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President's Message

Donna Taylor-Kolis

Dear Members:

Thank you for the opportunity to serve as President of the Cleveland Academy of Trial Attorneys for the past year. As the best words are sometimes not our own, I leave you with the following, provocative words of Doug Wesse, reprinted with his permission.

If you are a personal-injury lawyer in the conservative state of Virginia or elsewhere in the land of tort reform, this is my admittedly provocative view — employed by my firm over the past six (6) years or so — of how to obtain just personal-injury settlements for your clients:

1. Don't just dabble in personal-injury cases. The insurance defense lawyer is too good for that, and he will only smile as he runs over you while you are dabbling.

2. Study and read about how to be a better trial lawyer. If you don't enjoy much of what you are reading, try something else (not just another book; try another line of work).

3. Select good cases — this does not mean: select only those cases that are "sure winners;" he who does not take risks is not a real trial lawyer.

4. Investigate the facts, and keep investigating: (a) it's fun; b) the insurance companies are great at doing a lousy job at this; c) facts (if wound into a good story) win cases.

5. File suit in every case (with extremely rare exceptions; I told you this would be provocative). You have little leverage over insurance companies without litigation. They don't really ever pay you "voluntarily." They only pay justly when trial is closing in on them and you are an imminent threat to their money. When they pay you "voluntarily," you have been had.

6. Cerebrate about your case and your client. In the beginning. In the middle. In the end. About the good believeable facts, and the bad. If you don't cerebrate about your case, one among many serious casualties will be your ability to sincerely, powerfully and spontaneously talk with the jury in closing argument. Juries know when you have not lived the case, and when you don't know your client and what her injuries mean to her and her life.

7. Don't attempt settlement until the insurance company smells trial in the next room, in its back pocket, at its bottom-line.

8. Give the insurance company a firm deadline for settlement, and stick to it (unless the client changes his mind). Pre-trial settlement deadlines — if enforced by your firm over much time and many cases — pressure all sides to hear an early version of "the-jury's-knocking-on-the-door," and thus pressure the parties into staring headlong into the possibility of a much worse result at trial.

9. Never, ever "beg," "keep after" or try to cajole an insurance company to settle. The appearance of weakness is weakness. Relax. It's their money they're about to lose.

10. Try cases to verdict and get good results. Insurance companies do not respect an attorney with a track record of not going to verdict.

11. Try cases to verdict and get good results. Your track record precedes you, and each good "We the jury find our verdict in favor of plaintiff and award damages in the amount of ..." is wind at your back in your next effort to settle.

12. Try cases to verdict and get good results. The insurance companies' reasonable fear of a "runaway" verdict or a too-sympathetic jury is a very, very good friend of yours.

13. You cannot worry — at all — about your own financial state or about turning down substantial sums of money. You and your client never had it to lose. It's not your money. Money-hungry lawyers are scared lawyers, not great trial lawyers willing to risk.

14. Be honest with your client, not proud or self-indulgent. Your client needs to know your unvarnished professional opinion on settlement and the chances of reasonable-high and reasonable-low verdicts at trial, not your self-indulgent invective about how unfair the insurance company, insurance defense counsel and Virginia juries are.

15. Be completely ready for trial. Completely ready. And ready early. Many a bad verdict results from the assumption of settlement; many a bad settlement results from not being ready to try your case.

16. If the case does not settle within your deadline, try the case, and try it with focus and determination until you hear the knock on the door and the foreman speaking. Then put your arm around your client and feel good about what you have done.

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Valentine v. Conrad – Expanding the Role of the Gatekeeper

By William J. Price

In determining the admissibility of the opinion of an expert witness, a trial court's "gatekeeping" function should focus on whether the technique used to arrive at the opinion is scientifically valid, not whether the court agrees with the underlying opinion. In *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 613, 1998-Ohio-178, the Ohio Supreme Court stated that "a trial court's role in determining whether an expert's testimony is admissible under Evid.R. 702(C) focuses on whether the opinion is based upon scientifically valid principles, not whether the expert's conclusions are correct or whether the testimony satisfies the proponent's burden of proof at trial." Once an expert's methodology is deemed acceptable, the credibility to be afforded his or her conclusions should be left to the jury. Recently, in *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, the Ohio Supreme Court seemed to depart from these established rules. The Court broadened its role as gatekeeper by including an evaluation of not only the expert's methods, but also his conclusions. Only time will tell if the Court's decision will be limited to the facts of *Valentine*, or whether it marks the beginning of a change in the legal analysis utilized by courts to determine the admissibility of expert witnesses at trial.

Ohio Rule of Evidence 702(C) sets forth the criteria that should be used to evaluate whether the expert's methodology is scientifically valid:

> (C) The witness' testimony is based on reliable scientific, technical or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:
>
> (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;
>
> (2) The design of the procedure, test, or experiment reliably implements the theory;
>
> (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

A trial court's consideration of an expert opinion under this Rule must be made in the context of the appropriate field or discipline in which the expert works. The court should make a determination of whether the methodology followed by the expert is generally accepted in that particular field. The goal of the trial court should be to determine whether the technique used to arrive at the expert's opinion is generally accepted within that field and is therefore reliable enough to aid the jury.

In *Valentine v. Conrad*, the Court went beyond an examination of the methods used by the plaintiff's experts, and instead found the experts' opinions inadmissible in part because the majority did not agree with their conclusions. The plaintiff in *Valentine* claimed that her deceased husband developed glioblastoma multiforme (a form of brain cancer) as a direct result of his exposure to certain chemicals during his twenty-eight years of employment at a manufacturing plant. The Court cited the following reasons for upholding the trial court's decision to exclude as unreliable the testimony of the plaintiff's experts: (1) the experts did not cite any studies establishing a direct causal connection between chemical exposure and glioblastoma multiforme; (2) the experts extrapolated in order to reach to their conclusions; (3) the use of differential diagnosis was an inappropriate method to reach the conclusions; (4) the contemporaneous death of a co-worker does not allow for an inference of causation, and; (5) an expert's experience and expertise alone does not make his opinion admissible. *Id*. at 45-46. In short, the Court concluded that, because the plaintiff's experts "were unable to establish that any of the chemicals to which [plaintiff's decedent] were exposed are capable of causing glioblastoma multiforme," they are properly excluded as experts. *Id*. at 46.

The Court's analysis side-stepped the application of the criteria set forth in Evid.R. 702(C). The immediately preceding quote highlights the Court's error. Whether the experts ultimately established a connection between the chemicals and injury is a question for the jury; the Court's inquiry should have been limited solely to whether the procedure utilized by the experts is generally accepted in the relevant scientific community. In an attempt to include in its opinion some analysis of the method used by the plaintiff's experts, the majority focused narrowly on whether "differential diagnosis" was a reliable method for establishing the necessary legal causation between

the plaintiff's employment and his subsequent terminal illness. The Court defined "differential diagnosis" as "the process of isolating the cause of the patient's symptoms through the systematic elimination of all potential causes," and agreed with the trial court's finding that, because the experts were unable to establish which chemicals were possible causes of the cancer, their use of differential diagnosis was inappropriate. *Id.* at 687-688, citing *Hardyman v. Norfold & W. Ry. Co.,* 243 F.3d 255, 260. Again, the Court's reasoning here goes beyond its role as gatekeeper and infringes on the province of the jury by considering the ultimate conclusion reached by the experts (that a particular chemical is a cause of the subject cancer).

In deeming differential diagnosis an unreliable method of showing causation in this case, the Court confines the application of differential diagnosis to those cases in which the potential causes of a patient's symptoms are "scientifically known." *Id*. at 688, citing *Westberry v. Gislaved Gummi AB* (4th Cir. 1999) 178 F.3d 257, 262. One must ask whether this myopic proscription of when differential diagnosis will be considered a reliable foundation for an expert's testimony narrows the test for reliability as established by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579. In *Daubert*, the U.S. Supreme Court set forth the following, non-exhaustive factors a court should consider in evaluating the reliability of an expert's methodologies:

> (1) whether a theory or technique can be (and has been) tested;
>
> (2) whether the theory or technique has been subjected to peer review and publication;
>
> (3) the known or potential rate of error in using a particular scientific technique and the existence and maintenance of standards for controlling the technique's operation, and;
>
> (4) whether the theory or technique has been generally accepted in the particular scientific field.

The Ohio Supreme Court has held the above factors relevant in determining reliability of an expert's opinion. *State v. Nemeth*, 82 Ohio St.3d 202, 211, 1998-Ohio-376.

In *Valentine*, the plaintiff offered two medical experts who opined, based on, among other things, their collective experience, epidemiological studies, medical literature, and animal studies, that the decedent's exposure caused his condition. While the Court's decision does not separately dispute that each of these factors can provide a reliable basis for arriving at an opinion, it nonetheless thought it prudent to step in and label the experts' methodology as unreliable in establishing causation. As Justice Pfiefer noted in his dissent, the majority's criticism of the methodology would only be relevant if the experts were required to prove that one specific chemical caused the decedent's brain tumor. *Valentine*, supra. at 47. Instead, the experts were simply charged with examining the decedent's workplace and determining whether the environment "contributed to cause his cancer." *Id*. Because the application of differential diagnosis was an appropriate way for the experts to make their determination in this regard, Justice Pfeifer found the methodology passed the threshold test of reliability.

The Court's narrow application of differential diagnosis may effectively close the gate to necessary expert testimony in many cases. This decision will invariably launch innumerable arguments among experts as to what causes are considered "scientifically known." Further, because "some fields have not yet yielded a quantifiable threshold level of harmful exposure for certain agents," differential diagnosis may often be the only way to establish causation in cases such as *Valentine*. *Terry v. Ottawa Cty. Brd. of MRDD* (6th Dist.),165 Ohio App. 3d 638, 658, 2006-Ohio-866, citing *Cutlip v. Norfolk S. Corp.* (6th Dist.), 2003-Ohio-1862. By severely restricting the application of differential diagnosis, the Court has expanded its boundaries as a gatekeeper – inquiring into "whether the testimony was based upon sufficient facts and data, rather than only determining whether [an expert's] methodology was based upon scientifically valid principles." *Terry*, supra. at 652, citing *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 613-614, 1998-Ohio-178.

To date, only a few courts have applied the standard as set forth in *Valentine* in determining the reliability of an expert's methodology. In *Braglin v. Lempco Industries, Inc*. (5th Dist.), 2007-Ohio-1964, ¶26, the expert witness conceded that "epidemiologic studies have been limited in their ability to definitively identify risk factors for pancreatic cancer. This leaves the greater proportion of the causality of this disease undefined." *Id.* at ¶26. The court concluded that, "the expert testimony proffered by appellant's experts simply did not establish the requisite causal connection between the decedent's exposure and his pancreatic cancer based upon the law as set forth in *Valentine*." *Id*. at ¶27. The court does not directly discount the reliability of the methods by which the experts reached their conclusions, but concluded that, because the application of those methods did not yield a sufficient causal connection, they were not reliable.

