CATA News
Cleveland Academy of Trial Attorneys
www.clevelandtrialattorneys.org
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President's Message

Donna Taylor-Kolis

Fellow Trial Lawyers:

I want to take this opportunity to thank the membership for the care and concern you have thoughtfully expressed throughout the summer regarding the passing of my beloved senior partner, David Smith. Life is a precious journey and we do not know always know what lies around the bend. What I do know, however, is that wonderful challenges have been laid at all of our feet.

One of those challenges is the continuing struggle against the political momentum in favor of tort reform and, in particular, in favor of capping jury awards in medical malpractice lawsuits. As recently as last July, Sens. Hillary Clinton and Barack Obama took to task the Republican ideology that medical malpractice lawsuits and jury awards are the evils to combat, suggesting instead that the true ill lies in the frequency with which medical errors are committed. As reported by Ezra Klein in the Medical Examiner article "The Medical Malpractice Myth,"[1] a new study conducted by the Harvard School of Public Health shows that Clinton and Obama may have the better of the two arguments. According to the study, the results of which were released in May, of the 1,452 medical malpractice suits examined, researchers found that more than 90% of the claims involved real medical injury. Further, the study found that courts efficiently dismissed those malpractice claims that were frivolous. Klein's article further deflated the widely circulated belief that the level of jury awards has steadily increased over the years, citing a recent RAND study which revealed that, from 1960 to 1999, awards have actually grown by less than real income. Sens. Clinton and Obama would offer federal grants and support to launch programs designed to reduce medical error and prevent future injuries. With the support of trial lawyers, let's hope this approach can gain enough momentum to become the dominant response to this perceived medical malpractice "crisis."

While I do not second guess the leadership of the American Association for Justice (formerly ATLA), I, for one, am proud to be a trial lawyer. I do agree with Ken Suggs that powerful interests have spread lies, distorted the truth and manipulated the facts

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to demonize trial lawyers, blaming us for everything from clogging the courts to increasing the cost of health care. Rather than change our name, I encourage every member of CATA to get out and spread the truth.

CATA is launching a media relations committee. It is our intention to have a process in place so that we can convey a positive message to the media. I am also pleased to announce that this year we will be sponsoring our first ever CATA holiday party. Save the date: Thursday, December 14th, 2006.

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[1] Klein's article is available at Slate.com.

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Bad Faith Insurance Practices

by Jack Landskroner, Esq. and Rebecca Castell, Esq. [1]

Every insurance contract carries with it an implied duty of good faith. Yet in the face of this duty more and more carriers seem to completely abandon their responsibilities to their insureds. This turn of events may be considered by some legal counsel as an obstacle, interfering with the ability to get a timely, fair and reasonable result for their client. In the right case, however, such conduct may provide an opportunity to obtain a recovery above and beyond the limits of the insurance coverage available under the existing policy. In a limited coverage situation, where an insurance company's practices amount to bad faith, the carrier's own conduct may just be the best remedy a plaintiff needs as the mechanism for obtaining a full recovery.

There are essentially six duties owed by an insurance company to its insured under an insurance contract. They include: the duty to (1) investigate, (2) negotiate, (3) evaluate, (4) settle, (5) pay/indemnify, and (6) defend. Some of these duties are expressly set forth in the insurance contract and some duties are implied in law. In essence, an insured pays a premium to the insurance company to perform each of these obligations on his behalf. Under the terms of most policies, an insured cannot settle, voluntarily pay, negotiate or do much else independently without risking a breach of the contract. The insurance company assumes control of these duties and puts the insured in a vulnerable position. The insured can only hope that his insurance company will do its job.

Some courts have collapsed the duties to investigate, evaluate, negotiate and settle into one duty; however, a closer look at the law recognizes that each is an independent and distinct obligation of the carrier. In order to negotiate, one has to investigate and evaluate. Where a carrier fails to do so, it may be not only foreclosing on the opportunity to settle a case within the policy limits, and in turn negating the insured's opportunity to avoid being sued as a matter of public record, but also imposing the long and emotionally tolling experience of litigation and trial. The carrier not only has to do the right thing, but it must also do it at the right time. Similarly, a carrier must step up and defend its insured, as expressly provided within the four corners of the insurance contract. The insurer must also indemnify the insured from judgments taken against him within coverage.

A complaint alleging bad faith by the insurer may contain causes of action based in either contract or tort, or possibly both. A breach of contract claim against a carrier first requires proof that an underlying contract exists and that the insurer had no lawful basis to deny coverage. A cause of action based in tort should allege that the insurer breached its duty to its insured without reasonable justification. *Mid-American Fire & Cas. Co. v. Broughton* (2003), 154 Ohio App.3d 728.

Duty to Investigate Reported Claims

Insurance policies typically require that insureds give the carrier notice, as soon as practicable, of any losses incurred and of any claims made against them. *Emery v. Smith,* 2005 WL 2660256 (Ohio App. 5 Dist.). Prompt notice provides the insurance company time to conduct a thorough investigation so that full information about the circumstances of a claim can be ascertained. If the insured is later sued, the insured must also provide notice of suit to the carrier.

When a claim is reported, an insurance company has an absolute duty to investigate the claim. *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St. 3d 552. All available facts must be reviewed prior to making a decision on whether coverage is provided or denied. *Id.* The failure to interview witnesses, verify alibis, or examine evidence constitutes a breach of the insurer's duty to investigate. *White v. Allstate Ins. Co.*, 2000 WL 1177433 (N.D. Ohio). A claim cannot be denied without reasonable justification for the denial, based on facts available at the time of denial. *Id*. Should additional information become available after denial, the carrier must reinvestigate the claim to reconsider its denial. *Zoppo*, 71 Ohio St. 3d at 556.

It is essential that the carrier have a sufficient basis for denying coverage. The decision must be based on all information available to it at the time of decision. The insurer cannot backtrack and give a reason for denying coverage which it did not have at the time the claim was denied. If a carrier is unable to assess whether the claim is to be covered under the insured's policy, a reservation of rights notification must be sent to the insured to apprise him of a potential coverage dispute. The carrier should

then proceed to provide the insured with the protections provided by the policy, including the appointment of counsel, as necessary, until such time as a definitive decision on coverage is made.

Duty to Negotiate

Liability insurance policies routinely vest the insurer with complete control over the defense and settlement of third-party claims against the insured. This control imposes upon the insurer a duty to exercise good faith in settling claims. When the claimant makes an offer to settle within the policy limits, courts generally agree that the insurer's good-faith duty requires the insurer to accept the offer if it would be reasonably prudent to do so. *Hart v. Republic Mut. Ins. Co.* (1949), 152 Ohio St. 185. This, however, does not translate into a duty to initiate settlement discussions.

What constitutes a breach of the carrier's duty to negotiate? The following facts are indicative of bad faith on the part of an insurer toward its insured in its negotiations with a claimant: 1) the evidence as to liability and damages is overwhelmingly against the insured; 2) the insurer recognizes the advisability of settlement, but attempts to get the insured to contribute thereto; 3) the insurer refuses to discuss the acceptability of a contribution on the part of the insured; 4) the insurer fails to properly investigate the claim so as to be able to intelligently assess all of the probabilities of the case; 5) the insurer rejects the advice of its attorneys, and/or agents, urging a settlement; 6) the insurer receives a compromise offer within or near the policy limit, but fails to act in any fashion upon it; 7) after receiving a reasonable compromise offer of settlement, the insurer offers an unreasonably low settlement sum at the time of trial; and 8) the insurer fails to inform the insured of any compromise offer. *Netzley v. Nationwide Mut. Ins. Co.* (1971), 34 Ohio App. 2d 65, at syllabus.

Correspondingly, a carrier's breach of its duty to negotiate will also lead to a cause of action for its breach of the duty to evaluate and settle the claim.

Duty to Evaluate and Settle

Insurance companies are in the driver's seat when it comes to evaluating a claim against an insured. As the insured typically has little experience with liability claims or settlement evaluation, it is up to the carrier to investigate and evaluate the claim for settlement purposes. The majority of policies generally reserve the right to settle, as well as to defend, any claim made or lawsuit filed against the insured that falls within the coverage of the policy. *Travelers Ins. Co. v. Motorists Mut. Ins. Co.* (1961), 88 Ohio L. Abs. 129. Should the claim fall within coverage, the insurance company's conduct can be construed as bad faith when the insurer fails to settle a case where liability and damages are reasonably clear.

A carrier has a duty to settle where there is reason to believe that the claim against the insured is a meritorious one, and where the reasonable expectation of successfully defending the action is negligible. *Netzley v. Nationwide Mut. Ins. Co.* (1971), 34 Ohio App. 2d 65. Because the insured's interest in settlement generally conflicts with the company's interest in avoiding liability, many courts hold that the implied obligation of good faith and fair dealing requires an insurer to accept a reasonable settlement offer. *Id.* An insurance company runs the risk of a bad faith claim where the facts demonstrate that the company placed greater emphasis on its own interests, rather than the interests of its insured.

The carrier must evaluate the chance that a judgment could be rendered against the insured for an amount in excess of policy limits. Three factors exist that control whether an insurer should settle or try the case: 1) the insured's chance of losing; 2) the likely verdict range should the claimant prevail over the insured; and 3) what percentage of that verdict would ultimately be payable by the insured. Allan D. Windt, *Insurance Claims and Disputes: Representation of Insurance Companies and Insureds,* (West Group, 4th ed. 2001) p. 493. In considering these factors, an insurer will not breach its duty to settle if the reasonable settlement value of the covered claim does not exceed the policy limit. If there is only a slim chance of an excess verdict, the insurer need not push for settlement. However, the insurer must base this conclusion on objective, reliable evidence.

Should a rational evaluation of the above factors indicate that a verdict in excess of the insured's coverage is possible, the insured must be notified, in writing, of this risk. Any offer of settlement of the claim at or near the policy limits should be conveyed to the insured for the purpose of giving the insured the opportunity to push for settlement, and the opportunity to contribute toward settlement. *Netzley*, 34 Ohio App. 2d at 75.

It is important to note that, under Ohio law, an insured's cause of action against his insurer for bad faith exists only when the insurer fails or refuses to settle a claim

brought against the insured for an amount within the policy limits, so that the insured may recover for amounts in excess of policy limits. *Hart v. Republic Mut. Ins. Co.* (1949), 152 Ohio St. 185. Accordingly, there must be a verdict or judgment exceeding coverage before an insured can pursue a bad faith claim based upon the carrier's failure to settle the case. *Romstadt v. Allstate Ins. Co.* (C.A.6., 1995), 59 F.3d 608, citing *Hart*, 152 Ohio St. at 187-188.

Duty to Pay/Indemnify

Of course, the fundamental obligation of an insurer under an insurance contract is its duty to indemnify—whether to reimburse the insured for losses incurred or to pay sums that the insured becomes legally obligated to pay to others. Windt, *supra*, p.578. An insurer has a duty to act in good faith in the processing and payment of the claims of its insured. *LeForge v. Nationwide Mutual Fire Insurance, Co.* (1992), 82 Ohio App. 3d 692. A cause of action for its failure to do so lies in tort irrespective of any liability arising from a breach of the underlying contract. *Staff Builders, Inc. v. Armstrong* (1988), 37 Ohio St. 3d 298. Mere refusal to pay on a claim, however, is not, in and of itself, conclusive of bad faith. *Leforge,* 82 Ohio App. 3d at 698.

The Supreme Court of Ohio has explained that the insurer's failure to pay a claim need not involve bad intent or malice to amount to "bad faith." In *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St. 3d 552, the insurer failed to pay the insured's business establishment on a fire damage claim because the insurer believed that the insured had set the fire for the insurance money. The insurer's investigation uncovered evidence that third parties had threatened to burn down the establishment and that the insured would reap no financial gain by setting fire to his own business. Notwithstanding this evidence, the insurer refused to pay the claim on the suspicion that the insured deliberately set fire to the premises. The Ohio Supreme Court in *Zoppo* found that the insurer's failure to pay the claim under these circumstances amounted to the tort of bad faith. The court reviewed and clarified its earlier holdings in this area and held: "[a]n insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not

predicated upon circumstances that furnish reasonable justification therefor."

To evaluate whether a claim must be paid, one must look to the contract and the facts. Policy language is interpreted to give popular and ordinary meaning, and each policy provision must be examined in light of the whole contract. *Ohio Bar Liab. Ins. Co. v. Hunt* (2003), 152 Ohio App. 3d 224.

