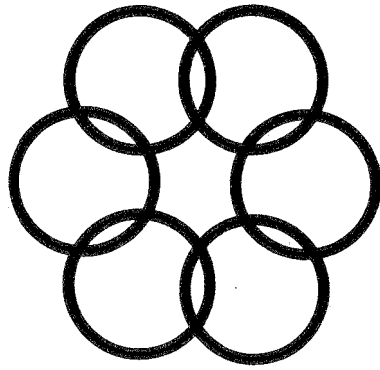
The appellate court stated that the determination of whether a party's neglect is excusable or inexcusable must take into consideration the surrounding facts and circumstances. The party attempting to demonstrate that relief should be granted must make a prima facie showing that the ends of justice will be better served by setting the judgment aside. The reviewing court noted that the summons served upon Sinclair clearly provided that an answer had to be filed within twenty-eight days, or that a judgment would be taken against him. Despite these circumstances, Sinclair did not retain an attorney or take any appropriate action. The court noted that if Sinclair did not understand the language in the summons or the consequences of the failure to file a response, it was incumbent upon him to seek prompt legal advice. In sum, the appellate court held that the trial court did not abuse its discretion in failing to grant Sinclair's Rule 60(B) motion and affirmed the judgment of the trial court.

Civil Procedure - 41(A) Dismissal of all Claims and Parties After an Adverse Summary Judgment Ruling Extinguishes the Ruling Absent 54(B) Language

***Fairchilds v. Miami Valley Hospital*, 2nd Dist. App. Nos. 20493 & 20542, 2005-Ohio-1712, 2005 Ohio App. LEXIS 1646.**

Plaintiff Fairchilds was hit by a car being driven by Defendant Landis while walking into Miami Valley Hospital (MVH). Thereafter, the Fairchilds sued Landis as well as her employer, MVH. MVH filed a motion to dismiss all claims pending against it, which was converted into a motion for summary judgment. Landis also filed a motion for summary judgment on some, but not all, of the claims pending against her. In two separate entries, the trial court granted both motions for summary judgment, but did not include Rule 54(B) language in either entry.

Subsequently, plaintiff dismissed all of her claims against all Defendants, and then filed a motion for reconsideration of the granting of the summary judgment motions. In response, Defendants requested the court to rule that the orders granting summary judgment became final appealable orders once the 41(A) had been filed. The trial court decided that it did not have the jurisdiction to reconsider the summary judgment rulings because the case had been dismissed, but that since it retained jurisdiction over certain "collateral matters," it could, and did, grant Defendants' request and rule that the summary judgment orders became final and appealable when the case was dismissed by Plaintiff.



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Plaintiff appealed this decision and refiled all of her claims against both Defendants. Fairchild then settled with Landis, and MVH filed a second motion for summary judgment, this time arguing that the doctrine of *res judicata* applied to bar Plaintiff's claims since they had already been dealt with in the originally filed action. This motion was granted by the trial court, and Plaintiff appealed that ruling as well. The appeals were consolidated.

On appeal, the 2nd District held that the trial court erred in concluding that the summary judgment orders became final appealable orders when the dismissal was filed. Those orders, the court reasoned, were interlocutory orders that could not become final absent a total adjudication of the remaining claims or Rule 54(B) language. Since there was no 54(B) language, and since the claims against all parties were dismissed without prejudice prior to a total adjudication, those interlocutory orders never became final. (Similar results have also been reached in the 6th, 8th, 9th, and 10th Districts. See *Toledo Heart Surgeons v. The Toledo Heart Hosp.*, Lucas App. No. L-02-1059, 2002-Ohio-3577; *Stohlman v. Koski-Hall*, Cuy. App. No. 82660, 2003-Ohio-7068; *Ohio Farmers Ins. Co. v. Modine Mfg.*, Medina App. Nos. 3114-M, 3116-M, 2001-Ohio App. LEXIS 3921; *State ex rel Mogavero v. Belskis*, Franklin App. No. 01-AP-164, 2002-Ohio-6497).

In response to arguments by Defendant that such a conclusion will lead to abuse by parties against whom summary judgment has been granted, the court stated that Rule 41(A) gives a party "an absolute right, regardless of motives, to voluntarily terminate its cause of action at any time prior to the actual commencement of the trial. There is no exception in the rule for any possible circumstances that would justify a court in refusing to permit the withdrawal of a cause prior to the commencement of trial." (§ 41.) Furthermore, the court stated that any change to this rule must be promulgated by the Rules Advisory Committee of the Supreme Court of Ohio.

Since this issue dovetailed with the first, the appellate court also held that the trial court erred in determining that the second case was barred by the doctrine of *res judicata*. Since *res judicata* is premised on a prior valid and final judgment, and since there was no valid, final judgment in this case, its application was error. The cases were therefore reversed and remanded.

Collateral Source Rule - Permits Admission of Total Amount of Medical Bill, Not Just That Portion Paid by Health Insurer; Open and Obvious Doctrine Not Applicable in Tenant's Case Against Landlord

***Robinson v. Bates*, 1st App. No. C-040063, 2005-Ohio-1879, 2005 Ohio App. LEXIS 1789.**

Plaintiff Caroline Robinson was injured when she stepped on a jagged piece of concrete in the driveway of the single family home she was renting from Defendant. Several days prior to the incident, Defendant hired a contractor to remove two retaining walls adjacent to the driveway. After doing so, the contractor discontinued his work, leaving jagged slabs of concrete on both sides. Plaintiff successfully negotiated the jagged slabs on several occasions before ultimately succumbing to the hazard and falling.

At trial, Defendant argued that (1) it owed no duty to Plaintiff because the jagged slabs were open and obvious, and (2) Plaintiff should be prohibited from presenting the total amount of the medical bills to the jury, but should only be permitted to present the amount actually paid by her health insurer. The trial court agreed on both counts, refusing to allow Plaintiff, in her case in chief, to present evidence of the entire amount of the medical bills, and then granting Defendant's motion to dismiss because the hazard was open and obvious. The 1st District reversed on both counts.

I. Open and Obvious Doctrine

According to the 1st District, Defendant landlord had a duty imposed by R.C. 5321.04(A)(2) to "make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition." Failure of a landlord to abide by this duty is negligence per se. In response to Defendant-appellee's argument that the hazard in question was open and obvious, the court replied that the open and obvious doctrine, and the Supreme Court's pronouncement in *Armstrong v. Best Buy* (2003), 99 Ohio St.3d 79, 2003-Ohio-2573, is a common law doctrine that cannot relieve a landlord of statutorily imposed duties. *Armstrong*, according to the court, only concerns the issue of whether a duty exists in the first place. In a landlord-tenant situation, no such issue exists because the duty is statutory.

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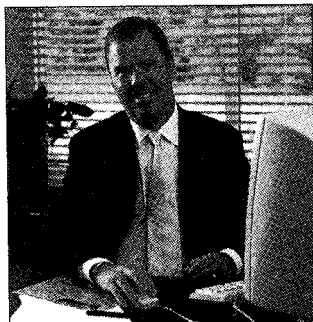
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II. Collateral Source Rule

The majority of this lengthy opinion, which reads like a law review article in that it enunciates the manner in which many other states deal with this issue, addresses the collateral source rule and its application in a situation where a medical bill is paid by a health insurer which did not pay the total bill, but rather a negotiated and discounted amount. According to the 1st District, which is the first appellate district in Ohio to address this issue, the trial court erred in not allowing the jury to consider the total bill.

Under the collateral source rule, a plaintiff's recovery cannot be reduced by payments or benefits from other sources such as health insurance. The rule is grounded in the principal that, should a windfall arise because of an outside payment, it is the injured party, and not the tortfeasor, who should benefit from the windfall.

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In holding that the total amount of the bills should be submitted to the jury for consideration, the court stated that it is the *value* of the services rendered that should be considered, not the *actual charge or cost* incurred. If the *cost* rather than the *value* was considered, a person without insurance would be in a better position than one with insurance. According to Judge Painter, "defendants should be liable for the full amount of damages caused by their wrongdoing, independent of the financial situation of their victims. We conclude that the collateral source rule applies to any written-off amount agreed to by a plaintiff's health care provider and insurer." (§83.) Furthermore, the undiscounted bills should be permitted because they are some evidence of the severity of the injuries suffered by plaintiff. If only discounted bills were admissible, "an insured person would then be seen as less injured than an uninsured. We think they bleed the same." (§84.)

In coming to this conclusion, the court went into great detail on how this issue is dealt with in other jurisdictions. It discussed the argument that the discounted rate obtained through negotiation by the insurance company is as much a benefit to the injured party as the payment of the bill itself, that the insured pays premiums, at least in part, to obtain this discounted rate, and that this benefit should be conferred on the injured party, not the tortfeasor.

In short, the overwhelming majority of jurisdictions do allow the total bill to be submitted to the jury (with the insurance company's subrogation rights preventing a double recovery.) Some jurisdictions do allow only the discounted bills to be used, but most of those are based on statutes requiring this use.

In addition, the court did not deal with the issue of Medicare or Medicaid payments, although its dicta suggests it would come to the same conclusion. However, it did note that some jurisdictions treat Medicare and Medicaid differently, because the injured party does not pay a premium for those benefits.

Discovery – Quality Assurance Privilege Not Applicable to Medical Provider's Incident Report

Brzozowski, Exec., et al., v. University Hospitals Health Systems, 8th Dist. App. No. 85097, 2005-Ohio-2628; 2005 Ohio App. LEXIS 2496.

Christine A. Brzozowski, Executrix of the Estate of Lewis Richter, filed an action against University Hospitals, Heather Hill Hospital Health and Care Center, and

Doe Corporation for violations of the Nursing Home Residents Bill of Rights, negligence, and wrongful death. Decedent was admitted to Heather Hill nursing home on December 1, 2000 with pneumonia, anemia, rectal prolapse, confusion and depression. About ten days later, decedent fell in his room and suffered a subdural hematoma, causing his death the following day. During discovery, Plaintiff filed a request for production of documents to Heather Hill on April 16, 2002 seeking, in part, "any and all reports...relating to the incident in which Lewis Richter was injured on December 11, 2000." On February 18, 2003, Plaintiff filed a Motion to Compel. On February 26, 2003, Heather Hill filed a Motion for Protective Order, arguing that the information sought was confidential, privileged and not subject to discovery. The trial court conducted an in camera review of an incident report produced by Heather Hill, and ordered its production insofar as it describes the subject incident.

Heather Hill appealed the trial court's decision, arguing that the incident report was protected from disclosure by the statutory privilege for quality assurance as codified at R.C. §2305.24 and R.C. §2305.251. Section 2305.24

provides that "[a]ny information, data, reports, or records made available to a quality assurance committee or utilization committee of a hospital or long-term care facility...are confidential and shall be used by the committee and the committee members only in the exercise of the proper functions of the committee." Section 2305.25 (former version) allows the records of all review committees, including quality assurance committees, to be held in confidence and not subject to discovery or introduced in evidence in any civil action against a health care professional, hospital, or long-term care facility. The purpose of the statutes is to provide limited protection to individuals who provide information to such committees, in order to encourage the free flow of information without fear of civil liability. *Browning v. Burt*, 66 Ohio St.3d 544, 562. Appellant argued that the privilege is not absolute, and incident reports such as the one at issue in this case may become discoverable to a limited extent if the events giving rise to the incident are not reported in the medical records. *Johnson v. University Hosp. of Cleveland*, Cuy. App. No. 80117, 2002-Ohio-1396.

The court of appeals upheld the trial court's decision, holding that the events surrounding the subject incident were not stated in the medical records. The medical records contain no explanation of the conditions of the facility before the fall, and only a "sketchy" description of the circumstances of the fall itself. The incident report, on the other hand, contains a thorough explanation of what transpired. Those sections of the report that describe the events, therefore, are not privileged.

