Cleveland Academy of Trial Attorneys

1801 Bond Court Building
Cleveland, Ohio 44114-1585

Phone: (216) 687-0900
Fax: (216) 687-0651

OUTGOING PRESIDENT'S MESSAGE
June 11, 1999

It is with both regret and pleasure that I leave office as your President for the 1998-1999 year. The annual meeting was a great success, and I wish the new officers success. Thanks to Video Discovery for their services in showing the video. Belated recognition to Bill Novak, one of our past presidents, who was "missed" at the dinner. For those who missed it, we have attached a transcript of Bob Linton's speech containing very interesting, recent scholarly research on the "phantom tort menace".

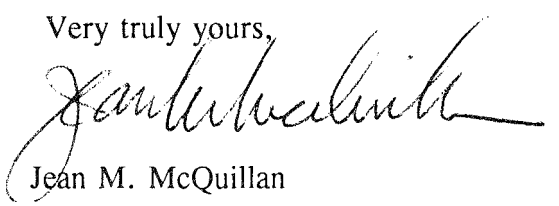
This has been a wonderful year for our academy, and it has been my privilege to work with the CATA officers, Board of Directors and membership. The one wonderful thing about a plaintiff lawyers' organization is that it is aplace where people help each other in spite of the fact that they are, in some sense, competitors. We fight battles everyday for our clients, and to do so with the assistance of our colleagues, is an advantage in these days of competition. Thank you.

Please note in this month's newsletter a special section entitled, Auto Insurance Update, by Romney Cullers, setting forth a summary of the recent decisions involving insurance coverage issues. It is notable that, as of June 9, 1999, the Supreme Court dismissed the appeal in Waite v. Progressive Insurance Company as being "improvidently allowed". This is, of course, a great disappointment.

Also, the P.I.E. task force still lives! Please mark your calendars for **August 17, 1999 at 12:00 p.m.**, at which time we will hold a final Task Force meeting at the Bond Court Building Conference Center and discuss where we're going with the difficult cases we have that haven't been settled as of August, 1999. Preceding the meeting, we will send out a notice and survey to members to obtain a sense of where they are with their OIGA cases. Hopefully, this sad chapter in our practice will soon end.

With the above, I bid you all farewell. Have a wonderful summer and remember to sign-up for next year's events to keep this organization the vital and important one it has been and will continue to be into the next millennium.

Very truly yours,



Jean M. McQuillan

GOVERNMENTAL IMMUNITY

Stacko v. City of Bedford, Cuy. Co. App. No. 74043, May 13, 1999. For Plaintiff-Appellant: Perrin I. Sah and For Defendant-Appellee: Brian J. Melling. Opinion by Michael Corrigan. Timothy McMonagle and John Patton concur.

Plaintiff was injured when she fell while descending steps at a recreation center in Bedford, Ohio. Defendant filed a motion for summary judgment arguing, among other things, that the city of Bedford was entitled to immunity pursuant to Ohio Revised Code Section 2744.01(C)(2)(U). Plaintiff countered the motion for summary judgment by arguing that Ohio Revised Code Section 2744.02(B) imposed liability as an exception to the general rule of immunity where the city of Bedford failed to keep public grounds within the political subdivision open, in repair and free from nuisance. The Court noted that R.C. 2744.02(A)(1) prescribes a general rule of immunity for political subdivisions in connection with governmental or proprietary functions. The Court further noted that pursuant to Revised Code Section 2744.01(C)(2)(U) that the "design, construction, reconstruction, renovation, repair, maintenance and operation of any indoor recreational facility is a "governmental function." The court then proceeded to affirm the Trial Court's grant of summary judgment specifically finding inapplicable Revised Code Section 2744.02(B)(3). The Court of Appeals relied upon Revised Code Section 1.51 which provides that if a general provision conflicts with a special or local provision, they shall be construed, if possible, so that the effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision. In this case, the Court of Appeals was of the opinion that the more specific language granting immunity for governmental functions surrounding the design and function of a recreational center overrode the more general exception to non-liability expressed in Revised Code Section 2744.03(B)(3).