Duty to Defend Its Insured

The last, and perhaps most critical, duty of an insurance carrier is the duty to defend the insured. Virtually all insurance contracts obligate the carrier to provide some form of defense to the insured. Defense of the claim may even be required if the claim is meritless. If the insured is left to defend himself or herself, the carrier may be required to reimburse the insured for the associated expenses, including the cost of hiring private counsel. The extent of the carrier's duty to defend is dependent upon the language in the policy, with any ambiguities resolved against the carrier. *Marginian v. Allstate Ins. Co.* (1985), 18 Ohio St. 3d 345.

Quite some time ago, the Ohio Supreme Court held that the test of the duty of an insurance company, under a policy of liability insurance, to defend an action against an insured is the scope of the allegations of the complaint in the action against the insured, and where the complaint brings the action within the coverage of the policy, the insurer is required to provide a defense, regardless of the ultimate outcome of the action or its liability to the insured. *Motorist Mut. Ins. Co. v. Trainor* (1973), 33 Ohio St. 2d 41, paragraph two of the syllabus. If the insurer's duty to defend is not apparent from the pleadings in the case against the insured, but the allegations do state a claim which is potentially or arguably within the coverage, or there is some doubt as to whether a theory of recovery within the policy coverage has been pled, the insurer must accept the defense of the claim. *City of Willoughby Hills v. Cincinnati Ins. Co.* (1984), 9 Ohio St. 3d 177.

Moreover, it is common for insurance carriers to contractually obligate themselves to defend any claim even if the claim is meritless. For instance, if the insurance policy states that the insurer is obligated to defend in any action seeking damages payable under the policy against the insured, even where the allegations are groundless, false or fraudulent, there is an absolute duty of the insurer to assume the defense of the action where the complaint states a claim which is partially or arguably within policy coverage. *Sanderson v. Ohio Edison Co.*, 69 Ohio St. 3d 582, paragraph one of the syllabus. Simply put, leaving the insured unprotected makes a strong case that the insurance company acted in bad faith.

Insurance carriers may provide their defense under a reservation of rights if a coverage dispute arises. A reservation of rights notifies the insured that the insurer will provide a defense to the claim, but is reserving any rights it has based on non-coverage under the policy. *Motorists Mut. Ins. Co. v. Trainor*, 33 Ohio St. 2d at 45. This reservation of rights must be made in a timely manner; however, if the reservation of rights comes so late that it prejudices the insured's ability to defend the matter, a court may find that the insurer has waived the reservation of rights. *Dietz-Britton v. Smythe, Cramer Co*. (2000), 139 Ohio App. 3d 337. Notification of a reservation of rights must be sent prior to the carrier's representation of the insured, either in pre-suit negotiations or when the case is in suit.

CONCLUSION

In short, do not hesitate to challenge questionable insurance practices. In this day of tort reform and juror bias against personal injury claimants, a bad faith insurance claim remains a solid case to pursue when an insurance carrier undertakes unscrupulous practices against its insured. The last word does not lie in the hands of the insurance executives sitting in the ivory tower, but rather with a jury of our peers who will level the playing field and remedy unlawful conduct by insurance companies who choose to act in their own best interests rather than fulfill their obligations and legal duties to their policy holders.

Endnotes

1. Jack Landskroner is a partner in the firm Landskroner, Greico, Madden, Ltd. Rebecca Castell is an associate in the same firm.

CATA 2006 Annual Installation Dinner

CATA held its annual Installation Dinner on Friday, June 2, 2006 at the Key Club. Approximately 145 members and their guests attended to see Judge Dick Ambrose swear in Donna Taylor-Kolis as President, Mark Barbour as Vice President, Stephen T. Keefe, Jr. as Secretary, W. Craig Bashien as Treasurer, and John Liber, II, Brian Eisen, Edward Fitzgerald, Laurel Matthews, George Loucas, Stuart Scott, Stephen Vanek and Cathleen Bolek as Members of the Board of Directors. Judges in attendance included Hon. Bridget McCafferty, Presiding Judge Nancy McDonnell (pictured with past President Dennis Lansdowne), and Diane Karpinski.

Officers swear in (l to r):
Honorable Dick Ambrose, Mark Barbour, Stephen T. Keefe, Jr., W. Craig Bashein, Donna Taylor-Kolis.

Judge Karpinski gave a moving tribute to Judith Kilbane Koch. President Kolis then described the efforts she will make to improve the public image of trial lawyers. She then introduced our speaker, James McElroy, Chairman of the Board of Directors of the Southern Poverty Law Center.

At a time when our profession and the rights of our clients are under siege, McElroy reminded us of the importance of the civil justice system to our Democracy. He described the good that has come from the filing of personal injury lawsuits on behalf of the weak against the strong. One of the most memorable cases he described was his experience working with Morris Dees in the civil action brought by the SPLC on behalf of the family of Mulugeta Seraw, an Ethiopian student killed in 1988 by a Skinhead gang. As a result of that lawsuit, the head of the Skinhead gang has financed Seraw's son's immigration from Ethiopia and his American education.

The installation dinner was a success, welcoming more attendees than any other prior CATA event. This tremendous turnout reflects our membership's abiding commitment to the interests of our clients, and the importance of CATA in providing local trial attorneys with the support they need to continue the struggle against tort reform and the negative public perception of trial attorneys it has engendered.

2006 CATA President Donna Taylor-Kolis addresses the crowd at the Installation Dinner.

Board of Directors swear in (l to r): Honorable Dick Ambrose, John R. Liber, II, Brian N. Eisen, Edward Fitzgerald, Laurel A. Matthews, George Loucas, Stuart Scott, Stephen S. Vanek

Honorable Diane Karpinski

Honorable Bridget M. McCafferty, former CATA President Dennis Landsdowne, Honorable Nancy R. McDonnell

2006 CATA Annual Installation Dinner

Law Updates
by Andrew Thompson

Civil Procedure – An Affidavit Of A Party Opposing Summary Judgment That Contradicts Former Deposition Testimony Cannot Create Genuine Issue of Fact

***Byrd, et al. v. Smith, et al.*, 110 Ohio St.3d 24, 2006-Ohio-3455.**

Bryan Byrd, Appellant, was involved in an automobile accident and subsequently made a claim for UM/UIM benefits under an insurance contract issued to his employer. Following the decision in *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St.3d 216, 2003-Ohio-5849, Appellees filed a motion for summary judgment, arguing that Appellants were not entitled to coverage because Mr. Byrd was not acting in the course and scope of his employment at the time of the subject accident. Appellees' motion was supported by Mr. Byrd's deposition testimony, wherein he stated that at the time of the collision he was on a personal errand. In response, Appellants submitted an affidavit from Mr. Byrd asserting that during his employment he was required to wear a pager, that he responded to work calls outside of normal working hours, that the vehicle involved in the accident was a company vehicle with a sign advertising 24-hour service, and that as long as he was driving this vehicle he considered himself working for and advertising for his employer.

The trial court granted Appellees' motion for summary judgment without mentioning the affidavit. The Twelfth District Court of Appeals affirmed, citing *Golden v. Kearse* (12th Dist.), 1999 WL 374128, for the proposition that "neither a movant nor a respondent can prevail on summary judgment by creating an issue of material fact through the use of contradictory or conflicting summary judgment materials." *Id.* at ¶ 4. The Supreme Court accepted the matter for review based on a certified conflict, identifying the issue as "[w]hether it is proper for courts to disregard an affidavit inconsistent with or contradictory to prior deposition testimony when ruling on a motion for summary judgment." ¶ 8.

The Court referenced its prior decision in *Turner v. Turner* (1993), 67 Ohio St.3d 377, where it held that a moving party's contradictory affidavit cannot be used to obtain summary judgment, since the contradiction in testimony creates a credibility issue that should only be resolved by the trier of fact. In applying this rule to nonmoving parties, the Eleventh and Twelfth Districts have held that a contradictory affidavit may not be used to create an issue of fact; the First and Fourth Districts utilize the same principle, but also consider any explanation provided by the nonmoving party. Other courts, including the Third District, have held that supplemental affidavits submitted by nonmoving parties in opposition to summary judgment should be considered.

The Supreme Court resolved the conflict by holding that "an affidavit of a party opposing summary judgment that contradicts former testimony of that party may not, without sufficient explanation, create a genuine issue of material fact to defeat a motion for summary judgment." ¶ 16. The Court noted that it is important to determine whether a party's affidavit is inconsistent with prior testimony, or whether it merely supplements the testimony. If it is supplemental, it should be considered by trial courts. If it is contradictory, the court should look to any explanation for the inconsistency. The Court held that in evaluating an explanation, if the affiant neither suggests he or she was confused at the deposition nor offers a legitimate reason for the contradictions, the affidavit will not create a genuine issue of fact.

Since the court of appeals in the instant case dismissed the matter without considering Appellant's explanation for submitting the affidavit, the matter was remanded.

Justice O'Donnell issued a brief dissent, suggesting that a contradictory affidavit submitted by a nonmoving party should not create a genuine issue of fact, regardless of any explanation provided. He submits that allowing additional explanation "could cause the trial court either to delay ruling on or to deny a motion for summary judgment, neither of which is contemplated by Civ. R. 56 or the court's requirements for summary judgment set forth in *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 662 N.E.2d 264." ¶ 36.

Civil Procedure – Claims File Materials Showing Insurer's Lack Of Good Faith In Refusing To Settle Claim Not Protected Under Attorney-Client Or Work-Product Privileges

***Unklesbay v. Fenwick, et al.*, 2nd Dist. App. No. 2005-CA-108, 2006-Ohio-2630, 2006 WL 1453120.**

Appellee filed a complaint for negligence against a woman who struck him with her car while backing out of a parking lot, and sought a declaratory judgment

against Appellant, Preferred Mutual Insurance Company, regarding his right to obtain UM/UIM coverage. Appellee later amended his complaint to add a bad faith claim for Preferred Mutual's alleged refusal to investigate and pay his claim. During discovery, Appellee requested Preferred Mutual's claim file. Preferred Mutual refused to turn it over, arguing that the file contained privileged documents. The trial court granted a motion to compel filed by Appellee, directing Appellant to "produce to Plaintiff all of its claims file materials that were created prior to Defendant's payment of insurance benefits to Plaintiff, including but not limited to attorney-client communications relating to coverage." ¶ 6. Preferred Mutual thereafter filed the instant appeal.

Appellant first argued that Appellee's motion to compel should not be granted because he failed to comply with Civ. R. 37(E), which requires that the party make reasonable efforts to resolve the dispute before filing a motion to compel. Appellee did not make a specific statement in his motion regarding his efforts to informally obtain the information, but he attached correspondence showing his requests. The court of appeals overruled this assignment of error, finding that Rule 37 is designed for the benefit of the trial court, not the parties. Since in the instant matter the trial court already accepted briefs on the issue and held a hearing, the court of appeals concluded that there would be no useful purpose in reversing the judgment and forcing the trial court to do its work again.

Appellant's second assignment of error challenges the trial court's decision to order the production of materials covered by the attorney-client privilege. In *Boone v. Vanliner Ins. Co.* (2001), 91 Ohio St.3d 209, the Ohio Supreme Court held that an insured is entitled to discovery of claims file materials containing attorney-client communications that were created prior to the denial of coverage. The Court reasoned that "[c]laims file materials that show an insurer's lack of good faith in denying coverage are unworthy of protection." *Id.* at 213. This rule was further extended to materials covered by the work-product privilege in *Garg v. State Auto. Mut. Ins. Co.* (2nd Dist.), 155 Ohio App.3d 258, 2003-Ohio-5960. Appellant attempted to distinguish these cases by arguing that it never expressly denied Appellee's UM/UIM claim (and ultimately paid it), so the reasoning underlying the other decisions is inapplicable. The court of appeals rejected this argument, noting that an insurer's duty to act in good faith extends beyond merely the denial of claims. In *Mundy v. Roy* (2nd Dist.), 2006-Ohio-993, 2006 WL 522380, the court recognized that an insurer can act in bad faith in its delaying the processing of a legitimate claim, and that the discovery obligation set forth in *Boone* applies to this situation as well as the outright denial of a claim. The *Mundy* court stated that "much of *Boone's* reasoning remains applicable without regard to this distinction." *Id.* The court of appeals concluded that claims file materials showing an insurer's lack of good faith in processing, evaluating, or refusing to pay a claim are unworthy of the protection afforded by the attorney-client or work-product privilege.

