Cleveland Academy of Trial Attorneys

1400 Renaissance Center
1350 Euclid Avenue
Cleveland, Ohio 44115-1817
(216) 781-1700

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CLEVELAND ACADEMY OF TRIAL ATTORNEYS JANUARY/FEBRUARY 1994 NEWSLETTER

EDITOR: RICHARD C. ALKIRE, ESQ.

PRESIDENT'S COLUMN

Happy new year! I hope 1994 will be a year filled with happiness, personal and professional fulfillment for each of you.

The **Annual Bernard Friedman Litigation Institute** will be held on **Friday, February 18, 1994** at Stouffer Tower City from 10:00 a.m. to 5:00 p.m. We have a terrific program scheduled with 5.00 hours of CLE credits, including .5 credits for ethics (0 hours of substance abuse). **Justice Paul Pfiefer** of the Ohio Supreme Court will be our luncheon speaker. Please review the semina; flyer which is enclosed and make your reservations early as this program will be a sell-out. If you can't be there for the whole day, come for lunch or just a portion.

Please make sure the following dates are on your calendars for our **upcoming CLE programs:**

1.	Date:	Thursday, **January 27,** 1994
	Topic:	Precedent, Juries and the Common Law
	Speaker:	**The Honorable Peter Sikora**
2.	Date:	Thursday, **March 24,** 1994
	Topic:	Pitfalls and Problems for the Civil Practitioner as Seen from the Bench
	Speaker:	**The Honorable James Porter** **The Honorable Janet R. Burnside**
3.	Date:	**April 21,** 1994
	Topic:	Current CD ROM Technology, its impact on small office legal research and the future of law office research with the coming "information super highway"
	Speakers:	**Kathy Carrick**, CWRU School of Law **Jan Novak,** Cuyahoga County Courthouse

All luncheon programs are held in the Grill Room at the Ritz-Carlton from 12:00 to 1:30 p.m. and have been approved for 1.00 hour CLE credit. Our last program which featured Albert Bell, Esq., General Counsel for OSBA was outstanding.

The **37th Annual Convention** of the **Ohio Academy of Trial Attorneys** will be held at Stouffer Tower City from **April 28 - 30,** 1994.

Have your heard? In a unanimous 13-page decision, our own Court of Appeals for the Eighth District in Kevin McAuliffe v. Western States Import Co., Inc., et al. on December 16, 1993 decided that the statute of limitations for all products liability cases is found in Ohio Revised Code Section 2305.07, which provides in pertinent part:

> Except as provided in Section 1302.98 of the Revised Code, an action *** *upon a liability created by a statute* ***, shall be brought within *six years* after the cause thereof accrued.

Because all products liability cases arising on or after January **5,** 1988 are now brought pursuant to products liability statutes, Revised Code Sections 2307.71, et seq., such cases are based "upon a liability created by statute" and the applicable limitations period is therefore ***six*** years. The OATL. has copies of the decision.

Bill Greene and Jean McQuillan have been very busy updating and upgrading our **Expert, Depo & Brief Bank.** We will provide you with a complete list of our "library" within the next few months. Many terrific cross examinations have been constructed with the use of our materials! Please make every effort to contribute materials on a regular basis -- we can all benefit from each other's experiences, good or bad.

Did you see the "unscientific" report in the January 17th issue of Forbes that listed Ohio as the 26th out of 51 places in the U.S. that someone is most likely to get sued in the U.S.?

The December 4, 1993 Holiday No-Dinner Dance was a smashing success. Thanks to all of you who contributed to this worthy cause. Mark your calendars for the Holiday No-Dinner Dance VIII on November 19, 1994.

Your response to encouraging your partners, associates and friends to join CATA has fallen off. An application for membership is included in this newsletter. Please sign up a new member today! Please contact me at your convenience regarding your suggestions or comments for improving CATA and its services to members. Your officers and directors are anxious to help.