MEDICAL MALPRACTICE - CAUSATION

Yaeger v. Fairview General Hospital, Cuy. Co. App. No. 72361, March 11, 1999. For Plaintiff-Appellant: Don C. Iler and For Defendants-Appellees: Anna Moore-Carulas and John T. McLandrich. Opinion by Timothy McMonagle. Patricia Blackmon and Leo Spellacy concur.

On December 23, 1993, plaintiff's decedent visited his family doctor complaining of shortness of breath, pain in his arms and back, and tightness in his chest. The defendant (the family physician) examined the decedent, asked him questions, listened to his heart and lungs and ordered both and e.k.g. and chest x-ray. Defendant found the e.k.g. reading to be normal. Defendant made the differential diagnosis of

pneumonia, ruling out coronary disease because of her conversation with decedent, the lung sounds of decedent's right lower lobe, her examination and the normal outcome of the e.k.g. Ultimately, the x-ray was interpreted by a radiologist as consistent with right lower lobe pneumonia. The defendant prescribed an antibiotic for the decedent. The decedent took the prescribed medicine and showed signs of improvement until December 28, when he awakened with severe chest pain accompanied by nausea and profuse sweating. That morning he went to the Hassler Medical Center where chest x-rays and an e.k.g. were taken. This chest x-ray showed no presence of pneumonia but the e.k.g. indicated that the decedent was having a heart attack. Despite the presence of the heart attack as indicated by the e.k.g., the decedent was sent home with an anti-inflammatory drug. Later that evening, plaintiffs decedent died of a myocardial infarction. Plaintiffs settled their claim against the Hassler Medical Center but proceeded to trial against the defendant family doctor. Among other issues, plaintiffs sought to exclude from evidence the subsequent negligent act of the settling defendant, Hassler Medical Center. Plaintiff argued that evidence of the subsequent negligence by the Hassler Medical Center was irrelevant under the doctrine announced in Travelers indemnity v. Trowbridae, 41 Ohio St.2d 11 (1975). In Trowbridge the Supreme Court of Ohio determined that "where the negligence of a tortfeasor in causing bodily injury to a person is a proximate cause of further injury or of aggravation of the original injury, caused by the subsequent independent negligence of the physician in treating the original injury, and the original tortfeasor responds in damages to the injured party for such injuries, the original tortfeasor has a right to indemnity from the treating physician as to that portion of the damages due directly to the independent negligence of the physician." Thus, plaintiffs argument was that since the evidence of the subsequent negligence of Hassler could not absolve the family physician of liability, it was irrelevant to permit evidence of the subsequent negligence. The Court of Appeals affirmed the entry of judgment upon the jury's verdict in favor of the defendant family physician refusing to accept the logic set forth by plaintiff. The Court of Appeals' refusal to accept plaintiff's argument with regard to the admissibility of the subsequent negligence was not based upon any statutory or case law. instead, the Court resorted to the rationale that application of the Trowbridge rule "simply does not require the Court to preclude evidence of the negligence of subsequent treating physicians." The Court of Appeals went on to state that "we fail to see how this matter could have been properly tried without the evidence of the subsequent treatment of decedent. A case cannot be tried in a vacuum."

MANDAMUS - PROHIBITION

State of Ohio, ex rel. Budget Inns of America v. Saffold, Cuy. Co. App. No. 76364 (May 5, 1999). For Relator: Judson J. Hawkins and For Respondent: William

D. Mason, Cuy. Cty. Pros. For Plaintiffs Ontario Board of Workers' Compensation and Gerald McConnell: David W. Goldense. Opinion by: Kenneth Rocco.