Appellant next argued that the trial court abused its discretion in not conducting an in camera review of the claims file materials before ordering that they be turned over to Appellee. In both the *Boone* and *Garg* cases, the trial courts conducted in camera reviews before ordering the production of the materials. In *Garg*, the Court observed that "the critical issue in evaluating the discoverability of otherwise privileged materials is…whether they may cast light on bad faith on the part of the insurer." *Garg*, 155 Ohio App.3d at 265. Appellant argued that, since at least some of its file may contain privileged materials that do not cast light on its alleged bad faith, the trial court should have reviewed the documents to determine which portions of the file were discoverable. The court of appeals agreed and sustained Appellant's assignment of error. The court held that the trial court's order was too broad since it required production of materials that might not be relevant to whether Appellant acted in bad faith. The trial court was obligated under these circumstances to review the claims file before ordering its production.

Finally, the court of appeals rejected Appellant's claim that the trial court improperly required production of information in its file prior to the date that benefits were paid. Appellant argued that *Boone* clearly established the line between discoverable and non-discoverable materials as the date on which coverage was denied, not that on which benefits were eventually paid. The court of appeals ruled that this case is distinguishable from *Boone* in that Appellant did not deny coverage, but instead allegedly acted in bad faith in handling, processing, evaluating, and refusing to pay the claim in a timely fashion. In such a case, the trial court correctly set the date of eventual payment as the cut-off point.

Civil Procedure – Attorney Work Product Doctrine Did Not Apply To Protect Nurse Paralegal From Testifying About How Expert Reports Were Generated

***Stanton v. University Hospital Health System, Inc., et al.*, 8th Dist. App. No. 86516, 2006-Ohio-2297, 2006 WL 1281002.**

Appellant brought an action for wrongful death and violations of the Nursing Home Resident's Rights statute stemming from the death of an elderly woman who fell twice during her care with Appellees. During litigation, Appellees deposed two of Appellant's expert witnesses, Cheryl Vajdik, R.N. and Dr. Stephen Aiello. Each of the expert witnesses testified that a nurse paralegal working for Appellant's counsel assisted them in the drafting of their expert reports. Each expert also confirmed that the substance of the reports and the opinions contained therein were formed based on their own review of the case, and those opinions were provided to the paralegal during telephone conversations before the reports were drafted. Based on this testimony, Appellees sought to depose the nurse paralegal. Appellant filed a motion for a protective order, arguing that allowing the deposition would implicate the work product of Appellant's counsel. The trial court denied the motion, holding that "Defendant may depose Plaintiff's nurse paralegal only on the issue of how Plaintiff's expert reports were generated."

The work product doctrine, now codified in Fed. R. Civ. P. 23(b)(3), provides that "a party may obtain discovery of documents and tangible things otherwise discoverable…and prepared in anticipation of litigation or for trial by or for another party…only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Pursuant to this rule, in order to obtain work product materials in discovery the proponent must show both a substantial need and undue hardship. When the work product includes an attorney's mental impressions, conclusions, opinions or legal theories, however, such a showing is not enough because such "opinion work product" enjoys a nearly absolute immunity. See *Cox v. Admr. U.S. Steel & Carnegie* (11th Cir. 1994), 17 F.3d 1386, 1422.

The court of appeals upheld the trial court's denial of Appellant's protective order. By limiting the deposition to only the issue of the generation of the reports, the court suggested that Appellee would not be able to seek information that is considered opinion work product. The court stated that "the trial court's order of Robert's deposition goes solely to the issue of how the reports were generated, protecting any intrusion into the mental processes that went into creating the reports." ¶ 14. Since the only method to determine how these reports were created is to depose the paralegal, the court held that the deposition was permitted.

In dissent, Judge McMonagle notes the potentially disastrous practical effect of the majority's holding. He states that "such holding will open the door to attorneys, paralegals, secretaries, law clerks, and any other agent of an attorney who is working under the direction and discretion of the attorney to be subject to deposition, based solely upon their participation in preparing discovery. In fact, by subpoenaing any one of these persons, opposing counsel would force them to withdraw pursuant to Ohio Disciplinary Rule DR 5-102." ¶ 56.

Judge McMonagle asserts that Appellees failed to meet their burden of overcoming the work product protection, since the only stated reason for the deposition was to establish bias and challenge the credibility of the experts. Appellees had an opportunity to, and actually did, explore potential biases during the experts' own depositions. The dissent would also reject the argument that the paralegal's participation in the drafting of the report somehow removes the protection of the work product privilege. He notes that the issue is not whether the reports themselves are protected; they are not. The issue is whether the communication between counsel and the experts is privileged; which it is. The privileges afforded to counsel are also applicable to nonlawyer employees working at his or her direction. In *Community Mut. Ins. Co. v. Tracy* (1995), 73 Ohio St.3d 371, 374, the Ohio Supreme Court noted that "[d]elegation of work to nonlawyers is essential to the efficient operation of any law office." The dissent also rejects the argument that the deposition was necessary to explore possible impermissible hearsay. Suggesting certain terminology to experts is commonplace, and the dissent notes "is precisely how experts reach certain conclusions." ¶ 53. For example, medical providers do not generally state things "to a reasonable degree of medical certainty." Such phrases can be introduced by counsel for the experts to apply to particular cases. For each of these reasons, Judge McMonagle would reverse the decision of the trial court.

Employment Law – Retaliation – Post-Employment Suit By Employer For Malicious Prosecution Seeking Attorney Fees And Punitive Damages Constitutes Retaliation Under R.C. §4112.02(I)

***Greer-Burger v. Temesi*, 8th Dist. App. No. 87104, 2006-Ohio-3690, 2006 WL 2023571.**

Appellee filed a sexual harassment lawsuit against Appellant based on alleged inappropriate comments and actions that occurred while she was employed by

Appellant. After a trial on the matter, a jury returned a verdict in favor of Appellant. About five months later, Appellant filed a suit against Appellee alleging malicious prosecution, abuse of process, and intentional infliction of emotional distress. Appellee filed a charge with the Ohio Civil Rights Commission (OCRC), asserting that Appellant's lawsuit was illegal retaliation for her filing of a sexual harassment claim. The OCRC found probable cause that Appellant violated the anti-retaliation provisions of R.C. §4112.02(I), and adopted the findings of an administrative law judge ordering Appellant to cease and desist from all discriminatory practices and reimburse Appellee $16,000 in attorneys' fees spent defending herself. Appellant appealed the decision.

In his first assignment of error, Appellant argues that Appellee failed to make out a prima facie case of retaliation. Under Ohio's civil rights statute, it is unlawful "for any person to discriminate…against any other person because that person has made a charge, testified,…or participated…in any investigation, proceeding, or hearing under [the statute]." In order to make out a prima facie case of retaliation, a complainant must show that: (1) the complainant engaged in protected activity, (2) the respondent knew of complainant's participation in the protected activity, (3) the respondent thereafter took adverse employment action against the complainant, and (4) a causal connection exists between the protected activity and the adverse employment action. ¶ 14.

Appellant argues that Appellee could not make out such a claim because she quit her employment with him before the sexual harassment suit, and therefore no adverse employment action could be taken against her. The court rejected this argument. The language of the anti-retaliation statute does not limit the claim to employers and employees; it prohibits "any person" from discriminating against "any other person." Therefore, an action is available even though the retaliation occurred post-employment. The court notes that the United States Supreme Court has held that Title VII's anti-retaliation provisions expressly cover former employees. *Robinson v. Shell Oil* (1997), 519 U.S. 337, 346. The court also held that the retaliatory action need not be employment related. The Supreme Court recently held in *Burlington Northern Santa Fe Ry. Co.* (2006), 548 U.S. —, that the scope of Title VII's anti-retaliation provisions "extends beyond workplace-related or employment-related retaliatory acts and harm." The court held that Appellee made out a prima facie case of retaliation.

The court also rejected Appellant's purported legitimate, non-discriminatory reason for his actions. Appellant argued that he filed a lawsuit not as retaliation, but to recoup economic loss and seek redress for emotional distress caused by a frivolous sexual harassment suit. The court held that this reason was merely pretext for discrimination, however, relying primarily on the fact that as a part of his suit, Appellant sought to recover punitive damages. The purpose of punitive damages is to punish and deter Appellee from her conduct; or, in other words, to deter her from filing a sexual harassment suit. Under these circumstances, the court concluded that Appellant's action was motivated by discriminatory animus.

In his second assignment of error, Appellant argued that the award of attorneys' fees was improper because he had a right to pursue a claim against Appellee for her actions in unsuccessfully suing him for sexual harassment. The court of appeals acknowledged that parties who are wrongfully sued may seek redress, however the court held that they may not do so in a retaliatory manner. If Appellant was motivated by a desire to recover his attorneys' fees, he could have done so pursuant to Civil Rule 11 and R.C. §2323.51 during the original sexual harassment suit. Since he failed to pursue those options and instead filed suit five months later, seeking more damages than simply his attorneys' fees, the court held that an award of attorneys' fees to Appellee was appropriate.

Appellant lastly argues that he should not be required to pay Appellee's attorneys' fees because they were discharged in bankruptcy and she would be receiving a windfall. The court rejected this assignment of error, holding that an award of fees serves as a necessary deterrent to retaliatory conduct. Further, the disposition of the amount of fees should be considered by the bankruptcy court, not the court of appeals. The decision of the OCRC was upheld.

Employment Law – Preemption – Disability Discrimination Action Found Not To Be Preempted By Atomic Energy Act

***Minshall v. The Cleveland Illuminating Co., et al.*, 11th Dist. App. No. 2004-L-156, 2006-Ohio-2241, 2006 WL 1214795.**

Appellant brought a disability discrimination claim against Appellees alleging a violation of Ohio Revised Code §4112. Appellant was employed as a Senior Reactor Operator at Perry Nuclear Power Plant from August 18, 1982 until his termination on February 2, 2004. Appellant's discharge stems from two alcohol-related

incidents. The first occurred on September 17, 2002, when a random vehicle inspection uncovered an empty beer bottle in Appellant's car. A blood alcohol test was performed and a detectable level of alcohol was found in Appellant's blood. He was denied unescorted access to vital areas of the plant for a four week period. About a year later, while off duty, Appellant fell asleep at the wheel of his car and ran into a building near his home. He admitted to drinking about 11 beers during the ten hours before the accident. He was convicted of disregard for safety and failure to control, and his unescorted access to vital areas of the plant was again denied. Appellant was eventually discharged for his "inability to maintain unescorted access to [Appellees'] plant."

Appellant's complaint alleged that he had the disability of alcoholism and that Appellees failed to accommodate him. Appellees filed a motion for judgment on the pleadings, arguing that even if he had a valid discrimination claim, because of the overriding safety issues, federal regulations under the Atomic Energy Act preempt state law and allow discipline to be imposed under these circumstances. The trial court converted Appellees' motion to a motion for summary judgment and found in favor of Appellees.

The court of appeals first noted that it was error for the trial court to convert Appellees' motion to a motion for summary judgment. However, since Appellant did not object at the trial level and submitted evidence in opposition outside of the pleadings as allowed by Civ. R. 56, the court found that the argument was waived.

In *Cleveland v. Pub. Utility Comm.* (1980), 64 Ohio St.2d 209, the Ohio Supreme Court addressed the issue of federal preemption with respect to nuclear power plants. The Court recognized the rule of judicial analysis that divides preemption into express or implied preemption, and held that "the federal government has preempted state regulation of the operation of nuclear power plants with respect to radiological hazards and safety considerations." *Id.* at 215. In other areas, however, the Atomic Energy Act specifically provides that "[n]othing in [the Act] shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards." 42 U.S.C. §2021(k). Since Congress has not expressly proscribed state law claims for such other purposes, the court of appeals determined that Appellant's claim was not expressly preempted.

In addressing implied preemption, the legal analysis is further broken down into "field" preemption and "conflict" preemption. "[I]n the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively,…or to the extent it actually conflicts with federal law." ¶32, quoting *English v. General Electric Co.* (1990), 496 U.S. 72, 78. The United States Supreme Court has described "field" preemption as follows: "Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because '[the] scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.'" *Fidelity Federal Savings & Loan Assn. v. De La Cuesta* (1982), 458 U.S. 141, 153, quoting *Rice v. Santa Fe Elevator Corp.* (1947), 331 U.S. 218, 230. The court of appeals held that Appellant's claim was not preempted by "field" preemption in the instant matter. Following the reasoning of *Brown v. Northeast Nuclear Energy* (Conn. 1999), 48 F.Supp.2d 116, the court determined that federal law only encompasses the need to regulate radiological safety aspects of the construction and operation of a power plant, not areas that deal solely with the rights of employees.

