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CLEVELAND ACADEMY OF TRIAL ATTORNEYS APRIL, 1998 NEWSLETTER

EDITORS DAVID M. PARIS, ESQ./PAUL V. WOLF, ESQ

PRESIDENT'S COLUMN

STATUS OF HOUSE BILL 350 CHALLENGE

The Ohio Supreme Court granted the request to issue an alternative writ and scheduled the presentation of evidence by parties on the merits of their claims. This four-three decision was announced on February 25, 1998. The dissenters assert that the Ohio Supreme Court has no jurisdiction to grant the relief sought by relators and further a writ of prohibition to prevent a court from applying legislation cannot be obtained on the grounds that the legislation is unconstitutional.

The Ohio Supreme Court then ruled on the following pending motions on March 9, 1998.

1. Granted the Attorney General's motion to intervene in the action as a party.

2. Denied Relator's request that all Ohio trial court judges (common pleas and municipal court) be certified as a class of respondents and that the action be maintained as a respondent class action.

3. Granted Relators' request for oral argument.

4. Granted Respondent Cuyahoga County Judge Norman A. Fuerst's motion to substitute proper party, substituting Judge Nancy A. Fuerst in his place.

5. Granted Relators' motion for admission *pro hac vice* of Attorney Robert S. Peck, who heads the ATLA's Legal Affairs Department.

Since then Relators filed a Motion to quash subpoenae, objections to command to produce and in the alternative, motion for a protective order. Also, the OATL filed a memorandum opposing the Respondents' motions to expedite the consideration of Motions to Dismiss, or in the alternative, to Clarify Scheduling.

The Relators OATL and AFL-CIO filed evidence on March 17, 1998 comprised of more than 450 pages, including affidavits from: Richard Mason, OATL Executive Director; Stephen Daniels and Joanne Martin of the American Bar Foundation; Marc Galanter, Professor of Law at the University of Wisconsin Law School; Tim Ryles, Former insurance Commissioner for the State of Georgia; and Stephen Chappelear, author of a series of jury verdicts and empirical studies in Franklin County courts.

PIE TASK FORCE

The Task Force, chaired by members Mike Becker and Vice President, Jean McQuillan, met on Tuesday, April 7, 1998. At that time member John Lancione brought to the attention of the group a ruling wherein Judge William Mahon lifted the stay as to The Cleveland Clinic on the grounds that insurance was not involved and that its relationship with PIE was in the nature of a service contract. This ruling occurred on April 6, 1998. Apparently, Judge Thomas Curran has ruled otherwise.

In terms of time frame, the liquidator has four to six months to marshall all the assets. An additional stay is allowed for six months from the March 23, 1998 ruling placing PIE in liquidation.

Volunteers were requested to do out of state research on Guarantee Association law as Ohio's Guarantee Association legislation is patterned after a uniform act. Research into Indiana, Kentucky, Michigan and New York law has been undertaken by various members of the committee.

ROBERT CORN, M.D

Please be advised that Robert Housel (216-363-6038) has been appointed by Judge Gaul in a pending case as a special master to conduct proceedings concerning alleged bias of Dr. Robert Corn based on the income he derives from the defense medical examinations and testimony. If any of you have any information concerning Dr. Robert Corn, the number of defense medical examinations, testimonies that he provides and his financial condition derived therefrom, please contact Mr. Housel directly.

SUB. H.B. 354 - NURSING HOME IMMUNITY

One of our directors, Dennis Landsdowne, brought to my attention that the Governor recently signed Substitute House Bill 354. The Ohio Legislative Service Commission analysis for this bill indicates that apart from the immunity provision the entire bill deals with do not resuscitate (DNR) protocols and issues related thereto. However, the add-on provision which creates Ohio Revised Code Section 3721.17 confers immunity upon nursing homes from punitive or exemplary damage awards unless it is first determined that (1) the plaintiff is entitled to compensatory damages for injury or loss to person or property and (2) the actions or omissions causing the injury or loss must demonstrate malice, aggravated or egregious fraud or insult. In essence, the Preston v. Murty version of implied malice no longer applies. Further, such damages are capped at three times the amount of compensatory damages or $100,000.00, whichever is less for a small employer and not to exceed $250,000.00 for a large employer. Finally, the act specifies that this provision is considered purely remedial in operation and thereby applies whether the action is pending in court or commenced on or after the acts effective date.

One wonders whether a single subject constitutional challenge can be made to this bill which is clearly a step backward from the existing law. In this regard, see Sprosty v. Pearlview, Inc., 106 Ohio App. 3d 679 (Cuyahoga Cty. 1995) for the current law in this area.

As a practice pointer you should all decide whether to file your nursing home cases before this bill becomes effective.

NEW MEMBERS

The CATA welcomes Edward J. Nagorny, Gregory J. Ochocki, Dale P. Zucker, Eugene A. Lucci, Joseph A. Farchione, Scott H. Kahn, David W. Skall, Michael E. Jackson, Daniel M. Finelli and Cheryl A. O'Brien as members.

LUNCHEON SEMINAR

On April 27, 1998 Judge Marcus provided an excellent update on the law relative to an Ohio evidence update. This seminar was well attended.

The next and final seminar organized by CATA Secretary Robert Linton will be held on May 28, 1998 at 12:00 p.m. at the Cleveland Marriott downtown. This seminar is entitled "Ethics for the Personal Injury Lawyer" featuring a distinguished panel including Mary L. Cibella, former counsel for the Cleveland Bar Association, Professor Jack A. Guttenberg and Ellen Hobbs Hirshman, a member of the Board of Commissioners on Grievances and Discipline of the Supreme Court. This seminar will not only involve lecture but also open questions from the audience. We look forward to your attendance.

CONCLUSION

Finally, if there is anything that the CATA can or should do better, we encourage our members to contact the officers or board members to relay such concerns. This organization is meant to be a vehicle whereby quality representation results from membership and participation.