Very truly yours,

Laurie

Laurie F. Starr

SUMMARIES OF RECENT DECISIONS BY THE
EIGHTH DISTRICT
COURT OF APPEALS, CUYAHOGA COUNTY

1. Kathleen Burgess Clark v. The Estate of Arthur James Halloran. Jr., Case No. 64576 (Cuyahoga Cty., January 13, 1994).

The Court of Appeals affirmed the trial court's dismissal of a personal injury action on the basis that the two year statute of limitations had run. The action was plead as a negligence or unintentional tort action and involved a shooting which took place at the plaintiff's place of employment. Plaintiff's argument that an insane defendant could not form the requisite intent to commit assault and battery was rejected. Therefore plaintiff's complaint was not timely filed and her claim was dismissed.

2. Roy Sang Pak. Admin.. Etc. v. State Farm Fire and Casualty Co., Case No. 64566 (Cuyahoga Cty., January 6, 1994).

The Court of Appeals reversed and remanded applying the recent Savoie v. Grange Mut. Ins. Co. (1993), 67 Ohio St. 3d 500, 620 N.E. 2d 809 case. Plaintiff had UIM coverage in the amount of $100,000.00 per person, $300,000.00 per accident. The plaintiff's decedent left four survivors who were all insured under the State Farm policy. The original tortfeasor's liability insurance paid $12,500.00, the policy limits. State Farm argued that only $100,000.00 of UIM was available to the multiple next-of-kin. The Court of Appeals agreed with plaintiff's argument that the UIM total coverage of $300,000.00 should be available to them.

3. Robin Jarvis v. State Farm Mutual Automobile Insurance Company, Case No. 64597 (Cuyahoga Cty., December 30, 1993).

The trial court's grant of summary judgment was affirmed in this declaratory judgment action seeking recovery under a no fault policy of automobile insurance issued and delivered by State Farm in Michigan. The daughter of the named insured was seriously injured in Cuyahoga County. At the time of her injury she was a passenger in her mother's automobile which was registered in Michigan and being driven by her boyfriend. Another driver was negligent in causing the accident. That driver's insurer paid the $12,500.00 limits. However, since this policy was issued in Michigan it was a no fault policy and uninsured/underinsured motorist coveraqe was not available. Plaintiff argued that under Ohio Revised Code Section 3937.18 State Farm was obligated to orovide underinsured/uninsured motorist protection under the circumstances of this case. The court rejected this argument citing the language of Ohio's uninsured/underinsured motorist statute which applies "only to policies delivered in Ohio to insure vehicle's registered or principally garaged in Ohio."

4. Jack E. Hoyler v. southwest General Hospital, Case No. **64292** (Cuyahoga Cty., December **16, 1993).**

Plaintiff, a City of Middleburg Heights Police Officer, was injured after he had been dispatched to the emergency room at Southwest General Hospital. The hospital had requested his presence to help control another patient who had been brought to the hospital by the City of Berea police after a domestic disturbance. While plaintiff was at the emergency room he was injured by the patient. He brought an action against the hospital and the emergency group. He did not attach an affidavit to this complaint pursuant to Ohio Revised Code Section **2307.42** (the medical claim statute). The court held that insofar as plaintiff's complaint alleged a common law negligence action and not a medical claim, which action essentially involved the failure of anyone to come to the assistance of the police officer when requested to do so, the two year statute of limitations would apply and he would be permitted to bring the action on that basis.

5. Gavlord Mills v. Drug Mart, Inc., Case No. **64358** (Cuyahoga Cty., December **16, 1993).**

The court reversed the trial court's grant of a motion for directed verdict. The court held that sufficient evidence had been presented such that the jury should have resolved plaintiff's claim of negligence. The plaintiff had been injured on the premises of defendant as a business invitee when she tripped and fell near a wire mesh beach ball display.