State law becomes nullified by virtue of "conflict" preemption when simultaneous compliance with both state and federal law is impossible, or when the state law becomes an obstacle to the accomplishment and execution of the goals of the federal law. *Burns International Sec. Svs., Inc. v. Pennsylvania* (Pa. 1988), 547 A.2d 818, 821. The *Brown* court held that for preemption to apply, the effect of the state law on the goals of the federal law must be "direct and substantial." *Brown*, supra. at 121. The court of appeals again followed *Brown* and found that Appellant's claim was not preempted because state laws addressing disability discrimination are not motivated by an objective to regulate safety aspects of the plant, but instead seek to protect an employee's right not to be discriminated against. The court noted that Appellees were unable to point to any specific federal regulation that Appellant was in violation of, and further could not identify the essential functions of Appellant's job.

The court of appeals did not address the merits of Appellant's discrimination claim, but remanded the matter to the trial court.

Evidence – Expert Opinions Excluded Under Rule 702(C) Because They Are Based On Materials Found Not To Be Scientifically Valid

***Valentine v. Conrad, et al.*, 110 Ohio St.3d 42, 2006-Ohio-3561.**

Appellant, Linda Valentine, filed an action for Workers' Compensation death benefits, claiming that her husband's exposure to toxic chemicals during his employment with Appellee, PPG Industries, caused a rare form of brain cancer (glioblastoma multiforme) that resulted in his death. The Industrial Commission denied her claim.

On appeal to the Pickaway County Court of Common Pleas, Appellant submitted testimony from three experts to establish that her husband's illness was caused by the conditions of his employment. Two experts were decedent's treating physicians, Dr. Michael E. Miner and Dr. Herbert B. Newton. Both physicians opined that decedent's brain tumor and eventual death was caused, to a reasonable degree of medical certainty, by the chemical toxins in his workplace. These opinions were based in part on their knowledge and experience as physicians, their specific knowledge of decedent's illness, medical and genetic research, and epidemiological studies. Most importantly, the experts considered the fact that a co-employee of decedent died within two weeks of him from the same rare condition. The third expert, Norman Brusk, was an industrial hygienist who performed an analysis of the workplace. He opined that decedent was at a heightened risk of developing brain cancer because of the conditions present at PPG Industries.

The trial court held that the expert testimony was unreliable and should be excluded under Rule 702(C) of the Ohio Rules of Evidence. Without the expert testimony, Appellant was unable to establish causation and summary judgment was granted for Appellee. The Fourth District Court of Appeals affirmed the ruling of the trial court. The Supreme Court accepted the discretionary appeal to consider whether Rule 702(C) requires a scientifically valid connection between the opinion of an expert witness and the resources relied upon by the expert.

The Court upheld the ruling of the lower court and found the expert testimony inadmissible. Rule 702(C) requires that the principles and methodology that underlie an expert's opinion be reliable. The Court stated that "[a]lthough scientists certainly may draw inferences from a body of work, trial courts must ensure that any such extrapolation accords with scientific principles and methods…Because expert opinion based on nebulous

methodology is unhelpful to the trier of fact, it has no place in courts of law." ¶ 18. The Court based its decision on the fact that no scientific study has definitively established that glioblastoma multiforme is caused by any particular chemical (Appellant's experts acknowledge that ionizing radiation is the only proven cause of the disease), that the epidemiological studies referenced did not involve persons in the same industry, and the animal studies cited did not indicate that brain tumors develop across species. To arrive at their conclusions, Appellant's experts were required to "extrapolate from the conclusions of the underlying materials…[and they] did not adequately explain the scientific basis for doing so." ¶ 21.

The Court held that the physician experts could not rely on differential diagnosis to support their opinions. Although differential diagnosis is a standard scientific method of determining causation, it is inappropriate when the potential causes of a condition are not scientifically known. Therefore, since no studies conclusively established that a chemical is capable of causing decedent's condition, differential diagnosis is not a reliable method of determining causation in this case. The Court also discounted the fact that decedent's co-worker died of the same illness only two weeks later, referring to the events as "lay speculations on medical causality" and "scientific guesswork," which the Court held "are a perilous basis for inferring causality." ¶ 23.

In well-reasoned dissenting opinions, Justices Pfeifer and Lundberg Stratton argue that the testimony offered by Appellant's experts "easily surpasses the standard for summary judgment, and the trial judge abused his discretion in finding otherwise." ¶ 24. Justice Pfeifer notes that the statistical odds that the two employees randomly contracted this rare form of cancer, out of 17 workers, are 1 in 1,442,206. He notes that there "is less than once chance in a million, quite literally, that the well-qualified doctors who testified on behalf of Valentine were wrong about the cause of her husband's death." ¶ 29. Justice Lundberg Stratton, after a thorough recitation of the basis of each expert's opinion, suggests that any issues relating to the credibility of the witnesses should be decided by the trier of fact, not the court.

Insurance – Intrafamilial Tort Exclusion In Automobile Liability Policy Precluded Coverage

***Kelly v. Auto Owners Insurance Co.*, 1st Dist. App. No. C-050450, 2006-Ohio-3599, 2006 WL 1933743.**

Appellant was seriously injured when he was struck by a car driven by his wife. Both were named as insureds in an automobile insurance policy issued by Appellee. Appellant asserted a claim against his wife for bodily injury. Appellee denied coverage based on a policy exclusion precluding coverage for injury to a spouse who resides in the same household. Appellant also asserted a claim under the UM section of the policy, which Appellee also denied. Appellant filed suit for breach of contract and bad faith. The trial court granted summary judgment to Appellee on both claims.

The court of appeals upheld the decision. The policy at issue excluded liability coverage for intrafamilial torts, presumably to prevent fraudulent claims. The court held that the 2001 amendments to R.C. §3937.18 allow an insurer to include any terms and conditions in its policy precluding coverage, as long as they are specified in the policy. "Specified" means that the exclusion must be "clear and conspicuous." The language at issue in this case provided that "liability coverage does not apply to bodily injury to you or any relative." "You" was defined as "the first named insured…and if an individual, your spouse who resides with you." The court held that this exclusion was clear and conspicuous, thus precluding coverage.

The court also upheld the trial court's denial of UM coverage. The UM portion of the policy stated that coverage did not apply "to bodily injury caused by an automobile operated by a person excluded from coverage for bodily injury liability under the policy." Appellee argued that this exclusion clearly applies because Appellant's wife was excluded from liability coverage for intrafamilial injury. The court agreed, holding that Appellant could not claim UM benefits for himself in the same policy in which his wife was excluded from liability coverage.

Finally, the court upheld the grant of summary judgment on Appellant's bad faith claim. Such a claim lies where an insurer's denial of a claim is not based on circumstances that reasonably justify the denial. Since the court upheld Appellee's denial of coverage, the bad faith claim was properly dismissed.

Insurance – Uninsured Motorist Coverage – Policy Listing Corporation As Named Insured Is Ambiguous

***Flynn, et al. v. Westfield Insurance Company, et al.*, 1st Dist. Case No. C-050909, 2006-Ohio-3719, 2006 WL 2034741.**

On February 22, 2002, Appellant Flynn was severely injured in an automobile accident on Interstate 74 in Cincinnati. At the time, he was a partner in the law firm of Griffin-Fletcher, was an employee of Lawyers Title of Cincinnati ("LTOC"), a real estate title company, and volunteered for LaSalle High School, which was operated by the Roman Catholic Archdiocese of Cincinnati. Flynn was traveling on I-74 to attend his first meeting as a member of the LaSalle High School development board. Before the meeting, he had planned to deliver documents for a real estate closing in the area. The accident occurred before he delivered the documents.

After receiving benefits under his own insurance policy, Flynn sought compensation from several other policies. The first was from Westfield, which issued an automobile and umbrella insurance policy to Griffin-Fletcher and LTOC. He sought recovery under the next group of policies based on his status as a board member and volunteer for LaSalle High School. United National, National Catholic, and St. Paul issued primary and excess liability policies to the Archdiocese covering volunteers and board members. The trial court granted summary judgment to each of the foregoing carriers, finding that Flynn was not covered by the respective policies.

In considering the Westfield policy, the court of appeals examined whether Flynn was an "insured." The named insured in the subject policy was "Lawyers Title of Cincinnati, Inc. dba Griffin and Fletcher." For purposes of the uninsured motorist coverage, insured persons include "you," which was defined as the named insured, LTOC dba Griffin-Fletcher. The court concluded that Flynn was an insured under the policy. In *Scott-Pontzer v. Liberty Mutual Fire Ins. Co.*, 85 Ohio St.3d 660, 1999-Ohio-292, the Ohio Supreme Court held that an insurance policy that lists a corporation as a named insured is ambiguous, and the corporation's employees should be considered as insured under such a policy. The court stated that "a corporation can act only by and through real live persons…[and] [i]t would be nonsensical to limit protection solely to the corporate entity." *Id*. at 664. Since Flynn was employed by LTOC, the named insured, he is therefore an insured under the Westfield policy.

Flynn is also covered by the Westfield policy because of his status as a partner of Griffin-Fletcher. "A partnership is an aggregate of individuals and does not constitute a separate legal entity." *Weddle v. Hayes* (Ohio App. 7th Dist.), 1997 WL 598095. When a partnership is listed as the named insured, the individual partners are also insured.

Westfield argues that any ambiguity in the policy over who is a named insured is removed because of the inclusion of a broadened-coverage endorsement that lists Mike Fletcher, a partner of Griffin-Fletcher, and his family as insureds. The court rejected this argument, though, interpreting the endorsement as adding coverage to these individuals, not limiting those who are considered named insureds. The court noted that Westfield's argument would require that Westfield accept an additional premium from its customer in exchange for a reduction in coverage under the policy.

The court further rejected Westfield's argument that Flynn should be denied coverage because he was not in a covered auto at the time of his accident. The court held that the policy's language was ambiguous on this requirement. The declaration page states that the policy will apply "only to those autos shown as covered autos." However, the uninsured motorist endorsement does not contain such a limitation, and includes "you" as an insured. Further, an "other-owned-vehicle" exclusion

in the policy limits coverage when injury is sustained by "you" while occupying any vehicle that is not a covered auto. The court reasoned that this exclusion would be redundant if Westfield's interpretation of the policy were accepted. Since the policy is ambiguous, the court construed it in favor of the insured and reversed the trial's court grant of summary judgment in favor of Westfield.

The court upheld the trial court's judgment in favor of the other insurance carriers, holding that Flynn was not acting in the course and scope of his duties as a volunteer and board member for LaSalle. The court applied the "coming-and-going" rule, which the Ohio Supreme Court described as follows: "As a matter of law, a master is not liable for the negligence of his servant while driving to work at a fixed place of employment, where such driving involves no special benefit to the master other than the making of the servant's services available to the master at the place where they are needed." *Boch v. New York Life Ins. Co.* (1964), 175 Ohio St. 458, ¶ two of syllabus. The court rejected Flynn's attempt to distinguish volunteers and employees for the application of this rule.

Insurance – Uninsured Motorist Coverage – Policy At Issue Did Not Restrict Coverage To Insured Suffering Bodily Injury

***Willet v. Geico General Insurance Co.*, 10th Dist. App. No. 05AP-1264, 2006-Ohio-3957, 2006 WL 2170682.**

This case involves a claim for uninsured motorist benefits. On August 13, 2003, Appellant's son was killed in a single car accident. He was a passenger in a vehicle driven by an uninsured driver. Appellant made a UM claim on an automobile liability policy he held with Appellee. It is undisputed that Appellant's son is neither a named insured under the policy nor a resident relative of a named insured. Appellee denied the claim and Appellant filed suit. Both parties filed motions for summary judgment. The trial court granted Appellee's motion, finding that Appellant is not entitled to benefits under the policy.

The determinative issues on appeal were whether Ohio law allows an insurer to restrict UM/UIM coverage only to accidents in which a named insured suffers injury, and if so, whether Appellee's policy so limits coverage in this case.

In *Sexton v. State Farm Mut. Auto Ins. Co.* (1982), 69 Ohio St.2d 431, the Ohio Supreme Court held that policy exclusions limiting UM/UIM coverage to insureds suffering bodily injury were void under the version of R.C. §3937.18 that was in effect prior to the S.B. 20 amendments to the statute. In *Moore v. State Auto Mut. Ins. Co.* (2000), 88 Ohio St.3d 27, the Court similarly held that the statute as amended by S.B. 20 does not permit the subject limitation. However, in *Hedges v. Nationwide*, 109 Ohio St.3d 70, 2006-Ohio-1926, the Court held that *Moore* does not apply to insurance contracts executed after the version of the statute as amended by 1997 H.B. 261. Therefore, *Hedges* presently allows insurers to restrict UM/UIM coverage to accidents in which an insured suffers injury.