The court of appeals further rejected the argument of Heather Hill requesting the application of an amendment to R.C. 2305.25, which provides that information, documents, or records otherwise available from original sources are to be obtained solely from such sources, and not those presented to a peer review committee. The amendment to the statute became effective on April 9, 2003, and applies only to matters where the discovery request was made on or after that date. In the instant matter, Plaintiff's request for the incident report was originally made on April 16, 2002. The amendment is therefore inapplicable.

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Employer Intentional Tort – Absence of Prior Accidents Not Determinative of Whether Harm Was Substantially Certain To Occur

Adkins v. Anderson-Austin News Company, LLC, 2nd Dist. App. No. 20561, 2005-Ohio-914; 2005 Ohio App. LEXIS 939.

Dana M. Adkins was employed by Anderson-Austin as a merchandiser. At the time of the incident, her duties included driving a panel truck to different locations to drop off and pick up Defendant's periodicals. The items were loaded in "totes," or hard plastic boxes, and stacked on pallets in the back of her truck. During her training, Adkins noticed that the totes would shift and fall during transport, and at times drop out of the back of the truck when she opened the panel door. She requested at that time, and numerous times thereafter, that management provided straps to hold the totes to the pallets. Adkins was not provided straps, and on limited occasions was only able to find a single strap to hold down the load.

On May 29, 2001, Adkins arrived to work to find that her truck was "very full," resulting in several totes being stacked six feet high near the rear of the truck. Near the end of her shift, Adkins slowly opened the panel door and a tote fell out towards her. She released the panel door while trying to grab the tote and it fully opened, causing 12 to 15 totes, weighing about 50 to 60 pounds each, to fall out of the truck and hit her. Adkins suffered a fractured leg and her peritoneal nerve was severed.

Adkins brought a claim against Anderson-Austin for employer intentional tort. The trial court granted Defendant's motion for summary judgment, holding that there was no issue of genuine fact that Defendant knew, with substantial certainty, that Adkins would be injured by the unsecured totes. The trial court's decision was based primarily on the fact that no evidence was presented showing other injuries of the same nature prior to the subject incident. Even if Defendant was aware of some other minor injuries resulting from shifting totes, "mere knowledge and appreciation of a risk, something short of substantial certainty, is not 'intent' for purposes of proving the employer committed an intentional tort." The court of appeals reversed the award of summary judgment, finding that genuine issues of material fact existed on this element of Adkins' claim. The court rejected the contention that the absence of prior accidents was determinative of whether Defendant had knowledge that harm was substantially certain to occur.

The non-existence of prior accidents is only meaningful if other employees were exposed to the same dangerous condition as Plaintiff. The evidence suggests, however, that Adkins may have been the only driver who was not using loading straps, and therefore the lack of prior accidents was irrelevant.

A reasonable jury under the circumstances of this case could find that Defendant had knowledge that harm to the Plaintiff was substantially certain to occur. Management was aware that totes were falling on Adkins. The loaded totes weighed 50 to 60 pounds each, and were stacked in the truck over six feet high. On the date of the accident, Plaintiff's truck was fully loaded. The court of appeals concluded that this evidence was sufficient to preclude summary judgment.

Employer Intentional Tort – Failure to Utilize Fall Protection Devices For Employees Working Twenty Feet Above Ground

Lear, et al. v. Hartzell Hardwoods, Inc., 2nd Dist. App. No. 2004-CA-33, 2005-Ohio-1907; 2005 Ohio App. LEXIS 1806.

Kevin Lear was employed as a maintenance supervisor by Hartzell Hardwoods, Inc. In February 2002, Lear and two maintenance employees were instructed to place metal sheets over fiberglass skylights in one of Defendant's buildings. The employees did not utilize fall-protection devices while on the roof. Lear fell through the skylight to a concrete floor about 20 feet below and suffered severe injuries.

About a month before the incident, Defendant had been issued "serious" citations by the Occupational Safety and Health Administration (OSHA) for failing to provide fall-protection devices where employees were working at heights greater than 15 feet above ground. In response to the citations, Defendant borrowed two lanyards, a type of fall-protection device, from a concrete company, and two lanyards from one of its employees. Lear, his supervisor, and one of the employees assisting Lear at the time of the accident were trained in the proper use of the lanyards. The lanyards were stored in one of Defendant's buildings, and Lear did not request to use the devices while performing the job that resulted in his injuries.

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Lear, his spouse and minor children filed an action against Hartzell for employer intentional tort. An employee must establish “intent” in such an action by showing: “(1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task.” *Fyffe v. Jenos, Inc.*, (1991) 59 Ohio St.3d 115, ¶1 of syllabus. The trial court granted Defendant’s motion for summary judgment, holding that Plaintiff could not establish the second prong of this test. The court noted that Plaintiff could not present evidence that Defendant knew that the subject job was so dangerous that it was substantially certain to result in harm.

In reviewing the trial court’s decision, the court of appeals examined what is necessary to establish that harm is “substantially certain” to occur. Whether harm is substantially certain to occur depends on the probability of its occurrence. *Busch v. Unibuilt Industries, Inc.*, 2000 Ohio App. LEXIS 4310, at *4-5. “While the law of gravity prevails, it is...certain that an unsupported object will fall until its travel is interrupted by some object or surface below. When the falling object is a human being, harm resulting from the fall is a substantial certainty, depending on (1) the height from which the fall takes place and (2) the hazard presented by the surface or objects below.” *Id.* at *8-9.

Utilizing this standard, the court of appeals reversed the award of summary judgment. Lear was assigned by Defendant to complete a job that put him at a direct risk of harm of falling from an elevated height. A reasonable jury could determine that such harm is a substantial certainty, not just a matter of high risk. In construing conflicting testimony about the availability of fall-protection in a light most favorable to Plaintiff, the court held that a reasonable person could find that Defendant refused to allow its employees to utilize the safety devices available, which has the same effect as removing a safety device from a machine. The court concluded that a genuine issue of fact existed about whether Defendant required Plaintiff to perform his job without using fall-protection equipment available, knowing that harm was substantially certain to occur.

Evidence - Rule 801(D)(2)(d) Employee’s Statement Admissible As Evidence That Employer Had Actual or Constructive Knowledge of Hazardous Condition

***Miller v. The Chateau Club*, 2nd Dist. App. No. 20525, 2005-Ohio-911, 2005 Ohio App. LEXIS 935.**

On March 14, 2002, Diana Miller was a business invitee at The Chateau Club in Dayton, Ohio. Towards the end of the evening, Miller attempted to use the women’s restroom. She pulled the handle of the first stall door in an effort to open the door, and was struck in the head above her left eye when the door came off of its hinges. As Miller lay on the floor in the seconds following the incident, Molly Enix, the assistant manager/bar manager of The Chateau Club, entered the restroom, observed Miller and the stall door, and remarked that she told the owner to “fix these f—ing things or something like this was going to happen.” In addition, in her deposition, Miller testified that another patron, Mary Baines, had complained to the owner that she had difficulty opening the stall doors. Miller filed suit against The Chateau Club alleging that it was negligent in: (1) failing to keep the restroom in good repair and free from faulty stall doors; (2) failing to conduct regular inspections of the business and thereby failing to discover and correct the defective condition; and (3) failing to properly design, construct, erect caution signs, or otherwise warn the public about the hazardous condition. The Chateau Club filed a motion for summary judgment, asserting that Ms. Enix’s and Ms. Baines’ statements were inadmissible hearsay. The trial court, relying upon the club owner’s affidavit in which he stated that Ms. Enix had no responsibility with regard to the maintenance and/or repairs of the restroom, concluded that Ms. Enix’s remark to Miller was not a statement concerning a matter within the scope her employment. Accordingly, the trial court found that the remark did not constitute an admission by a party-opponent, which would be admissible under Evid. R. 801(D)(2)(d). Having excluded Ms. Enix’s statement, the trial court concluded that Miller failed to raise a genuine issue of material fact as to whether The Chateau Club had actual or constructive notice of the condition of the restroom door, and accordingly granted summary judgment against her.

On appeal, appellant argued that the trial court erred in excluding Ms. Enix’s statement, and that had the trial court considered that evidence, it should have found that a genuine issue of material fact existed as to the club’s notice of the alleged defective condition of the

restroom stall door. The reviewing court found that the club owner's deposition testimony made clear that Ms. Enix's job duties did involve cleaning the restrooms. In turn, the court concluded that it was reasonable to infer that Ms. Enix was expected to notice the condition of the restrooms and report same to the owner. Therefore, since Ms. Enix was making a statement concerning a matter within the scope of her employment, the trial court erred in excluding her statement as inadmissible hearsay.

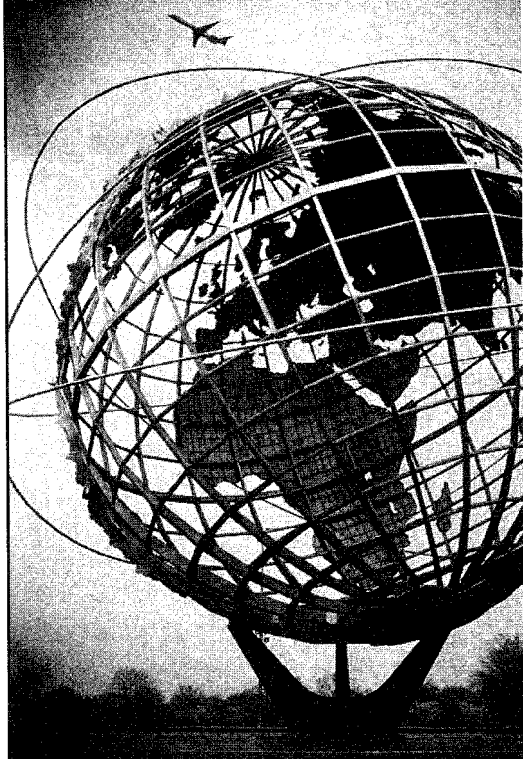
Appellee argued that, even assuming Ms. Enix's statement was admissible, it was still entitled to summary judgment because the statement was too ambiguous to raise a genuine issue of material fact as to whether the club had notice of the faulty stall door. The appellate court disagreed, concluding that a reasonable factfinder, construing the evidence in the light most favorable to appellant, could find that Ms. Enix's statement implied that she had told the owner to fix the restroom stall doors or that they could fall and injure someone as they had appellant.

Federal Preemption – Compliance With Federal Regulation Not An Absolute Defense To Negligence

Baldwin v. Golden Hawk Transportation Co., et al., 5th Dist. App. No. 04-CA-49, 2005-Ohio-1643; 2005 Ohio App. LEXIS 1585.

On April 30, 1999, at about 2:30 a.m., Terrence L. Sautter was driving a semi with a flatbed trailer on State Route 598. While backing the truck, he caused the trailer to extend across both lanes of the road. Stacey Baldwin was unable to see the trailer and drove under it, causing her to sustain serious injuries. The flatbed trailer at issue was manufactured by Appellee Transcraft in 1992 without retro-reflective tape that would reflect the headlights of a vehicle and make the trailer more visible at night. In 1993, federal law required such trailers to be equipped with conspicuity tape. Transcraft thereafter included such tape on its trailers and provided tape kits to owners of its pre-1993 trailers. Baldwin filed an action for damages, including a claim for negligence against Transcraft for failure to manufacture the subject trailer with retro-reflective tape. The trial court granted Transcraft's motion for summary judgment, holding that the trailer complied with federal guidelines at the time

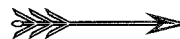
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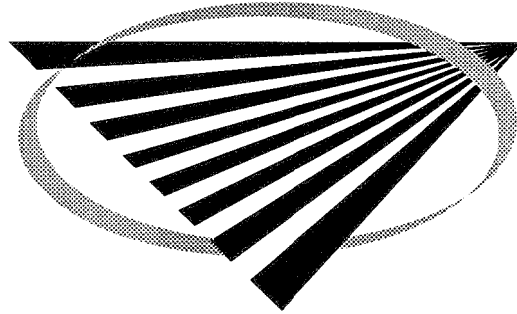
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it was manufactured, and the subsequent change in the law “can not be laid at the feet of Transcraft.” It is from this ruling that Baldwin appeals.