The Eighth District Court of Appeals has similarly applied *Valentine* and explained that, although its focus is on the expert's journey to the conclusion and not the conclusion itself, "even when these principles and methods are valid, they may not be a reliable basis for establishing legal causation. The journey may be flawed if a reliable connection between the data and the conclusion is not established." *Turker v. Ford Motor Co.* (8th Dist.), 2007-Ohio-985, ¶¶17-18. The court then concluded that an expert's methodology was unreliable, for though the proffered engineering expert held his theory for fifteen years, there were no known articles written in support of the theory and no procedures, tests, or experiments were performed which supported same.

It is axiomatic that science cannot always immediately explain each phenomenon with which it is faced. Yet in *Valentine*, the Court effectively punished the plaintiff because the medical community had not amassed foolproof methodologies to support the suspected causation between chemical exposure and a rare form of brain cancer. By arguably supplanting the *Daubert* test of reliability with one that inquires into the sufficiency of an expert's conclusions, the Ohio Supreme Court seems to have placed yet another obstacle into the path of an injured plaintiff, making them unreasonably susceptible to dispositive motions. How courts and attorneys will continue to navigate this obstacle remains to be seen, but practitioners must be aware of the importance of their efforts in qualifying their witnesses as experts.

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Law Updates

by Andrew Thompson

Civil Procedure – Civil Rules 3(A) And 15(C), (D) Require Personal Service Of Original Complaint, Not Amended Complaint, On John Doe Defendant Within One Year Of The Filing Of The Original Complaint

***Easter v. Complete General Construction Co., et al.*, 10th Dist App. No. 06AP-763, 2007-Ohio-1297, 2007 WL 853337.**

On November 19, 2002, Tammy Easter was leaving a physician's office on North High Street in Gahanna, Ohio when she stepped into a deep trench next to the sidewalk and fell. On that date, Complete General Construction Company was in the process of completing an improvement project for the city to replace sidewalks, curbs, and landscaping along North High Street. The trench that caused Easter to fall ran the length of one side of a new sidewalk and was obscured by fallen leaves.

On November 12, 2004, Easter filed a complaint against Complete General and several John Doe companies. After discovering its identity, Easter personally served Zuber Landscape, Inc., a potentially liable subcontractor, with a copy of the original summons and complaint on November 11, 2005. She thereafter moved the court for leave to file an amended complaint. On November 22, 2005, Easter filed her first amended complaint naming Zuber as a defendant. Zuber was served with a copy of the amended complaint by certified mail on December 5, 2005.

Zuber filed a motion for judgment on the pleadings, arguing that Easter's amended complaint did not relate back to the original complaint because Zuber was not personally served with the *amended* complaint within one year of the date the original complaint was filed. As such, any claim against Zuber was time-barred. Easter argued that she fully complied with the Civil Rules, which require only that she personally serve any previously unknown defendants with a copy of the *original* complaint within one year. The trial court granted Zuber's motion.

In order to determine whether a previously unknown defendant has been properly served to avoid the running of the statute of limitations, a court must consider the application of Civil Rule 15(D) in conjunction with Rules 15(C) and 3(A). *Amerine v. Haughton Elevator Co.* (1989), 42 Ohio St.3d 57, syllabus. Civil Rule 3(A) provides in part that "[a] civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing...upon a defendant identified by a fictitious name whose name is later corrected pursuant to Civ. R. 15(D)." Rule 15(C) states that "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Rule 15(D) describes the procedure to be used to amend a complaint when the name of the party is not initially known. It provides "that defendant may be designated in a pleading or proceeding by any name and description. When the name is discovered, the pleading or proceeding must be amended accordingly. The plaintiff, in such case, must aver in the complaint the fact that he could not discover the name. The summons must contain the words 'name unknown,' and a copy thereof must be served personally upon the defendant."

Easter argues that her actions complied with each of the requirements stated in the above rules. She contends that she (1) timely filed her original complaint; (2) alleged that she was unable to identify the name of defendant John Doe company; (3) included the words "name unknown" in the original summons; (4) personally served Zuber after discovering its identity with copies of the original complaint and summons within one year of filing the original complaint; and (5) properly amended the complaint to include Zuber as a named defendant. Easter claims that requiring service of the amended complaint within one year would unreasonably shorten the time limit as set forth in Rule 3(A), because it would include not only the time it takes to discover the identity of the party, but would include the time it takes to seek leave from the court to amend the complaint and file the amended complaint. Zuber counters by stating that Rule 15(D) states that when the identity of a defendant is discovered, the pleading must be amended "accordingly." It argues that "accordingly" refers to the requirements in the accompanying rules, which includes the necessity under Rule 3(A) that the party is personally served within one year.

The court of appeals reversed the judgment entered by the trial court and held that the Civil Rules require only that the *original* complaint and summons be served on a

defendant within one year. The court focused its reasoning, in part, on the wording of Civil Rule 15(D), which states that "[t]he summons must contain the words 'name unknown,' and a copy thereof must be served personally upon the defendant." "Thereof," as used in that phrase, refers to the *original* summons, since "it would be illogical to require that a new summons, issued with an amended complaint, contain the words 'name unknown' when the defendant's name, by that time, would no longer be unknown to the plaintiff. But the defendant's name *would* be unknown at the time of the filing of the original complaint and service of the original summons." The court also found that requiring a plaintiff to serve an amended complaint within one year would unfairly shorten the time limit set forth in Rule 3(A), and would contradict the plain language of the rule, which allows the plaintiff, after obtaining service, to correct the name "later" pursuant to Rule 15(D). The court of appeals went on to factually distinguish or reject decisions cited by Zuber that seemed to contradict the court's conclusion. Since the court concluded that Easter complied with the rules, and her amended complaint relates back to her original complaint, the trial court erred in granting Zuber's motion for judgment on the pleadings.

Civil Procedure – Civil Rule 10(D)(2) Affidavit Of Merit Required For Wrongful Death Claim

***Fletcher, et al., v. University Hospitals of Cleveland, et al.*, 8th Dist App. No. 88573, 2007-Ohio-2778, 2007 WL 1633427.**

Appellant filed medical malpractice and wrongful death claims against University Hospitals and Dr. Raymond Onders arising from the medical treatment of Victor Shaw. University Hospital filed a motion to dismiss the claims because Appellant did not attach to the complaint an affidavit of merit as required by Civil Rule 10(D)(2). Appellant argued that no affidavit was required because a wrongful death claim is not a "medical claim." The trial court dismissed the case with prejudice.

Civil Rule 10(D)(2), which went into effect on July 1, 2005, provides in part:

> (a) ...a complaint that contains a medical claim...as defined in section 2305.113 of the Revised Code, shall include an affidavit of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. The affidavit of merit shall be provided by an expert witness...

The Rule details the items to be included in the affidavit, and provides that a court, for good cause shown, may grant an extension of time for plaintiff to provide an affidavit of merit. Appellant did not seek an extension of time in this case.

Revised Code Section 2305.113(E)(3) defines a "medical claim" as

> any claim that is asserted in any civil action against a physician, podiatrist, hospital, home, or residential facility, or against a licensed practical nurse, registered nurse, advanced practice nurse, physical therapist, physician assistant, emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic, and arises out of the medical diagnosis, care, or treatment of any person.

The court of appeals held that the wrongful death claim asserted by Appellant is a medical claim as defined in the above quoted statute, and therefore Appellant was required under Rule 10(D)(2) to attach an affidavit of merit to her complaint. The court went on to state, however, that failure to attach an affidavit of merit to a complaint does not render the action subject to dismissal. The remedy for failure of a party to attach a written instrument to a complaint is to serve a motion for a more definite statement pursuant to Rule 12(E). The law is well established that this procedure applies to Rule 10(D)(1). The fact that the rules are grouped together implies that the procedure set forth in Rule 12(E) was meant to be applied in the same fashion to Rules 10(D)(1) and 10(D)(2). Although a defendant typically waives its right to file a motion for a more definite statement once an answer is filed, the court held that since the procedure to be applied to Rule 10(D)(2) was still unsettled, it would allow Appellees leave to file such a motion in this case. The trial court's dismissal of Appellant's complaint was reversed.

Employer Intentional Tort – Attorneys' Fees And Costs Awarded To Prevailing Party Following Jury Verdict Against Employer

***Maynard v. Easton Corporation*, 3rd Dist App. No. 9-06-33, 2007-Ohio-1906, 2007 WL 1176488.**

Maynard worked for Eaton Corporation as a maintenance supervisor in its facility in Marion, Ohio. On December 12, 1997, Maynard responded to a report of smoke in one of the facility's substations and put out the fire with a fire extinguisher. Seconds later, a circuit breaker exploded near Maynard and he was severely injured. Maynard filed suit against Eaton alleging an employer intentional tort. An initial trial of the case resulted in a hung jury. After a second jury trial, Maynard was awarded $950,000 in compensatory damages and $200,000 in punitive damages. Maynard filed a motion with the trial court seeking an award of pre-judgment interest, attorneys' fees and costs. The trial court denied his motion, and Maynard appealed.

The court of appeals first considered whether Maynard was entitled to an award of attorneys' fees. The general law in Ohio is that attorney fees may be awarded as an element of compensatory damages when a jury finds that punitive damages are appropriate. A trial court has the discretion to not award fees, however, if the amount of punitive damages awarded is adequate to both compensate plaintiff for his attorney fees and to deter the defendant from future similar conduct. If a court awards fees, it is then charged with responsibility for determining the appropriate amount. The court should consider the following factors in ascertaining the reasonable value of fees: (1) the time and labor involved in maintaining the litigation; (2) the novelty, complexity, and difficulty of the questions involved; (3) the professional skill required to perform the necessary legal services; (4) the experience, reputation, and ability of the attorneys; and (5) the miscellaneous expenses of the litigation.

The court held that an award of attorney fees was appropriate in this case and the trial court abused its discretion. At a hearing to consider the issue, Maynard's attorneys presented evidence of fees totaling $216,982.50. Since this amount is more than the $200,000 awarded in punitive damages, the court held that the punitive damage award was obviously insufficient to compensate Maynard for his attorneys' fees and to serve as a deterrent to Eaton.

The court next considered whether Maynard should be awarded pre-judgment interest. Revised Code §1343.03(C) allows a party to recover interest from the date the cause of action accrued in cases involving tortious conduct, if a court finds that "the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case." An award of pre-judgment interest is meant "to encourage litigants to make a good faith effort to settle their case, thereby conserving legal resources and promoting judicial economy." *Peyko v. Frederick* (1986), 25 Ohio St.3d 164, 167. Courts have held that a party has made a good faith effort to settle when he or she has "(1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer and responded in good faith to an offer from the other party." *Villella v. Waikem Motors, Inc.* (1989), 45 Ohio St.3d 36, 42.