In analyzing the policy language in the instant matter, the court of appeals held that it does not limit coverage to only an insured suffering injury. The policy states in part, "we will pay damages for bodily injury caused by accident which the insured is legally entitled to recover from the owner or operator of an uninsured or underinsured motor vehicle or hit-and-run motor vehicle arising out of the ownership, maintenance or use of that auto." The court interpreted this language to allow coverage when the bodily injury is suffered by any person, as long as the insured is legally entitled to collect damages for that person's injury, including for mental suffering. There is no clear and unambiguous limitation on coverage in the subject policy.

The court of appeals also rejected Appellee's contention that an exclusion in the policy precludes coverage to Appellant. The exclusion states that, "[w]e do not cover any person suffering bodily injury, who is not an insured under the policy." Appellee argues that this language shows a clear intention to limit coverage to persons suffering bodily injury who are insured under the agreement. The court of appeals disagreed. The policy only limits who is covered, not what claims are available. For example, under the facts of this case, coverage would be excluded for claims by Appellant's son. There is no question, however, that Appellant is covered and therefore is entitled to assert a claim. The judgment of the trial court was reversed and the case was remanded.

Medical Malpractice – Court Reverses Defense Verdict And Orders New Trial Because Of Inappropriate Comments Made By Defense Counsel Throughout Trial

***Thamann v. Bartish, et al.*, 1st Dist. Case No. C-040097, 2006-Ohio-3346, 2006 WL 1791403.**

Appellee, Dr. Lawrence Bartish, performed surgery on Meredith Thamann to remove her gall bladder and some gall stones. After a couple of days, during which Mrs. Thamann felt lethargic and nauseous, Dr. Bartish told her husband to bring her to the emergency room. Dr. Bartish arrived shortly after the Thamanns and assumed responsibility for her care. He determined that she suffered from septic shock caused by an infection relating to her surgery. After about six hours of treatment, Mrs. Thamann went into cardiac arrest and died. An autopsy revealed that multiple blood clots in her lungs had caused Mrs. Thamann's death.

Mrs. Thamann's husband filed suit for wrongful death and medical malpractice against Dr. Bartish and his employer. After a two-and-a-half week trial, a jury returned a verdict in favor of both defendants. Mr. Thamann appealed.

In his first assignment of error, Mr. Thamann argued that defense counsel repeatedly made improper and inflammatory comments throughout the trial that were so grossly improper and prejudicial the trial court should have intervened sua sponte and admonished defense counsel. The court of appeals agreed and ordered a new trial. In *Jones v. Macedonia-Northfield Banking Co.* (1937), 132 Ohio St. 341, 349-350, the Ohio Supreme Court determined that as an officer of the court, trial counsel's role is to aid in the administration of justice, not to try and win at all costs. Therefore, "counsel is obligated to refrain from unwarranted attacks on opposing counsel, the opposing party, and the witnesses." *Furnier v. Drury* (1st Dist.), 163 Ohio App.3d 793, 2004-Ohio-7362, ¶10, citing *Jones*, supra.

The court of appeals quoted extensively from the record of the trial court proceedings, listing numerous examples where defense counsel "consciously engaged throughout the trial in a pattern of misconduct that was designed to inflame the jury's passion and prejudice." ¶8. The theme of defense counsel's case was that Appellee was a "good doctor" who cared about Mrs. Thamann and did his best for her, and Appellant, his counsel, and his expert witnesses lied and manipulated the jury in order to cash in on a big verdict.

The court noted as an example the following statements made by defense counsel during his closing argument regarding Appellant's expert witnesses. "I'll let you be the judge of [Dr.] Ken Williams. I could hardly get an answer out of this guy…Dr. Snow, I liked him. He was the only honest guy that came in here for the plaintiffs…Then you get to my favorite, [Dr.] Panacek. Very clever guy, very glib, funny guy…he teaches this to his students as the classic example of pulmonary embolus. I find that unbelievably absurd and so intellectually disingenuous it made me sick." ¶37.

In trying to arouse the sympathy of the jury for his client, and to get them to render a verdict in the doctor's favor because he had done the best he could (as opposed to whether he complied with the standard of care), defense counsel argued: "Make no mistake about it. This is not an ATM machine sitting at the table…[H]e's a human being. He's not a bank. There hasn't been one scintilla of expression in this courtroom for two weeks, not one, how this man felt when this patient died. Not one expression about Dr. Bartish and how he felt…[O]n the verge of tears at times…because this man profoundly has pain…Now in our system if you point a finger at a doctor like this and you accuse him of causing the death of a young woman, there's nothing light about this. And there's blood being spilled because they're accusing him of causing the death of this young lady. Do you think they don't care about him?" ¶41.

The above-quoted portions of the record, in addition to numerous other statements of counsel, were found by the court to be extremely pervasive and prejudicial to Appellant's case. They encouraged the jury to disregard the proper legal standard and decide only if Appellee did his best. Defense counsel even told the jury that they should not complain about the quality of medical care in their community if they awarded damages to Appellant. The "most disturbing" thing to the court, however, was the fact that "this particular defense counsel has utilized these exact same inflammatory and grossly abusive comments in three other medical-malpractice cases." ¶46. See *Furnier v. Drury*, supra.; *Roetenberger v. Christ Hospital* (1st Dist.), 163 Ohio App.3d 555, 2005-Ohio-5205; *Fehrenbach v. O'Malley* (1st Dist.), 165 Ohio App.3d 80, 2005-Ohio-5554. When viewed in their entirety, the court found that defense counsel's comments warranted reversal.

In a dissenting opinion, Judge Gorman found that the failure of Appellant's counsel to object to most of defense counsel's statements constitutes waiver of his argument on appeal. He suggests that to hold otherwise would invite plaintiff's counsel to "sandbag," or not object to the opposition's argument at trial, hope for a favorable verdict, and if not argue on appeal that the remarks were so outrageous it requires reversal. Judge Gorman further noted that the argument of defense counsel should not be judged on its harshness, but rather whether it is based on evidence in the record. "Only when argument spills into disparagement not based on any evidence, is it improper." ¶58. Finally, in order to avoid the slippery slope of overturning too many defense verdicts in medical malpractice cases, Judge Gorman lists five factors that should be considered by a reviewing court when faced with these issues.

Medical Malpractice – Award Of Prejudgment Interest Warranted After Insurer Failed To Communicate Any Reasonable Offer Of Settlement

***Hartman, et al. v. Schachner, et al.*, 6th Dist. Case No. L-05-1239, 2006-Ohio-3982, 2006 WL 2196691.**

Appellees obtained a judgment against Appellants in the amount of $560,803.79 following a bench trial on a medical malpractice claim. The trial court thereafter entered an award of $213,325.01 in prejudgment interest. Appellants filed an appeal challenging the award of prejudgment interest.

The party seeking an award of prejudgment interest bears the burden of showing that the party required to pay the judgment failed to make a good faith effort to settle the case, and the party to whom the judgment is to be paid did not fail to make a good faith effort to settle. *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 658. The standard for determining good faith was set out by the Supreme Court as follows: (1) full cooperation in discovery proceedings; (2) rational evaluation of risks and potential liability; (3) no unnecessary delay of the proceedings; and (4) a good faith settlement offer or response in good faith to an offer from the other party. *Moskovitz*, supra., citing *Kalain v. Smith* (1986), 25 Ohio St.3d 157, syllabus.

In applying this standard, the court of appeals upheld the trial court's award of prejudgment interest. Appellant, Frontier Insurance, failed to communicate any offer of settlement to Appellants despite having enough information to evaluate the claim. In addition, Frontier's conduct unnecessarily delayed the proceedings.

Frontier's in-house doctor advised that Appellee's case was "dangerous" for the company, and a claim review

determined that Appellees had a 90 percent chance of success. In March 2003, Appellees made a demand of $1,500,000. A court mediation was held in July, at which Frontier failed to make an offer. After suggesting a private mediation, Frontier's counsel cancelled after stating that they were only willing to pay the cost of defending the matter. Frontier further failed to respond to a settlement demand in April 2004 in which Appellees proposed a high/low agreement of $700,000/$300,000, a waiver of appeal, a dismissal of all claims against the doctor's estate, and a waiver of any claim to prejudgment interest. Based on this evidence, the court held that an award of prejudgment interest was warranted.

Medical Malpractice – Manual And Regulations Issued By Hospital Considered Relevant Evidence Of Standard Of Care

***Luettke v. St. Vincent Mercy Medical Center, et al.*, 6th Dist. Case No. L-05-1190, 2006-Ohio-3872, 2006 WL 2105049.**

Appellant filed an appeal of a jury verdict in favor of all defendants on her claims of medical malpractice and lack of informed consent. Appellant challenges the decision of the trial court to exclude evidence of the hospital's "Resident Manual" and "Rules and Regulations of the Medical Staff" as evidence of the standard of care. The court of appeals reversed the trial court, holding that the Manual and Regulations are relevant documents and should have been presented to the jury as evidence of the standard of care.

Appellant was admitted to St. Vincent Mercy Medical Center for surgery to repair a paraesophageal hernia, a procedure during which a device known as a "bougie" is passed down the esophagus to make sure the opening of the esophagus remains wide enough to allow the patient to swallow freely. During Appellant's surgery, the device was inserted by a registered nurse enrolled as a student in a certified nurse anesthetist training program. The nurse never identified herself as a student to Appellant prior to the procedure. While inserting the bougie, the nurse perforated the esophagus, which required the surgeon to convert the surgery to an open procedure. The nurse was not supervised by an anesthesiologist while performing her duties. As a result of the perforation and repairs, Appellant had to be fed through a tube for several weeks. She also suffered severe complications, including loss of esophageal motility, pain, gagging, nausea, loss of appetite, and depression.

Prior to trial, Appellees filed a motion in limine seeking to exclude any evidence and/or testimony with respect to the policies, provisions, and standards concerning the supervision of anesthesia procedures performed by students, informed consent for student participation, and patient rights, as set forth in the hospital's Manual and Regulations. The Manual provided in part that all anesthetic procedures shall be performed under supervision of an anesthesiologist, and that patients have a right to know the professional status of all health care providers. The Regulations further state that a patient should be told the professional status of all providers, that persons in clinical training programs should identify themselves, and patients should be told who is responsible for performing all procedures or treatments. The trial court granted the motion in limine, holding that the above information was irrelevant in determining standard of care, and even if it was relevant, was inadmissible because it would mislead or confuse the jury.

The court of appeals reversed, noting that the Ohio Supreme Court has held that hospital rules and regulations may be admissible to provide evidence of the standard of care. *Berdyck v. Shinde* (1993), 66 Ohio St.3d 573;

Burks v. The Christ Hospital (1969), 19 Ohio St.2d 128, 131. The court reasoned that the purpose of promulgating such rules and regulations is to make sure employees follow the standards of care set forth therein. The documents are also relevant because they are consistent with the testimony of Appellant's expert witness, who testified that the standard of care requires students to be supervised by an anesthetist and all health care providers to inform patients of their training status. Admission of the hospital's regulations bolsters the credibility of this testimony.

The court rejected Appellee's argument that the information, even if relevant, should be excluded because it confuses or misleads the jury. Appellees contend that the jury would have to decide between five standards of care, from the expert witnesses, the ASA ethical guidelines, and the hundreds of pages of hospital policies and regulations. The court correctly points out, however, "that four out of the five pieces of evidence, including the Manual and Regulations, endorse a uniform standard of care, while Appellees' expert witness endorses another. It is difficult to understand how admitting into evidence documents that support one of two standards of care would be confusing to the jury." ¶ 36. The failure of the trial court to admit the hospital regulations was prejudicial error and required reversal of the jury verdict.

Medical Malpractice – Trial Court Abused Its Discretion In Excluding Relevant Evidence Submitted After Discovery Cut-Off Date

***Lostracco, et al. v. The Cleveland Clinic,* 8th Dist. Case No. 86924, 2006-Ohio-3694, 2006 WL 2023582.**

Appellants sought to overturn a jury verdict rendered in favor of Appellee on their claims for medical malpractice and wrongful death. Decedent was diagnosed on August 18, 2000 with a type of colon cancer known as cecal adenocarcinoma by a pathologist at Mount Saint Mary's Hospital (MSMH) in Niagra Falls, N.Y. She was referred to The Cleveland Clinic Foundation (CCF) where she underwent an extensive abdominal surgery to remove a number of malignant tumors. Specimens removed during surgery were reviewed by a pathologist at CCF, who found that decedent actually suffered from malignant non-Hodgkins large B-cell lymphoma. Appellants' expert witness testified that a lymphoma type of cancer is best treated with chemotherapy alone, not surgery. A review of the slides from MSMH confirmed the new diagnosis. During the summer of 2002, decedent required another surgery to remove scar tissue, adhesions and obstructions in her bowel resulting from the first procedure. She developed sepsis following the surgery and died on November 22, 2002.