Sincerely,

Richard C. Alkire, President

RCA/jjt

PRODUCT LIABILITY/STATUTE OF LIMITATION

Davis v. Becton Dickinson & Company, Cuy. Co. App. No. 72335, March 26, 1998, unreported. For Plaintiff-Appellant: Mark C. Cohn, Julie L. Juergens and Charlene R. Mileti and For Defendant-Appellee: Victoria L. Vance, Lois J. Cole and Irene Keyse-Walker. Opinion by Patricia Blackmon. Joseph Nahra and Kenneth Rocco concur.

Plaintiff filed her complaint approximately two years and five months after her cause of action accrued. At the time of the filing of the lawsuit, the Supreme Court of Ohio had not decided the case of McAuliffe v. Western States Import Company (1995), 72 Ohio St.3d 534. McAuliffe held that the two (2) year statute of limitations governing actions for bodily injury contained in Revised Code Section 2305.10 was applicable to product liability actions alleging personal injuries rather than the six (6) year statute of limitations contained in Revised Code Section 2305.07 governing actions upon a liability created by statute. The McAuliffe Court had held that product liability actions were not created by statute but, rather, that the product liability statute contained in Revised Code Section 2307.73 was merely a codification and/or modification of the cause of action for strict product liability for defective manufacture, defective design, inadequate warning and failure to conform to manufacturer's representation which had previously been enacted by judicial interpretation. Thus, Revised Code Section 2307.73 did not "create an action". Nevertheless, plaintiff argued that even though McAuliffe was entitled to retrospective application as is the general rule for all case law (Peerless Electric Company v. Bowers (1959) 164 Ohio St.209), that in the present instance, retrospective application of McAuliffe would negate a vested right of the plaintiff. The Court of Appeals held that application of McAuliffe would not negate a vested right by effecting a change in the law but, merely, applied the correct statute of limitations to plaintiff's cause of action.

ABUSE OF DISCRETION - FAILURE TO GRANT CONTINUANCE

Stanaczyk v. Fontanez, Cuy. Cty. App. No. 72130, March 12, 1998, unreported. For Plaintiff-Appellant: Susan M. Lawko and For Defendant-Appellee: Philip A. Marnachek, John T. McLandrich and Stephen F. Dobscha. Opinion by John Patton. Ann Dyke and Timothy McMonagle concur.

Defendant filed a motion for summary judgment alleging that the operator of a motor vehicle belonging to the operator's spouse had signed a specific endorsement on the insurance policy excluding him as a named insured. Plaintiff opposed the motion, appending to his response three separate documents containing defendant's signature.

Plaintiff alleged that the two documents other than the exclusion which contained defendant's signature were similar while the signature purporting to be defendant's on the exclusion was markedly different. The trial court set the motion for hearing approximately two months after the plaintiff filed his motion in opposition to summary judgment. Approximately one month before the hearing date, the trial court held a pre-trial hearing for which neither the plaintiff nor his counsel appeared. Four days prior to the date upon which the hearing on the motion for summary judgment was scheduled, plaintiff filed a motion for continuance in order to obtain the report of a handwriting expert. The trial court denied the motion for continuance and eventually granted summary judgment. The Court of Appeals reversed , holding that the trial court abused its discretion in failing to grant the plaintiff a continuance in order to procure the report of a handwriting expert. The Court of Appeals was of the opinion that the trial court had acted punitively against the plaintiff for failing to appear at the pre-trial and arbitrarily refused to grant a continuance.

INSURANCE COVERAGE - EMPLOYER INTENTIONAL TORT

State Auto Insurance Company v. Golden, Cuy. Cty. App. Nos. 72631 and 72657, March 12, 1998, unreported. For Plaintiff-Appellee: Michael Golden, Ronald L. Rosenfeld and Scott A. Spero and For Defendant-Appellant J.B. Stamping, Inc.: Joseph E. Rutigliano and Sara Gabinet and For Plaintiff-Appellee: Robert J. Koeth and Ann E. Leo. Per Curiam.

Plaintiff filed suit against J.B. Stamping, Inc., his employer, alleging intentional tort because injury was substantially certain to occur as a result of his employer's conduct. J.B. Stamping had commercial insurance in effect at the time of plaintiffs injury. The commercial general liability policy contained an endorsement for employer's liability (Stop-Gap Coverage). However, the endorsement contained exclusions for injuries to employees which were covered by workers' compensation and for injuries suffered by employees as a result of the employer's intentional tort, whether directly intended or because injury to the employee was substantially certain to occur.'

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[1]Coverage for "direct intent" employer torts is against public policy whereas coverage for "substantial certainty" employer torts is not. See Harasyn v. Normandy Metal, Inc. (1990), 49 Ohio St.3d 173 and Ward v. Custom Glass & Frame, Inc. (1995), 105 Ohio App.3d 131.

The trial court granted summary judgment in favor of State Auto on their claim for declaratory judgment. The Court of Appeals affirmed, finding that the endorsement did allow coverage to the employer if the manufacturer of the product that injured an employee sued the employer for altering the product and, also provided coverage for relatives of an employee claiming damages resulting from any injury to the employee. Because of these additional, albeit very minimal, coverages provided by the endorsement, the Court of Appeals did not find the endorsement sold to J.B. Stamping amounted to an illusory contract. "When some benefit to the insured is evident from the place of the endorsement, the endorsement is not an illusory contract."

INADEQUATE MONETARY DAMAGES

Sutherin v. Dimora, Cuy. Co. App. No. 72351, February 26, 1998, unreported. For Plaintiff-Appellant: Brian J. Melling, Thomas G. Longo and Clarence P. Rader, III and For Defendant-Appellee: Laurel E. Letts. Opinion by Timothy McMonagle.