In applying the facts of the instant case to this standard, the court held that Eaton should not be charged with an award of pre-judgment interest. Eaton fully cooperated

in the discovery process and did not attempt to unnecessarily delay the case. Prior to the first trial, Eaton made an offer of $125,000 to settle the case. At the second trial, Eaton reduced its offer to $40,000. Both offers were rejected by Maynard's counsel. The court held that this evidence was sufficient for the trial court to find that Eaton acted in good faith.

Finally, the court considered whether it was appropriate to award costs to Maynard as the prevailing party. Civil Rule 54(D) provides that "[e]xcept when express provision therefore is made either in a statute or in these rules, costs shall be allowed to the prevailing party unless the court otherwise directs." The trial court has discretion to determine whether to award costs in each case. In the instant matter, the trial court's judgment entry fails to address the issue of costs. Since it failed to "otherwise direct" the parties, the court of appeals found that an award of costs was appropriate under Rule 54(D).

Employment Law – Genuine Issues of Fact Precluded Summary Judgment On Claim For Workers' Compensation Retaliation

***Feurer v. Ohio Heartland Community Action Commission*, 3rd Dist App. No. 9-06-52, 2007-Ohio-2278, 2007 WL 1390674.**

Dwight Feurer worked for Appellee, Ohio Heartland Community Action Commission ("Heartland"), as a school bus driver. On November 25, 2003, he injured his knee while placing an engine heater on his bus. He sought medical treatment at an emergency room the following day and completed a report of injury form from the Bureau of Workers' Compensation. When he returned to work on December 1st, he was asked to fill out a second report of injury by Heartland. The Bureau of Workers' Compensation allowed Feurer's claim for injury over the objection of Heartland, which argued that he did not timely file his claim.

Shortly after the award, Heartland officials met with Feurer and asked him to sign a statement acknowledging that he was able to perform his job duties, and to provide a list of his current medications. After Feurer complied, Heartland contacted the hospital where Feurer was treated and learned he was taking a pain medication. On February 2, 2004, Heartland terminated Feurer for "misrepresentation of material facts in [Feurer's] application for employment and related documents and [Feuer's] violation of the Drug Free Policy mandating notification to [his] supervisor of [Feurer's] use of medications that have the capability of prohibiting safe and effective job performance."

Feurer filed suit alleging retaliatory discharge in violation of R.C. §4123.90 (workers' compensation retaliation), discrimination in violation of R.C. §4112.01 (disability discrimination), and various claims for wrongful discharge in violation of public policy. Heartland filed counterclaims for fraud, breach of contract, promissory estoppel, intentional misrepresentation, and negligent misrepresentation. The counterclaims were eventually dismissed without prejudice. Both parties filed motions for summary judgment. The trial court granted Heartland's motion, dismissing all of Feurer's claims, and overruled the motion filed by Feurer.

On appeal, Feurer first challenged the trial court's determination that an affidavit he submitted with his brief contradicted his prior deposition testimony. He stated in his deposition that he did not remember what questions a physician's assistant asked him during his employment physical for Heartland. The physician's assistant later testified during deposition, with Feurer present, that she read questions about prescription medication from a form, and that she typically asks an applicant about any other type of medication he or she is taking. Feurer submitted an affidavit two months later stating that the physician's assistant only asked him questions from the form, but did not ask him any additional questions. A court considering an affidavit submitted either in support of or in opposition to a motion for summary judgment must consider whether the affidavit contradicts former deposition testimony or merely supplements it. If inconsistent, the court may consider any explanations for the inconsistency. The appeals court held that Feurer's affidavit was not inconsistent, and therefore should have been considered by the trial court in rendering its decision. The court reasoned that Feurer's memory could have been refreshed after hearing the testimony of the physician's assistant, and the "mere fact that one later remembers what was not known at a prior deposition does not make them contradictory."

The remaining assignments of error challenge the trial court's decision to grant summary judgment to Heartland. The court of appeals first considered Feurer's claim for workers' compensation retaliation. To support this cause of action, Feurer must establish (1) that he was injured on the job, (2) he filed a workers' compensation claim, and (3) he was discharged in retaliation for filing the claim. There is no dispute concerning the first two ele-

ments. The court of appeals held that there were genuine issues of fact surrounding the third element and overruled the trial court's decision. The court based its decision primarily on the closeness in time between Feurer's workers' compensation claim and his termination. Prior to his injury, Feurer was given only good performance reviews. After the approval of his workers' compensation claim, he was discharged within six weeks. The close proximity of these events can be considered evidence of retaliation, and was sufficient in this case to overcome Heartland's motion.

The court overruled summary judgment on Feurer's claims for wrongful discharge in violation of public policy. It found that a clear public policy existed and was manifested in Revised Code §4123.90, and that discharging Feurer under the circumstances of this case would jeopardize that policy. There remained genuine issues of fact that would preclude summary judgment on the issues of whether Feurer's termination was motivated by conduct relating to the public policy or whether Heartland had an otherwise legitimate business justification for the decision.

To support his disability discrimination claim, Feurer argued that Heartland regarded him as disabled and terminated him because of its perception that he could not perform his job. Heartland witnesses testified that Feurer could not perform his job because of a lifting restriction and because he was taking medication. Feurer's doctor testified that he was capable of lifting the required weight and the medication had no effect on his ability to perform the job. The court of appeals held that this conflicting testimony created an issue of fact and summary judgment was improperly granted on this claim.

Finally, the court found that it was error to grant summary judgment on Feurer's claims related to Heartland's counterclaims. During the course of the proceedings, Heartland dismissed its counterclaims without prejudice. The trial court thereafter granted summary judgment to Heartland on Feurer's responsive claims. The court of appeals noted, however, that when a claim is dismissed without prejudice, it can be later re-filed. Summary judgment is a judgment on the merits and thereafter bars the claims. If Heartland decided to re-file its counterclaims, Feurer would be precluded from re-asserting his additional claims. Therefore, the trial court's decision was overruled.

Employment Law – Wrongful Discharge Claim Based On Public Policy Found In Ohio Products Liability Act And UCC Survives Summary Judgment

***Zajc v. Hycomp, et al.*, 8th Dist App. No. 88421, 2007-Ohio-2637, 2007 WL 1559303.**

Appellant, David Zajc, was employed by Hycomp Inc. as a quality manager. He was responsible for the inspection of parts manufactured by Hycomp to be used in the aircraft industry. Zajc became certified as a Designated Supplier Quality Representative ("DSQR") for General Electric Aircraft Engines ("GE"), one of Hycomp's customers. As a DSQR, he acted as an agent for GE in determining whether Hycomp parts met GE's specifications. In March 2005, Zajc was inspecting a part for a borehole, which lights and magnifies the view of an aircraft engine. He notified Hycomp's operations manager that the subject part was too small and did not fit properly into the measuring device. The manager disregarded Zajc's complaints and demanded that the parts be shipped because the customer needed them. When Zajc refused, he was told that he had 30 minutes to clean out his desk.

Zajc filed suit against Hycomp, alleging that his termination violated public policy found in the UCC and Ohio Products Liability Act. The Ohio Supreme Court has recognized an exception to the employment at-will doctrine where an employee's termination violates an established public policy, found in statutes, Constitutions of Ohio and the United States, administrative rules and regulations, or the common law. In order to state a claim for wrongful discharge in violation of public policy, a plaintiff must establish (1) the existence of a clear public policy (the "clarity" element); (2) that the dismissal of the subject employee would jeopardize the public policy at issue (the "jeopardy" element); (3) the plaintiff's discharge was motivated by conduct related to the public policy (the "causation" element); and (4) the employer did not have an overriding legitimate business justification for its decision (the "overriding justification" element). The trial court found that Zajc failed to meet the clarity element because the UCC and the Ohio Products Liability Act did not set forth a sufficiently clear public policy. It further held that Zajc could not establish the jeopardy element because if someone was injured as a result of a defective product, the injured party has claims available to address the injuries. Since Zajc could not establish the first two elements of his claim as a matter of law, the trial court granted summary judgment to Hycomp.

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The court of appeals disagreed with the trial court's analysis and overruled its decision. The court first stated that Zajc set forth sufficient evidence to meet the clarity element of his claim. A clear public policy exists in the UCC (which allows a buyer to reject nonconforming goods), the Products Liability Act (which imposes strict liability when the risks inherent in a product exceed the benefits of a design), and "most significantly" Chapter 447 of Section 49 of the United States Code (which allows the FAA to set forth standards for the production of aircrafts). Included in the FAA regulations is a provision that mandates a production inspection system to make sure subcontracted parts conform to specified design data, that the parts are inspected, and that records of said inspections are maintained. The court rejected Hycomp's argument that to satisfy the clarity element these sources of public policy must expressly prohibit the termination of an employee who raises objections to the safety of a product. The Ohio Supreme Court has clearly stated that wrongful discharge claims are not limited to situations where the termination violates a statute. See *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 2002-Ohio-3994. The court of appeals next held that the jeopardy element was satisfied, since the termination of employees under circumstances like Zajc would jeopardize the policy set forth in the above statutes and regulations.

In dissent, Judge Gallagher argued that absent evidence that the parts Zajc refused to ship were "flight critical" or presented a safety concern, there is no "clear public policy expressed in the above statutes that would be jeopardized by the termination of an employee who disagrees with his employer about whether a part is nonconforming or defective and then disobeys instructions to ship the goods."

Evidence – Expert Testimony Found Inadmissible Under Evid. R. 702(C) Because It Was Not Based On Reliable Scientific, Technical, Or Other Specialized Information

***Braglin, et al. v. Lempco Industries, Inc.*, 5th Dist App. No. 06-CA-1, 2007-Ohio-1964, 2007 WL 1203853.**

Andrew Braglin, Jr. worked at Lempco Industries, Inc., a manufacturer of metal products, for more than 30 years using various chemicals and solvents as lubricants. In 1997, he was diagnosed with pancreatic cancer. He died on March 4, 1998. His widow filed an intentional tort action against Lempco alleging that Andrew's death was caused, at least in part, by his exposure to carcinogenic chemicals in the workplace.