Appellants first challenge the trial court's exclusion at trial of a Federal Express document and MSMH pathology log book that was offered after the discovery cut-off date. The trial court set a discovery deadline for "all documents, medical records, bills, and expert reports" produced by the plaintiffs for March 4, 2005. On May 31, 2005, all discovery in the action was to be completed. Plaintiff produced the subject documents in June 2005. The trial court granted Appellee's motion in limine to exclude them because Appellee was prejudiced by not having enough time to review them.

The court of appeals reversed the trial court, finding that although the documents were produced only three days before a scheduled trial, the trial was continued for 30 days, leaving Appellee sufficient time to respond. Also, the court noted that evidence may be excluded when produced outside of a discovery deadline when the party at fault shows a pattern of abuse and delay. In this case, Appellants otherwise complied with the trial court's time limits and did not request an extension of time. The exclusion of relevant evidence under these circumstances was therefore not warranted.

The court of appeals further held that the decision of the trial court was materially prejudicial to Appellants' case. Appellants argued that the surgeon at CCF had decedent's pathology slides before the initial surgery was performed, which provided him an opportunity to discover the mistake in diagnosis and avoid an unnecessary surgical procedure. Appellants presented evidence that the standard of care requires outside pathology reports to be reviewed before surgery. Appellee argued that no such review is necessary. Excluding a crucial piece of evidence establishing that CCF was provided the slides before surgery was held to be too harsh a sanction for missing the discovery deadline.

The trial court also erred in denying Appellants' motion to compel discovery, which sought production of documents regarding CCF's internal rules and regulations relating to acquiring items from another hospital's pathology department. The trial court denied Appellants' motion because the discovery request was made after the discovery deadline passed. Again, the court of appeals held that it was an abuse of discretion to allow CCF to withhold this relevant evidence simply for that reason.

Finally, the court of appeals found that the trial court

committed reversible error in prohibiting Appellants from a recross examination of the surgeon, Dr. Strong. Appellants called Dr. Strong as a witness in their case-in-chief pursuant to R.C. §2317.07. Appellee thereafter called Dr. Strong during its case, and expanded the scope of his testimony. Since new areas were raised by Appellee, it was an abuse of discretion to deny Appellants the opportunity to recross examine the witness.

Medical Malpractice – Arbitration Clause Upheld Because It Is Not Procedurally Unconscionable

***Hanson v. Valley View Nursing & Rehabilitation Center, et al.,* 9th Dist. App. No. 23001, 2006-Ohio-3815, 2006 WL 2060575.**

Appellant, James Hanson, Jr., Executor of the Estate of Athline Hanson, filed a complaint for medical malpractice against Appellee, Valley View Nursing & Rehabilitation. Ms. Hanson was a resident at Appellee's nursing facility. Mr. Hanson, as her power of attorney, executed admission documents to the facility that provided, in part, "The Resident acknowledges that disputes under this Agreement may be submitted to arbitration, if the Resident elects to do so, by signing a separate agreement executed between the parties." The document stated that submission of claims to arbitration was not a condition of continuing care at the facility. The Arbitration Agreement included a warning that by agreeing to arbitration, "the parties are giving up and waiving their constitutional right to have any claim decided in a court of law before a judge and jury, as well as any appeal from a decision or award of damages." Appellant signed both the admission forms and the Arbitration Agreement.

Appellee filed a motion to dismiss with the trial court, or in the alternative, a motion to stay pending arbitration. Following a brief period of discovery, the trial court granted Appellee's motion to stay. Appellant filed an appeal, arguing that the Arbitration Agreement was procedurally and substantively unconscionable.

The court of appeals affirmed the trial court's decision, noting that Ohio public policy favors arbitration. *Schaefer v. Allstate Insurance Co.* (1992), 63 Ohio St.3d 708, 711. An arbitration clause may be invalidated, however, if it is found to be unconscionable. Whether a contract is unconscionable is purely a legal question. A party making such a claim must present evidence showing that a contract is both substantively unconscionable, meaning its terms are unfair or unreasonable, and procedurally unconscionable, meaning that no voluntary meeting of the minds was possible. *Eagle v. Fred Martin Motor Co.* (9th Dist.), 157 Ohio App.3d 150, 2004-Ohio-829, at ¶ 30.

In the instant case, the court of appeals rejected Appellant's assignment of error because he failed to prove that the agreement was procedurally unconscionable. When considering this factor, courts should look at the bargaining position of the parties, including the "age, education, intelligence, business acumen, experience in similar transactions, whether the terms were explained to the weaker party, and who drafted the contract." *Featherstone v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (9th Dist.), 159 Ohio App.3d 27, 2004-Ohio-5953, ¶ 13, quoting *Eagle*, supra. at ¶ 31. Appellant was 60 years old when he signed the agreement, worked as a manager for National Merchandising, and owned his own advertising business since 1980, in which he entered into numerous contracts with clients. Under these circumstances, along with the clear warnings expressed in the text of the agreement, Appellant failed to establish that he was unable to understand the terms of the agreement.

Motor Vehicle Accident – Excluding Cross-Examination Of Defense Expert Regarding His Relationship With Allstate Mandates New Trial

***Kremer v. Rowse*, 2nd Dist. Case No. 21311, 2006-Ohio-2336, 2006 WL 1284400.**

The parties to this case were involved in a motor vehicle accident. At trial, the jury rendered a verdict in favor of Defendant Rowse. The court of appeals upheld the judgment. Appellant filed a motion for reconsideration, arguing that the trial court committed reversible error by excluding the cross examination of Appellee's medical expert, Dr. Kenneth A. Jenkins, D.C. regarding his relationship with Allstate.

The court of appeals granted Appellant's motion, holding that "[u]pon further reflection, we agree with Kremer that there was a reasonable possibility that the verdict would have been different had the jury been informed of Dr. Jenkins' relationship with Allstate." ¶ 6. Dr. Jenkins testified that he worked regularly for all major insurance companies, including Allstate. He denied that he had a pecuniary interest in issuing reports favorable to the defense, and said "I have had more than my fair share of cases that have been sent to me that I've advised to pay." ¶ 3.

Upon reconsideration, the court of appeals held that the

exclusion of this testimony, which was relevant to potential bias, was prejudicial. The matter was remanded to the trial court for a new trial.

Political Subdivision Liability – Statutory Immunity – Summary Judgment In Favor Of County Overruled When Barricades Not Erected To Warn Of Fallen Bridge

***Huffman, et al. v. Board of County Commissioners, et al.*, 7th Dist. App. No. 05 CO 71, 2006-Ohio-3479, 2006 WL 1851715.**

Early on the morning of August 28, 2004, William Huffman was seriously injured when he drove his car off of a fallen bridge on Winona Road in Lisbon, Ohio. The bridge had been damaged the night before the accident during significant flooding caused by a rainstorm. Huffman filed an action against Appellees, alleging that the County and its employees were negligent in failing to erect barricades around the fallen bridge, and that they acted wantonly and recklessly in failing to take action despite having knowledge of the dangerous condition.

It is undisputed that Columbiana County is responsible for maintaining the subject bridge. At approximately 2:30 a.m. on August 28th, Paul Parks, Superintendent of the County Engineer Department, received notice that the bridge was damaged. Parks did not send employees to erect barricades in the area until about 7:30 a.m., almost an hour after Mr. Huffman's accident. Throughout the night, Parks sent employees to respond to several areas of the County that were flooded, however he did not call in several available employees until the following morning because he was concerned about employee safety traveling on the roads during the storm.

In response to Appellants' complaint, Appellees asserted the defense of governmental immunity pursuant to R.C. §2744. Appellants argued that immunity was not available because a fallen bridge is an obstruction, and R.C. §2744.02(B)(3) requires the county to keep the road free from obstructions. Appellants contend that the county could have removed the obstruction by putting up barricades or signs warning of the hazard. Appellees responded that the fallen bridge is not an obstruction, and even if it was, the erection of signs is a discretionary function and immunity attaches to the discretionary functions of the county. Both parties filed motions for summary judgment. The trial court held that since the fallen bridge "created a danger for ordinary traffic on the regularly traveled portion of the road," it was an obstruction. However, the court also held that failure to erect temporary signage is subject to the defense of immunity, and summary judgment was granted for Appellees. The court further stated that there was no evidence to establish that Appellees acted wantonly or recklessly.

The court of appeals first considered whether governmental immunity applied in this case. R.C. §2744 provides a three-tiered analysis for determining immunity. First, R.C. §2744.02(A)(1) states that political subdivisions are generally not liable for injury, death or loss to persons or property incurred in connection with the performance of a governmental or proprietary function. Section (B) of that statute provides five exceptions to general immunity, including R.C. §2744.02(B)(3), which states in part, "political subdivisions are liable for injury…caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads…" If one of the exceptions is found to apply, further defenses are listed in R.C. §2744.03, including the following: "(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee."

Applying this analysis to the instant case, the court of appeals agreed with the trial court's determination that the fallen bridge constitutes an "obstruction," making the exception to immunity quoted above from R.C. §2744.02(B)(3) applicable. The court further stated that even if not an obstruction, the fallen bridge would constitute a failure to keep a public road in repair. The court of appeals disagreed with the trial court, however, in finding that a further defense was available to Appellees because erecting a barricade to "fix" the obstruction was a discretionary function. The court relied on *Franks v. Lopez* (1994), 69 Ohio St.3d 345, in which the Ohio Supreme Court held that although the decision to erect signage is discretionary, the duty to maintain the signage is mandatory. The *Franks* court further stated that "physical impediments such as potholes are easily discoverable, and the elimination of such hazards involves no discretion, policy-making or engineering judgment." *Id.* at 349. A collapsed bridge was found to be an easily discoverable hazard, and therefore involves no discretion. The county did not have the option of not barricading the fallen bridge in this case. As such, governmental immunity did not apply and the trial court's summary judgment in favor of Appellees was overruled. This issue of whether Appellees were negligent in this case was an issue of fact to be determined by the jury.

In its second assignment of error, Appellants challenge the trial court's ruling that Appellees did not act wantonly and recklessly. "Willful and wanton misconduct constitutes more than mere negligence…It is behavior which demonstrates 'a deliberate or reckless disregard for the safety of others.'" ¶ 87, citations omitted. The court of appeals held that at most Appellees were negligent, and nothing in the record indicates a higher level of culpability. Therefore, the trial court's issuance of summary judgment on this issue was upheld.

Workers' Compensation – Court Upholds Finding Of Violation Of Specific Safety Requirement

***State ex rel. Coffman v. Industrial Commission of Ohio, et al.*, 109 Ohio St.3d 298, 2006-Ohio-2421.**

Appellant, Lincoln Electric Company, builds welding machines. After the machines are built, an inspector connects the machine to a live power supply for testing. The inspectors are trained to disconnect the power supply before removing a machine or attaching the next machine to be checked. No protective equipment is provided by Appellant. Brian Coffman was employed by Lincoln Electric as an inspector. On January 5, 2000, he apparently did not disconnect a welding machine from the power supply before he attempted to remove it and was electrocuted. He died shortly thereafter.

Coffman's wife filed a death claim, alleging that Appellant violated several specific safety requirements, including Ohio Administrative Code §4121:1-5-23(A), which provides that "[u]nless the electrical conductors or equipment to be worked on are isolated from all possible sources of voltage or are effectively grounded, the employer shall provide protective equipment approved for the voltage involved." Lincoln Electric argued that it satisfied the above requirement by providing a way to disconnect the power source from the equipment, and that the accident was caused by Coffman's unilateral negligence in failing to shut off the power. The Industrial Commission agreed and denied the claim. The Tenth District Court of Appeals vacated the decision and found that Lincoln Electric violated the above-quoted safety requirement.

The Supreme Court upheld the decision of the court of appeals. The Court stated that a worker's unilateral negligence will only bar an award for violation of a specific safety requirement if the employer first was in compliance. If the employer violated the safety requirement, the employee's conduct is irrelevant. The Court held that Lincoln Electric was in violation of the subject regulation, since the Code's wording expressly requires the employer to provide protective equipment. Accepting Appellant's argument would alter the requirement by allowing an employer to either provide protective equipment or isolate the equipment from all possible sources of voltage. This interpretation is inconsistent with the plain language of the safety provision. The Court concluded that simply instructing an employee to remove the equipment from the power source does not equate to compliance with the duty to provide protective equipment.