6. Kevin J. McAuliffe v. Western States Import Company, Inc., Case No. **65297** (Cuyahoga Cty., December **16, 1993).**

The Appellate Court applied the six year statute of limitations applicable to statutorily created claims to plaintiff's complain brought under Ohio's product liability statutes, **2307.71,** et seq. The court reasoned that plaintiff's rights under Ohio's new product liability act are materially different than the previous definition under the common law and that therefore they were truly statutorily created rights to which the six year statute should apply.

7. Anthony J. Young v. Kathleen Stanton, Case Nos. **64226, 64786** (Cuyahoga Cty., December **16, 1993).**

The trial court reversed a jury verdict in favor of the plaintiff who had fallen on the defendant's steps. The plaintiff was a social guest of defendant's daughter who lived in the upstairs apartment of a duplex house owned by the defendant. The trial court charged the jury concerning the duties of a landlord. The trial court felt that the jury instruction which confused a statutory landlord/tenant duty with principals of negligence was sufficient to take away the $100,000.00, net **$85,000.00,** verdict for plaintiff.

8. Suzanne Tves v. St. Luke's Hospital, Case No. 65394 (Cuyahoga Cty., December 2, 1993).

The Court of Appeals ruled on an appeal from a trial court's granting of plaintiff's motion to compel witnesses to answer questions propounded in depositions regarding the existence of an incident report as well as a physician to answer two questions he had not answered during his deposition. The Court of Appeals upheld the trial court's order compelling the hospital personnel to answer questions regarding the existence of the incident report and ruled in connection with the physician witness that he did not have to answer "opinion" questions propounded to him by plaintiff's counsel. The reasoning of this opinion is torturous at best which gave rise to Judge Porter's vigorous dissent. Judge Porter points out that this matter was strictly an interlocutory issue that should not have been heard on appeal. Additionally, he felt that the majority's opinion allowingthe physician to not answer certain questions was not consonant with the scope of discovery as set forth in Civ. R. 26(B)(1) and Evidence Rules 611(C) and *607.*

9. Leonard Armstronu v. Revco D.S., Inc., Case No. 64044 (Cuyahoga Cty., November 24, 1993).

The Court of Appeals reversed the trial court's dismissal of a work comp appeal based upon the failure of the plaintiff to comply with discovery orders. The defendant had filed a motion to dismiss to which plaintiff had not responded. This motion to dismiss was based on the failure of the plaintiff to comply with the court's order requiring interrogatories and requests for production to be answered. The court in response to the motion to dismiss ruled that it was now moot by agreement of the parties and the plaintiff was to answer interrogatories by a date certain. After that date had passed the defendant filed a memorandum of additional support for its motion to dismiss which motion the court granted six days later. The appellate court required that notice must be provided to plaintiff's counsel that the case will be dismissed and that the trial court's order in this case ruling that the motion was moot only confused the issue. Under the circumstances of this case the trial court should have notified plaintiff's counsel of its intent to dismiss before putting on the order of dismissal that it did.

10. Catherine Coburn v. Leader Personnel, Inc., Case No. 65405 (Cuyahoga Cty., November 10, 1993).

The Court of Appeals upheld the trial court's granting of motions to vacate a dismissal which occurred due to a settlement. The settlement was made on the basis of representations that no insurance coverage existed. After the settlement it was learned that although there was an insurance coverage dispute there was insurance coverage. The court held that the movants had demonstrated meritorious claims, provided evidence of mistake and fraud within the meaning of Civ. R. 60(B) (1) and *(3)* and made the motion timely therefore entitling them to the relief requested.

11. Larrv D. Vance v. Consolidated Rail Corporation, Case No. (Cuyahoga Cty, November 10, 1993).

The Court of Appeals reversed a jury verdict in the amount of $500,000.00 in an FELA case in which plaintiff claimed emotional distress and depression resulting from an alleged hostile work environment which had been tolerated by Conrail. After a thorough analysis of existing FELA law, this Court of Appeals held that negligent infliction of emotional distress in the work place under the Federal Employer Liability Act is not cognizable. Judge Nahra wrote a strong dissent disagreeing with this result of Judges Porter and Matia. The majority felt that either "unconscionable abuse" or "outrageous conduct" as those terms have been used in other F E U precedent, must be established.