On January 28, 2005, Lempco filed a motion to exclude the testimony of two expert witnesses offered by plaintiff. Dr. Debra L. Gray, a professor at Ohio State University with a B.S. in microbiology and a Masters degree in insect toxicology, opined that the chemicals at the Lempco facility were "risk factors" for the development of pancreatic cancer. She based her opinion on the Material Safety Data Sheets from Lempco, a personal visit to the Lempco facility, her review of depositions and the decedent's medical records, and a search of the epidemiologic literature. Dr. Frederick LeSar is a general practitioner who treated decedent in 1987 and 1991. Dr. LeSar stated his opinion that Mr. Braglin's cancer was 75% attributable to exposure to chemicals at work, and 25% attributable to smoking for 34 years. His opinion was based on his education and experience, his review of the medical chart, MSDS sheets from the chemicals of Lempco, and a review of medical literature. Following a hearing on the matter, the trial court excluded the testimony of both doctors because it found that said testimony was not based on reliable scientific, technical or other specialized knowledge and would not aid the trier of fact in determining the cause of Mr. Braglin's death. In addition, the trial court granted summary judgment to Lempco because without the testimony of the doctors the plaintiff could not prove the element of causation.

The admissibility of the experts' testimony is governed by Rule 702 of the Ohio Rules of Evidence. Rule 702(C) allows a witness to testify as an expert if the "witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply: (1) [t]he theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles; (2) [t]he design of the procedure, test, or experiment reliably implements the theory; [and] (3) [t]he particular procedure, test, or experiment was conducted in a way that will yield an accurate result." Courts apply Rule 702 in their function as gatekeeper to ensure that expert testimony offered by a party is sufficiently relevant and reliable.

In the instant appeal, the court found that the testimony offered was comparable to that offered in *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, a recent Ohio Supreme Court decision in which the Court held that expert testimony was inadmissible because the experts failed to cite any studies that established a causal connection between the plaintiff's medical condition

and the environment in which he worked. The Court in *Valentine* dismissed the experts' reliance on differential diagnosis, because although "differential diagnosis is a standard scientific method for determining causation,... its use is appropriate only when considering potential causes that are scientifically known." *Id.* at ¶22.

The testimony offered by Braglin's experts was found to be similarly insufficient. The court noted that the conclusion by Dr. LeSar was nothing more than "an arbitrary determination with no basis in scientific facts other than his own subjective opinion." The literature on which Dr. Gray relies discusses possible risk factors for developing pancreatic cancer, however the definition of "risk factor" is significantly different than "cause." Dr. Gray admitted that "[w]ith the exception of tobacco smoking and rare familial kindred groups, the literature... leaves the greater proportion of the causality of this disease undefined." Neither doctor cited to nor produced any studies that affirmatively show a causal connection between pancreatic cancer and chemical exposure. The court concluded that the testimony of Braglin's experts did not establish the requisite causal connection to meet the standard set by Rule 702 and *Valentine.* Since the plaintiff did not have any other expert witnesses to testify about causation, the trial court properly granted summary judgment to Lempco.

Insurance Law – Two Year Limitation Period For Bringing UIM Claim Under Allstate Policy Is Unenforceable

***Angel v. Reed, et al.*, 11th Dist App. No. 2005-G-2669, 2007-Ohio-1069, 2007 WL 726893.**

Plaintiff, Teresa Angel, was injured in a motor vehicle accident when the driver of the vehicle in which she was riding struck another vehicle from behind. The driver indicated on the police report that he had liability insurance with Nationwide. Angel had uninsured/underinsured motorist coverage through a policy with Allstate. The Allstate policy stated, in part, that "[a]ny legal action against Allstate must be brought within two years of the date of the accident. No one may sue us under this coverage unless there is full compliance with all the policy terms and conditions." Angel filed suit within two years of the accident against Nationwide, but later dismissed the action without prejudice. Almost three years after the accident, Angel was first notified by Nationwide that the driver's policy had been canceled before the accident occurred and he had no liability coverage. Angel filed a claim against Allstate for uninsured motorist benefits. The trial court granted summary judgment to Allstate because Angel failed to file suit within the two year contractual limitations period.

The court of appeals reversed the decision of the trial court. The limitations period for an action under a written contract is 15 years, however the parties to the agreement may validly shorten the limitations period "as long as the shorter period is a reasonable one." It has previously been held that a contractual two year limitations period for filing a claim under the UM/UIM provisions of an insurance contract is reasonable and enforceable. Despite this general rule, the court notes that it still must be determined when the cause of action accrues and when the contractual limitations period starts to run. In the instant case, the cause of action does not accrue until there is a determination that the claim arose from the use of a vehicle without insurance coverage. Angel vigorously pursued her claims, but did not discover that the driver lacked insurance until she was informed by Nationwide almost three years after the accident. The court held that "[a] contractual limitation period cannot be used to void a valid condition precedent to uninsured motorist coverage: a determination that the tortfeasor is uninsured. This is black letter contract law." A cause of action for UM/UIM benefits does not accrue until the injured party knows, or with the exercise of reasonable diligence should know, that the tortfeasor was uninsured.

Insurance Law – Section Of Former Version Of Uninsured Motorist Statute Allowing Intra-Family Exclusions Found Unconstitutional

***Burnett v. Motorist Mutual Insurance Companies, et al.*, 11th Dist App. No. 2006-T-0085, 2007-Ohio-1639, 2007 WL 1040957.**

Elizabeth Burnett sought uninsured motorist coverage from Defendant following an accident in which she was a passenger in a vehicle driven by her husband. Defendant initially denied coverage based on the "intra-family" exclusion set forth in the policy. The 1997 version of the Uninsured Motorist Statute allowed such exclusion at R.C. §3937.18(J)(1), which stated in part:

> (J) The coverages offered under Division (A) of this section or selected in accordance with Division (C) of this section may include terms and conditions that preclude coverage for bodily injury or

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> death suffered by an insured under any of the following circumstances...
> (1) While the insured is operating or occupying a motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a named insured, if the motor vehicle is not specifically identified in the policy under which a claim is made...

The statute further provided at R.C. §3937.18(K)(2) that a tortfeasor will not be considered uninsured or underinsured when operating "[a] motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a named insured."

The trial court initially found that Burnett should be covered under the subject policy because the above-quoted provisions of the statute "were ambiguous and irreconcilable," thereby rendering the intra-family exclusion under the policy unenforceable. This decision was overturned on appeal on the basis of the Ohio Supreme Court's decision in *Kyle v. Buckeye Union Ins. Co.*, 103 Ohio St.3d 170, 2004-Ohio-4885, which held that the subject provisions of the Uninsured Motorist Statute were complementary, not conflicting. On remand, the trial court was asked to address Burnett's constitutional arguments that were not previously considered. The trial court granted summary judgment to Defendant, holding that the intra-family exclusion applied and was enforceable. The instant appeal followed.

Burnett argues that the intra-family exclusion set forth in R.C. §§ 3937.18(J) and (K)(2) violates the Equal Protection Clause of the U.S. and Ohio Constitutions because it treats people differently on an arbitrary basis (their familial status), without furthering a legitimate state interest. The court of appeals agreed. The court concluded that the subject section of the statute is unconstitutional because "it impermissibly classifies individuals based upon familial relation, so that injured persons related to the tortfeasor are precluded from recovery while injured persons not related or even non-resident relatives can pursue recovery under the policy." The statute was not furthered by a legitimate state interest and has no rational basis.

In its decision, the court discussed the holding of *Morris v. United Ohio Ins. Co.* (4th Dist.), 160 Ohio App.3d 663, 2005-Ohio-2025, in which the Fourth District rejected a similar equal protection challenge to the intra-family exclusion. In *Morris*, the court held that the statute was focused on the tortfeasor's vehicle, not his or her identity, and therefore the statute did not improperly classify individuals. The instant court rejected this argument, noting how it fails under the facts of this case. Burnett's husband specifically listed the vehicle involved in the accident in his insurance policy. Therefore, the exclusion as stated in R.C. §3937.18(J) did not apply to Burnett. She was being denied coverage "solely because the person injured in the specifically listed vehicle...is a resident family member. This exclusion is clearly based upon the classification of the person and not on the status of the vehicle as the *Morris* court would have us believe." This arbitrary classification made the statute unconstitutional, and the insurance policy at issue was held to provide coverage to Burnett.

Editor's Note: The provision of the statute at issue in this case has been amended, and applies only to those injured between September 3, 1997 and September 21, 2000.

Insurance Law – Retroactive Application Of *Galatis* Did Not Undermine Bad Faith And Fraud Claims Against Insured

***Coe v. Grange Mutual Casualty Co., et al.*, 6th Dist App. Nos. E-06-057, E-06-058, 2007-Ohio-2823, 2007 WL 1653055.**

On June 19, 1999, Wanda Moffit was injured when a car in which she was a passenger crashed while attempting to pass another vehicle. Moffit survived for three months, then died as a result of her injuries. The driver of the car had minimal liability insurance that was soon exhausted. Moffit was employed at the time of the accident by Diana's Deli, which carried a Grange Mutual Casualty Company commercial liability insurance policy that was purchased through Fitzgibbons Arnold & Co., Inc.

The attorney representing Moffit's family requested a copy of the policy from Fitzgibbons "to see if Ms. Moffit has any insurance coverage thereunder." A claims manager for Fitzgibbons responded that there is no coverage for a person not "taking care of the insured's business interests." Copies of any applicable policies were not provided to Moffit's family. On August 10, 1999, the attorney sent the claims manager a copy of the recently released *Scott-Pontzer* decision and again requested "a copy of the commercial policy so I can determine if there is any coverage." The claim representative sent a detailed

response denying coverage. The insurer argued that *Scott-Pontzer* was distinguishable because the decision was based on coverage arising due to a failure to offer UM/UIM coverage on an umbrella policy, and Moffit's claim does not involve an umbrella policy.

At some point thereafter, it was discovered that Grange's denial of the existence of an umbrella policy was not true. Moffit's estate filed suit against Grange alleging breach of its obligation to provide coverage under the commercial and umbrella policies issued to Diana's Deli, and also for fraud and bad faith surrounding its denial of the claim and concealment of the fact that an umbrella policy existed. The parties settled the contractual claims for over $1.2 million, with a reservation of the bad faith and fraud issues. Fitzgibbons was later added as a party for its role in concealing the existence of the umbrella policy.

While the case was pending, the Ohio Supreme Court issued its decision in *Westfield Ins. Co. v. Galatis*, which limited *Scott-Pontzer* and held that UM/UIM coverage for an employee under a commercial policy is available only if the employee's loss occurs in the course and scope of his or her employment. After several pleadings and motions for reconsideration, the trial court granted the Defendants motion to dismiss the bad faith and fraud claims, concluding that retroactive application of *Galatis* undermined Plaintiff's cause of action. Plaintiff appealed.

The determinative issue on appeal was whether Moffit was an insured under the umbrella policy in light of the *Galatis* decision, and therefore whether the insurer owed her a duty. An element of both of the underlying claims is whether the insurer owed a duty to disclose the existence of the umbrella policy or to act in good faith in the settlement of the case. Absent such a duty, the claims must fail. Grange argued that since it is undisputed that Moffit was not acting in the course and scope of her employment at the time of the accident, as required by *Galatis,* she was not covered by the policy and it owed her no duty.