Verdicts & Settlements

(For members and educational purposes only)

ABC Corp. v. XYZ Corp.
Type of Case: Breach of Contract
Settlement: Confidential amount reached on appeal providing for Defendant's attorneys' fees; Plaintiff's demand in closing argument was $24,099.67.
Plaintiff's Counsel: Withheld
Defendant's Counsel: Rebecca J. Castell, Esq.
Court: Cuyahoga County Common Pleas Court
Date: March, 2006
Insurance Company: None

Summary: A large fire broke out at Defendant's trucking business. Plaintiff appeared and offered its services to help clean up any possible environmental damage caused by the fire. Prior to starting cleanup efforts, Plaintiff provided Defendant with a monetary figure in exchange for which the work would be completed. Upon completion of the work, Plaintiff submitted a bill to Defendant which was seven times the original amount to which Defendant had agreed. Defendant refused to pay more than the original agreed amount for services. Plaintiff refused to accept the original amount, stating the original amount was an estimate.

At trial, Defendant offered evidence that the original agreed amount was a "cap" to charges. Plaintiff confirmed that no additional work was performed for Defendant. Defendant also presented evidence that 20% of the charges Plaintiff was alleging it was owed were for work performed for a neighboring company. Plaintiff refused to acknowledge this error.

The jury returned a unanimous verdict for Defendant, finding that Defendant owed no money to Plaintiff. Instead, the jury determined that Plaintiff's claim was meritless and awarded attorneys' fees to Defendant. A confidential settlement was reached at the appellate level, providing for attorneys' fees incurred by Defendant.

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

Keith Spartano v. Kimberly Saunders, et al.
Type of Case: MVA – Personal Injury
Settlement: $100,000.00 (policy limits)
Plaintiff's Counsel: Scott Kalish, Esq.
Defendant's Counsel: Joseph Tira, Esq.
Court: Lorain County Court of Common Pleas; Case No. CV 05 141539 (Judge Zaleski)
Date: April 7, 2006
Insurance Company: Progressive
Damages: Herniated disc in cervical spine of 34 year old male, along with muscle strains to cervical and lumbar spine

Summary: On August 8, 2003, Plaintiff Keith Spartano was traveling northbound on Oberlin Avenue in the City of Lorain when Defendant Kimberly Saunders turned left in front of his vehicle, thereby causing a collision. Defendant admitted liability. Plaintiff incurred $19,959.00 in medical bills.

Plaintiff's Experts: George Mathew, M.D. (Family Doctor) and Harold Mars, M.D. (Neurologist)
Defendant's Experts: Howard Tucker, M.D. and Manual Martinez, M.D.

In Re: Megan Cooney (settled before lawsuit filed)
Type of Case: Slip and Fall
Settlement: $101,000.00 (policy limits plus med pay)
Plaintiff's Counsel: Scott Kalish, Esq.
Defendant's Counsel: N/A
Court: N/A
Date: March 22, 2006
Insurance Company: USSA Claims
Damages: Comminuted fracture of the right radial head of 22 year old Megan's right elbow, which required surgery.

Summary: On July 4, 2003, Megan Cooney was watching a Jart game on a lawn chair in a backyard of a home in Michigan when one of the contestants erroneously threw a jart that was headed in her direction. Megan hurriedly moved from her seated position on the chair and tripped over a tree root and fell, sustaining a comminuted fracture of the right radial head of her right elbow which required surgery. Her postoperative prognosis was good for a complete recovery. Plaintiff incurred $5,647.00 in medical bills, and did not lose wages as a teacher because the

accident occurred during the summer time. Megan sued the homeowner for negligently throwing the jart in her direction. The insurance company argued that Megan caused her own injuries, for she should have seen the tree root protruding from the ground before she tripped.

Plaintiff's Experts: Dr. Lacey, surgeon at MetroHealth
Defendant's Experts: None

(Confidential Case Caption)
Type of Case: Lead Poisoning in Section 8 Housing Complex
Settlement: $116,000.00
Plaintiff's Counsel: Scott Kalish, Esq.
Defendant's Counsel: Withheld
Court: Withheld
Date: March 15, 2006
Insurance Company: Withheld
Damages: Attention Deficit Disorder, hypertension and sleep deprivation in young male presently 10 years old.

Summary: In 1998, a 2 year old child suffered personal injury from lead poisoning at his mother's section 8 housing complex, which was owned and operated by the defendant company in the greater Cleveland area. As a result of the lead poisoning, the 2 year old child was forced to endure several chelation procedures and MetroHealth Medical Center, along with three follow up visits with psychologist Dr. Leach of the Center for Effective Living. The lead poisoning caused Plaintiff to develop Attention Deficit Disorder, hypertension, and sleep deprivation. Plaintiff incurred $6,942.98 in medical bills.

Plaintiff sued the defendant company alleging that, as the landlord of the complex, it had received notice of the lead hazards in the building several years before Plaintiff suffered lead poisoning and did nothing to eliminate the hazard. The defendant argued that Plaintiff's mother was negligent in not supervising her child and allowing him to ingest the lead that was in the building.

Plaintiff's Experts: Dr. Michael Leach at the Center for Effective Living (Psychologist)
Defendant's Experts: None

John Doe v. ABC Hospital
Type of Case: Medical Malpractice
Settlement: $2,100,000.00
Plaintiff's Counsel: Howard D. Mishkind, Esq.
Defendant's Counsel: Withheld
Court: Withheld
Date: November, 2005
Insurance Company: Withheld
Damages: Brain injury in 16 year old during cardiac pacemaker surgery.

Summary: 16 year old patient with congenital heart condition. During procedure to repair a defective lead in his pacemaker, he suffered a tear of the superior vena cava and developed cardiac tamponade and a cardiac arrest. There was a delay in resuscitation, resulting in brain injury.

Plaintiff's Experts: Alan S. Feit, M.D. (Cardiologist), Charles Joseph Cote, M.D. (Peds Anesthesiologist), Patricia McCollom, R.N (Life Care Planner), Rod Durgin Ph.D. (Vocational Expert), John Burke, Jr., Ph.D. (Economist)
Defendant's Experts: None

John Doe v. John Doe Convenient Store
Type of Case: Slip and Fall
Settlement: $185,000.00
Plaintiff's Counsel: Scott Kalish, Esq.
Defendant's Counsel: Withheld
Court: Withheld
Date: June 1, 2006
Insurance Company: Withheld
Damages: Fracture and dislocation of right ankle in a single 49 year old male requiring surgical insertion of plate and pins.

Summary: On January 31, 2003, Plaintiff John Doe slipped and fell on black ice that was formed by a leaky/defective downspout in the rear parking lot of John Doe Convenient Store. Plaintiff sustained a fracture and dislocation of his right ankle, which necessitated a surgically implanted metal plate and metal pins in his ankle area. Plaintiff incurred $52,457.00 in medical bills after undergoing a long course of physical therapy. As in most premises cases, Defendant denied responsibility, maintaining that the store had no notice of the defective

downspout in the back of the building. Plaintiff argued that Defendant contracted to maintain the building and should have known of the condition. A witness testified that the black ice was clearly formed because of the defective downspout leaking water at one of its joints.

Plaintiff's Experts: J. Britten Shroyer, M.D.
Defendant's Experts: None

John Doe v. XYZ Corporation
Type of Case: Elevator Malfunction
Settlement: $1,750,000.00
Plaintiff's Counsel: Olan R. Reese, Esq. & Richard F. Kwarciak, Esq.
Defendant's Counsel: Withheld
Court: Withheld
Date: June, 2005
Insurance Company: Withheld
Damages: Herniated disc L3-4, L4-5, L5-S1, which required two surgeries; left elbow lateral epicondylitis.

Summary: John Doe was injured due to an elevator malfunction. A lawsuit was filed against the manufacturer of the elevator, the corporation responsible for the service and maintenance of the elevator, the owner of the building and the tenant in the building who had exclusive use of the freight elevator.

Plaintiff's Experts: Richard Gregory (Elevator); Jerold Gurley, M.D. (Orthopedic Surgeon); Rod Durgin, Ph.D. (Vocational Assessment); Richard Duval, Ph.D. (Psychologist)
Defendant's Experts: Des Drotos (Elevator); Timothy Gordon, M.D. (Orthopedic)

Tony Marie Leach, et al. v. E.F. Boyd & Son Funeral Home, Inc., et al.
Type of Case: Negligence involving cremation of stillborn fetus
Verdict: $750,000 ($250,000 compensatory and $500,000 punitive)
Plaintiff's Counsel: William J. Novak, Esq. and Colin P. Sammon, Esq.
Defendant's Counsel: Clayton Kent, Esq.
Court: Cuyahoga County Court of Common Pleas (Judge Stuart Friedman)
Date: April 7, 2006
Insurance Company: Ohio Casualty Group
Damages: Parents' emotional distress, post-traumatic stress syndrome, and other emotional injuries

Summary: Plaintiffs Tonya Leach and Eddie Squire were parents of Miles Squire, a 25 month old gestational age stillborn fetus. On August 27, 2001, Plaintiffs contracted with Defendant to conduct the cremation of Miles. Plaintiffs were advised by Defendant that, due to the age of Miles, they would likely receive little to no cremated remains back. Despite repeated requests, the remains of Miles were not returned to Plaintiffs until September 27, 2001, when they received nearly one pound of remains – nearly 175 times the amount of remains that a stillborn fetus the size of Miles should have yielded. Subsequent investigation of the contents revealed adult dentition, a large quantity of adult bone, and other material not compatible with a stillborn fetus. As a result of Defendants' conduct, Plaintiffs will never receive appropriate closure and peace of mind knowing that Miles was mishandled and desecrated during the cremation process. Plaintiffs brought claims of negligent cremation, negligent infliction of emotional distress, and intentional infliction of emotional distress.

Experts for Plaintiffs: Walter H. Birkby, Forensic Anthropologist; Richard T. Callahan, Funeral Service Professional; Richard C. Halas, Clinical Psychologist
Experts for Defendants: None

John Doe v. ABC Corporation
Type of Case: Product Liability – Workplace Accident
Settlement: $4,500,000.00 (Partial)
Plaintiff's Counsel: Mark L. Wakefield, Esq. and Rondiene Novitz, Esq.
Defendant's Counsel: Withheld
Court: State Court, New York, N.Y.
Date: June, 2006
Insurance Company: N/A
Damages: Bilateral below-the-knee leg amputations.

Summary: Plaintiff was struck and injured by an excavator grapple. The excavator was defective in that it lacked a swing alarm to alert people working nearby of the movement of the excavator arm. Employer contributed to the settlement. Case remains pending against the owner of the excavator.

Plaintiff's Experts: William Vigilante and Anthony Muto, Robson Forensics
Defendant's Experts: None

Baby Jane Doe, a Minor v. ABC Hospital, et al.
Type of Case: Medical Negligence
Settlement: $3,500,000.00
Plaintiff's Counsel: Michael F. Becker, Esq.
Defendant's Counsel: Withheld
Court: Withheld
Date: July 2006
Insurance Company: Withheld
Damages: Spastic quadriplegia, profound mental retardation, and partial blindness.

Summary: The mother of Baby Jane Doe was diagnosed with gestational diabetes. She was essentially managed by a midwife during her pregnancy with consultation by an obstetrician. During the end of the pregnancy, the mother of Baby Doe complained of decreased fetal movement. She was sent to the hospital for a non-stress test that was reactive in nature. Three days later, she went into labor and was admitted to the hospital. Upon admission, Baby Doe's fetal monitoring strips were non-reassuring. Notwithstanding, some three hours of labor were permitted, resulting in the vaginal delivery of an extremely depressed newborn. During resuscitation, Baby Doe's heart stopped for at least eight minutes. Ultimately, Baby Doe suffered spastic quadriplegia, profound mental retardation and is partially blind. Plaintiffs alleged that since Baby Doe was full term at the first complaint of decreased fetal movement and at high risk due to the mother's gestational diabetes, there should have been an immediate move toward induction and delivery. Furthermore, there should have been intervention during labor within 45 minutes of admission to hospital. Defendants contend that severe and irreparable brain injury occurred between the first NST and the time Baby Doe arrived at the hospital. The fetal monitoring strips seem to support same. This matter, through mediation, was resolved with structured settlement.