V E R D I C T S A N D S E T T L E M E N T S

Picard v. Allied Van Lines
Court: Ashtabula County Common Pleas
Settlement: September, 1993
Plaintiff's Counsel: David M. Paris and Maurice L. Heller
Defendant's Counsel: Richard Rymond and William Riedel
Type of Action: Automobile Accident.

Allied Van Lines truck rear ended plaintiff on 1-90 in a heavy fog. Both vehicles spun out and came to rest in the roadway. Plaintiff's vehicle was then rear ended a second time by another tortfeasor.

Damages: TMJ dysfunction; L2 compression fracture, reflex sympathetic dystrophy right arm.

Plaintiff's Experts: Howard Tucker, M.D. (Neurologist)
Mark Piper, M.D. (Maxillofacial surgeon)
William Cappaert, M.D. (Neuro Ophthalmologist)
Henry Lipian (Accident Reconstruction)

Defendant's Experts: SEA (Accident Reconstruction)
Donavin Baumgartner
Kenneth Callahan, D.D.S.

Settlement: $929,000.00

Kerby v. Asplundh Expert Tree Co.
Court: Medina County Common Pleas
Settlement: October, 1993
Plaintiff's Counsel: David M. Paris
Defendant's Counsel: David Bertch
Insurance Company: Self-insured.
Type of Action: Automobile Accident.

Defendant was .21 driving company truck home form a job, rear ended plaintiff on his motorcycle on unlit country road. Defendant claimed plaintiff was .21 and was on an unlit motorcycle.

Damages: Fractured left tibia, laceration left parietal area, diminished hearing left ear.

Plaintiff's Experts: Robert Zaas, M.D. (Orthopaedic)
Jeff Christoff, M.D. (E.N.T)
James Scarcella (Plastic Surgeon)

Settlement: $215,000.00

Lisa Lewis f/k/a Lisa Bassa v. Westfield Insurance Companies
Court: Cuyahoga County Common Pleas
Judgment: October 26, 1993
Plaintiff's Counsel: Dale S. Economus and James C. Watson
Defendant's Counsel: Patrick Roche
Insurance Company: Westfield Insurance Companies
Type of Action: Automobile Accident (Uninsured Motorist Coverage).

On October 28, 1989 plaintiff, a 30 year old postal worker was status post laminectomy at L4-5 and only 6 weeks post surgery when struck from the rear by an insured motorist. The impact caused a herniated disc at L3-4. On June 6, 1990 she underwent surgery to remove the disc at L3-4 and stabilize the vertebral column with bone graft, plates and screws.

Damages: Herniated disc at L3-4 necessitating "PLIF" procedure performed at Lutheran Medical Center.

Plaintiff's Expert: Arthur Steffe, M.D.

Judgment: $200,000.00 Settlement: -0-

Offer: $ 60,000.00 Demand: $165,000.00

Jane Cunninaham. et al. v. Goodyear Tire & Rubber Co., et al.
Judgment: November 15, 1993
Plaintiffs' Counsel: Dale S. Economus, James C. Watson, Thomas W. Bevan and Verner R. Rudder, Jr.
Defendants' Counsel: Charles E. Peirson
Insurance Company: Self-insured.
Type of Action: Asbestos.

Plaintiffs' decedent worked for 22 years at Goodyear Tire & Rubber Companies, Akron Plants. At age 45 he was diagnosed as having lung cancer. He was a smoker for some 27 years and was also occupationally exposed to asbestos at Goodyear. He died at age 47. His widow and two children applied for workers' compensation benefits but were denied. They appealed to court.

Damages: Plaintiffs' decedent died at age 47 of metastatic lung cancer.

