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President's Message

Romney B. Cullers

The New England Journal of Medicine recently published an article detailing a study about the costs associated with medical malpractice litigation, "Claims, Errors, and Compensation Payments in Medical Malpractice Litigation," Vol.354: 2004-2033, May, 2006. The purpose of the study was to determine whether frivolous litigation is responsible for the costs of malpractice litigation. The study resulted in two general conclusions. First, the system presently in place for handling malpractice claims is not stricken with frivolous litigation, as Bill Frist and others would have us believe. All the hype about this alleged problem with the system is "overblown," the authors state. The second general conclusion is that the malpractice system performs well "in its function of separating claims without merit from those with merit and compensating the latter." In other words, the system is working.

The study is critical of the current tort-reform efforts of state and federal legislators because the focus of the effort is on frivolous litigation. According to the study, moves to curb frivolous litigation will have little, if any, impact on costs. We've known about this for a long time, but I am highlighting these findings because I have heard proponents of tort reform taking statements from this study out of context to support their cause. If you hear it too, please set them straight.

Congratulations to Donna Taylor-Kolis, our incoming president, and Craig Bashein, who has become an officer. As always, the Academy is here to support you. If you need anything, deposition transcripts, referrals to experts, whatever, let us know. We look forward to continuing success.

Edited by
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Contents

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Dennis R. Lansdowne
Michael F. Becker
Kenneth J. Knabe
David M. Paris
Frank G. Bolmeyer
Robert F. Linton, Jr.
Jean M. McQuillan
Richard C. Alkire
William Hawal
David W. Goldense
Robert E. Matyjasik
Laurie F. Starr
William M. Greene
James A. Lowe
Paul M. Kaufman
John V. Scharon, Jr.
Scott E. Stewart
Joseph L. Coticchia
Sheldon L. Braverman
William J. Novak
Peter H. Weinberger
Alfred J. Tolaro
Fred Wendel III
John V. Donnelly
Michael R. Kube
Frank K. Isaac
Seymour Gross
Lawrence E. Stewart
Milton Dunn
F. M. Apicella
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Eugene P. Krent
Walter L. Greene
T.D. McDonald
Ralph A. Miller
Nathan D. Rollins
Harold Sieman
Michael T. Gavin
Richard M. Cerrezin
Joseph O. Coy
Robert R. Soltis
James J. Conway

Law Updates

by John Landskroner
Stephen Vanek
Brian Eisen
Paul Flowers
Andrew Thompson
Alison Ramsey

Appellate Review – Appellate Court May Review Plaintiff's Prima Facie Case to Determine Whether Motion for Directed Verdict Should Have Been Granted in Employment Discrimination Case

***Williams v. City of Akron*, 107 Ohio St.3d 203, 2005-Ohio-6268, 837 N.E.2d 1169.**

Plaintiff/Appellant, Gerald Williams, was employed as a police officer for the City of Akron. On March 22, 1997, Williams slapped his wife, and she reported that he had beaten her. Williams, angered by his wife's report, hit her again and broke her jaw. A grand jury indicted Williams on domestic violence charges, but he pleaded guilty to a lesser charge of aggravated menacing.

The City fired Williams for the attack on his wife and his failure to be truthful with internal affairs investigators regarding the assault. The Civil Service Commission upheld Williams' dismissal. Williams then filed a racial discrimination lawsuit against the City. The City moved for summary judgment, arguing that Williams failed to establish a prima facie case of discrimination. The trial court denied that motion and the case proceeded to trial.

At the close of Williams' case, the City moved for a directed verdict, again arguing that Williams failed to establish a prima facie case of discrimination. The court denied this motion. At the close of all evidence, the City renewed its motion for directed verdict. Again, the trial court denied the motion. The court instructed the jury that Williams was a member of a protected class and had suffered an adverse employment action as a matter of law. The court instructed that the jury would have to determine whether Williams was qualified and whether he was treated differently than similarly situated white officers. The jury returned a verdict in favor of Williams and awarded $1.72 million in damages.

On appeal, the Ninth District Court of Appeals reversed the trial court's denial of the City's motion for directed verdict following the close of plaintiff's case. The appellate court concluded that the trial court erred in finding that Williams had established a prima facie case because he did not establish that he was treated differently than similarly situated white officers.

The appellate court then certified its decision as being in conflict with *Yelton v. Stehlin* (Aug. 20, 1999), 1st Dist. No. C-980503, 1999 Ohio App. LEXIS 3832 and *Pelletier v. Rumpke Container Serv.* (2001), 142 Ohio App.3d 54, 753 N.E.2d 958 from the First District Court of Appeals and with *Toole v. Cook* (May 6, 1999), 10th Dist. No. 98AP-486, 1999 Ohio App. LEXIS 2040. Those cases hold that in a discrimination case on appeal, after trial on the merits in favor of plaintiff, an appellate court is precluded from revisiting a plaintiff's prima facie case to determine whether the trial court improperly denied the defendant's motion for directed verdict at the close of plaintiff's case. The following question was certified: Whether a court can return to consider the prima facie case after a trial on the merits in a discrimination case.

First, the Supreme Court of Ohio reaffirmed the traditional *McDonnell Douglas* burden-shifting applicable to discrimination cases. Next, the court turned to the conflict cases cited by the Ninth District Court of Appeals. The court noted that these cases relied on a federal case, *United States Postal Serv. v. Aikens* (1983), 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403, which precluded an appellate court from reviewing a prima facie case of discrimination once the case has been tried on the merits.

The court noted that Ohio practice, unlike federal practice, does not preclude such review. Relying on *Helmick v. Republic-Franklin Ins. Co.* (1988), 39 Ohio St.3d 71, 529 N.E.2d 464, the court observed that Ohio courts view a prima facie case as an evidentiary threshold that a plaintiff in a discrimination action must meet or exceed in order to avoid a directed verdict. Here, the element in question was whether Williams presented evidence to establish that he was treated differently than similarly situated white officers. The appellate court held that he did not and that a directed verdict should have been granted in favor of the City. The Supreme Court of Ohio affirmed, opining that the appellate court appropriately examined just the sufficiency of plaintiff's evidence as to each element of his prima facie case.

Finally, the court expressly declined the invitation to establish a different level of appellate review for

discrimination cases by disallowing the appellate review of plaintiff's prima facie case. The court found the Ninth District's appellate standard of review to be consistent with the well-founded rule that a plaintiff must prove the essential elements of his case-in-chief before any defense is required.

This case thus represents an important departure from federal practice in the area of appellate review in the context of discrimination cases.

Civil Procedure – Unsworn Expert Report Not Sufficient and Acceptable Evidentiary Material To Overcome Summary Judgment As Contemplated By Civ. R. 56

***Cutcher v. H.B. Magruder Memorial Hospital*, 6th Dist. App. No. OT-05-013, 2005-Ohio-6135; 2005 Ohio App. LEXIS 5513.**

Appellants filed an action for medical negligence against H.B. Magruder Memorial Hospital, David Rickson, M.D., and Port Clinton Emergency Room Physicians, Inc. On June 10, 2004, Dr. Rickson and Port Clinton Emergency Room Physicians, Inc. filed a motion for summary judgment, arguing that Appellants failed to produce expert evidence to support their claims. After no brief in opposition was filed, the trial court granted the motion for summary judgment.

On December 6, 2004, H.B. Magruder Memorial Hospital filed a motion for summary judgment on the same grounds as the other defendants. Appellants filed a brief in opposition, relying on answers to interrogatories that identified Mrs. Cutcher's medical providers as expert witnesses and a report attached in response to interrogatory nine that stated that Mrs. Cutcher did not receive proper care in the emergency room. In conjunction with their brief in opposition, Appellants also filed a motion for relief from judgment under Rule 60(B), asking the trial court to vacate summary judgment awarded to the other defendants. Magruder filed a reply brief, arguing that the expert report provided was not proper evidence under Civ. R. 56(C) and (E) because it was not authenticated, and further, Appellants' answers to interrogatories were neither signed nor certified. The trial court agreed that the expert report could not be considered under Rule 56, and therefore granted Appellee's motion for summary judgment and denied Appellants' Rule 60(B) motion.

The court of appeals examined *Rogoff v. King* (8th Dist. 1993), 91 Ohio App.3d 438, which held that "appellants' unsworn medical reports are not 'sufficient and acceptable' evidentiary materials as contemplated by Civ.R. 56(C) and (E)...The proper procedure for the introduction of evidentiary matter not specifically authorized by Civ.R. 56(C) is to incorporate the material by references into a properly framed affidavit..." The court agreed with the trial court that Appellants could not properly rely on an unsworn expert report to defeat a motion for summary judgment.

The court also rejected Appellants' argument that the evidence was appropriate because it was a part of an answer to interrogatories. Appellants' discovery responses did not conform to Civ. R. 33(A) because they were unsigned and unsworn. The court concluded that "appellants attempt to bootstrap an unsworn expert report, which lacked an affidavit, onto improperly submitted interrogatories was improper." The decision of the trial court was upheld.

Discovery – Calling a Document an Investigation Report or Incident Statement is Insufficient to Demonstrate That It Was Prepared for use by Peer Review Committee

***Anthony Rinaldi, Administrator of the Estate of Hilda A. Lance, deceased v. City View Nursing and Rehabilitation Center, Inc.,* 8th Dist. App. No. 85867, 2005-Ohio-6360, 2005 Ohio App. LEXIS 5724.**

The decedent, Hilda Lance, was a resident of City View for several years prior to her untimely death on August 30, 2001. City View had noted Lance's medical history of dementia, loss of memory, wandering behaviors, asking of repetitive questions and exhibition of poor insight into her own health condition. City View's care plan for Lance identified the need for her to wear a monitoring device or "wanderguard" at all times. Lance also had a history of suffering falls while in the care of City View. On August 30, 2001 City View's staff lost track of Lance, who had been permitted to wander the facility without supervision or the monitoring device. She was eventually found at the bottom of the stairwell with fatal head, brain and spinal cord injuries. Lance's family did not learn the cause of her death until September 2003.

On October 28, 2003 this action was commenced asserting claims for negligence, violation of the nursing home bill of rights, fraud and wrongful death. A claim for spoliation of evidence was added as City View could not produce her patient file. City View deemed several documents regarding Lance as protected. City View was required to produce a privilege log, and then submitted the documents for an in camera review. City View identified these items as the "Investigation Report Form," "Investigation Report Narrative," "Investigation Report Conclusion-Narrative," "Supervisors Monitor Accident/Incident Report" dated August 30, 2001, "Employee Written Incident Statements for August 30, 2001, Accident/Incident Report" and "Resident Fall Investigation Reports", and "Falls Committee Notes." Following the in camera inspection the trial court ordered City View to produce all of the documents identified in the privilege log to Rinaldi. City View appealed this order.

The appellate court found it unnecessary to consider the effective date of R.C. 2305.253. Instead, the court looked to the documents that City View had presented and deemed that they were not incident reports as defined by the statute. The court held that City View had presented no evidence to the trial court which indicated that the records were prepared by or for the use of a peer review committee or that the records were within the scope of the functions of that committee. Although the reports were titled "investigation report" or "incident statements," this was not a sufficient demonstration that the reports were incident reports actually prepared for use by City View's peer review committee. Furthermore, the court noted that there had been no evidence presented that City View, in fact, had a peer review committee in place at the time of Ms. Lance's fall.

The court determined that City View had not established the privilege was applicable in its case. It had failed to produce any evidence whatsoever which established the privilege and, therefore, the court determined that the trial court had not abused its discretion in ordering City View to produce the documents to Rinaldi.

Employment Discrimination - Sexual Harrassment – Hostile Work Environment – Conduct Sanctioned by Employer Results in Reversal of Summary Judgment

***Emmilie K. Radcliff v. Steen Electric, Inc., et al.*, 9th Dist. No. 22407, 2005 Ohio 5503, 2005 Ohio App. LEXIS 4982.**

Appellant had worked for Steen Electric as a bookkeeper for 27 years prior to ending her employment with the company on August 23, 2002. On that date, appellant's adult son, Kenny Forrer, came to pick her up from work and drive her home, and waited in the parking lot for her. A personal friend and business associate of defendants Robert and William Steen, Theodore Goumas, was on the premises when Forrer came to pick up his mother. Appellant was planning a leave of absence due the recent death of her husband.

A series of events that occurred that day led to the complaint appellant later filed. The complaint contained claims for wrongful termination, constructive discharge premised on the maintenance of a hostile work environment due to sexual harassment, negligent/intentional infliction of emotional distress, age discrimination, negligent hiring, retention and supervision, and assault.

Apparently, appellant's son had previously made comments regarding Goumas' sexual orientation. In retaliation for these comments, Goumas planned a prank involving Forrer. When Forrer arrived on the afternoon of August 23, 2002, the Steen brothers went outside and told him that appellant had requested that he come into the building, knowing full well of Goumas' intention to execute the prank upon his arrival. Once he entered the premises, appellant alleged that Goumas exposed his genitalia in front of appellant and her son, performed simulated acts with a banana, and offered the banana to Forrer as a snack. Appellant also alleged in deposition that Robert Steen had grabbed her and threatened her to prevent her from leaving the premises, stating that "nasty things could happen to little old widow women like [appellant]."

In deposition, the Steen brothers acknowledged that they knew Goumas was planning a prank, but denied specific knowledge of the nature of the prank. Appellant presented evidence of a collaborative effort between Goumas and the Steen brothers to subject her to a series of sexually explicit conduct and conversations prior to her taking a leave of absence.

The trial court granted summary judgment to appellees (and Goumas) as to appellant's claims of constructive discharge, wrongful termination, negligent infliction of emotional distress, intentional infliction of emotional distress, age discrimination, negligent hiring, retention and supervision and assault. The trial court denied summary judgment on the claim of intentional infliction of emotional distress as to Goumas and assault as to Robert Steen.