Plaintiff alleged personal injury as a result of an admitted negligence automobile accident. Specifically, the plaintiff alleged injuries to her hands and knees which required emergency room treatment, and bruising to her stomach which caused her anxiety and the need to undergo fetal monitoring. Additionally, plaintiff alleged that she sustained injury to her nose as a result of the deployment of the air bag and that this injury resulted in the need for plaintiff to undergo surgery. Defendant did not contest plaintiff's need for emergency room treatment, fetal monitoring and the anxiety attendant thereto. Defendant did contest and provide expert testimony to the effect that plaintiff's nose injury was unrelated to the automobile accident. The jury returned a verdict in favor of the plaintiff in the amount of zero dollars. The Court of Appeals held that it was an abuse of discretion for the trial court to deny Plaintiff's Motion for a New Trial where the verdict was against the manifest weight of the evidence and that the jury's award was clearly inadequate as it related to plaintiff's emergency room treatment for injuries to her hands and knees and her subsequent fetal monitoring and the pain and anxiety attendant thereto. On remand, the Court of Appeals specifically instructed the trial court not to consider as an element of damages those injuries plaintiff alleged had resulted to her nose inasmuch as defendant had presented some competent, credible evidence contrary to the allegation of the plaintiff's as it related to that particular injury.

WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY

Takach v. American Medical Technology, Inc., Cuy. Cty. App. No. 72247, February 19, 1998, unreported. For Plaintiff-Appellant: Ellen S. Simon and Cathleen M. Bolek and For Defendants-Appellees: Michael T. McMenamin, Nancy A. Noall, Vincent L. Cheverine and William D. Dowling, Jr. Opinion by James D. Sweeney.

Plaintiffs filed suit against defendant alleging, ***infer alia,*** that she had been constructively discharged from her employment as a result of filing a lawsuit against Dow-Corning, a client of the defendant, for defective breast implants.[2] The trial court granted Defendant's Motion for Summary Judgment. The Court of Appeals recognized that Ohio has judicially created a tort for wrongful discharge in violation of Ohio public policy pursuant to Greeley v. Miami Valley Maintenance Contractors, Inc. (1990), 49 Ohio St.3d 228. However, the Court of Appeals held that the public policy which plaintiff alleged had been violated, the Open Courts provision of the Ohio Constitution, had never been recognized as a basis for a public policy wrongful discharge claim. The Court of Appeals also interpreted the Ohio Supreme Court case of Provens v. Stark County Board of Mental Retardation and Developmental Disabilities (1992), 64 Ohio St.3d 252 as standing for the proposition that the Ohio Supreme Court has declined to create an exception to the common law employment at will doctrine for an alleged violation of the Ohio Constitution.[3]

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[2]The plaintiff also alleged sexual harassment and the Court of Appeals' Opinion contains a decent summary of the law applicable to sexual harassment. However, the Court of Appeals agreed with the trial court that the behavior complained of was not sufficiently abusive to constitute an objectively hostile work environment.

[3]This belief on the part of the Court of Appeals is on rather shaky footing since the Ohio Supreme Court had held and affirmed the following rule of law subsequent to its decision in Provens: "Clear public policy sufficient to justify an exception to the employment at will doctrine is not limited to public policy expressed by the General Assembly in the form of statutory enactments, but may also be discerned as a matter of law based on other sources, such as the Constitutions of Ohio and the United States, administrative rules and regulations, and the common law." Painter v. Graley (1994), 70 Ohio St.3d 377. See also, Collins v. Rizkana (1995), 73 Ohio St.3d 65 and Kulch v. Structural Fibers, Inc. (1997), 78 Ohio St.3d 134.

The Court of Appeals, in affirming the trial court's grant of summary judgment, also made the following statement: "A review of the jurisprudence of this state reveals that no court has had cause to decide whether the cause of action herein, discharging an employee because the employee filed a civil lawsuit against a third party which affected the business interest of the employer, is in violation of the Open Courts element." However, the Ohio Court of Appeals for Hamilton County held as follows in the case of Chapman v. Adia Services, Inc. (1997), 68 Ohio App.3d 534: "The trial court erred in granting a motion for summary judgment in favor of the employer on a claim for wrongful discharge. When an employer terminates an employee for consulting an attorney regarding an issue that affects the employer's business interest, the employer has violated the clear public policy of Ohio. The courts must be open to the citizens of Ohio, and they may enter without fear of losing their livelihood. Chapman, *supra., at syllabus.*[4]

NEGLIGENCE - VIOLATION OF CITY ORDINANCE

Kingston v. Austin Development Company, Cuy. Co. App. No. 72034, February 5, 1998, unreported. For Defendant-Appellant: Richard R. Kuepper, and For Plaintiff-Appellee: Paul M. Kaufman. Opinion by Leo Spellacy. Dissenting opinion by James Porter.

Plaintiff tripped and fell over a crack in an access sidewalk leading from a bus stop located on Mayfield Road to Dillard's Department Store at the Severance Circle Shopping Center. At all times relevant the access sidewalk was owned by the defendant. At the time of the incident, the City of Cleveland Heights had in effect an ordinance which mandated that "no owner...of any premises shall maintain or shall permit to be maintained at or on the exterior property areas of such premises any condition which...creates...a safety or health hazard; or which is a public nuisance; including, but not limited to the following...improperly installed or maintained public sidewalks...which are in defective condition in any of the following list of particulars...any block having multiple cracks or any single crack larger than l/4"

[4]It should be noted that in Chapman, just as in Takach, the plaintiff was constructively discharged for consulting an attorney and filing suit against a business client of the employer.

wide...". The trial court read the ordinance as a jury instruction subsequent to the general negligence instruction. The Court of Appeals reversed a jury verdict in favor of the plaintiff in the amount of Forty Five Thousand Dollars ($45,000.00) finding that the trial court committed prejudicial error by instructing the jury with regard to the Cleveland Heights city ordinance. The Court of Appeals relied upon the unreported case of Hughes v. Kozak (February 22, 1996), Cuy. App. No. 69007, unreported, and Eisenhuth v. Moneyhon (1954), 161 Ohio St. 367, for the proposition that where the municipality fails to provide the owner with notice of its violation, the ordinance may not be relied upon to impose liability on the owner. Under the interpretation of the Court of Appeals the ordinance was not a proper basis for a jury charge because the defendant was never notified by the City of Cleveland Heights of its violation of the ordinance. Judge Porter dissented because he was of the opinion that the case should not be remanded for a new trial but, rather, should be reversed and judgment entered for the defendant because the plaintiff was a licensee rather than a business invitee and there existed no evidence at trial that the defendant had engaged in willful, wanton or reckless conduct.