The court of appeals initially considered Appellee’s argument that Appellant’s claims were preempted by the adoption of the 1993 federal regulations regarding retro-reflective tape. “[F]ederal preemption of state law can occur in essentially three instances: (1) where Congress expressly preempts state law (express preemption); (2) where Congress has occupied the entire field (field preemption); or (3) where there is an actual conflict between federal and state law (conflict preemption).” *Gade v. Natl. Solid Waste Mgt. Assn.*, (1992), 505 U.S. 88, 98.

The federal regulations at issue do not expressly preempt Plaintiff’s claim for negligence, because no such regulations were in place at the time of the manufacture of the trailer. Further, the regulations provide that the “rule does not have any retroactive effect...That section does not require submission of a petition for reconsideration or other administrative proceedings before parties may file suit in court.” 49 C.F.R. Part 571, at 58412. The court held that any arguments concerning the retroactive application of the new regulations would be improper.

Field preemption does not apply, because Congress expressly provided in the National Traffic and Motor Vehicle Safety Act that “compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.” *Minton v. Honda of America Manufacturing* (1997), 80 Ohio St.3d 62. There is also no conflict between Plaintiff’s claims and the federal regulations. Relying on *Peters v. Great Dane Trailers, Inc.* (N.D. Ind. 1996), 1996 U.S. Dist. LEXIS 17984, a case similar to the instant matter, the court of appeals noted that Plaintiff’s claims would actually serve to promote the installation of lighting equipment on trailers as contemplated by the federal regulations.

After concluding that Plaintiff’s claim was not preempted, the court of appeals reversed the trial court’s award of summary judgment, finding that the issue of whether Transcraft was negligent was for the jury. Plaintiff presented sufficient evidence of the knowledge of the trucking industry since 1960 to create an issue of fact as to the recognition of the benefits of using features such as reflective tape to prevent accidents such as the one that occurred in this case.

Insurance Law - Syringe Dropped in Eye Does Not Arise Out of the Ownership, Maintenance or Use of an Ambulance

***Estate of Nord, et al. v. Motorists Mutual Insurance Company*, 105 Ohio St.3d 366, 2005-Ohio-2165, 2005 Ohio App. LEXIS 1062.**

Appellant’s decedent was injured while being transported by a Cleveland emergency medical service. While en route to the hospital, a paramedic accidentally dropped a syringe, which struck Nord’s eye. Nord later died from unrelated causes. Nord was covered under an uninsured motorist policy issued by Motorists Mutual Insurance Company. Nord’s estate filed a complaint against Motorists alleging that his uninsured motorist coverage applied to the accident. The City of Cleveland owned and operated the ambulance and was therefore immune from liability. The issue on appeal was whether or not the Motorists policy, which provided uninsured motorist coverage and which limited coverage to bodily injuries caused by accidents that “arise out of the ownership, maintenance, or use of the uninsured motor vehicle,” covered damages resulting from accidental injury occurring within a motor vehicle where the ownership, maintenance, or use of the vehicle is not the cause of the injury.

The trial court granted Motorists motion for summary judgment, finding coverage did not apply. The 8th District reversed, finding that reasonable minds could conclude that Nord’s injuries arose out of the ownership, maintenance or use of the ambulance. On appeal to the Ohio Supreme Court, the Court stated that an uninsured motorist provision which limits coverage to damages that “arise out of the ownership, maintenance, or use of the uninsured motor vehicle” does not cover damages caused by an event unrelated to such ownership, maintenance or use. In this case, the Court stated, the carelessness of the paramedic caused Nord’s injury. The use and dropping of the syringe were unrelated to the ownership, maintenance or use of the ambulance itself. Therefore, there was not a causal link between the ambulance and the injury causing accident, nor was there any evidence presented that the ambulance was negligently operated or that the movement of the ambulance effected the injury causing accident. The Court stated that the mere fact that the incident/injury occurred within the ambulance was not a sufficient nexus to establish a causal link. As a result, the 8th District’s decision was reversed and the trial court’s decision was reinstated.

Insurance Law - Underinsured Motorist Coverage - Symbol 6 - Vehicles Garaged in States Which Do Not Allow the Rejection of UM/UIM Coverage

Sompo Japan Insurance Company of America, Etc. v. Doug C. Vaughn, 9th Dist. App. No. 22389, 2005-Ohio-1947, 2005 Ohio App. LEXIS 1857.

Doug Vaughn was injured in an automobile accident on November 10, 2001 while within the scope of his employment with Bridgestone/Firestone. The tortfeasor's liability coverage was insufficient to adequately compensate him, so he filed an action against his employer's UIM carriers, Sompo Japan Insurance Company fka Yasuda Fire & Marine Insurance Company of North America, and Old Republic Insurance Company. Vaughn was driving his own vehicle at the time of the accident because his employer's vehicle was in the shop for repairs. The insurers filed for summary judgment claiming that there was no UIM coverage because the policies did not contain the coverage at the time of the accident since Firestone had rejected it. Moreover, the insurers argued that Vaughn was not occupying a covered auto at the time of the accident. Old Republic argued that its policy was issued after S.B. 97 became effective

and did not contain UIM coverage, because after the effective date of the statute, said coverage was entirely voluntary. The trial court granted summary judgment to the insurers and Vaughn appealed.

On appeal, the court noted that the Sompo policy's declarations page indicated that UIM coverage applied to "Symbol 6" vehicles, which the policy defined as "only those 'autos' you own that because of the law in the state where they are licensed for principally garaged are required to have and cannot reject Uninsured Motorist Coverage." The court concluded that because Ohio *does* allow for the rejection of UM/UIM coverage, Vaughn was not an "insured" because the vehicle he was driving was not a "covered auto" under the terms of the policy. Two other issues before the appellate court were Vaughn's claims that (1) his automobile would qualify for coverage as a temporary substitute auto; and (2) that he must be covered under Sompo's policy or else Firestone's UIM coverage would be illusory. However, the court declined to address these two arguments, because they were not raised at the trial court level. The court also held a cross-assignment of error dealing with Sompo's rejection of UIM coverage to be moot based upon their disposition of the main appeal.



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Insurance Law - Umbrella Policy Renewed Yearly, S.B. 97 Applied and No UIM Coverage Was Available.

Russell Arn, et al. v. Carol McLean, et al., 159 Ohio App.3d 662, 2005-Ohio-654.

On July 12, 2002, Carol McLean was involved in an auto accident with a van being driven by Ronald Arn. McLean and her husband were insured by State Farm under an automobile policy with liability limits of \$100,000/\$300,000 and matching UM/UIM coverage. State Farm had also issued an umbrella policy to the McLeans. The umbrella was originally issued on February 21, 1989 with liability limits of \$1,000,000.00. The policy was originally written without UM/UIM coverage, as Mr. McLean had originally declined the coverage. On April 7, 1997, both Mr. & Mrs. McLean executed a rejection of UM/UIM coverage for the policy. The policy was thereafter renewed without UM/UIM coverage. On February 21, 2002, State Farm included a paragraph on the renewal certificate stating that the policy was issued without UM/UIM coverage because a named insured had declined it, and that if the McLeans wanted to purchase the coverage, they should contact their agent.

Carol was seriously injured in the July 2002 accident. Arn sued the McLeans for his injuries and the McLeans filed a counterclaim. The McLeans also filed a third party complaint against State Farm claiming that they were entitled to UIM benefits under the umbrella policy. State Farm filed a motion for summary judgment in the trial court, and the court granted State Farm's motion adding 'no just reason for delay' language to its decision. The McLeans appealed the trial court's ruling. On appeal, the court noted that the State Farm policy was originally issued to the McLeans in 1989 and under the holding in *Wolfe v. Wolfe*, 88 Ohio St.3d 281, the correct analysis was to start at the original issue date and move forward in two year increments, meaning new policies were issued in 1991, 1993, 1995, 1997, 1999 and 2001. As of the date of the accident, the last "new" policy would have been issued on February 21, 2001. The McLeans argued that this is the law that would control the policy. At that time the law required that all policies contain UM/UIM coverage unless properly rejected. If no such rejection was made, UM/UIM coverage would be implied by law.

State Farm's position was that the changes to R.C. 3937.18 brought about by S.B. 267 and S.B. 97 were applicable and that there was no obligation to offer UM/UIM coverage on February 21, 2002, when the policy last renewed before the accident. State Farm argued that the umbrella was a one year policy, and that it renewed each year. S.B. 267 changed R.C. 3937.18 to allow insurers to make changes to policy coverage within the two year guarantee periods discussed in *Wolfe*. State Farm argued that on February 21, 2002, when the umbrella renewed, this allowed them to incorporate the changes brought about by S.B. 97, including the complete elimination of any mandatory offer of UM/UIM coverage. Because the intent of S.B. 97 was to prevent UM/UIM coverage from being implied by law, this would mean that since Carol's accident occurred after the renewal of the umbrella on February 21, 2002, that

there was no UIM coverage, that said coverage could not be implied by law, and that State Farm had no obligation to even offer the coverage to the McLeans. The court disagreed with the McLeans, finding that when the policy "renewed" in 2001, S.B. 267 was already effective and allowed insurers to change the policy during the two year period. Thereafter, in 2002, State Farm was free to change the policy (i.e., to incorporate the changes that occurred as a result of S.B. 97), and in fact did so. Based upon these findings, the court affirmed judgment for State Farm.

The McLeans also raised issues concerning the prior rejections, which the appellate court found immaterial given its findings. Since S.B. 97 applied, whatever obligations State Farm had with regard to prior policies did not affect the most recent policy, since the law no longer required an insurer to offer the coverage. The court also reiterated several times the fact that the notice on the renewal clearly provided that the policy had been issued without UM/UIM coverage and that the insureds were free to contact their agent should they desire to purchase the coverage on the umbrella.

Insurance Law - Insurer Must Demonstrate Actual Prejudice From Untimely Notice; Sexton/Moore Claim Upheld

Jerelyn B. Yates v. Allstate Insurance Company, 5th Dist. App. No. 04 CA 39, 2005-Ohio-1479, 2005 Ohio App. LEXIS 1432.

On October 19, 2001, Jenise Connerton was a passenger in a vehicle operated by Rosemarie Sweazy. Sweazy negligently caused an accident which resulted in Connerton's death. Connerton's estate settled with Sweazy's carrier for its liability limit of \$100,000.00. The estate also collected \$150,000 from Connerton's own UIM coverage with Farmers Insurance. The proceeds of

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both settlements were allocated to Connerton's minor son, Neil Connerton. Connerton was survived by her sister, Jerelyn Yates, and her parents, Welden and Loretta Bauer. Yates was insured by Allstate under a policy which contained UM/UIM coverage. The Bauers were insured by State Farm also with UM/UIM coverage. The Bauers notified State Farm of their claim on May 6, 2002, seven months after the accident. State Farm did not deny the claim until March 4, 2003, nearly ten months later. Both Allstate and State Farm denied the claims for UIM coverage. Yates and the Bauers filed declaratory judgment actions each seeking UIM coverage from their own insurers for the damages they sustained from the wrongful death of Jenise Connerton.

State Farm moved for summary judgment in the trial court. The trial court granted State Farm's motion for summary judgment, finding that the Bauers failed to give any reason for the delay in notifying State Farm of their claim, and concluding that the seven month delay was unreasonable. The court further found that the Bauers failed to rebut the presumption that the delay caused further prejudice to State Farm.

The Bauers appealed the trial court's ruling. On appeal, the Fifth District held that in *Ferrando v. Auto-Owners Mut. Ins. Co.*, 98 Ohio St.3d 186, the court articulated a two-step approach for determining whether a prompt notice provision was breached, and if so, whether the breach resulted in prejudice to the insurer. First, the court must determine whether notice was timely. The court noted that such an inquiry is usually a question of fact for the jury, however, an unexcused significant delay may be unreasonable as a matter of law.