On appeal, appellant first argued that the trial court erred in granting summary judgment to appellees on her constructive discharge premised on the maintenance of a hostile work environment due to sexual harassment claim. The appellate court segregated its analysis into two parts, first determining whether an issue of material fact existed as to whether appellant was constructively discharged. In order to prove constructive discharge, there must be an inquiry into both the objective feelings of the employee and the intent of the employer. Proof of discrimination is not enough, as there must also be some inquiry into the employer's intent and the reasonably foreseeable impact that the conduct will have on the employee. When the claim of constructive discharge is based upon a hostile work environment, the claimant must prove that a reasonable employer would have foreseen that she would resign given the sexual harassment she faced, after she has made the threshold showing that the employer engaged in intentional discriminatory practices.

The appellate court, after reviewing in detail the facts and allegations and the testimony elicited in the action, found that there were genuine issues of material fact as to the allegations of constructive discharge arising out of a hostile work environment premised on sexual harassment. Though appellees argued in their motion for summary judgment that constructive discharge in the harassment context will not lie where the employee refuses to allow the employer to remedy the alleged harassment which gave rise to the employee's quitting, the appellate court held that the chance to remedy the conduct need not be offered where the employer/owner actively participated in and/or facilitated the activity giving rise to the claim. Further, where genitalia are exposed and sex acts simulated in the workplace, that type of harassment would make an employee's resignation reasonably foreseeable. The court found this to be particularly true where the conduct was performed by a non-employee with the tacit consent of the employer.

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The appellate court next inquired as to whether a genuine issue of material fact existed as to whether appellant was subjected to a hostile work environment. In order to prove this claim, an employee must show:1) the harassment was unwelcome, 2) the harassment was based upon sex, 3) the harassing conduct was severe or pervasive and 4) that the harassment was committed by a supervisor or that employer knew or should have known and failed to take action.

Appellees alleged that the conduct was not unwelcome by appellant based upon allegations that appellant herself had made sexually based comments regarding others while working there. However, the court observed that, because Forrer's affidavit indicated that appellant was crying and shaking as they left Steen Electric on the day in question, genuine issues of fact existed as to the unwelcome nature of the conduct.

Appellant claimed that the Steen brothers knew that Forrer was a homosexual, something the Steen brothers denied. The court held that because of the type and nature of the acts that were performed and because Goumas knew that appellant would be a witness to those acts, genuine issues of material fact existed regarding whether the harassment was based on sex.

The court also found that the participation of the Steen brothers in the prank, including some alleged comments regarding bestiality made by them at the time of the incident, presented a question of fact as to whether the harassment was committed by supervisors of Steen Electric. As the court found issues of fact remained with regard to whether appellant was constructively discharged based on a hostile work environment created by sexual harassment, the court reversed the trial court's grant of summary judgment on this claim.

Appellant also asserted as error on appeal the trial court's grant of summary judgment to appellees on her claim for intentional infliction of emotional distress. On such a claim, the employee must show that: (1) the actor intended to cause the emotional distress or knew or should have known that the actions would result in same; (2) that the actor's conduct was so extreme and outrageous as to go "beyond all possible bounds of decency" and was such that it can be considered as "utterly intolerable in a civilized community"; (3) that the actor's actions were the proximate cause of the employee's psychic injury; and (4) that the mental anguish suffered by the employee is serious and of a nature that "no reasonable man could be expected to endure."

In this case, the court held there was evidence that the Steens knew of the subject matter of the prank prior to its occurrence and that Forrer was the intended subject of the prank. Therefore, the Steens knew that the conduct had sexual overtones. Because Forrer was brought into the building on purpose and appellant had been restrained in the building, it was reasonable to believe that she would witness the events that ensued. The court held that the actual exposure of one's genitals or the simulation of same in the workplace for the purpose of retaliation rises to the level of extreme and outrageous conduct. That the employer would sanction this conduct in the workplace was held to be intolerable conduct in a civilized society. Finally, appellant submitted sufficient evidence to create a genuine issue of material fact surrounding the severity of her emotional distress, including the fact that she saw a physician and was prescribed a sedative to calm her nerves. Forrer also testified by affidavit that appellant was tearful and very upset the day after the incident.

The appellate court ultimately sustained appellant's first two assignments of error and remanded the matter to the trial court for further proceedings.

Employment - Intentional Tort – Substantial Certainty Test – Summary Judgment Inappropriate

***Howard v. Jet Corr Classic, Inc.*, 2nd Dist. App. No. 05CA0068, 2006-Ohio-415, 2006 Ohio App. LEXIS 347.**

Howard was injured on her first day working as a "catcher" of materials being cut by a band saw. She brought an intentional tort action against her employer. The trial court granted summary judgment for the employer, holding that under the second prong of the test set forth in *Fyffe v. Jeno's Inc. (1991), 59 Ohio St32d 115*, Howard could not show that that the injury was substantially certain to occur.

The appellate court reversed, reasoning that the trial court improperly used the "totality of the circumstances" test in determining that the injury was not substantially certain to occur. That test, the court reasoned, requires the trier of fact to weigh one or more circumstances against others, which is not permitted on summary judgment.

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In addition, the appellate court accepted the argument that requiring Howard to stand closer to the band saw than a "catcher" should was the equivalent of removing a safety guard for the purpose of the *Fyffe* analysis. Finally, the court noted that the trial court had essentially ignored the testimony of Howard's expert witness, and that failure to "thoroughly examine all appropriate materials filed by the parties before ruling on a motion for summary judgment constitutes reversible error." *Howard* at ¶40.

Employment - Wrongful Termination – Summary Judgment Appropriate When Plaintiff Fails to Identify Source of Public Policy Apart from Whistleblower Statute

Celeste v. Wiseco Piston **(Dec. 23, 2005), 11th Dist. No. 2004-L-073, 2005-Ohio-6893, 2005 Ohio App. LEXIS 6169.**

James A. Celeste worked at Wiseco Piston. Celeste claimed that during the course of his employment with Wiseco, he had expressed concerns to various individuals and management about the safety of its motorcycles. Specifically, Celeste claimed that he voiced safety concerns concerning Wiseco's proposed modifications to the motorcycle engines. Celeste alleged that he expressed his concerns that selling the motorcycles, as modified, without prior adequate safety testing could result in the purchaser being injured or killed. Celeste claimed that, as a result of his actions in expressing these concerns, Wiseco terminated his employment in February 2001. In his Complaint, Celeste alleged that his termination violated Ohio statute and public policy, including Ohio's tort laws and breached Celeste's rights in violation of *Greeley v. Miami Valley Maint. Contractors* (1990), 49 Ohio St.3d 228, 551 N.E.2d 981.

Wiseco filed a motion to dismiss for failure to state a claim upon which relief could be granted. Wiseco argued that Celeste's complaint was based on the public policy embodied in Ohio's whistleblower statute, R.C. 4113.52. As such, Wiseco argued that Celeste's complaint was governed by the 180-day limitations period in the statute and that Celeste's failure to comply with that period, as well as the written notice requirements of R.C. 4113.52, barred his Complaint.

Celeste countered the motion to dismiss by arguing that he was not bringing a wrongful termination claim pursuant to the whistleblower statute. Instead, he was attempting to establish a separate common law tort claim for wrongful discharge in violation of public policy, which was governed by a four-year statute of limitations period.

The trial court granted Wiseco's motion to dismiss on March 20, 2002. The trial court noted that Celeste had admitted in his memorandum in opposition to Wiseco's motion that his "common law" claim was premised on the public policy embodied in the whistleblower statute, R.C. 4113.52.

The appellate court reversed the trial court's decision, finding that Celeste's Complaint stated a claim for common law wrongful termination, not a violation of the Ohio whistleblower statute. On remand, the parties commenced discovery. Following completion of discovery, Wiseco filed a motion for summary judgment, which the trial court granted. Celeste appealed the trial court's decision, granting summary judgment in favor of Wiseco.

On appeal, Celeste argued that his wrongful discharge claim should have survived summary judgment based on the public policy of protecting consumers from defective products, as embodied in Ohio's Product Liability Act, R.C. 2307.71, et seq. The trial court had treated Celeste's claim as one arising out of the policy embodied in the whistleblower statute. As such, the trial court reasoned that Celeste was bound to comply with the statutory mandates thereunder. The trial court specifically rejected Celeste's argument that R.C. 2307.71 embodied a policy prohibiting employers from terminating employees who complain that the employer's products are defective, as argued by Celeste.

The appellate court referred to its prior ruling, reversing the trial court's order granting Wiseco's motion to dismiss. The appellate court reiterated that if Celeste could identify a source of public policy apart from the one in contained in the whistleblower statute, he might have an arguable theory of recovery. Thus, Celeste's Complaint was sufficient to withstand dismissal.

In this second appeal, however, which considered whether the trial court properly granted summary judgment in favor of Wiseco, the court upheld the trial court's ruling. Specifically, the appellate court concluded that Celeste (while he might have been able to establish one) failed to establish a public policy independent of the one embodied in the Ohio whistleblower statute. The court examined the four-part test established for determining whether Celeste stated a wrongful termination in violation of public policy claim: (1) clear public policy manifested in state or federal constitution, statute, administrative regulation or common law, (2) discharge under such circumstances would jeopardize the public policy, (3) discharge was motivated by conduct related to the public policy, and (4) employer lacked an overriding legitimate business justification for dismissal. *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134, 1997-Ohio-219, 677 N.E.2d 308.

While the appellate court agreed that R.C. 2307.71 embodies a policy favoring protection of consumers, the court noted that the Product Liability Act did not, unlike the whistleblower statute, prohibit an employer from terminating an employee who complains about a potentially unsafe product. Thus, the court concluded that Celeste failed to identify a public policy independent of the one embodied in the whistleblower statute, which specifically prohibits employers from terminating employees for reporting criminal offenses or safety hazards in the workplace.

Evidence - Collateral Source Rule – Jury Award Cannot be Reduced by Amounts of Medical Bills Paid or Written Off by Insurer

***Mattie Ferrell v. Summa Health System, et al.*, 9th Dist. No. 22527, 2005 Ohio 5944, 2005 Ohio App. LEXIS 5356.**

Appellant brought a professional negligence claim against a doctor and Summa Health System. Prior to trial, the doctor filed a motion *in limine* to exclude from evidence bill amounts that had been written off by her medical providers (in this case Medicare). Summa Health System joined in the motion. The trial court did not rule upon the motion immediately, but rather took the motion under advisement and stayed a ruling until such time as a verdict was awarded to appellant.

The jury awarded appellant $267,779.28, of which $117,779.28 was awarded to compensate for medical expenses. After the verdict, the appellee renewed its motion and the trial court granted it, reducing the medical bill portion of the jury's award by $74,058.59. Appellant appealed the trial's court's order granting the motion to reduce the jury's verdict.

Appellant argued that the written-off portion of the medical bills was a collateral benefit and as such, the admission of the evidence of said benefit violates established Ohio law. The court held that the collateral source rule, long standing in Ohio, was enacted to prevent the wrongdoer from obtaining the benefit of payments that come to the plaintiff from a 'collateral source.' A collateral benefit is a benefit received outside the scope of the litigation. Because Medicare writeoffs are collateral benefits and outside the scope of the litigation, the trial court erred in granting the tortfeasor the benefit that appellant received from a collateral

source. The appellate court held that the trial court improperly admitted and considered the evidence that it used to setoff the jury verdict. The judgment of the trial court was reversed and the matter remanded.

Insurance - Statute of Limitations - Two Year Contractual Limitation for Filing UM/UIM Claims is Reasonable, Even if Injured Party is a Minor

***Sarmiento, et al., v. Grange Mutual Casualty Co.,* (2005) 106 Ohio St. 3d 403, 2005-Ohio-5410, 2005 LEXIS 2384.**

Appellant/Cross-appellee David Camacho was driving a pickup truck owned by Maria Sarmiento when it was struck by a motor vehicle driven by an allegedly uninsured motorist in New Mexico on November 5, 1998. The action also involved six other appellants and cross-appellees, two of whom were passengers in the truck and minors at the time of the accident. Grange had issued a policy of insurance on the truck to Maria Sarmiento that included UM/UIM coverage in effect on the date of the accident.

On November 5, 2001, the Sarmientos filed a complaint in Cuyahoga Common Pleas Court seeking UM coverage under their Grange policy. The trial court granted summary judgment in favor of Grange based on the Sarmientos failure to bring suit within two years of the accident.

On appeal, the Sarmientos argued that Grange's two-year limitation period was unreasonable and unenforceable as it was shorter than New Mexico's three-year statute of limitations for the underlying personal injury claim. They also argued that, even if the two-year limit was enforceable, it was tolled as the two minor's claims.

The appellate court held that Ohio law governed Grange's obligations under the policy, and affirmed the trial court's finding that the two-year limitation was reasonable and enforceable. The appellate court determined, however, that R.C. 2305.16 did toll the UM claims of the two minors, reversing the trial court and remanding for further proceedings.