NEW TRIAL

Salem v. Trivisonno, Cuy. Co. App. No. 71147, January 29, 1998, unreported. For Plaintiff-Appellant: Mitchell A. Weisman and For Defendant-Appellee: Marillyn Fagan-Damelio. Opinion by John Patton. Ann Dyke and Terence O'Donnell concur.

The Court of Appeals reversed the trial court's failure to grant a new trial in favor of the plaintiff because the jury verdict in favor of the defendant was against the manifest weight of the evidence. Plaintiff had been rear-ended at less than five (5) miles an hour by the defendant. Plaintiff was apparently uninjured at the scene of the accident and at the time the police report was made. Later that evening plaintiff went to the emergency room. Subsequently, plaintiff alleged various injuries as a result of the accident. Defendant's expert physician, while disputing some of plaintiffs injuries, confirmed that plaintiff suffered some soft tissue injury. Citing Vescuso v. Lauria (1989), 63 Ohio App.3d 336 and Hallman v. Skender, (January 28, 1988), Cuy. App. No. 53027, unreported, the Court of Appeals held that it is well established that when a defendant admits negligence and denies proximate cause, and the plaintiff, plaintiffs physician and defendant's physician testified that some injury was caused by the accident, a verdict for the defendant is against the manifest weight of the evidence.

EMERGENCY DOCTRINE - PRIMARY ASSUMPTION OF RISK

Chaney v. Eason, Cuy. Co. App. No. 72142, December 24, 1997, unreported. For Plaintiff-Appellant: Gary Cowan and For Defendants-Appellees: John C. Kealy and Joseph H. Wantz. Per Curiam.

Plaintiff's decedent reached in the open window of defendant's vehicle while defendant and her passenger were stationery. Defendant testified that plaintiff grabbed the steering wheel while leaning in the window and told them not to move the car. Defendant's passenger testified that she informed the defendant that plaintiffs decedent had a gun. The defendant suddenly put the vehicle in motion and drove away with plaintiff's decedent hanging onto the car. Defendant accelerated to 45 miles per hour, went left of center and over a tree lawn causing the defendant to fall off the vehicle and sustain fatal injuries. Judge Mahon directed a verdict in favor of the defendant based in part upon the doctrine of trespass to chattels! Plaintiff appealed, arguing that a reasonable jury could have found the defendant negligent so that an analysis under comparative negligence would have been in order. The Court of Appeals affirmed the trial court on the basis of the "emergency doctrine." The Court of Appeals held specifically that in a negligence action, the so-called "emergency doctrine" applies where there has been a sudden and unexpected occurrence of a transitory nature which demands immediate action without time for reflection or deliberation and does not comprehend a static condition which lasts over a period of time. The Court of Appeals was of the opinion that the facts of this case relieved the defendant of liability. The Court of Appeals did not stop with the "emergency doctrine," it also found that the doctrine of primary assumption of the risk barred the plaintiff from recovering. Primary assumption of the risk arises in the situation where no duty is owed by the defendant to protect the plaintiff from a specific risk because the risk encountered is so directly associated with the activity in question that it creates no jury issue to be decided. The Court of Appeals held that leaning into an open car window and holding the steering wheel and telling the occupants not to move the vehicle so obviously gives rise to the risk that the driver will suddenly accelerate with the plaintiffs decedent half inside and half outside the car that the doctrine of primary assumption of the risk will relieve the defendant from any duty.

PRIMARY ASSUMPTION OF THE RISK

Buckles v. Stepanik, Cuy. Cty. App. No. 72006, December 18, 1997, unreported. For Plaintiff-Appellant: James D. Shelby and Thomas J. Vozar and For Defendant-Appellees: Gregory T. Rossi, Sean E. Leuthold and Brian D. Sullivan. Opinion by James D. Sweeney. Ann Dyke and Diane Karpinski concur.

In affirming the judgment of the trial court refusing to grant a new trial for the plaintiff subsequent to a jury verdict in favor of the defendant, the Court of Appeals held that where a mechanic in the garage of a truck terminal places a ladder against the side of a trailer and climbs on top of the trailer in order to fix a light and is killed when the driver re-enters the vehicle and begins to move it without checking his rear-view mirrors, the doctrine of primary assumption of the risk is a proper instruction for the jury. The Court of Appeals apparently placed great emphasis upon the fact that the driver never turned off the engine and the mechanic, before beginning the attempted repair, failed to turn off the engine and remove the keys. In utilizing the doctrine of primary assumption of the risk, the Court of Appeals necessarily held that there was sufficient evidence for a finder of fact to conclude that the specific risk of a driver entering a truck that is being repaired and moving it without checking his rear-view mirror is so inherent in repairing a light on the top of the trailer that the driver of the truck was relieved from any duty owed to the mechanic.

MEDICAL MALPRACTICE - STATUTE OF LIMITATIONS

Tanzi v. Nahigian, M.D., Cuy. Co. App. No. 71872, December 18, 1997, unreported. For Plaintiff-Appellants: James C. Venizelos and For Defendant-Appellee: Dale Kwarciany and Patrick J. Murphy. Opinion by James D. Sweeney. Terence O'Donnell concurs. Joseph J. Nahra dissents.