Appellant argued that Moffit was an insured, and her rights as an insured were vested as a result of the settlement and dismissal of the contractual claims. In considering the retroactive application of *Galatis*, the court of appeals noted that the "general rule is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former was bad law, but that it never was the law. The one general exception to this rule is where contractual rights have arisen or vested rights have been acquired under the prior decision." *Peerless Electric Co. v. Bowers* (1955), 164 Ohio St. 209, 210. Grange argued that a settlement and dismissal do not vest Appellant's rights, since only a judgment vests rights under prior law.

The court of appeals held that Grange's interpretation of the issue was too narrow, and that the joint notice of dismissal filed by the parties following their settlement is a final adjudication of the *Scott-Pontzer* claim that vested Appellant's rights. The court clearly states that a dismissal with prejudice on a settlement is the equivalent of a judgment. To hold otherwise, the court reasoned, would undermine the finality of settlement agreements. Since Appellant obtained vested rights that could not be disturbed by subsequent decisions, the trial court's dismissal of Appellant's bad faith and fraud claims was overruled.

Limitation Of Actions – Statute Tolling Limitations Period For A Minor Child's Claim Inures To The Benefit Of Parents Bringing Derivative Claims

***Fehrenbach v. O'Malley,* 113 Ohio St.3d 18, 2007-Ohio-971.**

Tara Fehrenbach, a minor child, suffered permanent injuries from bacterial meningitis. The parties agreed that the accrual date for Tara's injuries was no later than December 1991. In January 1997, her parents filed suit as Tara's guardians against Tara's pediatrician, Kathryn O'Malley, M.D. and Suburban Pediatric Associates, for medical negligence. The suit also included claims by the parents for loss of consortium and medical expenses. The trial court granted partial summary judgment to defendants, holding that the claims by the parents were time-barred. After a jury trial on the medical negligence claims, Tara's parents appealed the trial court's decision. The court of appeals reversed, holding that the tolling provisions of R.C. §2305.16 inure to the benefit of the parents because the interests of Tara and her parents were "joint and inseparable." The defendants appealed the decision to the Ohio Supreme Court.

R.C. §2305.16 allows a cause of action for medical malpractice to be tolled during a patient's minority. The statute further provides that "[w]hen the interests of two or more parties are joint and inseparable, the disability of one shall inure to the benefit of all." The Fehrenbachs

argue that the limitations period on their claims should be tolled pursuant to this statute because their claims are joint and inseparable from their daughter's claims. The defendants argue that since loss of consortium is recognized as a separate and distinct claim, the cause of action should be time-barred.

Rule 19.1 of the Ohio Rules of Civil Procedure requires the joinder of a claim for loss of consortium or expenses brought by the parents of a minor child who has a claim for personal injury. The purpose of the rule is to promote judicial economy and limit the possibility of conflicting results. The Staff Notes to the Rule provides that "Rule 19.1 extends the Rule 19 philosophy by requiring a person with a separate claim to join his claim with that of another person even though under substantive law there may be two independent claims which might be pursued separately." If the claims were pursued independently, the defendant would be required to defend the action twice.

The Court found that allowing the statute of limitations on the Fehrenbachs' loss of consortium claim to be tolled with their daughter's claims would further this policy of avoiding piecemeal litigation. The Court stated that "[r]equiring the Fehrenbachs to litigate their loss-of-consortium claim within one year of their injury and allowing Tara many years to bring her claim subjects the defendants to multiple lawsuits and potentially conflicting and inconsistent results." The Court further stated that the interests of the parents are joint and inseparable from those of their daughter. The damages and injuries both come from the same wrongful acts of the defendants. The claims are joint and inseparable because the Fehrenbachs cannot recover damages if the defendants are found not to be liable for Tara's underlying injuries.

The Court rejected the argument that since a loss of consortium claim is recognized as an independent cause of action, it is not inseparable from an underlying injury claim. "The independent nature of the loss-of-consortium claim is based on control and ownership of the claim...Because the loss-of-consortium claim belongs not to the person suffering a physical injury but to another, it is independent." However, although it is an independent claim in that sense, it is still a derivative action that is based on the same course of events. In this way, the cause of action can be considered both an independent claim and one that is inseparable from the underlying injury claim.

Medical Malpractice – *Comer v. Risko*, Which Prohibits A Claim Against A Hospital Based On Vicarious Liability When The Primary Tortfeasor Cannot Be Found Liable, Does Not Apply To A Claim Against A Nurse

***Doros v. Marymount Hospital, Inc., et al.*, 8th Dist. App. No. 88106, 2007-Ohio-1140, 2007 WL 764728.**

On July 5, 2003, Donald R. Miller, a patient admitted to Marymount Hospital, was found by a nurse sitting on the floor next to his bed. After helping Miller back into his bed, the nurse asked a nurse's aid to check Miller's vital signs. Miller was found to have a low blood oxygen level and became unresponsive. The nurse called a resuscitation order, but efforts to revive Miller were unsuccessful and he died. Kathy Van Doros, the executrix of Miller's estate, filed a complaint for medical negligence and wrongful death against Marymount, The Cleveland Clinic, and Jane/John Doe, alleging that agents of Marymount were negligent in causing Miller's death. Van Doros also asserted that Marymount and the Clinic were vicariously liable. Marymount and the Clinic filed a third party complaint against the nurse and Firstat Nursing Services, the staffing company that employed the nurse.

Shortly before trial, the Ohio Supreme Court issued its decision in *Comer v. Risko* (2005), 106 Ohio St.3d 185, holding that a claim against a hospital based on vicarious

liability fails if the statute of limitations has expired on the claim against the primarily negligent physician. In light of that decision, the trial court granted defendants' motions to continue the trial and file motions for summary judgment. Van Doros was granted leave to amend her complaint to substitute the nurse for John Doe and add a claim against Firstat. The trial court eventually dismissed these claims because Van Doros failed to obtain service on the defendants within one year of filing her complaint. On April 10, 2006, the trial court granted summary judgment in favor of Marymount based on the *Comer* decision because Marymount could not be held vicariously liable when Van Doros did not assert a timely claim against the nurse.

The court of appeals reversed the trial court's decision, stating that *Comer* applied to the negligent acts of a physician, not a nurse. "Nurses and physicians are distinctly different for purposes of vicarious liability." Physicians act in a hospital setting as independent contractors and retain primary control over their own actions. Nurses, on the other hand, even when employed by a staffing agency, are subject to the control of the hospital. A nurse must adhere to hospital guidelines, may be hired or fired at the hospital's discretion, and are under the direct supervision of hospital administration. Most importantly, "[a] ll nurses are shielded from primary liability in medical malpractice actions because they are subject to the control of a greater entity." Based on this distinction, the court held that *Comer* did not apply and it was error to grant summary judgment to Marymount.

Medical Malpractice – Court Upholds A Jury Verdict And Award Of Prejudgment Interest Against Doctor

***Wynn v. Gibert,* 1st Dist. App. No. C-060457, 2007-Ohio-2798, 2007 WL 1650021.**

Appellant, Dr. Carl Gilbert, performed a gallbladder removal surgery on Celeste Wynn in October 2001. During the procedure, Dr. Gilbert completely severed her common bile duct. Dr. Gilbert was forced to modify the laparoscopic surgery to an open procedure in order to better identify Ms. Wynn's anatomy and perform a reconstructive repair, which included connecting the common bile duct and the lower intestine. About a week after the surgery, Ms. Wynn was unable to walk without assistance and could not ingest enough food to avoid being malnourished. She stated that every time she tried to eat, it "felt like food was cutting through her system." Over the next six months, Ms. Wynn lost 46 pounds. Dr. Gilbert attributed the symptoms to phantom pain and depression, and at one point acknowledged that he did not "really know what was causing the damn problem."

Ms. Wynn sought another opinion from Dr. Jeffrey Matthews, Chairman of the Department of Surgery at the University of Cincinnati. Dr. Matthews performed an exploratory surgery in an attempt to find the cause of her symptoms. He discovered that the reconstructive surgery to repair the severed duct was performed in the reverse order, causing food ingested in Ms. Wynn's system to be directed towards, rather than away from, the bile duct and liver. Dr. Matthews had to revise the reconstruction to the proper orientation. It took Ms. Wynn another year to fully recover from the damage caused by Dr. Gilbert's mistakes.

The court of appeals concisely described the trial proceedings as follows. "Dr. Gilbert's defense was denial, even in the face of overwhelming evidence that he botched the operation. The jury saw through the masquerade." The court referred to Dr. Gilbert's assertions that he performed the procedure properly, or that the reverse reconstruction was medically acceptable, as an "ostrich-like defense." The jury unanimously returned a $1,500,000 verdict for Ms. Wynn. The trial court found that Dr. Gilbert failed to make a good faith effort to settle the case and awarded $400,469.79 in prejudgment interest.

Dr. Gilbert raised several assignments of error on appeal, and each one was overruled. Dr. Gilbert argued that he was entitled to a new trial because Ms. Wynn's counsel made inflammatory statements to the jury during closing arguments. These statements include the following: "I will tell you what [Gilbert] has done in this case [that] I believe to be imperfect, reprehensible... What's so reprehensible about [Gilbert's] defense is that it is filled with red herrings...[He] ha[s] put this lady through a second bout of hell, through this trial by [his] refusal to be honest, [and his] refusal to admit that she was connected wrongly, [and has asserted] a series of half truths in front of a jury to get away with it." Dr. Gilbert also objected to a statement by counsel noting that Dr. Gilbert's expert witness is covered by the same insurance carrier as Dr. Gilbert. Nothing in the closing argument was objected to at trial. A party is entitled to a new trial when opposing counsel's remarks create an atmosphere of passion or prejudice. The court of appeals stated that the dispositive question was "whether the verdict was rendered *on the evidence*, or was influenced

by improper remarks of counsel." Since the court found the jury verdict was based on overwhelming evidence of Dr. Gilbert's negligence, it was not an abuse of discretion for the trial court to refuse to intervene sua sponte based on the above-quoted comments of counsel.

For similar reasons, the court also rejected Dr. Gilbert's request to remit damages. The determination of damages is a jury function, and for the trial court to substitute its judgment, the award must be so disproportionate to the harm that it shocks reasonable sensibilities. The court held that the evidence supported the jury's award, and the verdict was not excessive nor the result of passion or prejudice. The evidence at trial revealed that Ms. Wynn endured excruciating pain for six months. Her family testified that "(1) the pain was so intense that Wynn wanted to give up and die; (2) Wynn had to be forced to eat just to keep her alive; (3) when Wynn ingested food, one could hear her stomach churning and gurgling from across the room, and it sounded like the food was cutting through her system, as if 'something in her inside, her intestine, was twisting and it wasn't going in the right direction'; (4) Wynn looked like she was dying; (5) Wynn was helpless and could not independently use the bathroom, dress, bathe, or care for her children; and (6) Wynn looked like a zombie and did not have presence of mind." The court noted that this evidence could have actually supported an even higher verdict.