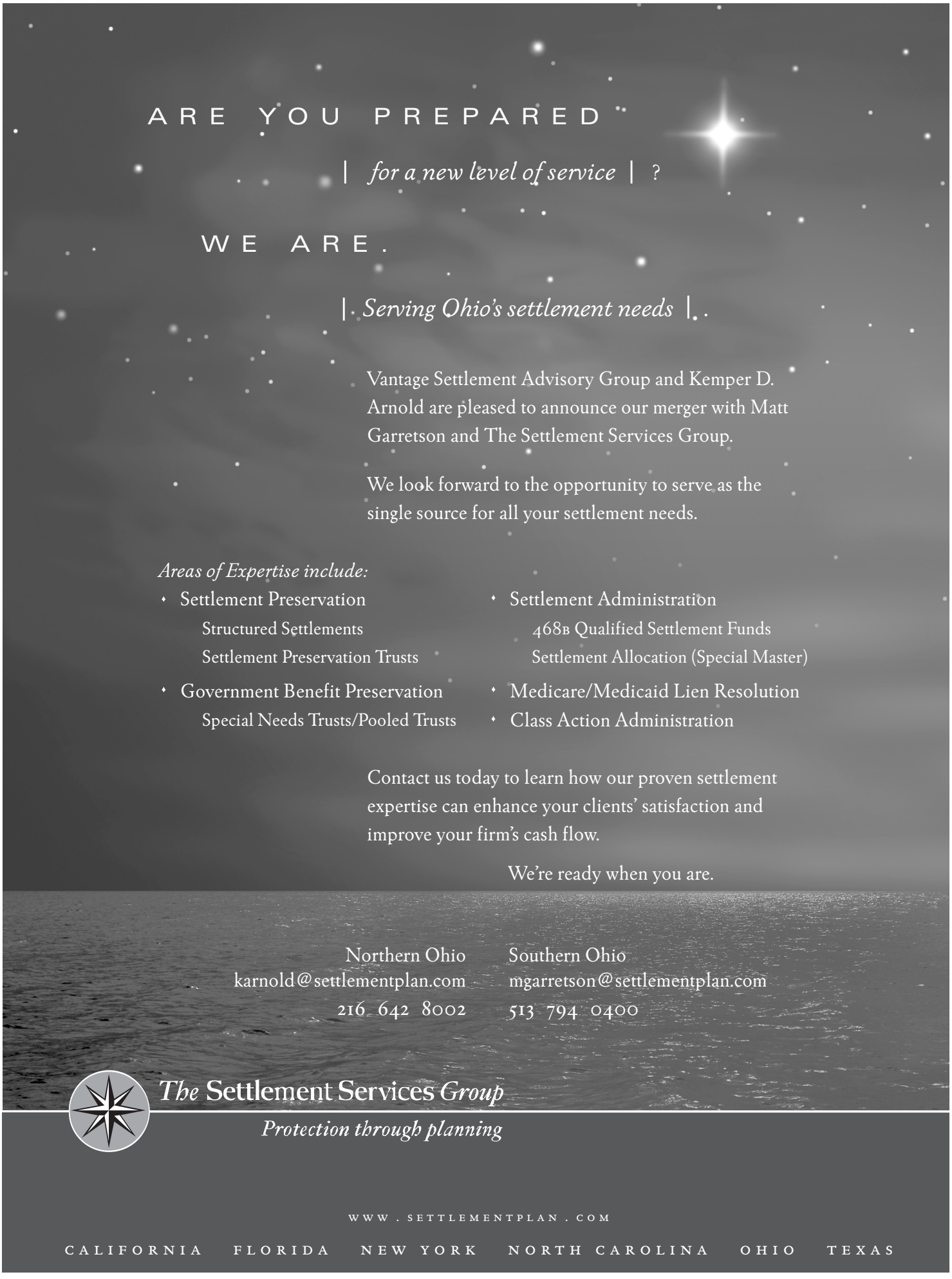
The Supreme Court of Ohio reviewed both decisions and affirmed the contractual limitation while reversing the appellate court's findings that the minors' claims were tolled under R.C. 2305.

Though the underlying tort claim was subject to New Mexico's laws, the court affirmed its prior decision as set forth in *Ohayon v. Safeco Ins. Co. of Illinois* (2001), 91 Ohio St.3d 474, 480, 2001-Ohio-100. In *Ohayon*, the Court held that an insurance policy, a contract between insurer and insured, establishes the rights and relationships between the parties. Therefore, a claim for UM/UIM coverage sounds in contract, not in tort. As the contract at issue was entered into in Ohio, to an Ohio resident, and covering a vehicle principally garaged in Ohio, application of Ohio law to the UM claims was appropriate.

The Sarmientos, citing *Miller v. Progressive* (1994), 69 Ohio St.3d 619, 1994-Ohio-160, argued that that to enforce a two-year limit in the face of the three-year statute of limitations for the underlying tort claim would be a violation of the public policy as set forth in R.C. 3937.18. In *Miller*, the Court decided that a contractual one-year limitation period for filing UM/UIM claims, when Ohio's statute of limitations for bodily injury in *R.C. 2305.10* was two years, was unreasonable and void as against the public policy behind former *R.C. 3937.18*. However, in *Miller*, the Court stated that a two year contractual limitation would be reasonable. Therefore, the court concluded that a two-year contractual limitation period for filing UM/UIM claims is reasonable and enforceable, regardless of whether the foreign state in which the accident occurred provides a longer statute of limitations for the underlying tort claim.

In analyzing the tolling statute, the court concluded that the plain language of R.C. 2305.16 applies to toll only certain statutes of limitation, and not all written contracts as was argued by the Sarmientos. For example, the statutes of limitations for wrongful death or workers' compensation claims of minors were not tolled by R.C. 2305.16. Accordingly, the court opined that if a minor seeks coverage as a third-party beneficiary of an insurance policy, the minor must comply with the policy's limitation period in which to commence an action. Consequently, the court reversed the appellate court's ruling.

In his dissent, Justice Lanzinger reasoned that, because the legislature included the limitation period for contract actions in the tolling statute by specifically enumerating the contract provision, *R.C. 2305.06*, the majority's holding that the limitation period for the claims of the minors in this case is not tolled is misplaced.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In a separate dissent, Justice Pfeiffer noted that in *Miller*, the Court only selected a two year limitation as a reasonable time period because it was the same as the statutory period within which an insured could bring a claim. In short, Justice Pfeiffer believed that *Miller* stood for the proposition that a UM policy should provide the same level of protection for an insured as if the tortfeasor had been insured.

Insurance - Underinsured Motorists Coverage – Commuting to Job Site is not Within Course and Scope of Employment

***Cincinnati Ins. Co. v. Lohri*, 10th Dist. No. 05AP-94, 2005-Ohio-5167, 2005 Ohio App. LEXIS 4633.**

Trick was an employee of a skilled nursing company. She was assigned to work as a nurse in the home of Shaeffer. Trick was injured severely by a negligent driver while in her personal automobile en route to Shaeffer's house. The negligent driver was underinsured. A declaratory judgment proceeding was initiated by the insurance company that insured Trick's employer.

The trial court granted summary judgment in favor of the insurance company (Cincinnati Ins. Co.), finding that Trick was not within the course and scope of her employment at the time of the accident and thus was not entitled to coverage under her employer's policies.

The appellate court affirmed, stating that "to obtain uninsured motorist coverage under an employer's policy like that at issue here, unless stated otherwise, the employee must be in the course and scope of employment." *Lohri* at ¶16. The court noted that while not specifically using the designation of the "going and coming" rule, several Ohio appellate courts had previously determined that one who is commuting to work is not within the course and scope of employment for purposes of uninsured motorist coverage under his or her employer's insurance policy.

In this case, Trick was hired to provide in-home care for Schaeffer; her duties and wages commenced only upon her arrival; and she was not paid for her travel. Accordingly, Trick was driving to work at a fixed place of employment (even though not at the physical location of her employer, the nursing company) and was outside the course and scope while commuting.

The appellate court also refused to find coverage under an endorsement to the employer's insurance policy for "the use of any non-owned automobile in the business" of the employer, finding that the language at issue was not applicable, as it was found in the liability section of the policy and not in the uninsured motorists endorsement. Moreover, the court held that commuting to and from one's place of employment is not acting "in the business" of the employer.

Lemon Law – Manufacturer Liable for Breach of Implied Warranty for Defects in Vehicle Sold After Dealer Used as Rental

***Curl v. Volkswagen of America, Inc.*, 11th Dist. App. No. 2004-T-0112, 2005-Ohio-6420; 2005 Ohio App. LEXIS 5770.**

On July 31, 2001, Stadium Lincoln-Mercury, a Volkswagen dealership, purchased and took title to a 2002 Volkswagen Beetle from the manufacturer. The car was covered by a two year, 24,000 mile limited warranty. Stadium utilized the vehicle as a rental car. On March 12, 2002, there was a recall on the subject vehicle due to a potential fire hazard. The dealership did not perform the recall.

On June 24, 2002, Stadium sold the car to Appellee, David Curl, as a "rental vehicle" with 10,435 miles on the odometer. Shortly after purchase, in about August 2002, the car would not stay running and was smoking from the left side. Appellee had the car towed to Stadium for service. Attempts to repair the vehicle took 84 days, until November 12, 2002. The car had 14,584 miles on the odometer at the time of repair.

Appellee filed suit against Volkswagen for breach of implied warranty pursuant to the Magnuson-Moss Warranty Act ("MMWA") and violation of Ohio's Lemon Law. The parties filed cross motions for summary judgment. The trial court granted Appellee's motion and ordered Volkswagen to take back the subject vehicle, refund all money paid towards the vehicle's purchase, and pay off any outstanding loan incurred for the vehicle's purchase. A subsequent hearing was to be scheduled to determine Appellee's attorneys' fees and costs.

Volkswagen appealed the decision, arguing first that the claim for breach of implied warranty under the MMWA should fail because there is no privity between

the parties. Appellee's claim for breach of the implied warranty is based on R. C. 1302.27(A), which provides that "a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." The court found that Volkswagen is a merchant under the statute's definition.

In resolving the issue, the court of appeals examined the evolution of the privity requirement in cases involving defective products. The Ohio Supreme Court, in *Wood v. General Electric Co.* (1953), 159 Ohio St. 273, initially found that there must be contractual privity between a seller and buyer for a breach of implied warranty claim to be maintained. Subsequent cases, however, relaxed this rule and carved out certain exceptions. The court of appeals noted that currently there is no requirement of privity where a defective product causes injury to person or property. Courts have been inconsistent, however, in determining whether privity is necessary in contract-based actions for economic damage. In the instant matter, the court held that lack of privity between the parties does not preclude a claim under the MMWA for breach of implied warranty. The court's decision was based on *Reichhold Chem. Inc. v. Haas* (11th Dist.), 1989 LEXIS 4129, which also held that "the buyer need not establish privity with the remote supplier to maintain an action for breach of express or implied warranties (under the U.C.C.)."

The court also rejected Appellant's second assignment of error challenging the application of Ohio's Lemon Law to this case. Appellant argued that the subject vehicle was not a "new motor vehicle" under the act because it was previously used as a rental car by the dealership. R.C. 1345.72(A) provides that "[i]f a new motor vehicle does not conform to any applicable express warranty and the consumer reports the nonconformity to the manufacturer, its agent, or its authorized dealer during the period of one year following the date of original delivery or during the first eighteen thousand miles of operation, whichever is earlier, the manufacturer, its agent, or its authorized dealer shall make any repairs as are necessary to conform the vehicle to such express warranty..." The Lemon Law does not contain a specific definition of "new" motor vehicle. However, in *Browning v. Am. Isuzu Motors, Inc.*, 2002 WL 32063978, the court of common pleas held that "a motor vehicle is 'new' as long as it has a valid

warranty, is within the first eighteen thousand miles of operation, and is within one year of the original delivery date." The court of appeals agreed with the reasoning of *Browning*, but held that the definition should be slightly modified. A motor vehicle is found to be "new" if it is within eighteen thousand miles of operation, *or* is within one year of the original delivery date to the consumer, whichever is earlier. Based on this definition, Appellee's cause of action is proper under Ohio's Lemon Law because the vehicle is "new."

Finally, the court rejected Volkswagen's claim that the original delivery date should be calculated from the time Stadium purchased the vehicle, not when Mr. Curl bought the car from Stadium. The court held that the delivery date refers to the time when the vehicle is first delivered to the consumer, because the protections of the Lemon Law are clearly aimed at the consumer, not a dealership.

Medical Malpractice – No Expert Testimony Required When Matter Within Knowledge of Lay Persons

***Ada R. Taliaferro v. South Pointe Hospital*, 8th Dist. No. 86999, 2006 Ohio 1611, 2006 Ohio App. LEXIS 1497.**

As guardian of the person and estate of her daughter, Heidi Joiner, an incompetent, Ada Taliaferro filed a medical malpractice claim against South Pointe Hospital. Joiner was admitted to South Pointe for rehabilitation after an exacerbation of multiple sclerosis, and the hospital was advised upon her admission and/or made notes during her rehabilitation as to her medical history, including multiple sclerosis, seizure disorders, increased falls, impaired balance, left lower limb weakness, progressive decline in function, and increased spasticity. Taliaferro alleged that, despite South Pointe's knowledge of Joiner's weaknesses and her disabled condition, it negligently allowed her to fall to the floor on three separate occasions between July 24 and July 28, 2002, resulting in personal injuries, including a fractured ankle, and other losses.

South Pointe moved for summary judgment on the grounds that Taliaferro had failed to produce expert testimony in support of her claims. The trial court granted the motion. On appeal, Taliaferro argued that no expert testimony was required to establish the duty of care in this case, for whether South Pointe was negligent in its care and supervision of Joiner and proximately caused her injuries was a matter within the common knowledge of lay persons. The appellate court cited a string of cases, including *Cunningham v. Children's Hosp.*, Franklin App. No. 05AP-69, 2005 Ohio 4294 and *Burks v. Christ Hosp.* (1969), 19 Ohio St.2d 128, 131, 249 N.E.2d 829, for the proposition that the common knowledge exception to the requirement that the standard of care be established by expert testimony has been applied to cases involving instances of gross inattention to a patient. Concluding that the facts of this case approximate those in which the exception has been applied, the appellate court reversed the trial court and remanded for further proceedings.

Medical Malpractice – Motion to Exclude Expert Witness May Be Made At Trial – Specialist May Testify Concerning the Standard of Care for an Emergency Room Physician

***George Schutte, Administrator v. Joseph Mooney, M.D., et al.*, 2nd Dist. No. 20888, 2006 Ohio 44, 2006 Ohio App. LEXIS 25.**

George Schutte brought a professional negligence claim against Joseph Mooney and his corporate employer as a result of the death of his wife, Cheryl Schutte, from a pulmonary thromboembolism. Mrs. Schutte had been on birth control pills on the advice of her OBGYN to address uncontrolled bleeding. Birth control pills increase the risk of blood clots. At one point, she presented to the emergency room complaining of leg pain, and was seen by Dr. Mooney and a history was taken. Dr. Mooney ordered a venous Doppler ultrasound study of her left leg to check for deep vein thrombosis (DVT). The ultrasound showed no blood clots but failed to adequately show the middle third of the thigh. Dr. Mooney informed Mrs. Schutte that the ultrasound was negative and discharged her with a diagnosis of "left calf strain/contusion." Mrs. Schutte died a week or so later from a blood clot that had traveled to her lung.