Plaintiff severely lacerated her finger on April 8, 1993. She sought immediate treatment at the Bedford Hospital Emergency Room on that date. She had follow-up treatment with the defendant who performed surgery on April 29, 1993. After the surgery, plaintiff's finger and hand condition continued to worsen. Plaintiff consulted with many physicians, none of whom could determine her problem. In early 1994 plaintiff consulted an attorney because she believed that a mistake had been committed at the time of her emergency room visit at Bedford Hospital. The attorney sent a 180 day letter to defendant on March 8, 1994. On January 4,1995, surgery was performed upon plaintiffs hand by Dr. Avrum Froimson. It was at that time Dr. Froimson told her that the problem with her finger had been that defendant had failed to reconnect certain nerves at the time of the initial surgery. Plaintiff filed suit against the defendant in November of 1995. The trial court granted summary judgment based upon the running of the applicable statute of limitations. The Court of Appeals reversed holding that the evidence demonstrated that plaintiff could not have discovered that the cause of her difficulties were related to the treatment rendered by defendant until January 4, 1995, when Dr. Froimson informed the plaintiff of the nature of the problem with her hand and finger. Thus, according to the Court of Appeals, the "cognizable

event" which would have put plaintiff on notice that she had probably received injury as a result of medical treatment did not occur until January 4, 1995, and that she had one year from that date within which to file her suit against the defendant. What is of particular interest in this case is that plaintiff's prior counsel had transmitted a 180 day letter to the defendant on March 8, 1994. However, plaintiff did not bring suit within the 180 day statutory period. Thus, two implied holdings stem from the Court of Appeals decision. First, the issuance of a 180 day letter by plaintiff's counsel is not necessarily a "cognizable event" which will trigger the running of the statute of limitations in a medical malpractice action. Second, a plaintiff need not file suit within the 180 day period indicated in counsel's letter where a "cognizable event" which would put a reasonable person on notice that they may have sustained injury as a result of medical treatment does not occur until after the 180 day period has expired.[5]

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[5]It should be noted that the recent amendments to the law contained in House Bill 350 were not applicable in this particular case

VERDICTS AND SETTLEMENTS

Carlos Caraus v. Mihir K. Datta
Court and Judge: Cuyahoga County Common Pleas; Judge K. Callahan
Settlement: April, 1997
Plaintiffs Counsel: Rubin Guttman
Defendant's Counsel: Michael Curtin
Insurance Company: State Farm Ins. Co.
Type of Action: Personal Injury - Dog Menacing

Plaintiff was an active 90 year old who actually still played softball and vigorously walked his dog. he was startled by a neighbor's dog which lunged at him from the neighbor's front door, causing him to fall. The insurance carrier paid policy limits.

Damages: Hip fracture.
Plaintiffs Experts: None
Defendant's Experts: None
Settlement: $301,000.00

Kaila Marino v. George Smirnoff, M.D., et al
Court and Judge: Cuyahoga County Common Pleas; Judge W. Aurelius
Settlement: August, 1997
Plaintiffs Counsel: Stephen J. Charms and Peter Marmaros
Defendant's Counsel: Beverly A. Harris
Insurance Company: CNA Ins. Co.
Type of Action: Medical Malpractice.

This 21 year old woman began seeing this physician in 1980 for complaints of back pain. The physician started injecting the patient with addictive narcotics. This continued for 15 years. The physician also took advantage of the patient sexually.

Damages: Drug addiction, total loss of buttock tissue from scar tissue from injections of narcotics.
Plaintiffs Experts: None.
Defendant's Experts: None.
Settlement: $1,125,000.00

Fegia Gutman v. Helen Shear
Court and Judge: Cuyahoga County Common Pleas; Judge B. Corrigan
Settlement: October, 1997
Plaintiffs Counsel: Rubin Guttman
Defendant's Counsel: Patrick M. Foy
Insurance Company: CNA Insurance
Type of Action: Auto/Pedestrian.

85 year old plaintiff was offered a rid by defendant. Defendant mistakenly left car in gear and exited the car to help plaintiff enter the vehicle. Plaintiff was thrown to the ground and run over by a wheel of the car. Defendant claimed impact did not occur, but police department photographs proved plaintiffs version to be accurate.

Damages: Crush injury to the right lower leg.
Plaintiffs Experts: David Uhrich (Accident reconstructionist).
Defendant's Experts: None
Settlement: $252,500.00

Jane Doe v. ABC Clinic and Medical Cener, et al
Court and Judge: Cuyahoga County Common Pleas Court, Judge J.R. Burnside
Settlement: October, 1997
Plaintiffs Counsel: Peter W. Marmaros, Stephen J. Charms and Larry Klein
Defendant's Counsel: withheld at defense counsels' request.
Insurance Company: PIE Mutual Ins. Co. and St. Paul Ins. Co.
Type of Action: Medical Malpractice/Wrongful Death.

A 47 year old male presented to the emergency room with complaints of chest and left arm pain two months after a left wrist fracture. The laboratory tests were suggestive of a possible heart attack even though the EKG performed was normal. The defendants failed to admit the patient to the hospital for further investigation. The plaintiff died approximately three weeks later from a heart attack.

Damages: Death.
Plaintiffs Experts: Dianne L. Zwicke, M.D. (cardiologist)
Defendant's Experts: Jonathan Glauser, M.D.; Raymond W. Roman, Jr., M.D.; Grover M. Hutchins, M.D.; Bruce Frank Waller, M.D.; Michael B. Rollins, M.D.; Steven E. Nissen, M.D. and Edwin Seson, M.D.
Settlement: $1,600,000.00

Harold Rice v. Patrick Pazos, et al
Court and Judge: Lorain County Common Pleas Court; Judge T. Janis
Settlement: November, 1997
Plaintiffs Counsel: John R. Miraldi, **MIRALDI & BARRETT**
Defendant's Counsel: Walter Matchinga
Insurance Company: Heritage Mutual Ins. Co.
Type of Action: Automobile.