In this case, the court noted that the State Farm policy required the insured to give notice "as soon as reasonably possible." However, the court noted that under *Vahila*, State Farm bore the initial burden of showing that there was no genuine issue of material fact and that it was entitled to judgment as a matter of law. That is, State Farm had to demonstrate that the notice was not reasonable in light of the surrounding facts and circumstances in order to shift the burden to the Bauers to show an issue of material fact. State Farm failed to provide any legal or factual basis as to why the seven month delay was unreasonable, aside from bare assertions that such a delay could not constitute prompt notice "in any sense of the word." The court found that State Farm had only made bare, conclusory statements that the Bauers had breached the terms of the policy by providing unreasonable notice, but made no actual

showing that the notice was unreasonable in light of the facts and circumstances.

As a result, the court found that the Bauers were not required to demonstrate that notice was reasonable in light of the facts and circumstances. Therefore, there was no need to proceed to the issue of whether State Farm was actually prejudiced as a result of the breach. The court held that summary judgment should not have been granted in favor of State Farm. The appellate court found it interesting that while State Farm claimed prejudice from a seven month delay in notification, it took the insurer ten months to deny the claim.

State Farm raised other arguments in the trial court, which the appellate court addressed on appeal. Among these was the argument that the case was subject to the S.B. 267 version of R.C. 3937.18 and that *Sexton/Moore* claims were no longer recognized. Utilizing the two year policy periods in *Wolfe v. Wolfe*, the court concluded that although the accident took place after the effective date of S.B. 267, September 21, 2000, the two year guarantee period had not yet expired, such that the policy had to be interpreted under the former statute. This meant that the *Sexton/Moore* claims were valid. Because the changes to the statute were not retroactive, the pre-S.B. 267 version of the statute was applicable. The court noted that it had already issued an opinion holding that under the pre-S.B. 267 version of the statute, *Sexton/Moore* claims remained valid.

Insurance Law – Application of Sudden Medical Emergency Defense

***Western Reserve Mutual Casualty Co. v. Clear*, 10th Dist. App. No. 04AP-976, 2005-Ohio-2204; 2005 Ohio App. LEXIS 2081.**

Western Reserve, as subrogee of its insured, brought an action against Clear following a motor vehicle accident. Clear did not dispute the fact that she collided with the insured's vehicle after losing consciousness while driving. She filed for summary judgment, however, arguing that she was free of liability under the "sudden medical emergency" defense. The trial court granted Defendant's motion. The sole issue on appeal was whether the "sudden medical emergency" defense applies as a matter of law to the facts of this case. This affirmative defense applies when "the driver of an automobile is suddenly stricken by a period of unconsciousness which [she] has no reason to anticipate and which renders it impossible for [her] to control the car [she] is driving." *Lehman*

v. Haynam, (1956), 164 Ohio St. 595, ¶2 of syllabus. Under such circumstances the driver is not chargeable with negligence as to such lack of control. *Id.* In order to establish the defense, a defendant must show: (1) unconsciousness rendered control of the vehicle impossible, and (2) the unconsciousness was unforeseeable. *Roman v. Estate of Gobbo*, 99 Ohio St.3d 260, 2003-Ohio-3655.

The court of appeals overruled the trial court, holding that a genuine issue of material fact existed as to whether Defendant was unconscious prior to the collision. The court noted that in Defendant's deposition testimony, she claimed she lost consciousness, briefly came to, noticed a white van near the passenger side of her vehicle, attempted to turn the wheel, collided with the van, and became unconscious again. The Defendant's awareness of the van and purported attempts to avoid it raise genuine issues of fact about whether she was in fact unconscious, and if so, when it occurred.

The court of appeals noted that claims of sudden medical emergency are not typically well suited for summary judgment, since testimony about precisely when a driver becomes unconscious rests almost solely on his or her

credibility. The Ohio Supreme Court has stated that "[i]t would be an unrealistic situation if a driver claiming that he blacked out must be believed as a matter of law, because another driver could not positively say that the first driver did not black out." *Lehman*, at 601. Such questions are more appropriately decided by a jury.

Insurance Law - Negligent Entrustment – Not Covered by Homeowner Policy.

***Bennett v. Waidelich*, 6th Dist. App. No. F-04-023, 2004-Ohio-2489, 2005 Ohio App. LEXIS 2366.**

Appellant, Bennett, was injured in an auto accident while a passenger in a vehicle being operated by Appellee's son. After obtaining limits from the son's policy, Bennett sued Appellee Waidelich under a negligent entrustment theory. Bennett also sued Waidelich's homeowner's carrier for a declaration that the policy covered this loss. Bennett argued that Waidelich was negligent in allowing her son to operate his own motor vehicle after he had been drinking at Waidelich's home, and that this negligence led to the accident. Waidelich argued that, since her son owned the vehicle and was an adult, she could not negligently entrust the vehicle to him. The

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trial court granted the motions for summary judgment filed by Waidelich and her carrier.

On appeal, Bennett argued that the policy exclusion excluding coverage for “bodily injury ... arising out of the ownership, maintenance, use, loading or unloading of ... a motor vehicle” was inapplicable because Waidelich’s negligence was in allowing her son to drink and drive, not in the actual ownership or use of a vehicle. The appellate court held that, even in this were true, another exception to coverage exists which would still bar coverage. That exclusion states that coverage does not apply to “bodily injury...arising out of...(1) the entrustment by any insured to any person; (2) the supervision by any insured to any person; (3) any liability statutorily imposed on any insured; and (4) any liability assumed through an unwritten or written agreement by any insured; with regard to the ownership, maintenance or use of any...motor vehicle....” Relying on both exclusions, the appellate court affirmed the decision of the trial court.

Medical Malpractice - New Trial – Error in Failure to Use Separate Jury Verdict Forms In Case With Multiple Defendants.

Moreland v. Oak Creek OB/GYN, Inc., 2nd App. No. 20468, 2005-Ohio-2014, 2005 Ohio App. LEXIS 1971.

Tami and Noel Moreland sued Robert A. Little, M.D. and the Rock Creek OB/GYN group for medical malpractice which they alleged resulted in the death of their newborn daughter. According to Plaintiffs, the pre-natal care of Dr. Little and a nurse practitioner of the practice fell below accepted standards of care. (More specifically, Plaintiff claimed that her preeclampsia was not dealt with appropriately). At the conclusion of the trial, the jury was given a single jury verdict form, which enabled it only to find that Little and the nurse practitioner were negligent or that Little and the nurse practitioner were not negligent. It did not enable the jury to find one negligent while vindicating the other. After deliberations, the jury rendered a judgment in favor of both Defendants.

On appeal, the Morelands argued that the trial court committed reversible error in submitting a single verdict form, rather than one for each individual Defendant. Defendants, on the other hand, argued that any error in this regard was “invited error,” because the Morelands objected to Defendants’ jury interrogatories, and the objection was sustained. Defendants argued that, had

the jury interrogatories been used, any confusion created by the single verdict form would have been resolved. As such, according to the Defendants, the Moreland’s objection to the interrogatories invited this error, and they should not now benefit from this invited error. The 2nd District agreed with the Morelands, stating that “common sense dictates that when competing theories of liability are advanced against separate defendants, separate verdict forms should be utilized.” It also rejected appellees’ “invited error” argument, holding that (1) Morelands’ right to separate verdict forms should not be conditioned on their waiver of their right to object to improper jury interrogatories, and (2) there is no way of knowing whether the jury interrogatories would have resolved the confusion of one single verdict form. Appellee also wanted the court to assume that the jury would have sent a question to the trial judge if they were confused by the single verdict form, but the court refused to make any such assumption.

The Morelands also argued on appeal that the trial court erred in its instructions to the jury. The first instruction to which the Morelands objected was regarding the standard of care for nurse practitioners. Their argument included (1) the court should have instructed the jury that the failure to abide by certain statutory standards was negligence per se, and (2) the court’s instructions contained certain grammatical and stylistic errors that may have confused and mislead the jurors.

In rejecting the first argument, the court of appeals held that a violation of the statutory provisions in question (R.C. 4723.151 and R.C. 4723.43) does not amount to negligence per se because these statutes do not define any civil liability. As such, instructing the jury that the violation of the statutory provisions is negligence per se would not accurately reflect the state of the law in Ohio.

Appellants’ second argument regarding the jury instructions was based on the fact that the instructions referred to Defendant doctors in the plural when there was only one remaining Defendant doctor, and on the fact that the duty of care of a nurse practitioner “were not addressed early enough in the charge.” This was also rejected by the appellate court which held that, when viewed as a whole, the jury instructions fairly and correctly stated the law applicable to the evidence presented in trial, and that any error resulting from the use of *physicians* in the plural rather than the singular was harmless.

Medical Malpractice – When Physician/Patient Relationship Is Continuing, Statute of Limitations Has Not Begun to Run for a Claim of Medical Negligence.

Dobrovich, et al. v. Kaiser Permanente, 8th Dist. App. No. 84819, 2005-Ohio-2444, 2005 Ohio App. LEXIS 2329.

On December 5, 2001, George Dobrovich (in his eighties at the time) underwent an endoscopy at Kaiser Permanente. Shortly after the procedure, Dobrovich used the restroom unattended and fell. He suffered injuries to his back, neck, head, and face, and is still treating with Kaiser for same. On December 1, 2003, Dobrovich filed a medical negligence claim against Kaiser, alleging that Kaiser's negligence in allowing him to use the restroom unattended following the endoscopy proximately caused the above described injuries. Kaiser filed a motion for summary judgment arguing that Dobrovich's claim was barred by the one-year statute of limitations, as it was filed nearly two years following the fall. The trial court granted Kaiser's motion.

On appeal, appellant argued that the trial court erred in awarding summary judgment, because it failed to properly recognize that the statute of limitations for a medical claim is one year from when the patient discovers or should have discovered the resulting injury or termination of the patient-physician relationship, whichever is later. Here, the 8th District reversed and remanded, finding that a proper application of the above referenced "discovery rule" would yield the conclusion that the statute of limitations had not yet begun to run, such that the claim was timely filed. The parties stipulated that the one-year limitations period governed the claim, and that the cognizable event occurred on December 5, 2001. However, the parties disagreed as to when the one-year period began to run. While appellee argued that the one-year period began to run on December 5, 2001, appellant countered that the statute has not yet started running since he was still treating with appellee in connection with injuries sustained. The 8th District agreed with appellant that the patient-physician relationship had not yet terminated since he was still treating with appellee for his injuries. As the discovery rule provides that the latter of the cognizable event and/or the termination of the patient-physician relationship governs the commencement of the one-year period, and the patient-physician relationship continued to date here, the trial court erred in finding that the statute of limitations had expired.

Medical Malpractice - Nonparty Physician Discovery; Causation; Loc. R. 21.1 and Civ. R. 26(E)

O'Connor v. The Cleveland Clinic Foundation, 8th Dist. App. No. 84219, 2005-Ohio-2328, 2005 Ohio App. LEXIS 2224.

Here, John O'Connor was admitted to the Cleveland Clinic for removal of a polyp from his colon believed to be precancerous. As a result of a burn injury during surgery, he developed sepsis. A second surgery was undertaken to repair a leak caused by the burn, but peritonitis set in. A third surgery was performed to reverse the second surgery. As a result of complications from the first three surgeries, two additional surgeries were required. Plaintiff filed suit and the jury returned a unanimous verdict for the defense. On appeal, Plaintiffs-appellants argued that the trial court erred in permitting the non-party doctor who performed the surgery to give a new expert opinion at trial without first having tendered a report or otherwise notified their counsel of the substance thereof in violation of Loc. R. 21.1 and Civ. R. 26(E). The 8th District agreed and reversed and remanded for a new trial.