The appeal focused on the trial court's order excluding Schutte's expert witness, Dr. Blair D. Vermilion, a vascular surgeon. Dr. Mooney had objected to Dr. Vermilion's qualifications to testify as to the standard of care to be applied to an emergency room physician. The trial court, in a hearing held outside the presence of the jury, found that Dr. Vermilion had not "kept up on the

skills in regard to emergency room physicians and different matters involving emergency room training," finding that Dr. Vermilion did not have "sufficient knowledge, skill, experience, training and education in the field of emergency medicine to testify regarding the standard of care in diagnosing the treatment of the disease in this case in an emergency room setting." Because the plaintiff's other expert was not qualified to testify in emergency room medicine, the trial court sustained Dr. Mooney's motion for a directed verdict.

In his second assignment of error (addressed first by the appellate court), Schutte argued that the trial court erred in granting the motion to exclude Dr. Vermilion because the motion was made during trial, nine months after taking the deposition of Dr. Vermilion and at a time when plaintiff/appellate could neither voluntarily dismiss the case or obtain the testimony of another expert witness. The appellate court, while clearly stating that it did not applaud the tactics of Dr. Mooney, could not find any rule or decision which prohibited the appellee from making the motion when he did. While such a motion may be more suitably filed pre-trial, the court reasoned that Dr. Mooney was within his rights to challenge Dr. Vermilion's expert testimony.

However, in the first assignment of error, appellant argued that the trial court abused its discretion in excluding Dr. Vermilion when the witness had "testified to his knowledge and familiarity with such standard of care which is common to, known and required of any physician of any specialty, including emergency medicine." The appellate court held that the trial court had abused its discretion in excluding the witness, as there is no requirement that the expert witness practice in the same specialty as the defendant where the fields of medicine overlap and more than one type of specialist may perform the treatment. The expert witness need not be the best witness on the subject. Distinguishing the facts in the instant case from those in *Taulbee v. Dunsky*, Butler App. No. CA2003-03-059, 2003 Ohio 5988, the court held that Dr. Vermilion's testimony indicated that he was qualified to testify to the standard of care required of emergency room physicians. His testimony indicated that the diagnosis of DVT transcends specialties and that primary care and emergency room physicians, as well as vascular physicians, would routinely be required to diagnose DVT. In sum, Dr. Vermilion testified that there would be no difference in how the problem would be approached among specialties. The court concluded that "Dr. Vermilion presented significant evidence that the standard of care for the diagnosis of DVT does not vary based on whether the patient presents herself to a family practitioner, an emergency room physician, or a specialist in vascular disease."

The court reversed on this assignment of error and remanded the case to the trial court for further proceedings.

Medical Malpractice – Negligent Genetic Counseling – Measure of Recoverable Damages

***Schirmer, et al. v. Mt. Auburn Obstetrics & Gynecologic Assoc., Inc.*, Supreme Court of Ohio No. 2004-0296, 2006 Ohio 942, 2006 Ohio LEXIS 530**

Helen Schirmer has a chromosomal condition which puts her at risk of bearing children with serious birth defects. When she and her husband became pregnant, they underwent genetic testing and counseling in an effort to monitor the health of the fetus throughout the pregnancy. Mrs. Shirmer underwent several tests, all of which showed that the fetus was developing normally. However, when her son Matthew was born on September 9, 1997, subsequent genetic testing revealed that he had

inherited a structurally abnormal chromosome which caused him to have severe and permanent disabilities. The Schirmers sued the doctors and medical centers involved in her prenatal care alleging that they negligently performed and interpreted the diagnostic tests and negligently failed to recommend further tests that would have revealed Matthew's abnormality. The Schirmers alleged that, had they obtained such information, they would have terminated the pregnancy. They sought damages relating to Mrs. Schirmer's pregnancy and delivery of Matthew (obstetrical costs and pain and suffering of pregnancy and delivery), the costs associated with raising and supporting a disabled child (consequential economic damages), and emotional and physical injuries resulting from added burdens of raising and supporting a disabled child (consequential noneconomic damages).

During trial, the Schirmers dismissed their claim for damages relating to the pregnancy and pain and suffering of delivering Matthew. As to the other damages sought, the trial court held that Ohio law allows only the recovery of damages relating to the pregnancy and pain and suffering of delivery in a wrongful birth action, and not consequential economic and noneconomic damages. Since the Schirmers had dismissed their claim for the damages associated with pregnancy and delivery, the remainder of the complaint was dismissed due to the legal inability to recover the other damages sought.

On appeal, the court affirmed the trial court's finding that noneconomic damages were not recoverable, as they would require a court to impermissibly weigh the value of being versus nonbeing. However, the appellate court reversed the trial court to the extent that it would allow the Schirmers to recover as consequential economic damages those costs associated with raising a disabled child over and above the ordinary child-rearing expenses.

The case came before the Supreme Court of Ohio on the Schirmers' discretionary appeal and the defendants' cross appeal. The Schirmers argue that their claim is one for wrongful birth, a cause of action recognized by Ohio wherein the parents of an unhealthy child born following negligent genetic counseling or negligent failure to diagnose a fetal defect or disease bring suit for the costs of having to raise and care for an impaired child, arguing that they were wrongfully deprived of the ability to avoid or terminate a pregnancy to prevent the birth of a child with the defect or disease. *Simmerer v. Dabbas* (2000), 89 Ohio St.3d 586, 587, 733 N.E.2d 1169. In contrast, the defendants argued that the claim was actually just derivative of a claim for wrongful life, a cause of action rejected in Ohio wherein an unhealthy child born following either a negligently performed sterilization of one of his or her parents or negligent genetic counseling or testing argues that he or she has been damaged by being born at all. *Id.* The Court, however, found the defendants' claim unpersuasive.

The Court characterized the Schirmers' claim as a cause of action for wrongful birth, since they were not claiming that Matthew suffered damages as a result of his being born, but rather were claiming that they suffered injury in the form of the lost opportunity to terminate the pregnancy. After a discussion of the evolution of prenatal torts and the application of the 'limited damages' rule in wrongful pregnancy actions, the Court extended the applicability of this measure of damages to wrongful birth cases. Under this rule, recoverable damages in a wrongful birth action are limited to costs arising from the continuation of the pregnancy after the negligent act and for the birth of the child. The Court further justified this limited measure of damages in this case with the lack of a causal nexus between the defendants' conduct and Matthew's condition. Reasoned the majority, nothing defendants did caused Matthew's condition and no additional treatment of Matthew of his mother could have prevented it.

The only causal connection which can be proven is that between defendants' conduct and Mrs. Schirmer's loss of the opportunity to terminate the pregnancy.
While recognizing a cause of action for parents of an unhealthy child born following negligent genetic counseling or negligent failure to diagnose a fetal defect or disease, the Court found that, because the Schirmers had dismissed their only viable damages claim for costs arising from the pregnancy and birth of the child, they were barred from recovery.

In his dissenting opinion, Justice Moyer explained that, while he ultimately agreed with the majority's adherence to precedence in applying the 'limited damages' rule, in this case, he found there to be a causal link between the defendants' conduct and such costs as the medical expenses and loss of consortium during pregnancy and birth, emotional distress during that time, Helen Schirmer's lost wages, if any, during a reasonable length of time, her pain and suffering during the pregnancy and childbirth, and the ordinary and extraordinary costs of raising Matthew. He further stressed the impropriety of postbirth damages on the grounds that courts should not be placed in a position to have to value a genetically unhealthy less than a healthy child, and that such a valuation, if it should take place at all, should be performed by the General Assembly.

In a separate dissent, Justice Pfeifer departed from the majority in his opinion that consequential economic and noneconomic damages should be recoverable in this case. Justice Pfeifer cited *Johnson v. Univ. Hosps. of Cleveland* (1989(, 44 Ohio St.3d 49, 540 N.E.2d 1370 as the leading case regarding damages in birth-based malpractice actions in Ohio and noted its rationale in support of the 'limited damages' rule that "the birth of a normal, healthy child cannot be an injury to her parents." *Id*. at paragraph two of the syllabus. He believed the use of the words "normal" and "healthy" in the holding to be significant, for they implied that the birth of an unhealthy child might warrant extension of the damages recoverable. He further distinguished *Simmerer v. Dabbas*, infra, wherein the Court based its decision not to award consequential damages on its finding that no causal nexus existed between the defendant's negligent sterilization procedure and the child's birth defect. In this case, he believed such a causal link was present, for the conditions from which Matthew suffers were an entirely foreseeable result of the defendants' negligent prenatal testing. If a child's condition is a foreseeable result of negligent prenatal care, Justice Pfeifer believes the aforementioned cases easily lend themselves to the allowance of recovery of the extraordinary costs associated with raising a disabled child. He further criticized the limited measure of damages in this case in noting the consensus among treatises that Ohio will be the only state that recognizes a cause of action in negligent prenatal counseling while limiting recoverable damages to only the costs arising from the pregnancy and birth of the child.

In a separate dissent, Justice O'Donnell lamented the majority's recognition of negligent prenatal testing within wrongful birth causes of action, reasoning that such a claim requires legislative authorization.

In the final dissent, Justice Lanzinger decried the majority's unwarranted judicial creation of a new cause of action for lost opportunity to terminate a pregnancy, explaining that the General Assembly is better equipped to allocate foreseeable risks and potential liability stemming from such a cause of action.

Medical Malpractice – Statute of Limitations – 180 Day Letters Must be Actually Received in Order for Statute to be Tolled

***Fulton v. Firelands Community Hospital*, 6th Dist. App. No. E-05-031, 2006 Ohio 1119, 2006 Ohio App. LEXIS 1011**

Diagnosed with probable squamous cell carcinoma of the nasopharynx nearly two years after he first presented to the emergency room with complaints, Samuel Fulton sent 180 day letters to the emergency room physicians who had failed to diagnose his condition during his five visits over the prior two years. Fulton sent the 180 day letters via certified mail to the emergency room physicians care of the medical center where the emergency treatment was rendered. Fulton filed a lawsuit within the 180 days wherein he named two emergency room physicians care of the medical center. He voluntarily dismissed the action and re-filed within the applicable statute of limitation, again naming the physicians care of the medical center. A woman signed the certified mail receipt with regard to service of the summons and complaint on one of the emergency room physicians named as a defendant.

The physicians filed a motion to dismiss the complaint on the grounds that it was time barred, arguing that,

because they had not received the 180 day letters, the statute of limitation had not been properly extended as to them. The trial court granted their motion (after considering same to be a motion for summary judgment) since the physicians proved that they had no memory of receiving the letters and had no regular contact with the administrative office at the medical center.

Fulton appealed, arguing that he complied with former R.C. 2305.11(B) because he sent the notice to appellees by certified mail within the prescribed time period, thereby effectively extending the statute of limitations. However, because the statute was silent as to how notice is to be effectuated, the court concluded that written notice will only be deemed to have been given when received by the recipient. Therefore, under R.C. 2305.11(B), the 180 day period commences from the date the notice is received and not the date on which it is mailed. *Edens v. Barberton Area Family Practice Ctr.* (1989), 43 Ohio St.3d 176, 539 N.E.2d 1124, syllabus. Further, where actual receipt of the notice is required, receipt by the intended recipient's agent will not suffice. *State v. Durbin* (1992), 83 Ohio App.3d 156, 614 N.E.2d 799. Because the physicians did not actually receive the 180 days letters before the expiration of the one-year statute of limitations, the trial court properly granted the motion to dismiss the complaint as time-barred.

Medical Malpractice – Statute of Limitations – Discovery Rule – Case is Time Barred When Suit Not Timely Filed After Notice of Claim Letters Sent

Hartman v. Schachner **(Dec. 30, 2005), 6th Dist. No. L-04-1335, 2005-Ohio-7000, 2005 Ohio App. LEXIS 6293.**

In 1996, Douglas Hartman sought treatment at Northwest Primary Care Physicians for hearing loss in his right ear. Dr. John L. Yuhas, Jr. treated Hartman and diagnosed him with Eustachian tube dysfunction. Dr. Yuhas prescribed an antihistamine and scheduled a follow-up visit in two weeks. While on the antihistamine, Hartman's condition did not improve, so he made an appointment to see an otolaryngologist or ENT specialist, Dr. Sheldon Schachner.

Hartman first saw Dr. Schachner on July 17, 1996. Dr. Schachner examined Hartman and concluded that he suffered notable hearing loss in his right ear. He diagnosed viral cochleitis and prescribed the vitamin niacin. Dr. Schachner advised a follow-up hearing test in six months and he communicated his findings to Dr. Yuhas. Hartman took the niacin for four months, but found no improvement. He did not return to Dr. Schachner.

On January 23, 1998, Hartman consulted audiologist Robert P. Gamble for a hearing aid. Gamble's tests revealed that Hartman suffered severe hearing loss in his right ear, which he found consistent with the diagnosis of viral infection. Gamble did not believe that a hearing aid would be a viable option for Hartman, as it would only amplify the garbled sounds he was already hearing in the right ear. Hartman elected not to get a hearing aid.

In 1999, Hartman began to experience dizziness, in addition to the hearing loss. He made an appointment with a different ENT, Dr. Benjamin W. Murcek. Dr. Murcek sent Hartman for an MRI, which revealed an acoustic neuroma or tumor in his right ear. The tumor was large and required invasive surgery, which resulted in the removal of part of Hartman's cerebellum and some permanent facial paralysis.

Hartman and his wife, Lisa, filed a medical malpractice action against Drs. Schachner and Yuhas, Northwest Primary Care, Inc., Robert P. Gamble and Professional Hearing Services, Inc. All filed motions for summary judgment. The trial court granted all motions on the basis of the statute of limitations, except Dr. Schachner's motion, which it denied on May 21, 2003.

Following a bench trial, the court ruled in favor of the Hartmans and against Schachner. The court held that Dr. Schachner breached the applicable standard of care by failing to advise Hartman to return for a follow-up visit in order to permit re-evaluation of his condition and to rule out a tumor if his condition had not improved. The court awarded the Hartmans $560,803.79.

On appeal, Dr. Schachner argued that the trial court committed reversible error when it failed to direct a verdict in his favor on the basis that the Hartmans' claim was time-barred. R.C. 2305.11(B)(1) sets forth the relevant statutory period of one year after the cause of action accrues, except that, if prior to the one-year period, the claimant notifies the person subject to the claim that it may bring an action (i.e., "notice of claim"). Then, the action may be commenced within one hundred and eighty (180) days after the notice is given.