Dr. Gilbert challenged the award of prejudgment interest, claiming that he acted in good faith. The trial court determined that Wynn acted in good faith, but Dr. Gilbert did not. She made an initial demand of $575,000. Dr. Gilbert's first offer to settle the case came during jury deliberations, and even then he only offered $100,000, less than the medical bills incurred by Ms. Wynn. The trial court stated that Dr. Gilbert "beyond question, failed to rationally evaluate his risk and potential liability...I have no idea what made [Gilbert] think he could prevail on liability. Simply because he was able to find an 'expert' to testify for him is not enough." The court of appeals upheld the trial court's decision, suggesting that it might have been an abuse of discretion for the trial court *not* to have awarded prejudgment interest.

Nursing Home Litigation – Arbitration Clause Signed During Admission To Nursing Home Upheld And Precluded Litigation Of Claims Following Death Of Resident

***Manley v. Personacare, et al.*, 11th Dist App. No. 2005-L-174, 2007-Ohio-343, 2007 WL 210583.**

Patricia Manley was taken to Lake West Hospital emergency room on April 8, 2004. She stayed at the hospital for about one week. After her discharge she was taken to Lake Med Nursing Home, where she met with Admissions Director Kathy Large. Prior to her admission into the home, Ms. Manley signed a "resident admission agreement," as well as an "alternative dispute resolution agreement." During her stay at the nursing home, Ms. Manley fell several times, was permitted to become sick, and eventually died. Her daughter, as personal representative, filed suit against the nursing home alleging that it was responsible for Ms. Manley's death. The nursing home moved to stay the proceedings and have the matter referred to arbitration pursuant to the agreement executed by Ms. Manley at the time of her admission. The trial court granted the nursing home's motion and plaintiff appealed.

The primary issue on appeal is whether the arbitration clause in the agreement between the parties is unconscionable. Although public policy in Ohio favors alternative dispute resolution, an arbitration agreement may be considered unconscionable "where one party has been misled as to its meaning, where a severe imbalance of bargaining power exists, or where the specific contractual clause is outrageous." To establish unconscionability, a party must show *both* that the terms are procedurally unconscionable and substantively unconscionable. "Procedural unconscionability involves those factors bearing on the relative bargaining position of the contracting parties, including their age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, and whether alterations in the printed terms were possible." Substantive unconscionability considers whether the actual terms of the contract are commercially reasonable.

In considering whether the agreement was procedurally unconscionable, the court noted several factors that weighed against such a finding. For example, Ms. Manley was alert, asked questions, and appeared to understand what was happening at the time of her admission to the nursing home. Kathy Large explained the arbitration procedure when she presented the agreement, including using a hypothetical situation (if a nurse spilled soup on Ms. Manley she would not be able to sue in court). The nursing home also provided a pamphlet that fully explained the arbitration agreement in plain language.

The court found, however, that these factors were substantially outweighed by other facts supporting a finding of unconscionability. Ms. Manley was transferred directly from the hospital to the nursing home, and she did not have a friend or family member present at the time of her admission. She was "quite frightened" because she was assaulted about a week prior to her hospital admission. Ms. Manley was 66 years old and had no prior legal experience. Her doctor noted that at the time of her admission that she had numerous medical ailments, including bouts of confusion and mild cognitive impairment. Her signatures on the arbitration agreement were significantly off of the designated line, indicating that she had difficulty signing the agreement. Finally, the court found it "troubling" that a resident was required to sign such an agreement at the time of admission. The court stated that "the reality is that, for many individuals, their admission to a nursing home is the final step in the road of life...In most circumstances, it will be difficult to conclude that such an individual has equal bargaining power with a corporation that, through corporate counsel, drafted the form contract at issue." The agreement at issue was found by the court to be procedurally unconscionable.

The court next considered whether the agreement was substantively unconscionable. The court quoted a Fifth Appellate District opinion that listed the characteristics of an arbitration clause that would be enforceable.

> An example of an arbitration agreement in a medical setting that a court found not to be oppressive or unconscionable had the following features: (1) it was a stand-alone, one-page contract; (2) the contract contained an explanation of its purpose that encouraged the patient to ask questions; (3) the contract contained a ten-point capital-letter red type directly above the signature line that stated, "(B)y signing this contract you are giving up your right to a jury or court trial"; (4) the contract also provided that it could be revoked by the patient within 30 days.

Fortune v. Castle Nursing Homes, Inc. (5th Dist.), 2005-Ohio-6195, ¶ 33. In comparing the above-cited agreement to the one at issue in the instant case, the court noted that several warnings appeared in the agreement Ms. Manley signed, including the right to seek legal counsel, the fact that admission was not contingent upon execution of the arbitration agreement, and that signing the agreement would waive the resident's right to a trial by jury or judge. Also important was the fact that the arbitration agreement was separate from the admission contract, which made it clear that admission to the facility was not contingent on submitting claims to arbitration. The clause allowed Ms. Manley 30 days to reject the agreement, giving her the opportunity to consult with family members or an attorney. Finally, the terms of the agreement provided that the nursing home would be responsible for the cost of the arbitration during the first five days, and if it lasted a longer period the parties would split the cost. All of these factors led the court to conclude that the agreement was not substantively unconscionable. Since the plaintiff was unable to establish both procedural and substantive unconscionability, the court upheld the trial court's decision to enforce the agreement.

Political Subdivision Immunity – Nursing Home Patients' Bill Of Rights Abrogates Governmental Immunity And Allows Claims Against County Nursing Home And County Commissioners, But Does Not Negate Immunity Of Nurse Employees

***Cramer v. Auglaize,* 113 Ohio St.3d 266, 2007-Ohio-1946.**

Decedent was a resident of Auglaize Acres, an unlicensed nursing home created by the Auglaize County Board of Commissioners. On January 27, 2002, decedent fell while two nurses at the home were using a Hoyer lift to help him into bed. He suffered a fractured left femur and was taken to the hospital, where he died following surgery to repair the injury. Decedent's son, Rex Cramer, filed suit against the nursing home, the county commissioners, and the two nurses who were involved with decedent's fall, alleging claims including violations of the Ohio Nursing Home Patients' Bill of Rights. Defendants moved for summary judgment in part claiming that they were protected from liability as a political subdivision as set forth in Revised Code §2744 et seq. The trial court granted summary judgment to the nursing home to the extent the claims sought punitive damages, but otherwise held that the nursing home and the nurses were not immune from claims brought under the patients' rights bill. The Third District Court of Appeals reversed in part, finding that the nurse employees were protected from liability because the patients' rights statute did not expressly impose liability on employees. The Ohio Supreme Court accepted the discretionary appeal.

To determine whether a political subdivision is immune from tort liability pursuant to R.C. §2744, a court must undergo a three-tiered analysis. The first tier is the general rule that a political subdivision is immune from liability in performing a governmental function or proprietary function. The second tier requires consideration of the five exceptions to immunity listed in R.C. §2744.02(B). If one of the exceptions applies, the third tier involves consideration of whether the political subdivision has a defense to liability as set forth in R.C. §2744.03. An employee of a political subdivision is immune from tort liability under R.C. §2744.03(A)(6) unless the employee's actions or omissions are manifestly outside the scope of employment, the acts or omissions were malicious, in bad faith, or wanton or reckless, or liability is otherwise expressly imposed by another section of the Revised Code.

Both lower courts held that the county nursing home was exposed to liability under the exception to immunity provided in R.C. §2744.02(B)(2), which provides that a political subdivision may be "liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivision." The Supreme Court also considered whether immunity was abrogated under R.C. §2744.02(B)(5) because that section is not limited to negligent actions. The statute provides that "[i]n addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when liability is expressly imposed upon the political subdivision by a section of the Revised Code... Liability shall not be construed to exist under another section...merely because a responsibility is imposed upon a political subdivision or because of a general authorization that a political subdivision may sue or be sued." Immunity is similarly abrogated for employees of a political subdivision under R.C. §2744.03(A)(6)(c), which allows imposition of liability if it is "expressly imposed upon the employee by a section of the Revised Code."

Cramer argued that the county and its employees were exposed to liability, for both its negligent and inten-

tional acts, under the (B)(5) exception pursuant to R.C. §3721.17(I)(1), which states that "[a]ny resident whose rights under sections 3721.10 to 3721.17 of the Revised Code are violated has a cause of action against any person or home committing the violation." Defendants countered by stating that the subject provision does not expressly impose liability on the county or its employees. Rather, the provision is a general sanction intended to apply to everyone. The Court's resolution of the issue involved an examination of the meaning of the phrase "any person or home."

In considering the immunity of the county defendants, the Court held that the definition of "home" found in R.C. §3721.10(A) applied. This section defines "home" as "all of the following:...(3) A county home or district home operated pursuant to Chapter 5155 of the Revised Code." This section does not distinguish between licensed and unlicensed county homes, and expresses the intent of the General Assembly to give all county nursing home residents the rights set forth in the statute. Under this definition, liability is specifically imposed on the defendants by statute, and therefore the cause of action against the nursing home and county commissioners under the patients' rights bill falls under the immunity exception found in R.C. §2744.02(B)(5).

After determining that exceptions to immunity applied to the county defendants, the Court next considered whether any defenses listed in R.C. §2744.03 would reinstate that immunity. The Court agreed with the lower court in holding that there were genuine issues of fact concerning the application of the defense found at R.C. 2744.03(A)(5), which states that immunity is restored if "the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner." Application of this defense to the case requires the fact-finder to determine whether the nurses used the lift properly, whether the nurses followed the home's policy concerning patient falls, and whether their actions could be considered malicious, in bad faith, wanton, or reckless. Each of these issues precludes summary judgment as a matter of law.

Unlike the term "home," there is no definition of the word "person" in the Nursing Home Patients' Bill of Rights, nor is there an express statement that employees of a nursing home are subject to individual liability. Therefore, since the statute does not expressly impose liability on employees, the exception to immunity found in R.C. §2744.03(A)(6)(a) does not apply to the individual nurses. The Court held that it was appropriate for the lower court to grant summary judgment on these claims.

Products Liability – Failure To Warn – Dangers Caused By Use Of Trampoline By Multiple People Not Open And Obvious

***Lykins v. Fun Spot Trampolines, et al.*, 12th Dist App. No. 2006-05-018, 2007-Ohio-1800, 2007 WL 1121305.**

Plaintiff-Appellant Connie Lykins attended an annual 4th of July party at her cousin's house on June 30, 2000. She had been coming to the party since the early to mid 1990s. In 1995, her cousin purchased a large circular trampoline from Biggie, Inc. for their backyard. At each party since then, guests, including Lykins, would jump on the trampoline. On the subject date in 2000, Lykins decided to use the trampoline at about 11:00 p.m. She and four other guests formed a circle around the perimeter of the trampoline while one person would jump in the center. At some point, as Lykins' brother jumped into the middle of the trampoline, Lykins lost her balance and fell off the trampoline. She suffered a broken neck and crushed spinal cord, rendering her quadriplegic.