Budget Inns of America sought relief in mandamus and prohibition against relator. In an underlying case, plaintiffs Ontario Board of Workers' Compensation and Gerald McConnell filed a personal injury action against Budget Inns of America. The case proceeded to trial and resulted in a verdict in favor of the plaintiff in the amount of Five Hundred and Three Thousand Seven Hundred Dollars ($503,700.00). Budget Inns of America appealed the decision and obtained a reversal. The Court of Appeals reversed the case finding the Court's instruction on the doctrine of *res ipsa loquitur* to be plain error. The Court of Appeals then remanded the case for a new trial. Upon remand the trial judge refused to permit additional discovery as well as an additional expert witness for Budget Inns of America. For these reasons, Budget Inns of America sought relief in mandamus and prohibition. The Court of Appeals dismissed the writ of finding that an appeal following the entry of a final appealable order constitutes and adequate remedy in the ordinary course of law to resolve any alleged error by the Trial Court in its pre-trial discovery orders. Moreover, the Court of Appeals noted that the Court ordered respondent to conduct a new trial. The respondent scheduled the new trial for May 10, 1999. Accordingly, the respondent was acting within the scope of the remand and, as a consequence, relief in mandamus or prohibition would not be appropriate.'

GOVERNMENTAL IMMUNITY - FINAL APPEALABLE ORDERS

Maloy v. Brennon, Cuy. Co. App. No. 75183. March 25, 1999. For Plaintiff-Appellee: Martin T. Franey and For Defendants: James E. Sennett and Stephen B Bond. Per Curiam.

P aintiff filed a personal injury action against defendants B rennon and the City of Rocky River for injur es she sustained when she tripped and fell c n a sidewalk that abutted defendant Malloy's property. The Complaint was filed on July 3, 1997, and the injury occurred on July 7, 1995. Defendant Rocky River moved to dismiss the Complaint maintaining that it was no longer subject to liability under R.C. 2744.02(B)(3) because of statutory amendments to R.C. 2501.02 and R.C. 2744.02 contained in

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[1]The second trial resulted in a verdict in favor of the plaintiffs in the amount of Five Hundred and Ten Thousand Six Hundred Dollars ($510,600.00)

House Bill 350. Subsequently, the Court denied defendant Rocky River's motion for judgment on the pleadings and the case was referred to arbitration. Defendant Rocky River then filed an appeal from the denial of its motion for judgment on the pleadings pursuant to Revised Code Section 2744.02(C). The Court went on to note the following provisions of House Bill 350 which became effective January 27, 1997: First, amended R.C. 2501.02 provides, in relevant part,

> "In addition to the original jurisdiction conferred by Section III of Article IV, Ohio Constitution, the Court of Appeals shall have jurisdiction upon an appeal upon questions of law to review, affirm, modify, set aside or reverse judgments or final orders of courts of record inferior to the Court of Appeals within the district,...including an Order denying a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in Chapter 2744..."

Second, R.C. 2744.02(C), also effective January 27, 1997, defines a final order in the context of governmental immunity, as follows:

> "An order that it denies a political subdivision or an employee of a political subdivision, the benefit of an alleged immunity from liability as provided in Chapter 2744, or any other provision of the law is a final order."

Nevertheless, despite these provisions now in effect as part of House Bill 350, the Court of Appeals dismissed the appeal finding that even if R.C. 2744.02(C) were sufficient to cause the Order to be a "final Order" that may be subject to appellate review, the ruling by the Trial Court did not adjudicate all the rights and liabilities of all the parties. Consequently, the requirement of Civil Rule 54(B) must still be met. The Court of Appeals went on to state that since there remained claims against the abutting landowner, the ruling as to the city's immunity did not adjudicate all

the rights and liabilities of all the parties. Moreover, the express language of Ohio Civil Rule 54(B) overrides new Revised Code Section 2744.02(C) under the facts of the case.[2]

OPEN AND OBVIOUS

Riley v. Wendy's International, Cuy. Co. App. No. 73996. April 29, 1999. For Plaintiff-Appellant: Gerald L. Steinberg and For Defendant-Appellee: Jennifer V. Sammon. Opinion by Timothy McMonagle. Diane Karpinski and James D. Sweeney concur.