The court then examined when a medical malpractice claim accrues under the three-part test, also known as the "discovery rule," set forth in *Hershberger v. Akron City Hosp.* (1987), 34 Ohio St.3d 1, 516 N.E.2d 204 and *Allenius v. Thomas* (1989), 42 Ohio St.3d 131, 538 N.E.2d 93. Thus, the issue for the appellate court's consideration was when the statute of limitations period began to run.

Hartman sent his notice of claim letter to Dr. Schachner pursuant to R.C. 2305.11(B)(1) on September 25, 2000. Hartman filed suit on February 12, 2001. Schachner contends that Hartman's cause of action for purposes of R.C. 2305.11(B)(1) accrued on September 21, 1999, the date of Hartman's first office visit to Dr. Murcek. Hartman counters that his cause of action accrued on October 6, 1999, when he received the results of the MRI that confirmed the suspected tumor.

Further evidence showed that during Hartman's initial visit with Dr. Murcek, his hearing was tested and he was seen by an audiologist, who conducted some balancing tests. Dr. Murcek reviewed the test results and Hartman's history and surmised that a tumor was causing the hearing loss. Dr. Murcek then ordered the MRI to rule out or confirm his suspicion. Thus, at the end of the initial visit, Hartman knew that he could have a tumor, but that the MRI would ensure the diagnosis. Hartman testified that he understood that Dr. Schachner missed an opportunity to diagnose the tumor in 1996.

At the second office visit to Dr. Murcek on October 6, 1999, Dr. Murcek confirmed that Hartman had a tumor. During this visit, Dr. Murcek referred Hartman to a neurosurgeon at the Cleveland Clinic.

Construing all of the evidence most strongly in favor of Hartman, the appellate court concluded that reasonable minds could disagree as to the date of the "cognizable event" triggering the running of the statute of limitations as against Dr. Schachner. Accordingly, the appellate court upheld the trial court's ruling denying Dr. Schachner's motion for directed verdict.

The Hartmans cross-appealed, claiming that the trial court incorrectly granted summary judgment in favor of the other defendants. The appellate court found that October 6, 1999, the date Hartman received his MRI results, was the "cognizable event" triggering the running of the statute of limitations period. Hartman thus had until October 6, 2000 to file a lawsuit or send a notice of claim letter to Dr. Yuhas and Northwest Primary Care pursuant to R.C. 2305.11(B)(1). Since Hartman failed to do either, his action against defendants Yuhas and Northwest Primary Care was time-barred.

Hartman also attempted to argue that the termination rule applied to his relationship with Dr. Yuhas. Under this rule, Hartman asserted that his claim against Yuhas

would not be time-barred because he did not terminate his relationship with Yuhas until February 2001, when he filed his lawsuit. The court rejected this proposed application of the termination rule. On October 6, 1999, Hartman's condition was diagnosed and he was referred to a neurosurgeon. On this date, the physician/patient relationship with Dr. Yuhas ended, according to the court.

Regarding defendants Gamble and Professional Hearing Services, the court applied the two-year statute of limitations period in R.C. 2305.10 for personal injury claims. That period runs from the date the injury arose. The trial court held that the date of injury was January 23, 1998, when Gamble saw Hartman for a hearing aid evaluation. Thus, Hartman had until January 23, 2000 to file a lawsuit against Gamble and Professional Hearing. On appeal, Hartman argued that the discovery rule should also apply to his claims against Gamble and Professional Hearing. Hartman failed to supply any support for this proposed application of the discovery rule in the context of personal injury claims that did not arise out of medical malpractice. The appellate court thus upheld the trial court's decision finding that the claims against Gamble and Professional Hearing were also time-barred.

Negligence – Recreational Activity Defense – Primary Assumption of the Risk Does Not Apply to Claims Brought by an Injured Bystander at Harness Race

***Konesky v. Wood Cty. Agricultural Soc.* (Dec. 30, 2005), 6th Dist. No. WD-05-032, 2005-Ohio-7009, 2005 Ohio App. LEXIS 6319.**

Eighty-two year old Plaintiff Rose Konesky attended a harness race on July 30, 2002 at the Wood County Fair. During the race, a horse threw its driver and ran through an opening in the fence around the track, trampling and injuring Plaintiff. The fence had several openings, at least one of which was gated and remained closed at all times. The opening where the runaway horse escaped had no gate.

At the time of the accident, Plaintiff was standing outside the track in a grassy area well away from the opening in the fence. She was in the process of loading horse grooming equipment into her truck and preparing to depart as her horse had completed an earlier race. Nearby were tents, parked cars, vendors and a food stand that served the public. The access to the area was not restricted to the horse racing participants, and families attending the fair could walk through the area. In fact, one tent was outfitted with tables and chairs where anyone could eat or sit and rest.

The runaway horse struck several other adults in addition to Ms. Konesky. Apparently, this was not the first time that a bystander sustained injuries while standing outside this particular opening in the fence. A similar incident occurred in 1974, after which fair officials instituted safety precautions to ensure future safety of patrons. Following that incident, all of the openings in the fence were gated and fair officials made sure that the gates were closed when a race was in progress. A sheriff's deputy was also posted at this particular gate to ensure its closure during each race.

Over time, these safety measures diminished. The practice of posting deputies ceased. The gates were left open during races. Eventually, the gates on the subject

opening were removed entirely. In fact, the opening was enlarged to allow semitrailers to access the track area to participate in tractor pulls.

The Ohio State Racing Commission has not promulgated formal rules requiring gates at fence openings. However, at the time of the accident, the absence of a barrier during the race was contrary to longstanding and strong recommendations of the Commission and was inconsistent with the practice employed at other fairs.

Rose Konesky and her husband filed their lawsuit to recover damages on July 29, 2003. The defendants moved for summary judgment on the basis of primary assumption of the risk. The trial court granted that motion and the Koneskies appealed.

On appeal, the Koneskies argued that the doctrine of primary assumption of the risk did not apply. The court noted that primary assumption of the risk has nothing to do with plaintiff's own conduct, but instead constitutes an alternate expression of the concept that a defendant did not owe a duty of care or did not breach a duty of care. *Gentry v. Craycraft,* 101 Ohio St.3d 141, 2004-Ohio-379, 802 N.E.2d 1116.

The court noted that some risks are so inherent in a sports or recreational activity that they cannot be eliminated. Further, the court noted that the types of risks covered under the doctrine are those that are foreseeable and customary of the sport or activity. Thus, only risks that are directly associated with the activity are within the scope of the doctrine of primary assumption of the risk. The appellate court also advised that a trial court must proceed with caution when contemplating whether primary assumption of the risk bars a plaintiff's recovery completely.

Where a risk is not inherent in an activity, courts reject the notion that primary assumption of the risk applies and instead apply an ordinary negligence standard. *Goffe v. Mower* (Feb. 5, 1999), 2nd Dist. No. 98-CA-49, 1999 Ohio App. LEXIS 308. The appellate court concluded that the risk of being trampled by a runaway horse that has escaped a racetrack through a negligently placed or permitted gap in the surrounding fence is not an inherent risk of horse racing. Thus, the court declined to apply primary assumption of the risk to bar the Koneskies' claims.

Additionally, the court concluded that a jury could conclude that the defendant/appellees breached their duty of ordinary care by allowing the gate to remain open, creating an unreasonable danger to someone located outside the track. The court noted that although its findings precluded summary judgment, the jury could conclude that Mrs. Konesky accepted the risk arising from the open gate, i.e., that she was contributorily negligent.

Finally, the court summarily concluded that the trial court did not err in concluding that defendant/appellees conduct was not reckless. The appellate court reiterated that the appropriate standard to apply was ordinary negligence, not recklessness.

Political Subdivision Liability – City is Immune From Liability For Deaths Resulting From a Motor Vehicle Accident

***Pylypiv v. City of Parma* (Dec. 1, 2005), 8th Dist. No. 85995, 2005-Ohio-6364, 2005 Ohio App. LEXIS 5718.**

At approximately 11:30 P.M. on June 30, 2002, Victor Gregorashenko was driving his motorcycle. Andrey Pylypiv was Victor's passenger. The two were driving with a group of other motorcyclists when they passed Parma police officers, Richard Burger and James Brink. One of the others in the group "popped a wheelie" as they passed the officers. The officers, believing that Victor was the one that had "popped a wheelie," proceeded to attempt to pull him over.

Officer Brink ordered Victor to pull over. Victor pulled to the curb, seemingly to stop, but he then turned and fled down a dead-end street. The officers activated their lights and sirens and pursued Victor down the dead-end street. Near West 33rd Street, the officers lost sight of the motorcycle, but they proceeded down the street until they reached the end. At the end of the street, there are three guardrails lining the pavement, which overlooks a large ravine. There is also a yellow and black reflective sign at one end of the guardrails and a working street light overhead. The officers exited their vehicle and searched the surrounding wooded area until they located the bodies of Victor and Andrey. From the scene, it appeared that Victor's motorcycle had struck the guardrail and that the impact threw the motorcycle and its passengers over the guardrail and into the wooded area. Both individuals died.

The subsequent investigation was comprised of eyewitness statements and the report of an accident

reconstructionist. This investigation concluded that that motorcycle had been traveling at least 66 m.p.h. on this 25 m.p.h. street and had failed to stop at any of the three stop signs on the street before impacting the guardrail at the end of the street.

Yevgen Pylypiv, father and administrator of Andrey's estate, and Ludmilla Gregorashenko, wife and administratrix of Victor's estate, sued the City of Parma and Officers Brink and Burger, individually. The City and Officers moved for summary judgment, which the trial court granted.

On appeal, the appellate court considered whether the Officers' pursuit constituted an exception to immunity under R.C. 2744.02(B)(1) because, as alleged, the Officers operated their cruiser negligently. The appellate court analyzed the City's and the Officers' immunity separately.

The appellate court applied the three-part analysis for determining whether a political subdivision is immune from liability. *Carter v. Cleveland,* 83 Ohio St.3d 24, 1998-Ohio-421, 697 N.E.2d 610. The court noted the general rule provides that political subdivisions are immune from tort liability. R.C. 2744.02(A)(1). Finding that the City of Parma was a "political subdivision," the court considered the remaining two parts of the analysis.

Under the second part of the immunity analysis, immunity can be lost if any one of five exceptions apply under R.C. 2744.02(B). Part three of the analysis allows the reinstatement of immunity if the political subdivision can avail itself of an available defense. R.C. 2744.03.

The plaintiffs only argued that the first exception to the general rule of immunity applied. R.C. 2744.02(B)(1). The plaintiff contended that the City should be liable for the negligent operation of a motor vehicle by its employees (the Officers) when the employees were engaged in the scope of their employment. The corresponding available defense to this exception is found in R.C. 2744.02(B)(1), which reinstates immunity if the alleged negligence occurred when one of its police officers was 'operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct.' The plaintiff responded that the Officers were not on an emergency call at the time of the accident.

The appellate court referred to the statutory definition of "emergency call" in R.C. 2744.01(A): a call to duty, including, but not limited to, communications from citizens, police dispatchers, and personal observations by peace officers or inherently dangerous situations that demand an immediate response on the part of a peace officer. Applying this definition, the court determined that Victor's actions in failing to stop at the Officers' request – not his action in "popping a wheelie" – constituted the "emergency call" to which the Officers were responding at the time of the accident. Further, the appellate court noted that the Officers observed Victor evade capture by turning down a dead-end, highly residential street at a high rate of speed – well above the posted 25 m.p.h. This created an "inherently dangerous" situation, which also brought the Officers' actions under the definition of "emergency call."

The appellate court further rejected the plaintiffs' argument that the operation of the police car constituted willful or wanton misconduct. The court placed weight on the statements of eyewitnesses concerning the high rate of speed of Victor's motorcycle when compared to that of the police cruiser, which arrived 15 to 20 seconds after the crash. The same evidence also demonstrated that the cruiser, unlike Victor's motorcycle, slowed at each intersection. All of this, the appellate court held, failed to demonstrate that operation of the cruiser was willful or wanton.

The court applied a similar analysis to assess whether the Officers were individually immune from liability. The court rejected the plaintiffs' argument that the Officers engaged in a high-speed chase. Instead, the evidence demonstrated that the Officers attempted to pull over Victor, that Victor fled at a high rate of speed down a dead-end street and that the police proceeded at a much slower pace down that street, slowing as it passed through intersections and losing sight of the motorcycle at one point.

The plaintiffs asserted an additional theory against the Officers , alleging that they were the proximate cause of the decedents' deaths. They claim that the Officers' conduct was negligent and that material questions of fact remain as to whether the Officers were in "pursuit." The court relied on *Vince v. City of Canton* (Apr. 13, 1998), Stark App. No. 1997CA00299, 1998 Ohio App. LEXIS 1989, wherein the court rejected a similar argument of proximate cause because the officer involved was at such a distance behind the motorcyclist that he could not have proximately caused the accident. Similarly, the appellate court found that the Officers in no way cut

off or physically forced Victor down the dead-end street. Further, the evidence established that the motorcycle was not even in sight at the time of the crash.

Finally, the plaintiffs claimed that the City was liable for negligently maintaining the signage on the subject street. They claim that no reasonable driver could have known that the street had no outlet. R.C. 2744.02(B)(3). The appellate court placed heavy reliance on the report from the accident reconstructionist, which concluded that the signs on the street were in compliance with The Ohio Manual of Uniform Traffic Control. It also concluded that the signs were adequately posted and lit and that the posting was not indicative of malicious purpose, bad faith or wanton or reckless manner.

Political Subdivision Liability - Statutory Immunity – Summary Judgment Overruled Where Traffic Pole Collapsed and Fell on a Car

***Trader v. City of Cleveland* (Jan. 26, 2006), 8th Dist. App. No. 86227, 2006-Ohio-295, 2006 Ohio App. LEXIS 258.**

William Trader was driving his car on Broadway Avenue in Cleveland, Ohio when he stopped at a traffic light at the intersection of Broadway and I-77. Trader noticed that the traffic signals were swaying, and moments later, a traffic pole on the east side of the street broke off at its base and fell onto his car. The pole smashed Trader's windshield and front hood. Trader was knocked unconscious and transported to the hospital.