Lykins filed suit against the distributor and seller of the trampoline alleging products liability claims, including a failure to warn. She also asserted negligence claims against her cousins. The trial court granted summary judgment to all defendants, holding that the defendants did not owe Lykins a duty to warn because the dangers of jumping on a trampoline were open and obvious and a matter of common knowledge. Lykins appealed the decision.

Lykins' strict products liability claim is premised on the fact that the trampoline was defective because of inadequate warnings or instructions given about the dangers of its use. Such a claim can be brought under Revised Code §2307.76(A)(1), which states in part that

> a product is defective due to inadequate warning or instruction...at the time of marketing if, when it left the control of its manufacturer, both of the following

> applied: (a) The manufacturer knew or, in the exercise of reasonable care, should have known about a risk that is associated with the product and that allegedly caused harm for which the claimant seeks to recover compensatory damages; (b) The manufacturer failed to provide the warning or instruction that a manufacturer exercising reasonable care would have provided concerning that risk, in light of the likelihood that the product would cause harm of the type for which the claimant seeks to recover compensatory damages and in light of the likely seriousness of that harm.

R.C. §2307.76(B) provides, however, that a product is not defective due to a failure to warn when the risk is open and obvious and a matter of common knowledge. Defendants argue that the dangers associated with the use of a trampoline are open and obvious, that Lykins had used the trampoline before while others were on it, and that she never read the warnings posted on the trampoline before using it.

The court of appeals disagreed and held that the hazards encountered by Lykins at the time of her accident were not open and obvious as a matter of law. The evidence showed that Lykins was not aware that multiple people bouncing on the trampoline created the particular risk of a "double bounce," which could project her off of the trampoline even while she stood on the perimeter. Expert testimony suggested that this danger was not common knowledge, and the other guests at the party were also unaware of the dangers of a "double bounce." Lykins also was not aware that more than 225 pounds on a trampoline at a given time creates a hard, inflexible surface, where usually the surface of a trampoline is flexible and forgiving. Based on these facts, construed most strongly in favor of Lykins, the court of appeals held that the trial court erred in granting summary judgment to defendants.

The court used the same reasoning to reverse the grant of summary judgment to Lykins' cousins. As a social guest, Lykins was owed a duty by her cousins "to exercise ordinary care not to cause her injury by any of their own acts or by any activities carried on by them, and to warn her of any condition on the premises of which they knew and which one of ordinary prudence and foresight in their position should have reasonably considered dangerous, if they had reason to believe [Lykins] did not know and would not discover such dangerous condition." No duty is owed, however, if the dangerous condition is open and obvious because "the open-and-obvious nature of the hazard itself serves as a warning." *Olivier v. Leaf & Vine* (2nd Dist.), 2005-Ohio-1910, ¶ 21. The court of appeals, citing the same issues discussed above, found that material issues of fact precluded summary judgment on Lykins' negligence claims. The court noted that although "jumping on a trampoline involves obvious risks of losing balance, falling down, falling off the apparatus altogether, and colliding with other individuals if more than one is present on the trampoline, we cannot find as a matter of law that the particular hazards at issue here were open and obvious."

Verdicts & Settlements

(For members and educational purposes only)

Donna Grimes, et al. v. Ford Motor Company

Type of Case: Products Liability
Verdict: $10.4 million
Plaintiff's Counsel: James A. Lowe, Esq. and Dennis P. Mulvihill, Esq. of Lowe Eklund Wakefield & Mulvihill Co., L.P.A.; David J. White, Esq. of Searcy Denney Scarola Barnhart & Shipley (West Palm Beach, FL)
Defendant's Counsel: Fred J. Fresard, Esq. and Nicholas G. Even, Esq. of Bowman and Brooke, LLP (Troy, MI); David R. Kelly, Esq. of Bowman and Brooke, LLP (Minneapolis, MN); Greg Cesarano, Esq. of Carlton Fields, P.A. (Miami, FL)
Court: In the Circuit Court of the 15th Judicial Circuit In and for Palm Beach County, Florida
Case No. 02 08749 AH
Judge Edward H. Fine
Date: May 31, 2007
Insurance Company: N/A
Damages: Quadriplegia in 60 year old woman

Summary: On October 30, 2001, Donna Grimes, age 60, was properly seatbelted and operating her 2000 Ford Explorer. While stopped and waiting to turn left into her tennis club, her vehicle was struck from behind by a Toyota Solara traveling at approximately 60 miles per hour. The teeth on the recliner mechanism gears stripped and sheared off, and Donna Grimes' seat collapsed onto the rear seat, allowing her to be thrown out of her seatbelt into the rear seatback. She suffered a severely fractured cervical spine, leaving her a quadriplegic.

Plaintiff's Experts: John Stilson of Grayslake, IL – Ford Motor Co. policies and practices and seat design development; Robert Caldwell of Littleton, CO – accident reconstruction; Dr. Richard McSwain of Pensacola, FL – metallurgy and the analysis of the recliner mechanism failure; Dr. Kenneth Saczalski of Newport Beach, CA – seat design and alternative designs; Dr. Joseph Burton of Alpharetta, GA – occupant kinematics and biomechanics; Patricia L. Pacey, Ph.D of Boulder, CO – economist; Lawrence S. Forman, M.Ed., J.D. of Miami, FL – life care planner.

Defendant's Experts: Dr. Michelle Vogler of Detroit, MI – metallurgical issues; Roger Burnett of Ford Motor Co. – seat design issues; Dr. Priya Prasad of Ford Motor Co. on seat design and biomechanical issues; Edward Paddock of Detroit, MI – seatbelt use and occupant position; Dr. Catherine Corrigan of Philadelphia, PA – occupant kinematics and biomedical issues; Dr. Gregory Smith of Provo, UT – accident reconstruction.

Shirley Brewer v. Jacqueline Peyton-Cook, M.D.

Type of Case: Medical Malpractice
Verdict: $750,000.00 (Plaintiff's pre-trial demand: $500,000.00; Defendant's pre-trial offer: $0; Plaintiff asked for $1.1M in closing argument)
Plaintiff's Counsel: Pamela Pantages, Esq. of Becker & Mishkind Co., L.P.A.
Defendant's Counsel: Ernest Auciello, Esq. of Tucker Ellis & West LLP
Court: Cuyahoga County Court of Common Pleas; Judge Peter Corrigan
Date: June, 2007
Insurance Company: St. Paul
Damages: Permanent left brachial plexus injury

Summary: Delivery at Mt. Sinai in May, 1997 complicated by shoulder dystocia. Defendant physician claimed appropriate maneuvers were used. Family member described excessive force during delivery.

Plaintiff's Experts: Stuart Edelberg, M.D.; James O'Leary, M.D.; Ronald Yarab, M.D.; Rod Durgin, M.D.
Defendant's Experts: T. Murphy Goodwin, M.D.

Adrianne Williams v. Dan Rusch, et al.

Type of Case: Legal Malpractice
Verdict: $150,000.00 (motion for $74,000 in attorney fees, costs, and interest remains pending as of this publication)
Plaintiff's Counsel: Gregory S. Scott, Esq. of Lowe Eklund Wakefield & Mulvilhill Co., L.P.A.
Defendant's Counsel: Melvin Schwartz, Esq.
Court: Circuit Court for Saginaw County, Saginaw, Michigan; Honorable Linda Heathscott; Case No.: 04-051228-NI
Date: June 8, 2007
Insurance Company: ProAssurance
Damages: Aggravation of pre-existing spondylolisthesis, requiring surgery

Summary: Defendant represented Plaintiff for injuries suffered in a car accident, but failed to file a lawsuit within the statute of limitations. Defendant claimed that

Plaintiff's injuries did not meet the legal threshold to file a lawsuit under Michigan no fault auto law. Summary judgment was granted in Plaintiff's favor on liability, and the case proceeded to trial on damages only. Pursuant to Michigan's no fault auto law, Plaintiff claimed only past and future pain and suffering.

Plaintiff's Experts: Dr. Jung Yoo, Orthopedics
Defendant's Experts: Dr. Gregory Uitvlugt

Willis v. St. Paul/Travelers
Type of Case: Fire Loss
Settlement: $287,000.00
Plaintiff's Counsel: Robert P. Rutter, Esq.
Defendant's Counsel: None
Court: None
Date: January, 2007
Insurance Company: St. Paul/Travelers
Damages: Fire loss to house

Summary: Fire damaged the insured's house and the insurer explored various policy defenses before agreeing to pay the claim in full.

Plaintiff's Experts: D.J. Cornelius, Personal Property Appraisal
Defendant's Experts: None

Simon v. Encompass Insurance Co.
Type of Case: Insurance Coverage
Verdict: $16,704 on contract claim; $16, 125 in attorney fees
Plaintiff's Counsel: Robert P. Rutter, Esq.
Defendant's Counsel: Jim Glowacki, Esq.
Court: Cuyahoga County Court of Common Pleas, CV 03 500980
Date: February, 2007
Insurance Company: Encompass Ins. Co.

Summary: Property damage insurance claim for basement wall that caved in. Insurer denied claim and insured filed declaratory judgment. Court of Appeals found coverage and remanded, and trial court awarded attorney fees.

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

Hamilton v. Ohio Fair Plan
Type of Case: Fire Loss
Verdict: $140,824 (appraisal)
Plaintiff's Counsel: Robert P. Rutter, Esq.
Defendant's Counsel: None
Court: None
Date: August, 2006
Insurance Company: Ohio Fair Plan
Damages: Fire loss to house

Summary: Fire totally destroyed the insured's house. Insurer investigated several policy defenses before agreeing to pay claim. Parties could not agree on amount of the loss and submitted the matter to appraisal.

Plaintiff's Experts: Dick Andrews, Reconstruction cost.
Defendant's Experts: None

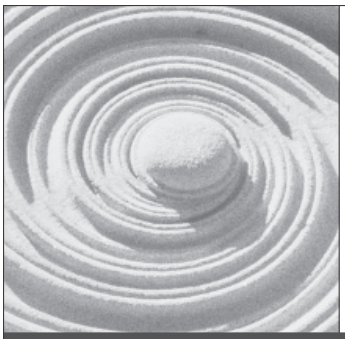
Valentin v. State Auto Mutual
Type of Case: Fire Loss
Settlement: $275,000.00
Plaintiff's Counsel: Robert P. Rutter, Esq.
Defendant's Counsel: None
Court: None
Date: February, 2007
Insurance Company: State Auto
Damages: Fire loss to house in Ohio City

Summary: Fire damaged house and city demolished it before insurance company could inspect and value loss. Insured had bought home at foreclosure sale for $5,000.00 and totally renovated it himself, but had few receipts. Insurer offered $5,000.00 plus total of receipts - $65,000 total – until insured sought counsel.