Plaintiffs' Experts: Dr. Atul Mehta
Dr. E. R. McFadden, Jr.
Dr. David Groth

Defendants' Experts: Dr. David Rosenberg
Dr. Jerome Kleinerman
Dr. Jay Thompson

Judgment: Plaintiffs entitled to participated in workers' compensation fund. Settlement: -0-

Offer: -0- Demand: $75,000.00

Georse Ponti, Executor of the Estate of Elizabeth Ponti, Dec'd v. Erieside Clinic, et al.
Court: Lake County Common Pleas
Judgment: November, **1993**
Plaintiff's Counsel: Paul M. Kaufman
Defendant's Counsel: Tobias Hirshman
Insurance Company: PIE
Type of Action: Medical malpractice, wrongful death.

Approximate one year delay in diagnosis of breast cancer; at diagnosis, 4 lymph nodes were involved resulting in significantly worse prognosis - client died three years after diagnosis made.

Damages: Shortened year life expectancy: premature death.

Plaintiff's Experts: Ronald Citron, M.D. (Internal Medicine/ Oncology)
Sam Kremen, M.D. (Pathology)
John Burke, Ph.D.

Defendants' Experts: Joseph Payton, D.O.*
Kenneth McCarthy, M.D.*
(*The defense called no witnesses at trial.)

Judgment: $425,000.00 Settlement: -0-

Offer: -0- Demand: $500,000.00

Griffith v. Mentor Marsh Beach Club
Court: Lake County Common Pleas Court
Settlement: November, **1993**
Plaintiff's Counsel: David M. Paris
Defendant's Counsel: James Hackenberg
Insurance Company: Motorist Mutual
Type of Action: Premises Liability.

While visiting resident of homeowner association, plaintiff was walking on association's beach and fell into covered up remnants of a bonfire.

Damages: Severe burns to left hand, left thigh and right foot.

Plaintiff's Experts: Tom Ebros (Aquatic Safety)
Dr. James Nappi (Plastic Surgeon)

Settlement: $300,000.00

Santon v. State Farm Insurance Co., et al.
Court: Lake County Common Pleas Court
Settlement: November, **1993**
Plaintiff's Counsel: David M. Paris
Defendants' Counsel: James Carrabine, David Fagnilli and Duane Dubsky
Insurance Company: State Farm,; Cincinnati and State Auto
Type of Action: Automobile (Underinsurance).

Underinsured tortfeasor attempted to overtake plaintiff left of center as plaintiff executed a left turn into private driveway.

Damages: C7 radiculopathy; temporary aggravation of asthma.

Plaintiff's Experts: Dr. John Nemunaitis
Dr. Charles Wellman

Defendants' Experts: Dr. Robert Corn (Orthopaedic)
Dr. James McFadden (Pulmonolgy)
Dr. Richard Kaufman (Orthopaedic)
Dr. Maurice Coffey (Pulmonology)

Settlement: $105,000.00

Anonymous v. Anonymous (Confidential)
Settlement: November, **1993**
Plaintiff's Counsel: John G. Lancione
Insurance Company: Self-insured
Type of Action: Medical Malpractice/Wrongful Death.

Twenty-nine year old Plaintiff was afflicted with Crohn's disease. Following bowel surgery, he was transferred to the hospital's Pain Clinic where he was left unattended and aspirated vomit, causing respiratory arrest and death.

Damages: Wrongful death.

Plaintiff's Experts: Harvey J. Dworken, M.D. (Cleveland OH)
Henry Pinsker, M.D. (New York NY)
Peter Thomashow, M.D. (New York NY)

Defendant's Experts: Gerald Aronoff, M.D.
Randal France, M.D. (Salt Lake City UT)

Settlement: $2,000,000.00

Anonymous v. Anonymous (Confidential)
Settlement: November, **1993**
Plaintiff's Counsel: John G. Lancione
Type of Action: Medical Malpractice/Wrongful Death.