Plaintiff's Experts: Michelle Murray, R.N., Ph.D. (nursing), Tampa, FL; Jeffrey Pomerance, M.D. (neonatologist), Pasedena, CA; Lawrence Forman (life care planner), Miami, FL
Defendant's Experts: Marc Collin, M.D. (neonatologist), Cleveland, OH; Patrick Naples, M.D., OB/GYN, Medina, OH; Robert Shavelle (life care planner), Riverside, CA

(Confidential Case Caption)
Type of Case: Securities
Settlement (in Arbitration): $234,623.00 (Demand was $249,623.00; Offer was $160,000.00)
Plaintiff's Counsel: Justin F. Madden, Esq., and Rebecca J. Castell, Esq.
Defendant's Counsel: Withheld
Court: Cuyahoga County Common Pleas Court
Date: April, 2006
Insurance Company: N/A
Damages: Loss of over ½ of claimants' retirement funds due to negligent allocation of investment funds.

Summary: Respondents' mismanagement of claimants/investors' retirement funds left the investors with a 98% concentration in unsuitable high risk equities, causing investors to lose over ½ the value of their investments over the course of a 5 year period.

Plaintiff's Experts: Joseph Manning, Esq.
Defendant's Experts: None

Robert v. Housel v. Jeffrey F. Shall, M.D., et al.
Type of Case: Defamation, Intentional Infliction of Emotional Distress
Settlement: $400,000.00 and a letter of apology
Plaintiff's Counsel: William Hawal, Esq. and Robert Housel, Esq.
Defendant's Counsel: Thomas L. Rosenberg, Esq.
Court: Cuyahoga County Common Pleas Court (CV 03 503831 – Judge Robert Lawther)
Date: May 25, 2006
Insurance Company: AIA and self-insured (Precision Orthopedic)
Damages: $500 in medical bills

Summary: The parties had a dispute about a treating physician's fee to testify as a witness. Defendant wrote a letter about Plaintiff that was defamatory per se. He sent the letter to fifty-one judges with the intent to harm Mr. Housel's reputation.

Plaintiff's Experts: Drs. Stuart Markowitz and Andrew Hoffmann
Defendant's Experts: Robert Kaplan (psychologist)

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For more information on how our Settlement Consulting Services team of professionals can benefit you, your clients and their families, please contact Marty Burke at 216.222.2495.

National City.

LISTING OF EXPERTS - CATA DEPOSITION BANK
(by specialty)

Anesthesiology
David C.Brandon, MD
Briccio Celerio, MD
Timothy C. Lyons, MD */Cardiothoracic*
Amir Dawoud, MD
Charles J. Hearn, MD
Alan Lisbon, MD */Cardiac*
Mary McHugh, MD */Resident*
Stephen W. Minore, MD
David S. Rapkin, MD
Michael Smith, 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
Michael Oddi, MD */Cardiothoracic Med*
George Q. Seese, MD
Bruce S. Stambler, MD
Sabino Velloze, MD
Thomas Vrobel, MD */Intern/Pulm*
Richard Watts, MD
Steven Yakubov, MD
Kenneth G. Zahka, MD */Pediatrics*
Christine M. Zirafi, MD
Benjamin Felia Zolta, MD

Cytopathology
William Tench, MD */Chief of Cytopathology*

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

ER Medicine/Physicians
Mikhail Abourjeily, MD
David Abramson, MD
Joseph Cooper, MD
Rita K. Cydulka, MD
Phyllis T. Doerger, MD
David Effron, MD
Mark Eisenberg, MD
Charles Emerman, MD
Cory Franklin, MD
Richard Frires, MD */Family Medicine*
Gayle Galen, MD
Howard Gershman, MD
Thomas Graber
Hannah Grausz, MD
Ginger A. Hamrick, MD
Mark Hatcher, MD
Bruce Janiak, MD
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
Norman Schneiderman, MD
Albert Weihl, MD
Robert C. Woskobnick, MD

ENT
Steven Houser, MD
Yunn W.Park, MD
Seth J. Silberman, MD
Barry Wenig, MD

Epileptology
Stephen Collins, MD
Barbara Swartz, MD

Family Medicine
Arthur M. Amdur, MD
Robert T. Blankfield, MD
David M. Cola, MD
Mary Corrigan, MD
Julia Ann Heng, MD
Theodor F. Herwig, MD
John E. Hollin, MD
Joseph J. Kessler, Jr., MD
Jeffrey R. Kontak, MD
Kelly Oh, MD
Dean P. Rich, MD
Elisabeth Righter, MD
Michael Rowane, MD
John E. Sutherland, MD

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

General Internal Medicine

Thomas Abraham, MD */Pulmonology*
Bruce L. Auerbach, MD
Sharon Lynn Balanson, MD
Stephen Baum, MD
Mark Bibler, MD
Frederick Bishko, MD */Rheumatology*
Garardo Cisneros, MD
Alan J. Cropp, MD */Pulmonology*
Carl A. Cully, MD
Douglas Einstadter, MD
Kirk R. Elliott, MD
Douglas N. Flagg, MD
Stacy Hollaway, MD
Amir Jaffe, MD
Douglas Junglas, MD
Suzanne Kimball, MD
Keith Kruithoff, MD
Calvin M. Kunin, MD */Microbiology*
Lorenzo Lalli, MD
Hilliard A. Lazarus, MD
Peter Y. Lee, MD
Kenneth L. Lehrman, MD */Cardiology*
Roger A. Manserus, MD
John Maxfield, MD */Emergency Medicine*
Elizabeth Dorr McKinley, MD
Neal R.Minning, MD
Darshan Mistry, MD
Hadley Morgenstern-Clarren, MD
Lorus Rakita, MD
Raymond W. Rozman, MD
Juan A. Ruiz, MD
James K. Salem, MD
Jeffrey Selwyn, MD
Vijaykumar Shah, MD
Allen Solomon, MD */Cardiology*
Lawrence Joseph Spoljaric, MD
Patrick Whelan, MD */Pulmonology*
Leonard S. Williams, MD
Michael Yaffe, MD
David Yana, MD

General Surgery

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

Geriatrics

Elizabeth E. O'Toole, MD
Neal Wayne Persky, MD

Hematology

Vinodkumar Sutaria, MD
Alan Lichtin, MD
Ronald A. Sacher, MD */Pathology*
Roy Silverstein, MD

Infectious Disease

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

Neonatology

Richard E. McClead, MD

Neurology

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

Neurosurgery

Bruce Ammerman, MD
Gene Barrett, MD
Frederick Boop, MD */Pediatrics*
John Conomy, MD
Thomas Flynn, MD
Neil R. Freidman, MD */Pediatrics*
Abdi Ghodsi, MD
Jaimie Henderson, MD

David Kline, MD
Fraser Landreneau, MD
Frederick Lax, MD
Matt Likavec, MD
Mark Luciano, MD */Pediatrics*
Gary Lustgarten, MD
Donald Mann, MD
Patrick W. McCormick, MD
William McCormick, MD
Samuel Neff, MD
James A. O'Leary, MD
Charles Rawlings, MD
Ali Rezai, MD
Morris M. Soriano, MD

Nephrology

Meade W. Perkman, MD

OB/Gyn

Paul Bartulica, MD
William Bruner, MD
David Burkons, MD
Janet Burlingame, MD
Daniel Cain, MD
Michael S. Cardwell, MD
Ricardo Loret deMola, MD
Stephen DeVoe, MD
Method Duchon, MD
Stuart Edelberg, MD
John Elliott, MD
Gath Essig, MD
Gretchen Fisher, MD
Bruce Flamm, MD
William S. Floyd, MD
Martin Gimovsky, MD
David M. Grischkan, MD
Michael Gyves, MD
William Hahn, MD
Hunter Hammill, MD
Nawar Hatoum, MD
Tung-Chang Hsieh, MD
Steven Inglis, MD
David Klein, MD
Steven Klein, MD
Robert Kiwi, MD
Mark Landon, MD
Henry M. Lerner, MD
Andrew M. London, MD
Mark Lowen, MD
James Nocon, MD
John O'Grady, MD
John R. O'Neal, MD
Richard O'Shaughnessy, MD
Urmila J. Patel, MD
George Petit, MD
Stanley Robboy, MD
Baha Sibai, MD
Anthony Tizzano, MD
Mark Turrentine, MD
Josephine Wang, MD
Louis Weinstein, MD
David Zbaraz, MD

Occupational Therapy

Ellen Flowers
Rod W. Durgin

Oncology

Nathan Levitan, MD
Michael T. Lotze, MD */Surgical Oncology*
Howard Muntz, MD */GYN Oncologist*
Howard Ozer, MD
David Stepnick, MD

Ophthalmology

Thomas R. Hedges, MD
Gregory Kosmorsky, MD
Andrew G. Lee, MD */Neuro-Ophthalmologist*
Andreas Marcotty, MD
Peter J. Savino, MD
Robert Tomsak, MD */Neuro-Ophthalmologist*

Orthopaedic Surgery

William Barker, MD
William Bohl, MD
Malcolm Brahms, MD
James David Brodell, MD
Dennis Brooks, MD
Lawrence A. Cervino, MD */Hand Surgeon*
Robert Corn, MD
Ahmed Elghazawi, MD
Robert Erickson, MD
Richard Friedman, MD
Robert Fumich, MD
Timothy Gordon, MD
Gregory Hill, MD
Ralph Kovach, MD
Jeffrey S. Morris, MD
Andrew Newman, MD
Jeffrey J. Roberts, MD
Duret Smith, MD
Susan Stephens, MD
Glen Whitten, MD
Robert Zaas, MD
Faissal Zahrawi, MD

Osteopathic Medicine

John Lee, DO
Patrick A. Rich, DO

Otolaryngology

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

Otoneurology
John G. Oats, MD

Pathology
Enid Gilgert-Barness, MD */Pediatric*
Charles L. Hitchcock, MD
Robert D. Hoffman, MD
Sharon Hook, MD
Nadia Kaisi, MD
Richard Lash, MD */Surgical*
Kenneth McCarty, MD
Laszlo Makk, MD
Diane Mucitelli, MD
Kanalyalal Patel, MD
Norman B. Ratliff, MD
Jacob Zatuchni, MD

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

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

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

Proctology
Henry Eisenberg, MD

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

Psychology
Robert K. DeVies, PhD
Mark Janis, PhD

Pulmonology
Robert Becic, MD
Robert DeMarco. MD
Lawrence Martin, MD

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

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): _____

_____

_____

Submitted by/Contact Info: 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

The Cleveland Academy of Trial Attorneys
"Access to Excellence"

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:**

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

2. **THE ACADEMY NEWSLETTER:**
   Published four times a year, contains summaries of significant cases in Cuyahoga County and throughout the state, recent verdicts and settlements, a listing of experts in CATA's deposition bank and guest articles.

3. **LUNCHEON SEMINARS:**
   C.L.E. accredited luncheon seminars, about six per year, includes presentations by experienced lawyers, judges and expert witnesses on trial strategy and current litigation topics. These lunches also provide networking access with other lawyers, experts and judges.

4. **THE BERNARD FRIEDMAN LITIGATION SEMINAR:**
   This annual C.L.E. seminar has featured lecture styled presentations and mock trial demonstrations with a focus group jury. Guest speakers usually include a judge from the Ohio Supreme Court.

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   These include the annual installation dinner and the golf outing, among other events. These events are routinely attended by members of the academy and judges from Cuyahoga County Common Pleas Court, the Eighth District Court of Appeals, U.S. District Court and the Ohio Supreme Court.

Cleveland Academy of Trial Attorneys
Sixth Floor, Standard Building
1370 Ontario Street
Cleveland, Ohio 44113
216.621.0070
216.687.4231 FAX

Application for Membership

I hereby apply for membership in The Cleveland Academy of Trial Attorneys, pursuant to the bylaws contained herein by the members of the Academy whose signatures appear below. I understand that my application must be accepted by association with Academy and approved by the President. Included in the Academy, I agree to abide by the Constitution and By-Laws and participate actively in the purposes 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 as a willing peer to serve in promoting the best interests of the legal profession and the standards and techniques of trial practice.*
3. *Excellent character and integrity of the highest order.*

In addition, I certify that no more than 20% of my practice and that of my firm's practice will consist of 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 Activities Within:_____

_____

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

Percentage of Cases Representing Defendants:_____

Do You Do 20% or More Personal Injury Defense:_____

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

_____

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

_____

Date:_____ Applicant:_____

Invited:_____ Sponsored By:_____

President's Approval:_____ Date:_____

Please return completed application with $175.00 fee to:
CATA, Sixth Floor, Standard Building, Cleveland, OH 44113