While attempting to enter defendant's restaurant, plaintiff tripped and fell in a pothole located in the parking and driving area of the restaurant. The Trial Court granted defendant's motion for summary judgment finding defendant did not owe a duty of care to the plaintiff because the pothole was open and obvious. The Court of Appeals reversed the Trial Court stating that whether the pothole was open and obvious to the plaintiff was a question of fact both on the issue of defendant's negligence and on the issue of plaintiff's comparative negligence. The Court of Appeals relied, at least in part, upon the recent Supreme Court decision in Texler v. D.O. Summers Cleaners and Shirt Laundry Co., 81 Ohio St.3d 677 (1988).[3]

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[2]It should be noted that House Bill 350 also resulted in an amendment to Ohio Revised Code Section 2744.02(B)(3) which removed sidewalks from the list of grounds that political subdivisions have a duty to keep open, in repair and free from nuisance.

[3]The Riiev decision is the latest in a growing line of cases that have refused to apply the "open and obvious" doctrine to defeat potential liability against a premises owner. Rather, in accordance with the Texler decision, the cases view the issue as one of comparative negligence.

VERDICTS AND SETTLEMENTS

Kostyo V. Sherwood Food Dist., Inc.
Court and Judge: Cuyahoga County; Judge Sutula
Settlement: June, 1999
Plaintiff's Counsel: KENT B. SCHNEIDER
HERMANN CAHN & SCHNEIDER
Defendant's Counsel: Mark Ropchock
Insurance Company: Firemen's Fund
Type of Action: Auto Collision

Plaintiff was hit head-on by a tractor trailer that went left of center.

Damages: Multiple orthopedic injuries and traumatic brain injury.
Plaintiff's Experts: Tarvez Tucker, M.D. (Neurologist);
James Mack, Ph.D. (Neuropsychologist);
William Seitz (Orthopedist);
Lawrence Bilfield (Orthopedist);
Robert Kaplan, Ph.D. (Psychologist);
Sharon Reavis (Life Care Planner)
Defendant's Experts: Doreen Spak (Life Care Planner and Economist)
Settlement: $6,500,000.00

Timothy Shank. et al. v. Barbara Sanders, et al.
Court and Judge: Richland County
Settlement: July, 1998
Plaintiff's Counsel: MICHAEL F. BECKER
Defendant's Counsel: Withheld
Insurance Company: Kemper Insurance Company
Type of Action: Automobile Accident

Barbara Celma, a Johnson & Johnson employee, negligently operated her motor vehicle when she struck the automobile of Timothy Shank causing Timothy's vehicle to careen off the right side of the roadway, resting in a grassy area adjacent to a fence.

Damages: Posterior dislocation of hip; vertical fracture involving posterior wall of acetabulum; soft tissue swelling and hematoma in lateral aspect of pelvis adjacent to acetabular fracture; subluxed hip and partial sciatic nerve injury; posterior column fracture; a second more superior posterior acetabular wall fracture; a free floating fracture in the acetabular dome.
Plaintiff's Experts: Mark Anderson, M.S., CIRS, LPC, CCM
Defendant's Experts: Charles Clicquennoi
Settlement: $800,000.00

Jane Doe, etc., et al. v. ABC Hospital
Court and Judge: Not Listed
Settlement: November, **1998**
Plaintiff's Counsel: MICHAEL F. BECKER
Defendant's Counsel: Withheld
Insurance Company: Self-Insured
Type of Action: Medical **Malpractice**

Plaintiffs claim Defendant, by and through its employees, rendered substandard care and was otherwise negligent by failing to work up the newborn for sepsis and treat same and failing to timely administer IV antibiotics given clear meningitis.