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Here, the doctor testified at deposition that he had no good explanation of why he missed, or did not see, the cautery burn created during the initial surgery. However, at trial, he offered the opinion that the burn was a “conductive” burn that was not immediately detectable as an explanation for why he did not discover and repair the burn during the initial surgery. Here, the 8th District noted that Loc. R. 21.1 requires that “non party” expert reports be submitted to opposing counsel. The court also noted that when, as here, the treating physician is the expert witness, Loc. R. 21.1(C) grants the trial court discretion to accept hospital or office records in lieu of a written expert report. Citing to *Cleveland Clinic v. Vaught*, 98 Ohio St.3d 485, the 8th District noted that a trial court is required to determine if the disclosure of medical records in lieu of an expert report “would adequately provide the requesting party with the information that it needs.” *Id.*, at 487-88. However, when a new theory is advanced that was not contained in the medical records or otherwise disclosed, fundamental principles of discovery must be considered. As stated in *Vaught*, “[o]ne of the purposes of the rules of civil procedure is to eliminate surprise. This is accomplished by way of a discovery procedure which mandates a free flow of accessible information between the parties upon request, and which imposes sanctions for failure to timely respond to reasonable inquiries.” Here, Plaintiffs-appellants made reasonable inquiry of the treating doctor at his deposition as to why the injury was not discovered during the operation. His response was clear that he could not give a good explanation. In light of that testimony, Appellants had a reasonable expectation, in the absence of an expert report or a supplement to that deposition testimony, that the doctor would testify consistent at trial. Citing to *Shumaker v. Oliver B. Cannon & Sons, Inc.* (1986), 28 Ohio St.3d 367, 370-71, the 8th District noted that “[u]nder similar circumstances, the Supreme Court of Ohio held that it was an abuse of discretion to allow a party to introduce testimony of an expert on a new theory for which no discovery had been provided.”

The 8th District also holds that, in accordance with Civ. R. 26(E)(1), there is a duty to supplement and inform the opposing party of a new theory of causation. According to the 8th District, the trial court abused its discretion by allowing the doctor to offer a new opinion on the possible cause of the cautery burn. “The failure to disclose the new theory in either an expert report, as a supplement to Dr. Marcello’s deposition, or by supplementing responses to original interrogatories distorted the level playing field.”

Medical Malpractice – Oral Contract – Fraud – Summary Judgment Reversed On Claim of Breach of Oral Contract Where Patient Testifies That Plastic Surgeon Promised Result Not Obtained

***Lovely v. Percy*, 2nd Dist. App. No. 20584, 2005-Ohio-1591; 2005 Ohio App. LEXIS 1539.**

Plaintiff Lovely consulted with Defendant Percy, a plastic surgeon, regarding breast augmentation surgery. She told him she wanted to be a size 34C. Percy performed the surgery, and Lovely’s breast size was less than a 34B. Lovely brought suit against Percy, claiming that he had breached an oral contract, committed malpractice, and engaged in fraud. The trial court granted summary judgment, and Lovely appealed.

Lovely testified that Percy had assured her that post-operatively she would be a size 34C, and that his statement formed an oral contract. She produced a paper given to her by Percy instructing her to purchase a size 34C bra, and pointed out that Percy had written into his own medical record that Lovely should bring a size 34C bra to her post-operative follow-up visit. In response, Percy testified that he did not give any assurance or guarantees to Lovely and that he never gave any assurances or guarantees to any of his patients. He produced a surgical consent form containing a disclaimer signed by Lovely acknowledging that “no guarantee has been given by anyone as to the results that may be obtained” by the surgery. Lovely claimed she was under the influence of drugs prescribed by Percy when she signed the acknowledgment.

The Court of Appeals reversed summary judgment on the claim for breach of oral contract, holding that the claim was viable and separate and apart from a claim of medical malpractice. The court rejected Percy’s claim that the surgical consent form was a written contract that superceded any oral contract. Notably, the appellate court noted that R.C. §1335.05, the Statute of Frauds, provides a complete defense to a claim of breach of oral contract against a physician. The court explained, however, that because this affirmative defense had never been raised by the defendant, the defense had been waived in this case.

The appellate court affirmed the trial court decision on the claim for fraud, holding that a promise of a certain outcome may form the basis of an oral contract, but it does not constitute a “representation of fact,” and therefore, cannot form the basis for a fraud case. The court also affirmed the trial court’s decision to grant summary

judgment on the claim for medical malpractice, holding that Percy's own affidavit was sufficient evidence that the standard of care had been met, and Lovely's failure to produce expert testimony to rebut Percy's affidavit was fatal to her claim.

Medical Malpractice Insurance – Prejudgment Interest – Declaratory Judgment – Where Verdict and PJI Exceed Policy Limits. Insurer Liable For PJI When Insurer Rejected Good Faith Offers of Settlement.

***Medical Protective Co. v. Watson*, 10th Dist. App. No. 04AP-915, 2005-Ohio-1452, 2005 Ohio App. LEXIS 1400.**

Watson brought a medical malpractice claim against Dr. Cahill and his corporation, Ophthalmic Surgeons of Ohio, Inc. ("OSO"). Cahill and OSO were insured by two policies issued by Medical Protective Co. ("MPC"), with a combined limit of \$4 million, including any prejudgment interest.

Watson's malpractice action was tried to verdict; the jury awarded Watson more than \$5.65 million. In addition, the trial court awarded Watson prejudgment interest based on MPC's failure to make a good faith effort to settle. MPC then filed this declaratory judgment action, alleging that it was not liable for the prejudgment interest. The trial court granted summary judgment to Watson, Dr. Cahill, and OSO, and ordered MPC to pay the prejudgment interest award.

The Tenth Appellate District Court affirmed. The Court acknowledged *Lovewell v. Physicians Inc. Co.* (1997), 79 Ohio St. 3d 143, which held that, in general, the liability for prejudgment interest falls to the named party and not his insurer. The Court distinguished *Lovewell*, however, by noting that in that case the physician's refusal to consent to settlement resulted in the award of prejudgment interest; in this case, however, it was the insurer that failed to negotiate in good faith. The Court reasoned that the party responsible for the failure of good faith should be held liable for the interest award.

Medical Malpractice – Savings Statute – Hearsay – Directed Verdict – Trial Court Erred in Excluding Statements by Non-Party Surgeon and Granting Directed Verdict, Sua Sponte, Where Evidence Proves Surgeon was Agent of Defendant Hospital.

***Fiske v. U.S. Health Corp. of Southern Ohio*, 4th Dist. App. No. 04CA2942, 2005-Ohio-1295, 2005 Ohio App. LEXIS 1261.**

Plaintiff Fiske visited the Southern Ohio Medical Center (SOMC) emergency room with abdominal pain. He told the hospital personnel that he was HIV-positive. After examining Fiske, the emergency physician advised him that he may have appendicitis and recommended a surgical consult. Plaintiff alleged that he was then told that the surgeon on call refused to examine him because he was HIV-positive. He was transported to another hospital for treatment. Plaintiff brought suit against the hospital and the surgeon, alleging malpractice and discrimination. After the trial court granted summary judgment to the Defendants, Plaintiff appealed, and the appellate court reversed. See, *Fiske v. Rooney* (1995), 105 Ohio App.3d 269.

On remand, Defendants again moved for summary judgment. Plaintiff requested additional time to conduct discovery, and that motion was denied. Plaintiff filed briefs and evidentiary support opposing the motion for summary judgment, but the trial court again granted summary judgment. The court of appeals reversed a second time. See, *Fiske v. Rooney* (1998), 126 Ohio App.3d 649.

Plaintiff then dismissed his suit and refiled, naming only the hospital as a Defendant. Count three of the complaint alleged that the hospital was vicariously liable for the conduct of the surgeon. This allegation was not made in the first complaint. The Defendant hospital moved to dismiss count three, arguing that this was a new claim and the statute of limitation had expired. Plaintiff failed to respond to the motion.

Notably, shortly after dismissing and refiled the complaint, Plaintiff's counsel moved to withdraw because he was closing his law practice due to "personal reasons." Plaintiff then appeared *pro se* and asked for a continuance to retain new counsel, explaining that his counsel was hospitalized. While the motion to dismiss was pending, Plaintiff's counsel resigned his license to practice law in the midst of disciplinary action against him.

Nevertheless, two months after the motion to dismiss was filed and two days after Plaintiff's counsel resigned his license to practice law, the court granted the motion. Plaintiff retained new counsel, who filed two motions for reconsideration. Both were overruled.

At the time of trial, Plaintiff was unable to locate the surgeon. The trial court prohibited Plaintiff from making any reference to anything the surgeon said unless the surgeon testified. During voir dire, Plaintiff's counsel stated that when the surgeon was informed of Plaintiff's HIV status, he refused to treat him. The Defendant's motion for mistrial was granted and the Plaintiff was ordered to pay the Defendant's costs and attorneys fees.

At the time of the second trial, the Plaintiff successfully subpoenaed the surgeon. Nevertheless, the court ordered that the Plaintiff refrain from mentioning any "act or statement" by the surgeon. The parties each proffered a description of the evidence that would be presented at trial, and the trial court *sua sponte* directed a verdict in favor of the Defendant.

Plaintiff appealed. The court of appeals held that the trial court erred by: dismissing count three of the complaint; failing to reconsider that decision; excluding evidence regarding the surgeon's statements in the first trial; granting a mistrial; sanctioning the Plaintiff; excluding the surgeon's statements in the second trial; and, finally, granting a directed verdict.

The court erred in dismissing count three because: cases should be decided on their merits, and therefore the interests of justice weigh against applying a waiver theory, and the statute of limitations had not expired on the claim. "(A) new complaint is substantially the same as the original complaint for purposes of the savings statute when the new complaint differs only to the extent it adds new recovery theories based upon the same factual occurrences stated in the original complaint." *Fiske*, 2005-Ohio-1295, at ¶19.

The trial court erred in ordering the Plaintiff not to mention any statement by the surgeon and in granting a mistrial because: The surgeon was an agent of the hospital, and as such, his statements and actions are admissible against the Defendant pursuant to Evid. R. 801(D)(2)(d); a court cannot simply exclude all of the evidence necessary to prove a claim without legal basis; and the Plaintiff complied with the spirit of the Court's order by not mentioning the surgeon by name or repeating any statement made by the surgeon. In the

second trial, the court had no legal basis whatsoever for the exclusion of the surgeon's testimony.

Finally, the trial court erred in granting a directed verdict *sua sponte* because Civ.R.50(A) specifies that a directed verdict may be granted after opening statements, at the close of the opponent's evidence, or at the close of all evidence, and in this case the court granted the directed verdict before any opening statement was delivered.

Medical Malpractice – Learned Treatise – Plaintiff May Not Cross-Examine Defendant's Expert on "Guidelines" Written by Expert, Where Guidelines Were Used Only At Expert's Hospital and Were Not "Published" to the Medical Community At Large.

Peat v. University Hospitals Health System Bedford Medical Center, 8th Dist. App. No. 84472, 159 Ohio App.3d 638, 2005-Ohio-395, 2005 Ohio App. LEXIS 430.

Plaintiff Peat brought suit against Dr. Kranitz, alleging Dr. Kranitz was negligent in failing to order a CT and timely diagnose a brain abscess. Dr. Kranitz retained Dr. Charles Eckerline as his expert witness. On Dr. Eckerline's CV, in the list of his publications, is the University of Kentucky Department of Emergency Medicine Evaluation and Treatment Guidelines. At deposition, Eckerline testified that the Guidelines were consistent with the current standard of care, but that he did not rely upon them or find them to be authoritative. At trial, the court granted the Defendant's motion to exclude all testimony regarding the Guidelines. The jury returned a verdict for the Defendant.

The trial court then granted the Plaintiff's motion for a new trial, finding that the court erred in refusing to allow the Plaintiff to impeach Dr. Eckerline with the Guidelines. Defendant appealed. The 8th District reversed, holding that the Guidelines were not "published" within the meaning of Evid. R. 706, and therefore were not admissible for impeachment purposes. The Court noted that Black's Law Dictionary defines "publish" as "to make public; to circulate; to make known to people in general." *Peat*, 159 Ohio App.3d 638, at ¶13. The Guidelines, the 8th District reasoned, were an internal document of the University of Kentucky Emergency Department, and were not circulated to the public or put before public scrutiny. Accordingly, the Court found that the Guidelines were not a "learned treatise," and were not admissible. The trial court therefore erred in granting a new trial on the basis that the Guidelines should have been admitted for impeachment.