Patient had anterior cervical discectomy followed by severe edema

to neck causing respiratory arrest; C.P.R. was unsuccessful.

Damages: Death.

Plaintiff's Expert: Mervyn Jeffries, M.D. (Washington, DC)

Defendant's Experts: Robert M. Rogers, M.D. (Pittsburgh PA)
Michael Frank, M.D. (Hudson OH)

Settlement: $400,000.00

Anonymous v. Anonvmous (Confidential)
Settlement: November, 1993
Plaintiff's Counsel: John G. Lancione
Insurance Company: Self-insured
Type of Action: Medical Malpractice/Wrongful Death.

Plaintiff was examined during an executive physical and no examination was done of his colon. Colon cancer discovered one year later. Cancer metasticized, causing death.

Damages: Wrongful death.

Plaintiff's Experts: David Pleet, M.D. (Springfield MA)
Peter Wasserman, M.D. (Seattle WA)

Defendant's Experts: R. W. Kellermeyer, M.D. (Cleveland OH)
Eugene Salvati, M.D. (Plainfield NJ)
E. Graham Lampert, M.D. (Westlake OH)

Settlement: $350,000.00

Joanne K. Wovma. Individually and as Administratrix of the Estate of Stephen M. Westbrook, Deceased v. Oscar R. Johnson
Court: Lake County Common Pleas
Plaintiff's Counsel: Michael Shafran and Victor A. Mezacapa, III
Defendant's Counsel: William Riedel
Type of Action: Automobile Accident.

Twenty-five year old, single, male motorcyclist was struck and killed by 64 year old male turning into the motorcycle's path of travel. Defendant alleged contributory negligence on behalf of plaintiff's decedent.

Damages: Death.

Judgment: $105,000.00

Shirley Comstock. Individually and as Administratrix of the Estate of Daniel Comstock, Deceased v. The Mead Corporation, et al.
Court: Ross County Common Pleas
Plaintiff's Counsel: Robert F. Linton
Defendants' Counsel: Leo F. Krebs and Deborah D. Barrington
Type of Action: Wrongful death.

The decedent was a 32-year-old roofing foreman, killed while working for an independent contractor at Mead's paper plant in Chillicothe, Ohio. A deteriorated roofing panel collapsed underneath him, resulting in multiple injuries, coma and death seven days later. The decedent was survived by his spouse and two minor children.

Mead claimed the hazard was inherent in the work for which the independent contractor had been hired, that the hazard was open and obvious, and that Mead had warned roofers about the hazard. Mead also claimed the decedent, who was an insulin dependent diabetic, had early signs of renal failure, which would result in shortened life expectancy.

Plaintiff denied that adequate warnings were given and claimed Mead had superior knowledge of the hazard based on the lengthy repair history of similar roof panels at the Chillicothe plant and at other Mead paper plants across the country.

Plaintiff also filed an intentional tort claim and violation of specific safety requirement (VSSR) claim against plaintiff's employer for its alleged knowledge of the hazard and failure to provide safety nets or other safety equipment to its workers in violation of the Ohio Administrative Code.

Damages: Death.

Plaintiff's Experts: Russell S. Fling, P.E. (Structural Engineer Columbus OH)
Harvey S. Rosen (Economist - Cleveland OH)
Dr. David M. Yashon (Neurosurgeon - Columbus OH)

Defendants' Experts: James Nikoli, P.E. (Columbus OH)
Mead staff engineers (Chillicothe OH)
Dr. David Westbrook (Internal Medicine - Dayton OH)

Settlement: The Mead Corporation: $600,000.00

Consent judgment against employer, Ruthco Incorporated dba Adena Roofing & Contracting Co.: $1.5 million with full assignment of all claims against its insurers and insurance agent for failing to provide necessary (stop gap) insurance coverage. Ten percent VSSR penalty awarded by

Industrial Commission in favor of widow and minor children.