Damages: Severe brain injury resulting in Plaintiff being profoundly handicapped, including spastic quadriplegia and mental retardation.
Plaintiff's Experts: Marcus C. Hermansen
Defendant's Experts: Richard a Polin;
Mary Lou Kumar;
Patrick Catalano;
Andrew S. Barson
Settlement: $4,000,000.00

Rufus Christian v. The Estate of Harold McDonald, M.D.
Court and Judge: Lorain County Common Pleas
Judgment: June, **1998**
Plaintiff's Counsel: MICHAEL F. BECKER
Defendant's Counsel: Withheld
Insurance Company: Physician's Insurance Company of Ohio
Type of Action: Medical Malpractice

Plaintiffs claim Dr. Harold McDonald, while performing a TURP surgery, completely lacerated Plaintiff's external sphincter, resulting in gross incontinence, altering Plaintiff's lifestyle and requiring further surgery to correct.

Damages: Laceration of external sphincter resulting in gross incontinence.
Plaintiff's Experts: Dr. Stephen Merriweather
Defendant's Experts: Dr. Donald Bodner
Judgment: *$700,000.00*

Harold Lancaster v. LTV Steel, et al.
Court and Judge: Cuy. County Common Pleas; Judge Kathleen Sutula
Settlement: April, 1999
Plaintiff's Counsel: RICHARD L. DEMSEY
NURENBERG, PLEVIN, HELLER & McCARTHY CO., LPA
Defendant's Counsel: Withheld
Insurance Company: Withheld
Type of Action: Premises Liability

Plaintiff was on LTV's premises delivering caustic soda from his truck to LTV's intake pipe. The pipe exploded below the connection due to inadequate design of the system.

Damages: Blindness in left eye.
Plaintiff's Experts: William J. Reinhart, M.D.
Defendant's Experts: Edward J. Sowinski, Ph.D. (Environmental Health Science)
Settlement: $415,000.00

Jane Doe, Adm. v. Doctors Group
Court and Judge: Cuy. County Common Pleas; Judge Thomas Curran
Settlement: April, 1999
Plaintiff's Counsel: LEON PLEVIN, ELLEN McCARTHY, HARLAN GORDON
NURENBERG, PLEVIN, HELLER & McCARTHY CO., LPA
Defendant's Counsel: Withheld
Insurance Company: Withheld
Type of Action: Medical Malpractice

Decedent had been followed by various physicians in Defendant's medical group who documented multiple abnormal EKG's without cardiac workup. Subsequently, she was given an injection of Imitrex for migraine headaches which is contraindicated for cardiac patients. This resulted in a massive myocardial infarction, followed by heart transplant and her subsequent death.

Damages: Wrongful death
Plaintiff's Experts: G. Richard Braen, M.D.;
Jeffrey Garrett, M.D.; Harvey Goldberg, M.D.;
Hadley Morganstern-Clarren, M.D.;
Nolan Tzou, M.D.; Michael Wilensky, M.D.
Defendant's Experts: Dean Dobkin, M.D.; Ralph Lach, M.D.;
McCallum Hoyt, M.D.
Settlement: $1,200,000.00

Greene v. Goodrich
Court and Judge: Cuyahoga County; Judge John Angelotta
Case No. **98CV 365537**
Judgment: May, **1999**
Plaintiff's Counsel: JOHN S. CHAPMAN
Defendant's Counsel: W. Scott Derkin
Insurance Company: Allstate
Type of Action: Auto

Defendant's car rear-ended Plaintiff's car, which had broken down, and was pulled to the side of the road. The impact propelled the car into Plaintiff, striking his knee and causing him to sprawl backwards.