Medical Malpractice – Evid. R. 601(D) – Retired Physician Who Engaged Full Time In Active Clinical Practice At Time Of Alleged Malpractice Is Qualified To Testify As Expert.

***Aldridge v. Garner*, 4th Dist. App. No. 04CA2945, 159 Ohio App.3d 688, 2005 Ohio 829; 825 N.E.2d 201, 2005 Ohio App. LEXIS 868.**

This case involves the appeal of the trial court's decision granting summary judgment to the Defendant on the basis that the Plaintiff's expert was not qualified to testify on standard of care under Evidence Rule 601(D). The alleged malpractice occurred in 1998. At that time, Plaintiff's expert, Dr. Kirwin, was engaged full-time in the clinical practice of medicine. In 2001, he ended his twenty-year career of full-time clinical practice and began to spend eighty percent of his time working for two insurance companies reviewing cases and determining whether individual claims should be paid or denied. The remainder of his time was spent in clinical practice.

The appellate court summarily rejected the Plaintiff's argument that Dr. Kirwin's work for the insurance company is so related or adjunctive to patient care as to be included in the definition of "active clinical practice." The reviewing court held, however, that "based upon Dr. Kirwin's length of practice, and the fact that Dr. Kirwin was engaged in the active clinical practice at all times relevant to the lawsuit against Garner," his experience "satisfies the purpose intended by the active clinical practice rule." *Id.* at ¶ 18.

Medical Malpractice – Negligent Credentialing – Peer Review Privilege – Trial Court Cannot Order Hospital to Identify Records in Peer Review File

***Huntsman v. Aultman Hospital*, 5th Dist. App. Nos. 2004CA00124 & 2004CA00142, 160 Ohio App.3d 196, 2005-Ohio-1482, 2005 Ohio App. LEXIS 1435.**

Plaintiff administratrix brought a medical malpractice and negligent credentialing action against the Defendant hospital. Plaintiff moved for an in camera review of the hospital's credentialing file documents. The trial court granted the motion, and the hospital complied with the order. After reviewing the documents, the trial court ordered the hospital to provide a list of documents from the credentialing file to the Plaintiff to enable the Plaintiff to obtain the documents from the "original source." The court reasoned that the Plaintiff could not "obtain the documents from the original source," as permitted

by R.C. 2305.251, the peer review statute, if Plaintiff did not know what those documents were.

The hospital appealed, claiming that the newer version of the statute applied, and the trial court's order was in violation of that version of the statute, since it prohibits a party from obtaining any information, documents or records from a peer review committee's records. The court of appeals agreed, and reversed the trial court. The appellate court held that the statute is procedural, because it does not impair the substantive right of the Plaintiff to bring an action, but merely limits the admissibility of some of the evidence. The court added that the change in the statute is procedural, because it simply limits further the ability of a party to obtain information from a peer review committee's records. Accordingly, the change applied retroactively; the newer version of the statute applied to this action, despite the fact that the action accrued before the effective date of the newer statute. Finally, the appellate court found that the trial court's order violated the clear intention of the statute since the court's order required the hospital to provide information obtained from the peer review committee's records to the Plaintiff.

Personal Injury - Injury By A Motorized Golf Cart Is Not An Ordinary Risk Of The Game of Golf; Negligence Standard Applies

***Coblentz, et al. v. Peters*, 11th Dist. App. No. 2004-T-0017, 2005-Ohio-1102, 2005 Ohio App. LEXIS 1073.**

On September 9, 2001, Wilbur H. Coblentz, Ronald N. Peters, and Justin Doran met to play golf at Avalon South Golf Course in Warren, Ohio. Coblentz and Peters shared a motorized golf cart. When they reached the thirteenth hole, Coblentz parked the golf cart between his ball and Peters' ball so they would each have only ten to fifteen yards to walk to their respective shots. Peters finished his shot first, sat down in the golf cart, and leaned out of the passenger side in an effort to better view Coblentz's shot. The golf cart suddenly moved forward towards Coblentz, who stood unsuspectingly in his post-shot position. Despite Peters' attempts to hit the brake pedal with his left foot and grab the steering wheel, the golf cart struck and knocked Coblentz down, trapping him underneath the cart and dragging him a short distance up the fairway. Peters did not know what caused the cart to suddenly move forward and he did not intentionally try to strike Coblentz. Coblentz filed a personal injury action against Peters, alleging that

Peters negligently and recklessly operated the golf cart which injured him. Peters filed a motion for summary judgment, which the trial court granted.

On appeal, appellant argued that the trial court erred by granting summary judgment because it applied a recklessness standard rather than a negligence standard. The appellate court reversed the trial court's ruling on the grounds that the trial court should have applied a negligence standard rather than a recklessness standard in determining appellee's liability. The appellate court initially cited the Supreme Court of Ohio's holding in *Marchetti v. Kalish* (1990), 53 Ohio St.3d 95 for the proposition that one who engages in a recreational activity or sport assumes the ordinary risks of that activity or sport, and cannot recover for injury absent proof that the other participant's actions were either intentional or reckless. However, the reviewing court noted that whereas being struck by an errant golf ball or club are ordinary risks of the game, injury by a motorized golf cart is not an ordinary risk of the game. As appellant did not assume the risk of injury by a motorized golf cart by participating in a game of golf, the trial court improperly raised the standard by which it assessed appellee's liability from negligence to recklessness. Accordingly, its grant of summary judgment pursuant to the recklessness standard was not appropriate.

Premises Liability - Open and Obvious Doctrine Whether a Retail Display Constitutes an Open and Obvious Hazard is a Question for the Jury.

Klauss v. Marc Glassman, Inc., 8th Dist. App. No. 84799, 2005-Ohio-1306, 2005 Ohio App. LEXIS 1274.

On May 1, 1999, Howard Klauss was a business invitee at Marc's retail store. As Klauss turned into a cross aisle toward the back of the store, he noticed a bench and a merchandise display, but did not observe the empty wooden pallet between them. Indeed, it appeared to him that the area between the bench and the display was clear and was a place he could walk through. As he attempted to pass through them, he tripped on the wooden pallet and injured his right elbow. Klauss filed a negligence action against Marc's, and Marc's filed a motion for summary judgment alleging that the pallet was an open and obvious condition. The trial court granted Marc's motion. On remand from the first appeal (the appellate court's initial directive that the comparative negligence standard be applied was later reversed by the Supreme Court of Ohio in *Armstrong v. Best Buy Co., Inc.*, 99

Ohio St.3d 79, 2003-Ohio-2573), the trial court again concluded that the pallet was an open and obvious danger. The trial court cited *Armstrong* for the proposition that, when a danger is open and obvious, a premises owner owes no duty of care to the invitee to warn of its presence or to otherwise protect the invitee from it, and it serves as a complete bar to the plaintiff's recovery.

On appeal, appellant argued that whether the pallet was open and obvious is a question for the jury, and that the trial court erroneously found that the open and obvious doctrine relieved Marc's of its duty of care. The appellate court held that, while the existence of a duty of care is a question of law for the court, whether a hazard is open and obvious may involve a genuine issue of material fact requiring jury resolution. Attendant circumstances which would distract a person from discovering the condition are to be considered, and the appellate court found that the record revealed a factual dispute as to the appearance of the pallet based upon the attendant circumstances. The view of the pallet was obscured by the bench on the one side and a display of merchandise on the other. Further, as shoppers normally have carts or baskets, reasonable minds could differ as to whether the pallet would constitute an open and obvious condition. Accordingly, the appellate court reversed the grant of summary judgment and remanded the case for further proceedings.

Premises Liability - Open and Obvious Danger, Negligence, and Proximate Causation - What Degree of Proof is Required to Withstand a Motion for Summary Judgment?

Durham, et al. v. Major Magic's All Star Pizza Revue, Inc., et al., 6th Dist. App. No. L-04-1192, 2005-Ohio-1029, 2005 Ohio App. LEXIS 1038.

On March 21, 2003, Nancy Durham and her husband went with her family to Major Magic's All Star Pizza Revue, Inc. to celebrate her son's birthday. At one point, Durham walked from the seating area into the game room. The two rooms were connected by a ramp, as the game room was at a slightly lower level than the game room. Durham then went from the game room through the television room, again by passing over a ramp which connected the rooms due to their slightly different elevation levels. Upon hearing that her food was ready over the intercom, Durham walked from the television room towards the dining area. Durham was looking up at the lighted display of order numbers, and did not see that there was a step down from the televi-

sion room into the dining area. She fell and broke her leg on the stair and then filed suit against Major Magic's alleging that it negligently failed to warn her of the danger posed by the stair. The trial court granted Major Magic's subsequent motion for summary judgment on the grounds that Durham had failed to submit specific, provable facts regarding the obscurity of the step and the proximate cause of her fall.

On appeal, appellant argued that she provided sufficient evidence that she was caused to fall by a step in a doorway that she did not see, did not know existed, and in the exercise of ordinary care should not have known existed. Appellee cited *Lovejoy v. Sears, Roebuck & Co.* for the proposition that a plaintiff can only overcome a motion for summary judgment by advancing "specific, provable facts and not mere allegations; evidence of a possible inference is not sufficient." See *id.*, 1998 Ohio App. LEXIS 2688 at *6, citing *Jackson v. Alert Fire & Safety Equip., Inc.* (1991), 58 Ohio St.3d 48, 52. The appellate court reminded appellee that, to be "provable," a fact need only be capable of being proven true, not be already known to be true. Further, a "mere allegation" is one with no basis in fact, such that when a provable fact bolsters an allegation and the provable facts are in dispute, the allegation is more than "mere" and a genuine issue of material facts remains for jury consideration.

In support of her claim that the premises conditions rendered the step "unseeable" and therefore not an open and obvious danger, appellant submitted photographs showing the condition of the step, including one showing that the carpet on the step and the floor above and below the step was the same. When evaluating the duty of care in such cases of "unseen" dangers, courts should evaluate whether a person should be aware of the danger, as well as the likelihood of that person's encountering that danger. *Grossnickle v. Village of Germantown* (1965), 2 Ohio St.2d 96, 104. The appellate court considered to be sufficient evidence appellant's deposition testimony that: (1) she had not previously passed through that area of the restaurant prior to the fall and that; (2) if anything, she expected only another ramp connecting the two floor levels or no change in elevation at all. Construing all inferences from this evidence in favor of appellant, the appellate court concluded that reasonable minds could reach differing conclusions as to whether the step was open and obvious.

Similarly, with regard to the issue of causation, the appellate court found that reasonable minds could conclude that appellant's testimony that, as she was walking there was "suddenly no more floor," is consistent with

a person's experience when he/she does not know he is encountering a step. Appellee's counter-argument that unawareness of a step alone does not cause a person to fall made it clear to the reviewing court that a disputed issue remained for the jury to resolve. The appellate court held that the credibility of the evidence in this regard is a matter for the jury to consider, such that summary judgment was not an appropriate resolution of appellant's claims.

Probate Law – Is an Aunt Considered “Other Next of Kin” For Purposes of Ohio’s Wrongful Death Statute?

In the Matter of: Estate of Jerrod D. Payne, 10th Dist. App. No. 04AP-1176, 2005-Ohio-2391; 2005 Ohio App. LEXIS 2266.

Jerrod D. Payne, a minor, was struck and killed by an uninsured motorist while walking home from school. At the time of his death, Sharma Presley, his paternal grandmother, was his legal custodian. She filed an uninsured motorist claim with her insurer, Progressive Insurance, and settled for \$105,000. She presented the settlement to the Probate Court for approval. While the matter was pending, Kathy Altizer, decedent's maternal aunt, sought to participate in the award. Altizer was decedent's legal custodian from 1999 through 2002 after decedent's parents abandoned him.

A magistrate held that both parties were "next of kin" under R.C. §2125.02(A)(1), Ohio's wrongful death statute, and awarded (1) \$17,000 to Presley for the initial shock and trauma of Jerrod's death, (2) reimbursement of funeral expenses to the party who paid them, and (3) equal division of the net remaining proceeds between Presley and Altizer. The Probate Court approved the award, and Presley appealed.