Trader filed a lawsuit against the City of Cleveland, claiming that as a direct and proximate cause of the City's negligence, he suffered a concussion, neck strain, back strain and posttraumatic stress disorder and post traumatic headaches. The City moved for summary judgment, which Trader opposed. The trial court denied the City's motion, but days later the City filed a response to Trader's opposition and claimed that the trial court's grant of summary judgment had been premature.

The trial court subsequently issued another order, stating that it had read the City's reply, but that it was still denying the motion for summary judgment. The City asserted a single assignment of error that no exception to the general grant of immunity existed under R.C. 2744.02(A)(1). Specifically, the City argued that the exception providing liability for negligence in performing government functions, i.e., maintaining public roads, did not apply because the traffic pole was not part of the "public road." R.C. 2744.02(B)(3), R.C. 2744.01(H).

The trial court applied the immunity analysis set forth in *Greene Cty. Agricultural Soc. V. Liming*, 89 Ohio St.3d 551, 2000-Ohio-486, 733 N.E.2d 1141. The court also noted that the availability of statutory immunity is a purely legal question. Once it is determined that immunity is available, the application of it to a particular case is a question of fact.

The court focused its analysis on whether an exception to immunity existed under R.C. 2744.02(B). Specifically, R.C. 2744(B)(3) provides such an exception for political subdivisions are negligent in failing to keep public roads in repair and failing to remove obstructions from public roads. The City emphasized that the new version of R.C. 2744.02(B) removed the words "sidewalks" and "public grounds" from this Section.

The court did not find this revision significant. Instead, the court focused its inquiry on whether the term "public roads" included the traffic pole at issue. R.C. 2744.01 defines "public roads," and specifically excludes "rights-of-way" from that statutory definition. Thus, the City argued that the pole was located in a right-of-way and therefore did not constitute part of the "public road," which absolved the City of legal responsibility for its maintenance.

The court rejected the City's novel argument. A licensed surveyor for the City opined that the right-of-way for Broadway Avenue extended some sixty feet and was under the control of the City. Measured from the center of Broadway, the surveyor concluded that this sixty-foot right-of-way included the street, the curb and 6.4 feet of the sidewalk. The traffic pole thus was located squarely within the right-of-way.

The court observed that accepting the City's argument that the pole was excluded from the definition of "public road" because it was located in the right-of-way would necessarily exclude the portion of the road located in the right-of-way on Broadway where cars travel. The court concluded that this result would be contrary to the statute's intent. Further, the definition of "public road" notably did not exclude traffic poles from its purview. Since the statute is silent as to traffic poles, generally, the court declined to assume that the pole was automatically excluded.

The court also concluded that the condition of the pole raised genuine issues of fact regarding whether the City was negligent in maintaining it. Evidence showed that the pole was at least twenty years old and the arm and cap were missing from it at the time of the accident.

Thus, questions of fact concerning whether the pole was meant to be included in the "right-of-way" and whether the condition of the pole constituted negligence precluded summary judgment in favor of the City.

Politial Subdivision Liability – Improper Design of Sewer Grate Does Not Fall Within Exception to Statutory Immunity

***Murray v. City of Chillicothe*, 4th Dist. App. No. 05CA2819, 2005-Ohio-5864; 2005 Ohio App. LEXIS 5279.**

Michael Murray was hired to perform landscaping work at a home on the corner of Mead Drive and Belleview Avenue in Chillicothe, Ohio. As he was carrying two bags of mulch to the work area, he stepped onto a storm sewer grate located within the right-of-way of Belleview Avenue. His foot fell through the grate and his knee became lodged between the bars, causing his injuries. Mr. Murray filed suit against the homeowners and the city for negligence in the installation and maintenance of the storm sewer grate. The claim against the homeowners was dismissed. The trial court granted summary judgment to the city, holding that it was immune from liability pursuant to R.C. 2744.01, et. seq.

Revised Code Section 2744 establishes a three-tier analysis to determine whether a political subdivision is immune from liability. The general rule, set forth in R.C. 2744.02(A)(1), is that such an entity is immune from liability in tort for acts or omissions connected to a government or proprietary function. There are five exceptions to this immunity that are set forth in R.C. 2744.02(B). Finally, the government may assert one of several defenses to liability as stated in R.C. 2744.03(A).

Murray first attempted to establish the city's liability under the exception allowing a claim for the negligent performance of a proprietary function. See R.C. 2744.02(B)(2). After examining the statutory definitions of governmental and proprietary functions, the court of appeals rejected this argument. The design and construction of the subject storm sewer grate is a governmental function, whereas its maintenance is a proprietary function. Since the basis of Murray's claim was that the bars on the grate were too far apart, as opposed to being poorly maintained, the court held that this exception is inapplicable. The trial court's legal conclusion that "[b]ecause the design of a sewer system is designated by the statute as a governmental function per se, no liability can attach to the city under the proprietary function exception to the statute's general grant of immunity" was upheld.

The court of appeals also rejected Murray's argument that the city was liable under the exception set forth in R.C. 2744.02(B)(3), which allows claims for failure to keep public roads free from nuisance. The court focused on "whether a condition exists within the political subdivision's control that creates a danger for ordinary traffic on the regularly traveled portion of the road." *Haynes v. Franklin*, 95 Ohio St.3d 344, 2002-Ohio-2334, ¶12. The storm sewer at issue was located six feet from the paved road in a drainage ditch. Since this is not an area that was not on the regularly traveled part of the road, the exception does not apply as a matter of law.

The final argument asserted by Murray was that the city is liable under R.C. 2744.02(B)(5), which allows an exception to immunity when liability is expressly imposed by a statute. Murray claimed that R.C. 723.01 imposes a duty on the city for the "care, supervision, and control of the public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the municipal corporation, and the municipal corporation shall cause them to be kept open, in repair, and free from nuisance." The court of appeals held that this section did not apply to the instant case, however, because the statutory duty is limited to conditions that affect the regularly traveled portions of the roadway. To find otherwise would impose liability for failure to maintain any ground owned by the government. The court stated that "[i]t makes no sense to impose such a duty upon a city right of way that is not intended for general public access."

Since none of the exceptions to the city's general immunity apply, the trial court's grant of summary judgment was upheld.

Premises Liability – Duty of Care to Delivery Persons – Evidence of Violation of Ohio Basic Building Code Sufficient to Withstand Summary Judgment

***Richard J. Christen, Jr., et al. v. Don Vonderhaar Market & Catering Inc.*, 1st Dist. App. No. C-050125, 2006 Ohio 715; 2006 Ohio App. LEXIS 650.**

Richard Christen delivered paper goods to Don Vonderhaar Market & Catering over the course of a year as a delivery person for Ricking Paper & Specialty Company. The storage area to where Christen was directed to deliver the goods was on the second floor. The only way to get to this storage area was via a set of wooden steps. The step treads were wooden and covered with regular paint but not with any slip-resistant material. Vonderhaar allowed delivery persons the option of ascending the stairway by either (1) pulling the handcart loaded with products up the stairs or (2) leaving the handcart at the bottom of the stairs and carrying each box up the stairs by hand.

Christen followed the example set by the majority of suppliers and made his deliveries by walking backwards up the stairs with the handcart. He typically entered Vonderhaar's store through the back door, proceeded with the handcart down a hallway which contained an ice machine, and then pulled the handcart up the stairs to the second floor. There was a handrail, but he did not use it for support because he had to use both hands to pull the handcart up the stairs.

On August 4, 2005, Christen entered Vonderhaar's store as he normally did, passing through the store's double doors and heading down the hallway to the stairs. There was water in front of the ice machine on the cement floor which Christen traversed in approaching the stairway. Christen walked through the water and then ascended the stairs backwards, pulling the handcart up the stairs one step at a time. When he reached the sixth or seventh step, his feet slid out from under him and he fell. Christen hit his lower back on a stair and slid down two or three steps. His back injuries have caused him to undergo two surgeries, and he remains on temporary total disability.

Christen filed suit against Vonderhaar, alleging that its negligent maintenance and repair of the wooden stairway created unreasonably dangerous conditions. Christen argued that failing to have slip-resistant material on ordinary painted-wood stair treads was a violation of ordinary care, OSHA regulations, and the Ohio Basic Building Code ("OBBC"). Vonderhaar argued that Christen did not know whether he slipped or tripped, and that since he could not prove by a preponderance of the evidence that he did slip, summary judgment was appropriate. The trial court granted summary judgment on that basis.

On appeal, the court first reminded that premises owners owe the duty of ordinary and reasonable care for the safety of their business invitees, including delivery persons, and are required to keep their premises in a reasonably safe condition. The invitee bears the burden of proving that the premises owner has failed to take reasonable safeguards for the protection of its invitees.

Christen presented evidence that Vonderhaar failed to maintain its stairs in accordance with OBBC, a set of administrative rules. Though the Ohio Supreme Court has held that violation of administrative rules is not evidence of negligence per se, they are admissible as evidence of negligence. *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 568, 697 N.E.2d 198. Because Vonerdhaar's violation of an OBBC violation raised a genuine issue of material fact as to its duty and breach of that duty, the trial court's grant of summary judgment was inappropriate.

The appellate court also addressed Vonderhaar's argument that Christen's affidavit could not create a genuine issue of material fact because it was in conflict with his prior deposition testimony. The appellate court reiterated its prior holdings that "when a party has given clear answers to unambiguous questions which negate the existence of any genuine issue of any material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony." At *P13. The court has further held, however, that an affidavit which explains inaccurate deposition testimony or reveals newly discovered evidence does not contradict a deposition and can thus be considered to create issues of fact sufficient to defeat a motion for summary judgment.

In his deposition, Christen could not step whether both feet were stationary prior to his fall or whether he was in the act of stepping backwards. In his affidavit, Christen clarified that he slipped on the step and did not miss a

step. The appellate court concluded that the affidavit did not contradict his prior deposition testimony, and could thus be considered in response to the motion for summary judgment.

Vonderhaar also argued that, because Christen could not identify the specific cause of his fall, it was entitled to summary judgment in its favor. However, the appellate court held that Vonderhaar's violation of the OBBC violation raises sufficient evidence to overcome summary judgment even if Christen cannot identify the specific cause of the slip.

Premises Liability – Open and Obvious Doctrine – Summary Judgment Inappropriate Due to Issues of Fact Regarding Structural Weakness of Pallet

***Monte Hamaoui, et al. v. Tops Friendly Markets, et al.*, 8th Dist. App. No. 85919, 2005 Ohio 6718, 2005 Ohio App. LEXIS 6060.**

Appellant Monte Hamaoui was shopping at Appellee Tops Friendly Markets' grocery store, and fell when he stepped on a pallet stacked with twelve packs of soda pop. He had retrieved one pack and had gone back for another when a slat on the pallet broke causing him to fall and sustain injury. The trial court determined that the appellee did not owe appellant a duty because the danger posed by the pallet was open and obvious.

Appellant argued that the condition was not open and obvious because the pallet was surrounded on three sides by a four foot cardboard fence, and that the only means of reaching the product was by stepping on the pallet. Appellee argued that, because appellant weighed 315 lbs., he could not reasonably have expected the pallet to hold him and, in fact, he did not inspect the pallet to see if it could hold him prior to stepping onto it.

Based upon the competing evidence, the appellate court reversed, finding that reasonable minds could disagree on the question of whether appellant's weight should even be a factor in resolving the liability dispute in the case. Further, there were issues of fact surrounding whether or not appellee knew of the structural weakness of the pallet's slats and whether appellee created a dangerous condition by allowing the pallet to remain on the floor. There was also evidence that the appellant should have done more to protect himself from the potential danger of stepping onto the pallet.

In the end, the court held that the case could not be resolved by summary judgment because there were genuine issues of material fact and the matter was reversed and remanded to the trial court.

Premises Liability – Latent Hazard Precludes Application of Open and Obvious Doctrine

***Fink v. Gully Brook, Inc.*, 11th Dist. App. No. 2004-L-109, 2005-Ohio-6567, 2005 Ohio App. LEXIS 5879.**

Fink fell and broke her shoulder while traversing the front yard of a house for sale. Fink sued the realtor who had director her to the house but not warned her of any dangerous condition on the property. The trial court granted summary judgment to the realtor on the ground that the condition which caused the injury ("rough-graded" ground that can shift or give way) was open and obvious.

The appellate court reversed. The court reasoned that although Fink recognized that the walking in the unfinished yard required more caution than walking on pavement, she had no warning of the possibility of unsettled ground sinking. The appellate court noted that the trial court had confused the appearance of the yard (soft, uneven ground and clods of dirt) with the instrumentality that caused the fall (the latent sinking hazard of unsettled earth). The former may have been open and obvious to anyone, but the latter was not obvious to an invitee who was not a contractor or construction specialist.

Premises Liability – Open and Obvious – Minor Imperfections Do Not Constitute Nuisance

***Neumeier v. City of Lima*, 3rd Dist. App. No. 1-05-23, 2005-Ohio-5376, 2005 Ohio App. LEXIS 4886.**

Neumeier fell in a city-owned parking lot as she was stepping out of her car. The parties stipulated that Neumeier was a business invitee. The trial court granted summary judgment in favor of the city on Neumeier's claims that the city had failed to keep the lot in good repair and free from nuisance, finding that the condition of the parking lot was an open and obvious danger. It also found that the condition of the lot was not a nuisance.
The appellate court affirmed, finding that although the

sewer grate that caused the fall was sunken and the surrounding area in slight disrepair, those conditions were "minor imperfections" that as a matter of law do not rise to the level of a "substantial defect." The court relied primarily upon the Ohio Supreme Court's decision in *Jeswald v. Hutt* (1968), 15 Ohio St.2d 224, quoting that decision as stating, "generally, no liability exists for minor imperfections in the surface of such a parking area – those slight irregularities reasonably to be anticipated in any traveled surface." *Neumeier* at ¶14.

Premises Liability - Open and Obvious - Collapsed Wet Floor Sign – Issue of Fact as to Notice of Hazard Precludes Summary Judgment

***JoeAnn Hudspath, et al. v. The Cafaro Company*, 11th Dist. App. No. 2004-A-0073, 2005 Ohio 6911, 2005 Ohio App. LEXIS 6184.**

Plaintiff was shopping with her husband on November 24, 2000 at the Ashtabula mall. As she was leaving a store with her packages, she fell on a collapsed "wet floor" sign that had apparently been knocked over by other patrons. A salesperson at a kiosk testified that the sign had been laying on its side for approximately fifteen to twenty minutes prior to plaintiff's fall. Plaintiff sustained injury to her shoulder.