Defendant drove left of center striking plaintiff in a "head-on" collision.

Damages: Permanent paralysis from waist down.
Plaintiffs Experts: George Cyhers, Advocare - re: life care plan for plaintiff.
Settlement: $1,500,000.00

Jane Doe v. Anonymous Hospital of Cleveland, et al
Court and Judge: Cuyahoga County Common Pleas Court; Judge K.A. Sutula
Settlement: November, 1997
Plaintiffs Counsel: Peter W. Marmaros, Stephen J. Charms and Larry Klein
Defendant's Counsel: Jan L. Roller, Linda **A.** Epstein and Anna M. Carulas
Insurance Company: Self-insured hospital and PIE Mutual
Type of Action: Medical Malpractice/Wrongful Death

Patient went into the hospital for pediatric neurosurgery for a tumor. She developed signs and symptoms that should have lead the physicians to investigate her for possible disseminated herpes. The physicians failed to investigate the signs and symptoms and the patient was sent home. She died two days later from DIC secondary to disseminated herpes.

Damages: Death.
Plaintiff's Experts: Mark R. Schleiss, M.D.; Bennet Blumenkopf, M.D. and Evan A. Jones, M.D., Ph.D.
Defendant's Experts: Daniel Goodenberger, M.D.
Settlement: $600,000.00

Regina Simmons v. George L. Christian
Court and Judge: Case settled before filed in Court.
Settlement: December 24,1997
Plaintiffs Counsel: Daniel J. Klonowski
Defendant's Counsel: Not Applicable
Insurance Company: Western Reserve Group
Type of Action: Automobile Collision.

Intersectional collision. Defendant failed to yield. Comparative issues. Plaintiff admitted speeding (40 mph in 25 mph zone) and failure to wear seat belt.

Damages: Fracture, right radius and ulna; arthroscopy; right knee, no permanency.
Plaintiffs Experts: Paul A. Forcier, M.D.
Defendant's Experts: Not listed.
Settlement: $ 81,500.00

Confidential
Court and Judge: Medina County Common Pleas Court; Judge Cross
Settlement: December, 1997
Plaintiffs Counsel: Debra J. Dixon and James L. Deese
Defendant's Counsel: John Farnan
Insurance Company: St. Paul
Type of Action: Automobile.

Disputed liability. Plaintiff claimed defendant failed to yield right of way when exiting a private drive into a roadway.

Damages: Soft tissue - neck and back.
Plaintiffs Experts: William Bauer, M.D.; Christopher Marriotti (chiropractor).
Defendant's Experts: Dr. Boert Kelb
Settlement: $37,500.00

Mary Temple, et al v. Roseann Rocha, et al
Court and Judge: Medina County Common Pleas Court; Judge Cross
Settlement: December, 1997
Plaintiffs Counsel: Debra J. Dixon and James L. Deese
Defendant's Counsel: John G. Farnan
Insurance Company: St. Paul
Type of Action: Automobile Accident.

Disputed liability. Plaintiff claimed defendant failed to yield right of way when exiting a private drive onto a roadway.

Damages: Not Listed
Plaintiffs Experts: Christopher Marriotti (chiropractor); William Bauer, M.D.
Defendant's Experts: Daniel J. Sullivan, M.D.
Settlement: $85,000.00

Elaine Bobinchuck, etc. v. The Cleveland Clinic Foundation, et al
Court and Judge: Cuyahoga County Common Pleas Court; Judge P. Cleary
Settlement: December, 1997
Plaintiffs Counsel: Peter W. Marmaros and Stephen L. Charms
Defendant's Counsel: Patrick J. Murphy
Insurance Company: PIE Mutual Insurance Co.
Type of Action: Medical Malpractice/Wrongful Death.

A 68 year old male, with history of laryngectomy for throat cancer and history of coronary artery disease, presented to Cleveland Clinic with complaints of hemoptysis, fever, finding of swollen glands, red throat. Was discharge for out-patient management and two days later presents to Medina General Hospital E.R. with tachycardia, temperature of 104.5 deg., CBC demonstrated marked left shift. Despite findings, no antibiotics administered either in ER or by attending until 13 hours after presentation to E.R. Decedent continued to deteriorate and died some 15 hours after admission to the hospital.

Damages: Wrongful death.
Plaintiffs Experts: Vel Warhaft, M.D.
Defendant's Experts: Jack L. Gluckman, M.D.; Gayle Galan, M.D.; Bruce D. Janiak, M.D.
Settlement: $800,000.00

Michael Uhnak. et al v. Robert Arcuri
Court and Judge: Cuyahoga County Common Pleas Court; Judge C. Friedland
Settlement: January, 1998
Plaintiffs Counsel: Frank G. Bolmeyer, **SAMMON & BOLMEYER**
Defendant's Counsel: Brian Ramm
Insurance Company: CNA Insurance
Type of Action: Automobile Accident.

Plaintiff, a Fire Dept. Lieutenant, was involved in accident while a passenger on a pumper truck. Although the injuries were not severe, plaintiff could not return to work as a firefighter.

Damages: Rotator cuff tear and cervical strain.
Plaintiffs Experts: Mark Schinckendantz, M.D.; Mark Anderson (vocational expert)
Defendant's Experts: None
Settlement: **$3**75,000.00

John Doe v. ABC Amusement Park
Court and Judge: Withheld
Settlement: January, 1998
Plaintiffs Counsel: Charles M. Young, **SINDELL, YOUNG & GUIDIBALDI**
Defendant's Counsel: J. Michael Vassar
Insurance Company: Hartford, Travelers
Type of Action: Blankenship Action Arising From Fall In The Workplace.