In her sole assignment of error, Presley argued that the court erred in its determination that a maternal aunt should be included with a paternal grandmother as an "other next of kin" for purposes of receiving a distribution of wrongful death proceeds. The Ohio Supreme Court allows, in the case of the death of an insured, settlement proceeds from an uninsured motorist policy to be distributed among those entitled to bring a statutory wrongful death action. *In re Reeck*, (1986), 21 Ohio St.3d 126. An action may be brought under R.C. §2125.02(A)(1) "for the exclusive benefit of the surviving spouse, the children, and the parents of the decedent, all of whom are rebuttably presumed to have

suffered damages by reason of the wrongful death, and for the exclusive benefit of the other next of kin of the decedent.”

In construing the plain language of the statute, the court of appeals held that “other next of kin” means the nearest surviving relative after accounting for those expressly stated in the statute. Since decedent did not have a spouse or children, and his parents legally abandoned him, his nearest surviving relative was entitled to recover. Under civil law rules for the computation of consanguinity, parents and children are related in the first degree, grandparents, grandchildren, and siblings are related in the second degree, and aunts, uncles, nieces and nephews are related in the third degree. Since Presley was the “next of kin” to decedent, she is entitled to recover to the exclusion of other more distant relatives. The court of appeals stated that to hold otherwise would ignore the use of the word “next” in the statute.

The court of appeals also rejected Altizer’s attempt to apply *Ponser v. St. Paul Fire & Marine Ins. Co.*, 104 Ohio St.3d 621, 2004-Ohio-7105, to the facts of this case. Although *Ponser* recognized an aunt as “next of kin,” that case was not construing the language of the wrongful death statute, but instead considered the right of an aunt to recover damages under her own insurance policy. Since the case is distinguishable from the instant matter, the court of appeals reversed the judgment of the trial court and remanded the case for proceedings consistent with its opinion.

Trial – Inappropriate Response by Court to Question from Jury Results in New Trial; Loss of Consortium Claim Rejected

***Bailey v. Whittekind*, 5th Dist. App. No. 04CAE6044, 2005-Ohio-2548, 2005 Ohio App. LEXIS 2414.**

Appellant was involved in an auto accident in which she sustained injuries that included a perforation of the eardrum and cholesteatoma (A benign condition involving an expanding mass of cholesterol crystals and keratinised skin in the middle ear space resulting in pain and hearing loss.) As a result, she underwent surgery on both ears, and her hearing remained affected after surgery. At trial, her husband claimed, and testified in regard to, a loss of consortium. During deliberations, the jury sent the following question to the court: “If future medical bills are incurred can an additional claim be filed.” In response, the court stated: “The question posed is outside of the scope of this trial, it cannot be

answered.” The jury then returned a verdict in favor of Appellant as follows: \$16,057.74 for past medical bills, \$10,000 for past non-economic damages and \$10,000 for future, non-economic damages. The jury rejected the claim for loss of consortium altogether.

On appeal, Appellant claimed the trial court erred in responding to the question posed by the jury, and that the jury’s rejection of the loss of consortium claim was against the manifest weight of the evidence. With regard to the consortium claim, the appellate court held that the jury was not required to accept the testimony of the husband, and had no duty to render an award for his alleged loss of consortium. With regard to the first assignment of error, however, the appellate court agreed with Appellant, and remanded the case for a new trial. Citing *Columbus v. Triplett* (1993), 91 Ohio App.3d 239, 246, the court observed that “[a] trial court’s response to a jury’s question ‘should not only be legally correct, but also should be so explicit as not to be misconstrued or misunderstood by the jury in the proper application of the law to the facts in evidence.’” The court then went on to hold that the trial court’s response to the jury’s question was “confusing, at best, and misleading, at worst,” because it may have lead the jury to believe that future claims *could* be filed, and, as a result, may have affected their verdict.

In remanding for a new trial, the appellate court held that the trial court committed “plain error,” a doctrine generally used in criminal cases, but which also has application in civil cases if the error complained of “would have a material adverse affect on the character and public confidence in judicial proceedings.” *Reichert v. Ingersoll* (1985), 18 Ohio St.3d 220, 223.

Voir Dire – Failure to Utilize All Peremptory Challenges Results in Waiver of Right to Appeal Denial of a Challenge.

***Pennell v. Dewan*, 5th Dist. App. No. 2004 CA 00221, 2005-Ohio-1727, 2005 Ohio App. LEXIS 1653.**

At the start of this medical malpractice trial, the court immediately dismissed two jurors for cause, one with family members who were doctors, and another who had an experience with a misdiagnosis by a physician. Thereafter, according to appellant, the trial court “actually argued with jurors who later expressed bias against the Plaintiffs.” At the conclusion of the voir dire, appellant failed to object to the jury as seated, and the trial commenced. At the conclusion of the trial, a verdict was rendered against Plaintiffs-appellants, whose cause of action was based on an eye surgery that they alleged was performed inappropriately by Defendant-appellee.

On appeal, appellant argued that the trial court acted in an arbitrary fashion in conducting voir dire, because it started out by immediately dismissing two jurors who were potentially biased, but then began to argue with jurors who showed bias and to essentially cajole them into agreeing that they could render an impartial verdict. However, appellant made two fatal errors during trial that resulted in the judgment of the trial court being affirmed. First, appellant failed to object to the juror selection process at the close of voir dire. A failure to object to the remaining jurors during the trial results in a waiver on appeal in all cases but those involving plain error. *State v. Ivory*, 6th Dist. App. No. 79722, 2002-Ohio-1275. The doctrine of plain error, in the civil realm, is limited to those extremely rare cases in which the error challenges the legitimacy of the underlying judicial process itself. *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 1997-Ohio-401. No such plain error was present in this matter.

HELP!

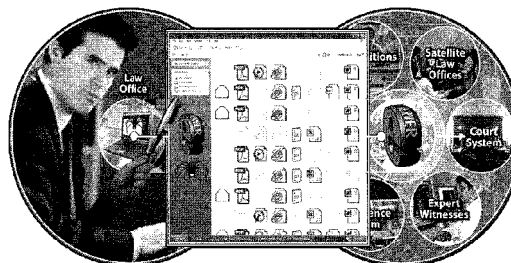
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Second, appellant failed to utilize all of its peremptory challenges. “Error in the denial of a challenge of a juror for cause cannot be grounds for reversal when the [party requesting that the juror be excused for cause] did not exhaust his peremptory challenges.” *State v. Getsy* (1998), 84 Ohio St.3d 180. This *Getsy Rule* is also applicable to civil cases. In the case at bar, not only did appellant fail to utilize all of the peremptory challenges, but he failed to do so after the trial court took the additional step of allowing appellant to revisit one of his peremptories to excuse a juror, and appellant chose not to do so.

Not only did appellant fail to object at trial and fail to use all of his peremptory challenges, but he also failed to convince the court of appeals that substantial rights of his were affected, a requirement to succeed in a claim of juror-selection error.

Voir Dire – Trial Judge’s Failure to Conduct *Batson* Inquiry Upon Presentation of a Prima Facie Case is Reversible Error

***Martin v. Nguyen, et al.*, 8th Dist. App. No. 84771, 2005-Ohio-1011, 2005 Ohio App. LEXIS 1026.**

Monique Martin, an African American, contracted a fungal infection (which, in turn, led to an infection in the bone of her finger) following Lyanna Nguyen’s application of Martin’s acrylic nails. During the trial of Martin’s injury, counsel for Nguyen used two peremptory challenges to excuse the only two African American females from the jury venire. Martin’s counsel requested an inquiry under *Batson v. Kentucky* (1981), 476 U.S. 79 to determine whether Nguyen’s counsel had a race neutral reason for excusing the two women. The trial court refused Martin’s request for a *Batson* inquiry, and the jury ruled in favor of Nguyen.

On appeal, appellant argues that the trial court’s refusal to conduct a *Batson* inquiry constituted reversible error. For the following reasons, the 8th District agreed and reversed and remanded. In order to establish a prima facie case of purposeful racial discrimination by counsel in his exercise of peremptory challenges, a litigant must show that: (1) she is a member of a cognizable racial group and, and (2) that a peremptory challenge will remove a member of the litigant’s race from the venire. As appellant is African American, and two African Americans were removed from venire, appellant presented a prima facie case of purposeful racial discrimination. At that

point, the trial court had a duty to conduct a *Batson* inquiry into defense counsel’s motivation for excluding the two women from the jury.

The trial court did not probe into defense counsel’s reasons for the excusals, yet defense counsel attempted to proffer said reasons at the appellate level. However, the 8th District noted that the inquiry must occur at the trial level. Citing *Hernandez v. New York* (1991), 500 U.S. 352, 363, the reviewing court noted that the best evidence as to counsel’s true motivations will be his demeanor in exercising the challenges. As demeanor and credibility lie within the trial judge’s province, the *Batson* inquiry cannot be take place at the appellate level. Incidentally, the court noted that the proffer need not be rendered contemporaneously with the objection in order to properly preserve the appellate record.

Verdicts & Settlements

(For members and educational purposes only)

John & Jane Doe v. ABC Corp., et al.

Type of Case: Automobile Accident

Settlement: \$2,250,000.00

Plaintiff's Counsel: James G. Joseph, Esq.

Defendant's Counsel: Withheld

Court: Mahoning County Court of Common Pleas

Date: May 2005

Insurance Company: Withheld

Damages: Two fractured femurs, non-fatal ruptured aorta. PTSD. Future lost wages

Summary: Plaintiff was hit head on by Defendant's truck. One of Plaintiff's femurs healed with a recurvation malunion (hyper-extension) causing irregular gait and lumbar symptoms. Both husband and wife suffered post-traumatic stress disorder.

Plaintiff's Experts: Bruce Ziran, M.D. (Orthopedic Surgeon); Vincent Prolong, M.D. (Psychiatry); John Burke, Ph.D. (Economist); George Cyphers (Vocational Expert)

Defendant's Experts: Timothy Gordon, M.D. (Orthopedic Surgeon); Melvin Shelton, M.D. (Psychiatrist); Donald Shrey (Vocational Expert)

Vicky Agee, Executor v. Talawanda Emergency Physicians

Type of Case: Medical Malpractice/Wrongful Death

Verdict: \$1,000,000.00

Plaintiff's Counsel: William Hawal, Esq. and Peter Weinberger, Esq.

Defendant's Counsel: Brian Goldwasser, Esq.

Court: Butler County Court of Common Pleas;

Judge Spaeth

Date: February 11, 2005

Insurance Company: Medical Protective

Damages: Wrongful death of 47-year-old husband

Summary: Decedent with multiple cardiac risk factors presented to ER with complaints of chest pain and was diagnosed with gastro-esophageal reflux and was discharged without an EKG. He died 8 hours later from arrhythmia caused by severe coronary artery disease.

Plaintiff's Experts: Raymond Magorien, M.D. (Cardiologist); Marvin Wayne, M.D. (Emergency Med.)

Defendant's Experts: Albert J. Kolibash, M.D. (Cardiologist); Ronald Gordan, M.D. (Emergency Medicine)

Reihard v. Trumbull Cardiovascular Care, Inc., et al.

Type of Case: Medical Malpractice/Wrongful Death

Verdict: \$1,250,000.00

Plaintiff's Counsel: William Hawal, Esq.

Defendant's Counsel: Jeffrey Schobert, Esq.

Court: Trumbull County Court of Common Pleas; Judge McKay

Date: January 14, 2005

Insurance Company: ProAssurance

Damages: Wrongful death of 67-year-old unemployed wife

Summary: Decedent was a dialysis patient who presented to the ER with complaints of nausea, vomiting and diarrhea with a Tesio catheter in her chest for dialysis. Evaluation showed fever and leukocytosis. She was discharged with a diagnosis of gastroenteritis and was readmitted 41 hours later and diagnosed with endocarditis. Decedent did not survive her surgery to repair her heart valves. The trial court granted Plaintiff's Motion for Prejudgment Interest on the basis of a zero offer.