Plaintiff sued the mall's management company, and the trial court ultimately granted the management company's motion for summary judgment finding that the plaintiff failed to establish that the defendant knew or should have known of the collapsed sign, and that, aside from the notice issue, the sign was an open and obvious hazard nullifying any duty of care owed by defendant.

On appeal, the court reversed the trial court, finding that Plaintiff/Appellant: (1) had put forth evidence that the sign had been laying flat on the floor for 15-20 minutes prior to her fall, and; (2) had offered testimony that the mall had been notified by the salesgirl prior to this incident that the signs would get knocked over by kids or patrons and that she had witnessed another customer trip on a fallen sign (although in that incident the patron did not fall and was not injured). The appellate court found that a genuine issue of material fact existed on the issue of notice of the existence of the hazard in question.

As to the open and obvious defense, the court found that the appellant testified that the mall was very crowded with people and that she was carrying her purse and two other packages close to her body because she had a bad back. This allowed her to see in front of her but obstructed her vision downward. However, the court found that a person is not required to look constantly downward, especially when the multitude of other patrons demanded that she look up and forward to avoid colliding with them. Viewing all of the 'attendant circumstances,' the court found that there was a genuine issue of material fact surrounding whether the appellee breached its duty of care to appellant.

Premises Liability – Possession and Control of Premises – Right to Admit/Exclude Others

***Briggs v. First Realty Mgmt. Co.,* 8th Dist. App. No. 86354, 2006-Ohio-458, 2006 Ohio App. LEXIS 391.**

Briggs was injured when a water tower tank burst as he was attempting to refill it. Briggs filed a negligence action against the Patricia Investments (owner of the premises where the injury occurred) and First Realty (manager or operator of the premises). The owner of the premises sought summary judgment, arguing that Pioneer Standard Electronics (Briggs' employer and the lessor of the premises) had possession and control of the premises at the time of Briggs' injury and had the duty to maintain the water tank pursuant to the applicable lease agreement. Briggs opposed the motion, arguing that as a business invitee, he was owed a general duty of care by the owner of the premises, and that the owner retained control over the premises because it reserved the right to repair the premises if damaged.

The manager of the premises also sought summary judgment, arguing that it acted solely as the agent of the owner and thus owed no duty to Briggs beyond that owed to him by the owner (*i.e.*, none). It also argued that a provision in its management agreement with the owner of the premises limited its liability for any acts or omissions of the owner.

The trial court granted both motions for summary judgment, and the appellate court affirmed. The appellate court reasoned that with respect to a business invitee, the plaintiff must prove that the business owner (here the premises owner) had either actual or constructive notice of the defect that caused the injury. Moreover, the court reasoned that a "commercial lessor who has neither possession nor control of the premises

is not liable for damages resulting from the condition of the premises." *Briggs* at ¶18. Because the owner/lessor did not retain the right to admit or exclude others from the premises, it did not have the degree of possession or control necessary to impose liability, even though the owner/lessor retained the right to inspect and enter the premises for limited purposes. *Id.*

The appellate court also upheld the judgment in favor of the manager of the premises, finding that it, too, had no control over access by third parties to the building and had no reason to know of any defect. Finally, the court noted that the agreement between the manager and owner limited the manager's liability, and that such a limitation is valid and enforceable. (The court did not mention the fact that neither the injured party nor the lessee of the premises was a party to that agreement.)

Probate – Savings Statute Applies to Claims Against Estate

***Vitantonio, Inc., et al. v. Baxter*, 11th Dist. App. No. 2005-L-004, 2006 Ohio 1685, 2006 Ohio App. LEXIS 1543**

Plaintiffs/Appellants presented claims against the estate of a decedent within the one-year time limit prescribed by R.C. 2117.06(B). Defendant/Appellee rejected the claim pursuant to R.C. 2117.06(D), after which time Appellants filed an action in the Lake County Court of Common Pleas within the two month period prescribed by R.C.2117.12. In their suit, they asserted various claims of negligence in connection with the decedent's management of a business of which he was president and a majority shareholder. Appellants voluntarily dismissed their complaint and refilled it within one year from the date of dismissal pursuant to Ohio's saving statute, R.C. 2305.19. Appellees filed a motion to dismiss the complaint as time barred, which the trial court granted.

On appeal, Appellants argued that the holding in the Supreme Court of Ohio decision in *Allen v. McBride* (2004), 105 Ohio St.3d 21, 821 N.E.2d 1001 wherein the Court ruled that R.C.2305.19 applied to will contests should be extended to claims against the estate. In contrast, Appellees urged the court to find that R.C. 2117.12 mandates that the suit be filed within the two month time limitation contained therein.

In extending the application of the saving statute to will contest actions, the Court in *Allen* reasoned that, although to do so could be disruptive to the will administration process, it would not be so disruptive as to warrant not allowing the claimants the benefit thereof. In this case, Appellees argued that the application of the saving statute would frustrate the settlement and disposal of estate claims without delay. The Eleventh District reasoned that, since such an argument was not persuasive in *Allen*, it similarly would not justify barring use of the saving statute to save claims against an estate. After not finding any significant distinction between will contest actions and claims against the estate for purposes of the appeal, the court reversed the trial court and remanded for further proceedings.

Workers' Compensation - Psychological Harm Without Accompanying Physical Injury is Not Compensable.

***McCrone v. Bank One Corporation, et al.* 107 Ohio St.3d 272, 2005-Ohio-6505, 2005 Ohio LEXIS 3010.**

Appellee, Kimberly McCrone, was an employee of Bank One Corporation from 1998 to 2001. During her employment, the branch in which she worked was robbed twice. McCrone was present but not involved in the first robbery, however, she was the teller robbed during the second robbery on August 4, 2001. After this second robbery, McCrone was diagnosed with posttraumatic stress disorder and left her job. She filed for workers' compensation benefits for her psychological injuries, but was denied because she had not suffered a physical injury.

McCrone exhausted her administrative appeals and then filed suit in Stark County Common Pleas Court, challenging R.C. 4123.01(C)(1) on grounds that it violated the Equal Protection and Due Process Clauses of the United States and Ohio Constitutions as she was unable to benefit from workers' compensation benefits because she had no physical injury. At the trial court level, R.C. 4123.01(C)(1) was ruled unconstitutional as applied to McCrone. The court found that the exclusion of psychological injuries from workers' compensation coverage was not rationally related to a legitimate governmental interest and thus found an equal protection violation. The court of appeals affirmed.

The appellate court discussed the definition of a compensable injury under R.C. 4123.01(C). This definition specifically excludes "[p]sychiatric conditions except where the conditions have arisen from an injury or occupational disease." The court cited its prior decision in *Rambaldo v. Accurate Die Casting* (1992), 65 Ohio St.3d 281, for the proposition that "in the absence of a clearly expressed legislative intent to recognize mental conditions caused solely by work-related stress as occupational diseases within the purview of the Workers' Compensation Act, such mental conditions are not compensable as occupational diseases." *Id. at syllabus*.

The Court next explored whether the legislature's exclusion of purely mental injury from the category of compensable injuries under the Workers' Compensation Act violates the Equal Protection Clause of either the United States or Ohio Constitution. Because this legislation does not involve a suspect classification, absent any evidence that "varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational," it is presumptively valid. *State ex rel. Doersam v. Industrial Com. of Ohio (1988), 40 Ohio St. 3d 201, 203, 533 N.E.2d 321*, quoting *Vance v. Bradley (1979), 440 U.S. 93, 97, 99 S.Ct. 939, 59 L.Ed.2d 171*. If there are reasonable bases for the disputed classification at issue, it will not be deemed a violation of the Equal Protection Clause of either the U.S. or the Ohio Constitution.

In support of the classification, the BWC defended that the exclusion of mental injuries that lack corresponding physical injury is justified by the difficulty in proving same. The BWC further argued that it must make the most efficient use of a finite fund. Because Appellant did not set forth any arguments as to why the state's reasons were invalid, and because *R.C. 4123.01(C)(1)* rationally advances legitimate governmental interests., the Court reversed the appellate court's finding of unconstitutionality.

Two justices dissented from the majority opinion, both arguing a lack of rational explanation or legitimate state interest that could justify excluding Appellant's claim while hypothetically allowing a claim if McCrone had received some minor injury from the robbery, such as a paper cut or a stubbed toe. Psychiatric advances have made the diagnosis of mental injuries such as posttraumatic stress disorder more accurate, rebutting the majority's assertion that proof of injury without a physical manifestation is difficult. Furthermore, the two dissenters challenged the majority's "cost-cutting justification," chastising the majority for allowing a cost analysis to justify ignoring the Equal Protection Clause.

Verdicts & Settlements

(For members and educational purposes only)

Sabiers v. Lakeland Emergency Physicians, et al.
Type of case: Medical Malpractice
Verdict: $1,250,000 against family doctor only
Plaintiff's Counsel: Benjamin F. Barrett, Sr., Esq. and David P. Miraldi, Esq., Miraldi & Barrett Co., L.P.A.
Defendant's Counsel: Stephen E. Walters, Esq. (Lakeland) and Douglas Leak, Esq. (Dr. Sun)
Court: Lorain County Court of Common Pleas, Judge Glavas
Date: December 2005
Insurance Company: ProNational (Lakeland), ProAssurance (Dr. Sun)
Damages: amputation of right arm

Summary: Failure to timely diagnose blood clot in hand. Plaintiff, age 37, injured right hand by striking the palm of his hand against his son's elbow. He went to the emergency room with symptoms of pain, cold and numbness. He was diagnosed with a sprained wrist. Two days later he saw a family physician with further symptom of difficulty straightening his fingers. The family doctor diagnosed a sprained wrist. Two days later he returned to the emergency room. A doppler revealed no blood flow into his hand or arm. Plaintiff was life-flighted to Metro, where his arm was amputated.

Plaintiff's Experts: Fred N. Littooy, M.D. (Vascular surgeon); Samuel J. Kiehl, M.D. (Emergency room physician); Finley W. Brown, M.D. (Family physician)
Defendant's Experts: Jean E. Starr, M.D. (Vascular surgeon); John Tafuri, M.D. (Emergency room physician); Randy Wexler, M.D. (Family physician); Robert S. Mayer, M.D. (Rehabilitation)

Elliot Doe v. Steven Roe, et al.
Type of case: Personal Injury — Motor vehicle accident
Settlement: $500,000 (policy limits)
Plaintiff's Counsel: Rubin Guttman, Esq. and Ann Marie Stockmaster, Esq.
Defendant's Counsel: N/A
Court: Case not filed
Date: November 2005
Insurance Company: Western United Insurance (tortfeasor), Westfield Insurance Company (UIM)
Damages: $49,654 medicals; $74,204 lost wages

Summary: Plaintiff was a passenger in a rental car being driven by his cousin in Las Vegas, NV when the tortfeasor went left of center, striking Plaintiff's vehicle. Plaintiff suffered lacerations and a skull fracture, resulting in the need for cranial surgery and the insertion of a plate to repair the damage. Plaintiff suffered from cognitive and functional deficits caused by the brain injury, post-collision tinnitus, cervical, thoracic and lumbar sprains, and contusions to both knees. Plaintiff was found totally disabled for purposes of Social Security Disability. Settlement was reached with the tortfeasor's insurance carrier for the policy limit of $100,000. An uninsured motorist claim was made against Plaintiff's carrier, resulting in a settlement for the policy limit of $500,000, with an offset for the funds paid by the tortfeasor's carrier.

Plaintiff's Experts: Teresa D. Ruch, M.D. (Neurosurgeon); Barry S. Layton, M.D. (Neuropsychologist); Daniel J. Leizman, M.D. (Orthopedic); Seth J. Silberman (ENT)
Defendant's Experts: None

Austin v. Palmeri Builders, Inc.
Type of case: Personal Injury — General Contractor Liability
Verdict: $3,300,000
Plaintiff's Counsel: Thomas Mester, Esq. and Jonathan Mester, Esq., Nurenberg, Paris, Heller & McCarthy
Defendant's Counsel: Joseph Pappalardo, Esq. and Martin Pangrace, Esq.
Court: Cuyahoga County Court of Common Pleas, Judge Nancy McDonnell
Date: January 2006
Insurance Company: Motorists
Damages: Burst fracture L1; partial paraplegia and loss of bowel and bladder function

Summary: Plaintiff was working on a 30 foot roof. No fall protection was provided and Plaintiff fell from the roof. Plaintiff sued the general contractor claiming that it had the duty to provide fall protection because it actively participated in the project. Defendant denied it actively participated and blamed the subcontractor/employer.

Plaintiff's Experts: Phillip VanKuiken (Safety Engineer); Donald Mann, M.D.; Robert Ancell (Vocational Expert); Pam Hanigosky (Life Care); John Burke (Economist)
Defendant's Experts: Michael Wright (Safety Engineer)

Minor v. MMM Hospital, et al.
Type of case: Medical Malpractice
Settlement: $2,650,000
Plaintiff's Counsel: Dennis R. Lansdowne, Esq. and William Hawal, Esq., Spangenberg, Shibley & Liber, LLP
Defendant's Counsel: Withheld
Court: Cuyahoga County Court of Common Pleas, Judge Glickman
Date: September 2005
Insurance Company: Withheld
Damages: Brain damaged infant

Summary: This was a medical negligence case involving injuries suffered at birth. The child was born on May 3, 1996 at MMM Hospital. He was in obvious distress at birth and was transferred to Rainbow Babies and Children's Hospital. The baby was in the NIC unit on a ventilator for several days. He remained hospitalized for three weeks. The discharge diagnosis was hypoxic ischemic encephalopathy. The baby showed improvement during the first two years of his life. His seizure activity subsided and he was able to wean off of medication. Shortly after age three, he began to demonstrate the effects of the brain damage suffered at birth. The damage manifested itself in delays in reaching certain milestones and also behavioral disorders. As he grew older and entered school his deficits became more pronounced. At school he is required to have a one-on-one aid to keep him on task and prevent outbursts. He is falling behind his peers and had a very low IQ. A case was brought against MMM Hospital and the obstetricians and their group. The claim against Dr. A was that he should have acted on the results of a contraction stress test two days prior to the mother beginning labor. The claim against both Dr. B and the hospital was that significant warning signs were present during labor that should have prompted an earlier delivery. During the course of litigation 15 experts were identified by the parties. On the Friday before trial, settlement was reached with the hospital and house officer. Following jury selection another settlement was reached with Dr. B and the group. Following approximately one week of trial a settlement was reached with Dr. A.