Damages: Strain to lower back and right knee; irritation of soft tissue near spinal fusion hardware.
Plaintiff's Experts: E. Byron Marsolais, M.D.
Defendant's Experts: Robert Corn, M.D.
Settlement: **$25,000.00**

Jane Doe v. ABC Hospital, et al.
Court and Judge: Cuyahoga County; Judge Anthony Calabrese, Jr.
Settlement: March, **1999**
Plaintiff's Counsel: CHARLES KAMPINSKI, CHRISTOPHER M. MELLINO
KAMPINSKI & MELLINO CO., LPA
Defendant's Counsel: William A. Meadows
Insurance Company: Not Listed
Type of Action: Medical Malpractice

ABC Hospital was responsible €or the health care of Jane Doe during the years of **1994** and **1995**. In these years mammograms were performed by ABC Hospital and were read to be normal. Jane Doe had another mammogram done in April of **1997**'at a different hospital which showed an abnormality. A biopsy was done which showed breast cancer. A review of the previous mammograms revealed the same abnormality, which had not been reported by the radiologists. At the time of the **1994** and **1995** mammograms, her condition was 80% - **100%** curable. At the time of diagnosis, metastasis had occurred. Had the proper diagnosis been made and appropriate treatment given at the time, Jane Doe would have been cured. Because of the malpractice, Jane Doe now only has a 20% chance of survival.

Damages: Not Listed
Plaintiff's Experts: Harry N. Boltin, M.D. (Radiology);
Paul M. Goldfarb, M.D. (Surgical Oncology);
John F. Burke, Jr., Ph.D. (Economist)
Defendant's Experts: Kenneth S. McCarty, M.D. (Pathology);
Michael S. Levey, M.D. (Radiology)
Settlement: $1,500,000.00

James Seeley v. Munson Transport
Court and Judge: Lorain County Common Pleas; Judge Betleski
Settlement: March, 1999
Plaintiff's Counsel: PETER H. WEINBERGER, MARY A. CAVANAUGH
SPANGENBERG, SHIBLEY & LIBER LLP
Defendant's Counsel: James Turek
Insurance Company: Self-Insured
Type of Action: Auto

Rear-end collision. Liability was admitted.

Damages: Severe shoulder separation.
Plaintiff's Experts: James Brems, M.D.
Defendant's Experts: William Hassler, M.D.
Settlement: *$250,000.00*

John Doe v. Dr. Doe
Court and Judge: Trumbull County
Settlement: April, 1999
Plaintiff's Counsel: PETER H. WEINBERGER
SPANGENBERG, SHIBLEY & LIBER LLP
Defendant's Counsel: David Comstock, Marc Groedel, Robert Maynard
Insurance Company: PICO, Medical Protective
Type of Action: Medical Malpractice

Due to inputting the wrong axial measurements into a computer, Defendant ophthalmologist implanted too strong a lens into Plaintiff's right eye who he was operating on for a cataract. The Defendant then concealed his error.

Damages: Blurriness, partial loss of vision of right eye, anisometropia.
Plaintiff's Experts: Carl Asseff, M.D.
Defendant's Experts: William Reinhart, M.D.
Settlement: $725,000.00

Marcus Hardin v. David A. Bender
Court and Judge: Cuyahoga County; Judge Nancy M. Russo
Judgment: March, 1999
Plaintiff's Counsel: D. SCOTT KALISH
CARAVONA & CZACK
Defendant's Counsel: James A. Sennett
Insurance Company: Nationwide
Type of Action: Premises Liability

Plaintiff was assisting the Defendant in jacking Defendant's vehicle, when vehicle collapsed on Plaintiff's left hand while Plaintiff was inserting jack stand under the frame of the vehicle.

Damages: Partial traumatic amputation of distal and middle phalanx of non-dominant index finger.
Plaintiff's Experts: Dr. Michael Keith
Defendant's Experts: None
Judgment: $55,000.00

Estate of Jane Doe v. ABC Nursing Home and XYZ Mfa.
Court and Judge: Cuyahoga County
Settlement: 94/99
Plaintiff's Counsel: PAUL M. KAUFMAN
Defendant's Counsel: Mark McCarthy, Scott Smith
Insurance Company: Not Listed
Type of Action: Nursing Home Negligence and Product Liability

A 76 year old, end-state renal disease patient was found in bed at the nursing home with their head caught in between the siderails. The occurrence was due to the negligent design of the bed and the negligent failure of the nursing home staff to properly operate the bed.