Plaintiff's Experts: Jonathan Zenilman, M.D. (Infectious Disease); Jay Falk, M.D. (Emergency Medicine); David Burstein, M.D. (Nephrology);

Defendant's Experts: David Brown, M.D. (Emergency Medicine); John Anastasi, M.D. (Cardiovascular Surgery); David Weber, M.D. (Infectious Disease)

Scibelli v. Pannunzio

Type of Case: Dental Malpractice

Verdict: \$800,000

Plaintiff's Counsel: William Hawal, Esq. and Susan E. Petersen, Esq.

Defendant's Counsel: Ronald Wilt, Esq. and Dirk Riemenschneider, Esq.

Court: Mahoning County Court of Common Pleas;

Judge Cronin

Date: October 29, 2004

Insurance Company: ProAssurance

Damages: Reconstruction of right side of jaw with fibular graft

Summary: Plaintiff presented to dentist with swelling on the right side of his jaw and with a loose tooth. The dentist diagnosed radiolucency on the x-ray as an infection. Six months later, Plaintiff was diagnosed with odontogenic myxoma, a rare benign tumor of the jaw, which had destroyed the mandible and TMJ. Defendant claimed that the slow growing tumor had destroyed the jaw by the

time of the first visit. Plaintiff's Motion for Prejudgment Interest based upon a zero offer is pending.

Plaintiff's Experts: Leon Assael, M.D. (Oral Surgeon); John Neary, M.D. (Oral Surgeon)
Defendant's Experts: Kasey Li, M.D. (Oral Surgeon); Richard Zarbo, M.D. (Oral Pathology)

Walter Gawronski v. Jonathan Berger, M.D.

Type of Case: Medical Malpractice
Verdict: Gross - \$2,942,000.00; Net - \$2,412,440.00
Plaintiff's Counsel: Mark Koberna, Esq.
Defendant's Counsel: Edward Murphy, Jr., Esq.
Court: Paulding County Court of Common Pleas; Judge David Webb; Case No. C1-02 318
Date: January 27, 2005
Insurance Company: Withheld
Damages: See below

Summary: Plaintiff presented to emergency room with abdominal pain. CT scan confirmed presence of kidney stone. Plaintiff was discharged the following day. Defendant radiologist performed a final review of the CT scan after Plaintiff's discharge and failed to observe evidence of abnormal soft tissue mass on film and/or to bring it to the attention of the ordering physician. The tumor was ultimately removed in April 2003, and Plaintiff has been cancer free since that time.

Plaintiff's Experts: Myron Marx, M.D. (Radiology; San Francisco, CA); Thomas Olencki, D.O. (Oncology; Columbus, OH); Robert Steele, M.D (Oncology; Kokomo, IN)
Defendant's Experts: David Decker, M.D. (Oncology; Royal Oak, MI); David Schlueter, M.D. (Urology; Fort Wayne, IN)

Reserve Marketing, Inc. v. Posi-Plus Technologies, Inc., et al.

Type of Case: Breach of Contract
Settlement: \$600,000.00
Plaintiff's Counsel: Mark R. Koberna, Esq.
Defendant's Counsel: Ronald Kopp, Esq.
Court: Portage County Court of Common Pleas
Case No. 2003 CV 000373
Date: April 4, 2005
Insurance Company: N/A
Damages: See below

Summary: Plaintiff entered into a Consulting Agreement to provide consulting services regarding the design,

manufacture and sale of underground cable handling equipment. Plaintiff argued that Defendant (1) breached the agreement by failing to pay consulting fees, commissions and royalties, and (2) breached the duty of good faith and fair dealing by failing to use its best efforts to develop and market the equipment.

Plaintiff's Experts: Edward Bell, Ph.D. (Cleveland, OH)
Defendant's Experts: N/A

John Doe v. Jane Roe, et al.

Type of Case: Motor Vehicle Accident
Settlement: \$225,000.00
Plaintiff's Counsel: Scott Kalish, Esq.
Defendant's Counsel: Withheld
Court: Cuyahoga County Court of Common Pleas
Date: March 14, 2005
Insurance Company: Withheld
Damages: L-1 Burst Fracture, \$28,500.00 in medical bills and no lost wages

Summary: Plaintiff, who was physically and mentally handicapped because of a preexisting condition of Cerebral Palsy, was in a commercial van being transported in his wheelchair when the van negligently went left of center striking a second vehicle.

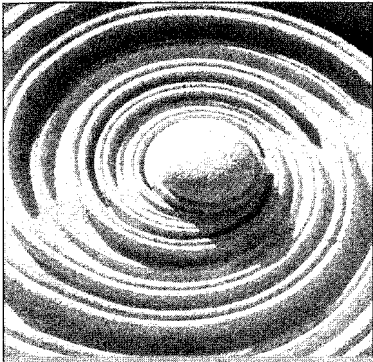
Plaintiff's Experts: Matt J. Likavec, M.D.
Defendant's Experts: N/A

Sweitzer v. Costanzo

Type of Case: Legal Malpractice
Binding Arbitration: \$214,922.50
Plaintiff's Counsel: Mark Ruf, Esq.
Defendant's Counsel: Reminger & Reminger
Court: Cuyahoga County Court of Common Pleas
Date: May 10, 2005
Insurance Company: Withheld
Damages: Wrongful imprisonment for 3.25 years

Summary: Defendant failed to file a wrongful imprisonment claim within the statute of limitations.

Plaintiff's Experts: Andrew Crites, Esq.
Defendant's Experts: Kirk Migdal, Esq.



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John Distefano, DDS
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Chris J. Kaluces, MD

Wayne M. Koch, MD
Raphael Pelayo, MD

Otoneurology

John G. Oats, MD

Pathology

Robert D. Hoffman, MD
Sharon Hook, MD
Kenneth McCarty, MD
Richard Lash, MD /*Surgical*
Laszlo Makk, MD
Diane Mucitelli, MD
Norman B. Ratliff, MD
Jacob Zatuchni, MD

Pediatrics

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

Plastic Surgery

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

Podiatry

Anthony A. Matalvange, MD
Richard J. Rasper, MD
Gerald Yu, MD

Proctology

Henry Eisenberg, MD

Psychiatry

Ronald J. Diamond, MD.
James A. Giannini, MD
Richard Lightbody, MD
Elizabeth Morrison, MD
Daniel A. Newman, MD
Stephen G. Noffsinger, MD
David Shaffer, MD /*Pediatrics*
Martin Silverman, MD
Howard S. Sudak, MD
Cheryl D. Wills, MD

Psychology

Robert K. DeVies, PhD
Mark Janis, PhD

Pulmonology

Robert DeMarco, MD

Radiology

Laurie L. Fajardo, MD
William Murphy, MD
David Spriggs, MD

Sleep Disorders

Leo J. Brooks, MD
Steven Feinsilver, MD
Thomas Hobbins, MD /*Pulmonology*

Social Work

Barry Mickey /*Professor/Teacher*
Diane Mirabito

Thoracic Surgery

George Anton, MD
Marc Cooperman, MD
Delos M. Cosgrove, MD /*Cardiothoracic*
Noel H. Fishman, MD /*Cardiothoracic*
Geoffrey Graeber, MD
Dennis Hernandez, MD /*Cardiothoracic*
Gregory F. Muehlbach, MD
Mehmet C. Oz, MD /*Cardiothoracic*
Thomas W. Rice, MD
Craig Saunders, MD
V.C. Smith, MD /*Cardiac Surgeon*

Urology

W.E. Bazell, MD
Kurt Dinchuman, MD
Frederick Levine, MD

Vascular Surgery

John J. Alexander, MD
Richard Paul Cambria, MD

General/Misc.

Walter Afield, MD /*Unknown*
Mack A. Anderson /*Counselor*
Lisa Ann Atkinson, MD /*Staff Physician*
Stanley P. Ballou, MD /*Unknown*
Elizabeth Barker /*CT Technologist*
Amardeep S. Chauhan /*Osteopath- Physical
Medicine & Rehab*
Charles E. DuVall /*Chiropractor*
Ahmed Elghazawi /*Independent Med Exam*
Nancy Holmes /*Cert. Physicians Assistant*
Norman B. Ratliff, MD /*Staff Physician*
Gary A. Tarola /*Chiropractor*
Caroline Wolfe /*M.EdLCP (Rehab Counselor)*
Karen Wolffe /*Professional Counselor*
Arthur B. Zinn, MD /*Medical Geneticist*

Nursing

Jennifer Ahl, RN
Debbie Bazzo, RN /*Obstetrics*
Mary Ann Belanger, RN
Brenda Braddock, RN
Jill Castenir, RN
Danielle Coates, RN
Lois Cricks, RN
Linda DiPasquale, RN /*Perinatal CNS*
Rita J. Freehorn /*Home Health Aide*
Debra A. Gargiulo, RN
Phyllis Hayes, RN
Laura Hoover, RN
Denise Hrobat, RN
Mary Hulvalchick, RN /*Obstetrics*
Mary Janesch, RN
Donna Joseph, RN
Geraldine Kern, RN
Linda Law, RN
Judith Wright Lott, RN /*Neonatal N.P.*
Patricia J. Lupe, RN /*Nurse Midwife*
Migdalia Mason, RN
Susan Massoorli, RN
Susan Morgan, RN /*Midwife*
Jay Morrow, RN
Lekita Nance, LPN
Delicia Ostrowski, RN
Jeanne M. O'Toole, RN
Janet Pier, RN
Debra Seaborn, RN
Melissa Slivka, RN
Penny Sonters, RN
Mary Jane Martin Smith, RN /*Teacher*
Suzanne Smith, RN /*Midwife*
Diane Soukup, RN /*Geriatrics*
Shirley Stokley, RN
Elizabeth Svec, RN
Jennifer Syrowski, RN
Laurel Thill, RN
Julie Warner, LPN
Helenmarie Waters, RN /*Obstetrics*
Jacqueline Whittington, RN
Angelique Young, RN
Catherine Zalka, RN
Colleen Zelonis, LPN
Joanne Zelton, RN

Administration/Professional

Susan Allen /*Architect*
Frederick Anderson /*Business Mgr, Dr. Cola*
Bernard Agin /*Attorney*
LuAnn K. Busch /*Nursing Home Administrator*
Richard Hayes /*Safety Expert-OSHA Inspector*
Thomas Hilbert /*Consultant*
Gary Himmel, Esq. /*Attorney*
Albet I. King /*Bioengineer*
Susan Kirkland /*Mgr, Safety Programs-
Ohio Rail Commission*
Clark Millikan /*Dir. of Academic Affairs*
Donald Plunkett /*Architect*
Sue Sanford /*Dir. Obstetrical Services*
Richard W. Schule /*Mgr, Surg. Process Dept.*
David Silvaaggio /*Dept. Admin. - Fam. Pract.*
Stephen L. Spearing /*Admin. Dir. Radiology*
Kelly Sted /*Manager of Enrollment*
Kelly Trease /*Office Manager, Dr. Cola*

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Case Caption: _____

Type of Case: _____

Verdict: _____ Settlement: _____

Counsel for Plaintiff(s): _____

Address: _____

Telephone: _____

Counsel for Defendant(s): _____

Court/Judge/Case No: _____

Date of Settlement/Verdict: _____

Insurance Company: _____

Damages: _____

Brief Summary of the Case: _____

Experts for Plaintiff(s) _____

Experts for Defendant(s): _____

RETURN FORM TO:

Andrew Thompson, Esq.
Stege & Michelson Co., LPA
200 Public Square, Suite 3220
Cleveland, OH 44114
FAX: 216.348.0803

Alison Ramsey, Esq.
The Brunn Law Firm
700 West St. Clair Ave., Suite 208
Cleveland, OH 44113
FAX: 216.623.7330

Application for Membership

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

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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 than 25% of my practice and that of my firm's practice if I am not a sole practitioner, is devoted to personal injury litigation defense.

Name _____ Age: _____

Firm Name: _____

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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): _____

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Date: _____ Applicant: _____

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