Plaintiff's Experts: Patricia Fedorka, Ph.D. (OB Nursing); Marcus C. Hermansen, M.D. (Neonatology); Brian K. Iriye, M.D. (Obstetrics/Gynecology); Richard L. Sweet, M.D. (Obstetrics/Gynecology); Stephen R. Bates, Ph.D. (Pediatric Neurology); John Burke, Ph.D. (Economist);
Sharon L. Reavis, RN (Life Care Planner)
Defendant's Experts: MMM Hospital: Charles Brill, M.D.

(Pediatric Neurology); Kristina M. Jones, M.D. (Labor/Delivery Nursing); James M. Greenberg, M.D. (Neonatology); Stephen J. DeVoe, M.D. (Obstetrics/Gynecology); Janice M. Lage, M.D. (Pathology); Dr. A: David M. Burkons, M.D. (Obstetrics/Gynecology); Method Duchon, M.D. (Obstetrics/Gynecology); Michael J. Painter, M.D. (Pediatric Neurology); Dr. B and Group: Thomas M. Frank, M.D. (Reproductive Biology); House Officer: Gordon Sze, M.D. (Diagnostic Radiology); Harry Farb, M.D. (Maternal Fetal Medicine); Gary L. Trock, M.D. (Pediatric Neurology); Christopher L. Marlowe, M.D. (Obstetrics/Gynecology); Jeffrey T. Peitz, M.D. (Neonatology)

Smith v. Allstate Insurance Co.
Type of case: Personal Injury — Motor vehicle accident
Verdict: $100,000
Plaintiff's Counsel: Scott Kalish, Esq.
Defendant's Counsel: Terrance J. Keneally, Esq.
Court:
Date: July 2005
Insurance Company: Allstate
Damages: $25,383 medicals; three herniated discs in cervical spine

Summary: On November 21, 2000, Plaintiff was driving her car and was hit from behind by Defendant Jeremy Shondrick, propelling Plaintiff two car-lengths into a third vehicle. Plaintiff incurred $4,700 of damage to her car. Defendant incurred about $3,000 in damage to his vehicle, which was later deemed a total loss. Liability was admitted by Defendant at trial. Plaintiff suffered three herniated discs in her cervical spine and $25,383 in medical bills, mostly for diagnostic tests and therapy. Defendant's insurance company, Progressive, settled with Plaintiff for the policy limits of $25,000. Suit was filed for against Allstate for underinsured motorist benefits pursuant to Plaintiff's insurance policy. The jury's verdict was impacted by the unfair position Allstate took relative to Plaintiff.

Plaintiff's Experts: Harold Mars, M.D.; Mark Allen, M.D.
Defendant's Experts: Joseph Hanna, M.D.

Karley v. Bell
Type of case: Personal Injury – Motor Vehicle Accident
Verdict: $100,000 (policy limits)
Plaintiff's Counsel: Jonathan Mester, Esq., Nurenberg, Paris, Heller & McCarthy
Defendant's Counsel: Terrance Kenneally, Esq.
Court: Cuyahoga County Court of Common Pleas, Judge Brian Corrigan
Date: March 2006
Insurance Company: State Farm
Damages: Fractured Tibia

Summary: Plaintiff was proceeding straight through an intersection on a yellow light. Defendant made a left turn in front of Plaintiff. Defendant testified that all traffic had stopped, the light changed, and she attempted to clear the intersection. The issue at trial was the color of the light and whether Plaintiff was speeding. Two witnesses testified that Plaintiff was at fault. The jury found the Defendant liable, with no comparative negligence for Plaintiff. The parties stipulated to $100,000 damages before trial and tried the case on liability only.

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

State Automobile Mutual Insurance Co. v. Reust, et al.
Type of case: Insurance Bad Faith
Settlement: $2,400,000
Defendant/Counter-Claimant's Counsel: Jack Landskroner, Esq.
Defendant's Counsel: Kip Reader, Esq. and David Lester, Esq.
Court: Trumbull County Court of Common Pleas, Judge Kontos
Date: February 2006
Insurance Company: State Automobile Mutual Insurance Co.
Damages: Judgment taken against Reust in the underlying case in the amount of $2,157,200, when the case could have settled for the policy limits of $100,000.

Summary: Counter-claimant Jeff Reust was a State Auto insured under his homeowners' policy. He had $100,000 in liability coverage. While visiting his home, Reust's girlfriend, Karen Konscol, had her lip bitten off by Reust's dog. State Auto denied Konscol's claim, refused to indemnify Reust and refused to provide him with a defense when he was sued by Konscol for her personal injuries.

Plaintiff's Experts: None
Defendant Counter-Claimant's Experts: Allan Windt, Esq.; Frederick Taylor, Esq.

Estate of John Doe v. John Doe Surgeons, Surgery Group, Surgery Center, Radiologist, Radiology Group, and Hospital

Type of case: Medical Malpractice/Wrongful Death
Settlement: $1,200,000.00 (confidential terms)
Plaintiff's Counsel: Susan Petersen, Esq. of Petersen & Ibold
Defendant's Counsel: Withheld
Court: Franklin County Court of Common Pleas
Date: Following Mediation in November, 2005
Insurance Company:
Damages: Death of a 39 year old male

Summary: This case involved a 39 year old male who underwent bariatric surgery. He was 463 pounds with a BMI of 61. The decedent developed a post operative leak of his anastomosis after surgery. Despite classic signs and symptoms over a three day time period, his surgeons failed to promptly diagnose and repair his leak. On day three, they transferred him to the hospital for consultation with specialists but the same surgeons continued to manage his care. The x-ray which diagnosed the leak was not ordered to occur until day four. By that point, the decedent had become septic. After the repair surgery, he went into multi system organ failure. He died after a month long complicated hospital course.

Plaintiff's surgery expert opined that the surgery center involved was not an appropriate environment for the decedent in the first place as he was a technically difficult patient. Despite promises made in an aggressive marketing campaign, the center did not provide an experienced bariatric surgeon nor appropriate staffing and equipment to meet the needs of the morbidly obese patients, including radiology equipment that would fit the decedent.

Defendants argued that a leak was a common complication of this surgery and that the leak occurred in the eight hours before the repair surgery and it just was an unfortunate outcome. However, certain of Defendants' experts conceded in deposition that the leak was probably there 24 hours before the repair surgery. All experts agreed that a post operative leak in a bariatric surgery patient is deadly and must be repaired quickly.

The decedent left behind two teenage sons of whom he had custody who were 17 and 18 at the time and financially dependent. Plaintiff's economist opined that the decedent's lost future earnings and benefits amount to a range of $576,680 - $638,062. He has also valued replacement costs of services at $149,610. The decedent's medical and funeral expenses totaled $355,751.95.

The medical records in the 24 hours before the repair surgery left little debate that a leak should have been suspected. Given the admissions by defense experts that the leak was probably there on day three, the defense was in a catch 22 as the surgeons themselves and the experts on both sides testified that prompt diagnosis and treatment is critical to survivability. Another important factor was the promises in the center's marketing as to having more experienced surgeons and more specialized equipment than patients would find at a local hospital when they actually had less.

Note: the hospital was in the case under an agency by estoppel theory, and neither the hospital nor the radiologist/group contributed to the settlement.

Plaintiff's Experts: Eric DeMaria, MD (BariatricSurgery); William Thompson, MD (Radiology); John Burke, Ph D, (Economist)

Defendant's Experts: Michael Schweitzer, MD (Bariatric Surgery); Elliot Fegelman, MD (Bariatric Surgery); Peter Benotti, MD (Bariatric Surgery); George Gianakopoulos, MD (Infectious Disease); Lane Donnelly, MD (Radiology); Louis Flancbaum, MD (Bariatric Surgery)

Estate of Doe v. Trucking Company
Type of case: Personal Injury - Motor Vehicle Accident
Settlement: $1,350,000.00
Plaintiff's Counsel: Daniel M. Sucher, Esq., Young Sucher & Guidubaldi
Defendant's Counsel: withheld
Date: Febuary 21, 2006
I*nsurance Company:* AIG
Damages: death of 39 year old male

Summary: Defendant trucker lost control, crossed median and struck Plaintiff's vehicle. Defendant claimed blackout/sudden emergency and limited insurance coveragecase settled at court mediation.

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

Correction: In our last issue, we mistakenly identified the result of the case of *Susan Mulhern, etc. v. Nationwide Insurance* as a settlement of $1,900,000.00. Plaintiffs actually obtained a $2,000,000.00 verdict, then a post verdict settlement of $1,900,000.00.

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(by specialty)

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Amir Dawoud, MD
Charles J. Hearn, MD
Alan Lisbon, MD */Cardiac*
Mary McHugh, MD */Resident*
Stephen W. Minore, MD
David S. Rapkin, MD
Kenneth E. Smithson, MD
Jeffrey S. Vender, MD
Jean-Pierre Jarned, MD

Cardiology

Mark T. Botham, MD
Robert E. Botti, MD
Delos Cosgrove, MD
Reginald P. Dickerson, MD
Barry Allan Effron, MD
Barry George, MD
Wayne Gross, MD
Patricia Gum, MD */Interventional Cardio.*
Alan Kamen, MD
Alfred Kitchen, MD
Allan Klein, MD
Alan Kravitz, MD
Raymond Magorien, MD
Steven Meister, MD
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Bruce S. Stambler, MD
Sabino Velloze, MD
Thomas Vrobel, MD */Intern/Pulm*
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Steven Yakubov, MD
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Benjamin Felia Zolta, MD

Cytopathology

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John Distefano, DDS
Michael Hauser, DDS
Don Shumaker, DDS
Pankaj Rai Goyal, MD */Oral Surgery*
John F. Zak, MD */Oral Maxillofacial Surg.*

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Rita K. Cydulka, MD
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David Effron, MD
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Charles Emerman, MD
Cory Franklin, MD
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Gayle Galen, MD
Howard Gershman, MD
Thomas Graber
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Ginger A. Hamrick, MD
Mark Hatcher, MD
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Allen James Jones, MD
Nour Juralti, MD */Intern*
Gerald Geromin, MD
Allen Jones, MD
Samuel Kiehl, MD
Frederick Luchette, MD
Jeffrey Pennington, MD
Pradyumna Padival, MD
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Elias Chalub, MD */Pediatrics*
Bruce Cohen, MD */Pediatrics*
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Herbert Engelhard, MD
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Lawrence Martin, MD

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Rheumatology

Karl A. Schwarze, MD
Thomas M. Zizic, 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
James Bass, Jr, 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
Vincent J. Bertin, 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*
Sandy Brightwell, *Registered Technologist*
Amardeep S. Chauhan/*Osteopath- Physical Medicine & Rehab*

Charles E. DuVall */Chiropractor*
Ahmed Elghazawi */Independent Med Exam*
Nancy Holmes */Cert. Physicians Assistant*
Claudia Howatt, *Medical Assistant*
George W. Nadolski, *Cert. Surgical Assist.*
Norman B. Ratliff, MD */Staff Physician*
Jesse Smith, *Postal Worker*
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
Yelena Beregovskaya, RN */Nurse Midwife*
Brenda Braddock, RN
Michael Carroll, RN
Jill Castenir, RN
Danielle Coates, RN
Patricia Coffman, RN
Lois Cricks, RN
Linda DiPasquale, RN */Perinatal CNS*
Kim Evans, RN
Rita J.Freehorn */Home Health Aide*
Josephine Gaglione, LPN
Debra A. Gargiulo, RN
Michelle Grimm, 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
Robbin Moore, RN
Susan Morgan, RN */Midwife*
Jay Morrow, RN
Lekita Nance, LPN
Delicia Ostrowski, RN
Jeanne M. O'Toole, RN
Janet Pier, RN
Lisa A. Piscola, RN
Kelly M. Price, RN
Elizabeth Ruzga, RN */Nurse Midwife*
Laura Schneider, 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
JulieWarner, LPN
Helenmarie Waters, RN */Obstetrics*
Jacqueline Whittington, RN
Angelique Young, RN
Catherine Zalka, RN
Colleen Zelonis, LPN
Joanne Zelton, RN, *Legal Nurse Consultant*

Administration/Professional

Susan Allen */Architect*
Frederick Anderson */Business Mgr, Dr. Cola*
Bernard Agin */Attorney*
James W. Burke, *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*
Terri Lefever, *Claims Adjuster*
Toni Madden, *Medical Secretary*
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*

CATA VERDICTS AND SETTLEMENTS

Case Caption:_____

Type of Case:_____

Verdict:_____ **Settlement:**_____

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

Counsel for Defendant(s):_____

Court/Judge/Case No:_____

Date of Settlement/Verdict:_____

Insurance Company:_____

Damages:_____

Brief Summary of the Case:_____

_____

_____

_____

_____

Experts for Plaintiff(s):_____

_____

_____

Experts for Defendant(s):_____

_____

_____

RETURN FORM TO:

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

Alison Ramsey, Esq.
The Brunn Law Firm
700 West St.Clair Ave., Suite 208
Cleveland, Ohio 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:

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

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

Name_____Age:_____

Firm Name:_____

Office Address:_____Phone no:_____

Home Address:_____Phone no:_____

Spouse's Name:_____No. of Children:_____

Schools Attended and Degrees (Give Dates):_____

_____

Professional Honors or Articles Written:_____

_____

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

Percentage of Cases Representing Claimants:_____

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

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

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

_____

Date:_____ Applicant:_____

Invited:_____Seconded By:_____

President's Approval:_____Date:_____

Please return completed Application with $100.00 fee to:
CATA, 1900 East 9th Street, Suite 2400, Cleveland, Ohio 44114

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

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