Plaintiff fell 20 feet from an elevated and unguarded platform while working for the defendant-employer. Discovery demonstrated that the employer was aware of the fall hazard, and that the work area violated OSHA standards.

Damages: Closed head injury with reduction of IQ and loss of cognitive functioning. Plaintiff is unemployable.
Plaintiffs Experts: Vincent Gallagher (fall hazard and OSHA standards); Joseph Spoonster (vocational rehabilitation); Dr. John Burke (economist); Dr. Richard Litwin (neuropsychologist).
Settlement: $2,000,000.00

James Patterson, exec. v. David McClure, M.D.
Court and Judge: Franklin County Common Pleas Court; Judge Fais
Settlement: January, 1998
Plaintiffs Counsel: Peter H. Weinberger, **SPANGENBERG, SWIBLEY & LIBER**
Defendant's Counsel: Mark DeFossez
Insurance Company: Medical Protective
Type of Action: Medical Malpractice/Wrongful Death

Virginia Patterson was diagnosed with an adrenal tumor known as a pheochromocytoma, which required surgery. Prior to surgery, her family doctor prescribed a beta blocker, which is contraindicated for patients with this tumor. Thirty minutes after her first dose, she died from a hypertensive stroke.

Damages: Death.
Plaintiffs Experts: Baba Arafah, M.D. (endocrinology)
Defendant's Experts: Lee Hebert, M.D. (nephrology).
Settlement: $1,000,000.00 (policy limits)

John P. Mulgrew v. Neshkin Construction Company, et al.
Court and Judge: Cuyahoga County Common Pleas Court; Judge M. Boyle
Settlement: January, 1998
Plaintiffs Counsel: Frank **G.** Bolmeyer, **SAMMON & BOLMEYER**
Defendant's Counsel: Martin Murphy, D. John Travis, William Baughman
Insurance Company: USF&G, Westfield, American States Insurance
Type of Action: Premises Liability.

Off-duty police officer who had been drinking attempted to investigate a woman's screams from the basement of his apartment complex. As he broke down the basement door, he fell 10'. The stairs had been removed for renovation. No warning signs were on locked door.

Damages: Incomplete paraplegic.
Plaintiffs Experts: Quentin Hasse (former OSHA investigator - liability); Fred Frost, M.D. (damages).
Defendant's Experts: Robert Challener (County Coroner regarding effects of alcohol on plaintiff)
Settlement: $475,000.00

William E. Graham v. Katherine Luby, et al.
Court and Judge: Cuyahoga County Common Pleas Court; Judge M.J. Boyle
Settlement: February, 1998
Plaintiffs Counsel: Debra J. Dixon and James L. Deese
Defendant's Counsel: Bonnie Gust
Insurance Company: CNA
Type of Action: Automobile Accident.

Plaintiff was stopped at a red light. Defendant struck in rear, forcing plaintiff into car in front. Plaintiffs vehicle was a total loss.

Damages: Soft tissue neck and shoulders, along with traumatic bi-lateral carpal tunnel.
Plaintiffs Experts: Daniel Leizman, M.D.; Harold Mars, M.D.
Defendant's Experts: R. Mark Fumich, M.D.
Settlement: $108,000.00

Jane Doe. Adm v. John Doe Hospital
Court and Judge: Cuyahoga County Common Pleas Court; Judge T. Curran
Settlement: February, 1998
Plaintiffs Counsel: William S. Jacobson, **NURENBERG, PLEVIN, HELLER & McCARTHY**
Defendant's Counsel: William Meadows
Insurance Company: Self-Insured
Type of Action: Medical Malpractice.

Plaintiffs decedent went to defendant ER with wife for psychiatric and delusional episode. Telephone consult with psychiatrist was had and he was discharged with instructions to follow-up in 2 days. The next day, he killed himself.

Damages: Suicide by shotgun.
Plaintiffs Experts: Robert Sadoff, M.D. (psychiatrist); Richard Braen M.D. (emergency medicine)
Defendant's Experts: Stephen Olson, M.D. (psychiatry); David Effron, M.D. (emergency medicine)
Settlement: $340,000.00

Patricia Gober, et al v. National City Center
Court and Judge: Cuyahoga County Common Pleas; Judge T. McCormick
Settlement: February 6,1998
Plaintiffs Counsel: Howard d. Mishkind, **BECKER & MISHKIND**
Defendant's Counsel: Susan Stephanoff
Insurance Company: Home Insurance Company
Type of Action: Premises - Slip and Fall.

Plaintiff, a business invitee, fell after she entered the stairwell at the fourth level of a parking garage of defendant's premises. Plaintiffs fall was caused by the defendant's negligence in using a damp mop to clean the stairs creating a hazardous condition on the staircase.

Damages: Fracture of the distal third of plaintiffs right fibular requiring open reduction and internal fixation.
Plaintiffs Experts: Alan Wilde, M.D. (orthopedic surgeon)
Defendant's Experts: None
Settlement: $250,000.00

Bastawros v. Horstman
Court and Judge: Cuyahoga County Common Pleas Court; Judge T. McCormick
Settlement: February, 1998
Plaintiffs Counsel: Mark Ruf
Defendant's Counsel: Dean Steigenvald
Insurance Company: None
Type of Action: Fraud and Breach of Contract.

Plaintiff purchased Jaxx bar from defendant for $210,000.00 ($120,000.00 cash and $90,000.00 note). Defendant misrepresented the gross sales figures for the bar.

Damages: See above.
Plaintiffs Experts: None
Defendant's Experts: None
Settlement: $210,000.00 Fraud and $90,000.00 Breach of Contract

Dukes, et al v. Ellen Nathison
Court and Judge: Cuyahoga County Common Pleas Court; Judge J. Villanueva
Settlement: March, 1998
Plaintiffs Counsel: Robert F. Linton, **LINTQN & HIRSHMAN**
Defendant's Counsel: Marilyn J. Singer
Insurance Company: Safeco Ins. Co.
Type of Action: Automobile Accident.