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

Case Caption Withheld
Type of Case: Disability insurance
Settlement: $100,000.00
Plaintiff's Counsel: Robert P. Rutter, Esq.
Defendant's Counsel: Chicago counsel
Court: None
Date: May, 2006
Insurance Company: Lloyd's of London
Damages: Knee injury

Summary: Professional basketball player in Europe was disabled due to knee injury. Insurer denied claim alleging pre-existing injury. Policy called for binding arbitration, which was requested. Insurer agreed to pay policy limit prior to arbitration.
Plaintiff's Experts: None
Defendant's Experts: None



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Robin Avery, MD
Michael Bergman, MD
Neil A. Crane, MD */Internal Medicine*
Robert Flora, MD
George J. Gianakopoulos, MD
Steven M. Gordon, MD
Clark Kerr, MD
David Longworth, MD
Lawrence Martinelli, MD
Martin J. Raff, MD */Internal Medicine*
Susan Rehm, MD
Raoul Wientzen, MD

Neonatology

Jay P. Goldsmith, MD
Richard E. McClead, MD

Neurology

Nancy Bass, MD */Pediatrics*
Bennett Blumenkopf, MD
Jonathan A. Borden, MD
Donald I. Cameron, MD */Pediatrics*
Elias Chalub, MD */Pediatrics*
Bruce Cohen, MD */Pediatrics*
John Conomy, MD
Ronald Cranford, MD
Benjamin H. Eidelman, MD
Herbert Engelhard, MD
Geoffrey W. Eubank, MD
James M. Gebel, MD
Joseph P. Hanna, MD
Mary Hlavin, MD
Samuel J. Horvitz, MD */Pediatrics*
Donald M. Johns, MD */Pediatrics*
Howard S. Kirschner, MD
Dennis Landis, MD
Charles Lanzieri, MD
Alan Lerner, MD
Hans Luders, MD
Donald Mann, MD
Sheldon Margulies, MD
Gordon J. McComb, MD */Pediatrics*
James M. Parker, MD
David C. Preston, MD
Thomas R. Price, MD */Psychiatrist*
Mark Scher, MD/*Pediatrics*
Tarvez Tucker, MD

Neuropsysiology

Bruce Fisch, MD

Neurosurgery

Bruce Ammerman, MD
Gene Barrett, MD
Frederick Boop, MD */Pediatrics*
John Conomy, MD
Thomas Flynn, MD
John L. Fox, 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

Anthony Bacevice, Jr., MD
Paul Bartulica, MD
William Bruner, MD
David Burkons, MD
Janet Burlingame, MD
Wayne R. Burrows, MD */Perinatology*
Daniel Cain, MD
Michael S. Cardwell, MD
Ricardo Loret deMola, MD
Stephen DeVoe, MD
Method Duchon, MD
Stuart C. Edelberg, MD
John Elliott, MD
Gath Essig, MD
John Farinacci, MD
Gretchen Fisher, MD
Bruce Flamm, MD
William S. Floyd, MD
Robert Gherman, MD
Martin L. Gimovsky, MD
David M. Grischkan, MD
Michael Gyves, MD
William Hahn, MD
Daniel Hall, MD
Hunter Hammill, MD
Nawar Hatoum, MD
Tung-Chang Hsieh, MD
Steven Inglis, MD
James J. Izanec, MD
John J. Kane, MD
George Kingsley, MD
David Klein, MD
Steven Klein, MD
Robert Kiwi, MD
Mark Landon, MD
Justin P. Lavin, Jr., MD */Maternal Fetal Med.*
Young K. Lee, MD

Henry M. Lerner, MD
Andrew M. London, MD
Mark Lowen, MD
Mohamed Al Madani, MD
Clarence R. McClain, Jr., MD
Sharon Mikol, 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
Mark Terrentine, MD
Anthony Tizzano, MD
Josephine Wang, MD
Louis Weinstein, MD
Jean Pierre Yared, MD
David Zbaraz, MD

Occupational Therapy

Ellen Flowers
Rod W. Durgin

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Dennis F. Devereau, MD */Surgical*
David S. Ettinger, MD
Paul Goldfarb, MD */Surgical*
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*
Steven Choung, MD
Robert Corn, MD
Ahmed Elghazawi, MD
Robert Erickson, MD
Richard Friedman, MD
Robert Fumich, MD
Timothy Gordon, MD
Gregory Hill, MD
Ralph Kovach, MD
Stephen H. Lacey, MD
Jeffrey S. Morris, MD
Andrew Newman, MD
Jeffrey J. Roberts, MD
Duret Smith, MD
Michael J. Smith, MD
Susan Stephens, MD
Paul A. Steurer, MD
Glen Whitten, MD
Raymond M. Vance, 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
Seth J. Silberman, MD

Otoneurology

John G. Oats, MD

Pathology

Rebecca Baergen, MD */Placental*
Enid Gilgert-Barness, MD */Pediatric*
Harry J. Bonnell, MD
Charles L. Hitchcock, MD
Robert D. Hoffman, MD
Sharon Hook, MD
Grover M. Hutchens, MD
Nadia Kaisi, MD
Richard Lash, MD */Surgical*
Jan Leestma, MD */Neuropathology*
Kenneth McCarty, MD
Laszlo Makk, MD
Diane Mucitelli, MD
Kanalyalal Patel, MD
Norman B. Ratliff, MD
Jacob Zatuchni, MD

Pediatrics

Raymond R. Buganski, MD
Alvin J. Chin, MD
Victoria Cornette, MD
Ronald Gold, MD
Ivan Hand, MD
Mary C. Goessler, MD
Charles S. Griffin Jr., MD
Elizabeth Hait, MD
Joseph Jamhour, MD
Peter Kollros, MD */Pathology*
Timothy McKnight, MD
Martha Miller, MD */Neonatal*
Philip Nowicki, MD

Ellis J. Neufeld, MD */Hematology*
Philip Nowicki, MD
Fred Pearlman, MD
Michael Radetsky, MD
Umarani Ramachandran, MD */Neonatal Resc.*
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Ghassan Safadi, MD */Allergist*
Mark Scher, MD */Neurology*
Tracy L. Trotter, MD
Susan M. Vargo, MD
Lee M. Weinstein, MD
Keith Owen Yeates, MD */Neuropsychology*

Perinatology

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

Podiatry

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

Proctology

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Cheryl D. Wills, MD

Psychology

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Mark Janis, PhD
Jim Mushkat /*Psychotherapist*

Pulmonology

Robert Becic, MD
Angelo Canonico, MD
Robert DeMarco. MD
Lawrence Martin, MD
Carl Schoenberger, MD

Radiology

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

Rheumatology

David B. Hellman, MD
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
Christian Baeza, MD */Cardiothoracic*
James Bass, Jr, MD
Robert Campbell, 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
Nicholas Smedira, MD
V.C. Smith, MD */Cardiac Surgeon*

Urology

W.E. Bazell, MD
Kurt Dinchuman, MD
Jack S. Elder, MD
Frederick Levine, MD

Vascular Surgery

John J. Alexander, MD
Vincent J. Bertin, MD
David C. Brewster, 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*
Tracey Cherry */Residential Case Worker*
Charles E. DuVall */Chiropractor*
Ahmed Elghazawi */Independent Med Exam*
Itri A. Eren, MD */Nursing Home Staff Physician*

Nancy Holmes */Cert. Physicians Assistant*
Claudia Howatt, *Medical Assistant*
Albert I. King */Bio-Mech Engineering*
Paul M. Matus */Coroner*
Donald Mayes */Dental Consultant*
George W. Nadolski, *Cert. Surgical Assist.*
Ronald Nichols */Microbiologist*
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Jesse Smith, *Postal Worker*
Gary A. Tarola */Chiropractor*
Caroline Wolfe */M.EdLCP (Rehab Counselor)*
Karen Wolffe */Professional Counselor*
Gary M. Yarkony */Physical Medicine; Rehab*
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
Denise Brown, RN
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Michael Carroll, RN
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Danielle Coates, RN
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William Flood, RN
Rita J.Freehorn */Home Health Aide*
Josephine Gaglione, LPN
Debra A. Gargiulo, RN
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Phyllis Hayes, RN
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Laura Hoover, RN
Denise Hrobat, RN
Lori A. Huber, RN
Mary Hulvalchick, RN */Obstetrics*
Dawn Hutchins, RN
Mary Janesch, RN
Donna Joseph, RN
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Jodi Lasher, RN
Linda Law, RN
Judith Wright Lott, RN */Neonatal N.P.*
Mary Lucy, RN
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Robbin Moore, RN
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Karen Nye, CRNA
Delicia Ostrowski, RN
Jeanne O'Toole, RN
Francoise Payen-Healy, BSN/*Cardiovascular*
Janet Pier, RN
Lisa A. Piscola, RN
Kelly M. Price, RN
Patricia Russo, RN
Elizabeth Ruzga, RN */Nurse Midwife*
All Saylor, RN
Laura Schneider, RN
Debra Seaborn, RN
Melissa Slivka, RN
Penny Sonters, RN
Mary Jane Martin Smith, RN */Teacher*
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Helenmarie Waters, RN */Obstetrics*
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Colleen Zelonis, LPN
Joanne Zelton, RN, *Legal Nurse Consultant*
Catherine Zilka, RN

Administration/Professional

Susan Allen */Architect*
Frederick Anderson */Business Mgr, Dr. Cola*
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Edward B. Bell */Economist*
James W. Burke, *Attorney*
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Thomas Hilbert /*Consultant*
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Ohio Rail Commission
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Kelly Sted */Manager of Enrollment*
Kelly Trease */Office Manager, Dr.Cola*

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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:_____

_____

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Experts for Plaintiff(s):_____

_____

_____

Experts for Defendant(s):_____

_____

_____

RETURN FORM TO:

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Cleveland, Ohio 44114
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The Brunn Law Firm
700 West St.Clair Ave., Suite 208
Cleveland, Ohio 44113
FAX: 216.623.7330

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

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Cleveland Academy of Trial Attorneys
Sixth Floor, Standard Building
1370 Ontario Street
Cleveland, Ohio 44113
216-621-0070
216-687-4231

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

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

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

Name_____Age:_____

Firm Name:_____

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Schools Attended and Degrees (Give Dates):_____

_____

Professional Honors or Articles Written:_____

_____

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

Percentage of Cases Representing Claimants:_____

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

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

_____

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

_____

Date:_____ Applicant:_____

Invited:_____Seconded By:_____

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