30 m.p.h. rear end impact.

Damages: Developed disc herniation two and a half years after accident, requiring surgery, and leading to subsequent disc space infection. Defendant contested causation.
Plaintiffs Experts: Krishan Chandar, M.D. (neurologist); Philip I. Lerner, M.D. (infectious disease); Benedict J. Colombi, M.D. (neurosurgeon); John Conomy, M.D. (neurologist).
Defendant's Experts: Susan E. Stephens, M.D. (orthopaedic surgeon)
Settlement: Verdict Amount: $316.375.00 **(Note:** The defendant's insurance carrier, Safeco Insurance Company, paid the full amount of the verdict, even though their limits were $250,000.00, since a demand had been made to settle within the $250,000.00 policy limits.

Flagg v. Cuyahoga County Dept. of Children & Family Services. et al.
Court and Judge: Cuyahoga County Common Pleas Court; Judge T.J. McGinty
Settlement: March, 1998
Plaintiffs Counsel: Robert F. Linton, **LINTON & HIRSHMAN**
Defendant's Counsel: Steven J. Walters
Insurance Company: Not Applicable
Type of Action: Personal Injury/Tort Liability

Family adopted 10 year old girl who sexually molested three younger siblings as she reached puberty. County only disclosed that she had been sexually abused, without disclosing details and severity of prior sexual abuse, and her sexual acting out in foster care.

Damages: See Above.
Plaintiffs Experts: Kathleen Quinn, M.D. (forensic pediatric psychiatrist) and various treating mental health professionals.
Defendant's Experts: Deborah Ross, M.D.
Settlement: Confidential

John Doe v. ABC Company
Court and Judge: Cuyahoga County Common Pleas Court Judge J. Burnside
Settlement: April, 1998
Plaintiffs Counsel: Leon M. Plevin and Ellen McCarthy, NURENBERG, PLEVIN, HELLER & McCARTHY
Defendant's Counsel: Confidential
Insurance Company: Confidential
Type of Action: Premises Liability.

Plaintiff was a passenger on an elevator which fell three floors into a basement. Liability admitted.

Damages: Comminuted tibial fracture extending into ankle joint and havicular fracture of left foot.
Plaintiffs Experts: John Sontich, M.D.
Defendant's Experts: Dennis Brooks, M.D. (withdrawn)
Settlement: $680,000.00

Jane Doe v. ABC Medical Center
Court and Judge: Cuyahoga County Common Pleas Court; Judge N. Fuerst
Settlement: April, 1998
Plaintiffs Counsel: Ellen McCarthy and Harlan Gordon, NURENBERG, PLEVIN, HELLER & McCARTHY
Defendant's Counsel: Withheld
Insurance Company: Withheld.
Type of Action: Medical Malpractice.

Defendant emergency room physician injured the rectum while performing an incision and drainage of a Bartholin abscess resulting in a rectal labial fistula which required a temporary colostomy.

Damages: Rectal labia fistula with temporary colostomy.
Plaintiffs Experts: Martin Gimovsky, M.D.; James Church, M.D.
Defendant's Experts: David Burkons, M.D.; David Grischkan, M.D.; Bruce Janiak, M.D.
Settlement: $315,000.00 (Demand: $600,000.00)

Janet L. Porach. Admx. of Estate of John G. Porach, Jr. v. Lorenzo S. Lalli. M.D.
Court and Judge: Cuyahoga County Common Pleas Court; Judge A.O. Calabrese, Jr.
Settlement: April 10, 1998
Plaintiffs Counsel: Howard D. Mishkind, **BECKER & MISHKIND**
Defendant's Counsel: Ronald A. Rispo
Insurance Company: Frontier Medical Malpractice
Type of Action: Medical Malpractice.

Death of 44 year old patient who experienced an acute myocardial infarction on October 14, 1994. Decedent called his family physician on two occasions. The family physician did not have any appointments available and did not advise the decedent to go to the Emergency Room. After the second telephone call, the decedent was advised to come into the doctor's office. Shortly after arriving, he went into ventricular fibrillation, cardiac arrest and died. Defendant denied that plaintiffs decedent communicated symptoms suggestive of a serious condition, that decedent delayed in seeking medical care and that decedent was in denial.

Damages: Wrongful Death.
Plaintiffs Experts: Dr. Robert Botti (cardiologist); David Effron (emergency room); Dr. Robert Hoffman (pathology); Dr. Jeffrey Selwyn (internal medicine).
Defendant's Experts: Dr. Carl Culley (internal medicine); Dr. Barry Effron (cardiology); Dr. Bruce Janiak (emergency room care).
Judgment: $1,107,000.00; offer: $250,000.00; demand: $675,000.00.

Jane Doe v. John Doe Hospital
Court and Judge: Cuyahoga County Common Pleas; Judge Craig
Settlement: April, 1998
Plaintiffs Counsel: William S. Jacobson, **NURENBERG, PLEVIN, HELLER & McCARTHY**
Defendant's Counsel: Diedre Henry
Insurance Company: Self-Insured
Type of Action: Medical Malpractice.

Plaintiff was hospitalized for angioplasty and got an infection for which she received I.V gentamycin for four days. Plaintiff claimed that the dose was calculated improperly.

Damages: Vestibular dysfunction and diminished hearing due to gentamycin overdose.
Plaintiffs Experts: Neil Crane, M.D. (infectious disease); Gordon Hughes, M.D. (ENT).
Defendant's Experts: Martin McHenry, M.D. (infectious disease); M. Klepser, M.D. (pharmacology); J. Conomy, M.D. (neurology).
Settlement: $500,000.00