Damages: Death by asphyxiation
Plaintiff's Experts: Carol Miller, R.N.; Ronald Leshner, P.E.
Defendant's Experts: Not Listed
Settlement: $500,000.00

Lucic, et al. v. Dwornina, et al.
Court and Judge: Cuyahoga County; Judge Daniel Corrigan
Settlement: April, 1999
Plaintiff's Counsel: STUART E. SCOTT
SPANGENBERG, SHIBLEY & LIBER
Defendant's Counsel: Not Listed
Insurance Company: Not Listed
Type of Action: Negligence and Dram Shop

Plaintiff was participating in his son's bachelor party. The bachelor party had been travelling by chartered bus to various nightclubs. At the end of the evening, a fight broke out on the bus between several members of the bachelor party. Plaintiff was accidentally struck in the head, causing a brain hemorrhage.

Damages: Catastrophic brain injury
Plaintiff's Experts: Jeffrey Frank, M.D.
Defendant's Experts: None
Settlement: $322,000.00 (policy limits)

Joplin v. Koziura
Court and Judge: Lorain County; Judge Kosma Glavas
Judgment: April, 1999
Plaintiff's Counsel: JOHN R. MIRALDI
Defendant's Counsel: Joseph Ritzler
Insurance Company: Progressive
Type of Action: Auto Accident

Plaintiff complained of soft tissue neck and upper back pain for the first 6 weeks after a motor vehicle accident. On the first day back to work (6 weeks after MVA), Plaintiff experienced low back pain radiating into the right leg. He was treated with epidural injections.

Damages: Soft tissue damage in the neck and upper back; contusion at L5 nerve root.
Plaintiff's Experts: Bharat Shah, M.D.
Defendant's Experts: Not Listed
Judgment: $60,000.00

Ritterbeck v. Owens Corning Fiberglas Corp.
Court and Judge: Cuyahoga County; Judge James Sweeney
Settlement: March, 1999
Plaintiff's Counsel: DALE S. ECONOMUS, TOM BEVAN
Defendant's Counsel: Martin Murphy
Insurance Company: N/A
Type of Action: Asbestos Litigation

Plaintiffs alleged that Plaintiff's decedent and others were injured as a result of inhalation of Defendant's asbestos-containing products.

Damages: Asbestos-related lung cancer
Plaintiff's Experts: Douglas Trochelnan, M.D.;
Jaywant Parmar, M.D.
Defendant's Experts: None
Settlement: $530,000.00 (after 2nd day of trial)

Sharon Noewer, et al. v. Cleveland Central Enterprises, et al.
Court and Judge: Cuyahoga County; Judge Mary J. Boyle
Judgment: January, 1999
Plaintiff's Counsel: EUGENE A. LUCCI
Defendant's Counsel: James Glowacki
Insurance Company: American States
Type of Action: Auto Accident

Plaintiff was rear-ended by Defendants' truck at moderately high speed.

Damages: Connective tissue injuries to neck and upper back; unable to work for 3 months.
Plaintiff's Experts: Keith Kersten, D.O.; Two physical therapists
Defendant's Experts: Malcolm Brahms, M.D. (withdrew due to compe11ed discovery)
Judgment: $160,000.00

Jane Doe v. Doctor's Group and Laboratory
Court and Judge: Cuy. County Common Pleas; Judge Patricia Cleary
Settlement: May, **1999**
Plaintiff's Counsel: DAVID M. PARIS, LEON M. PLEVIN
NURENBERG, PLEVIN, HELLER & McCARTHY CO., LPA
Defendant's Counsel: Withheld
Insurance Company: Withheld
Type of Action: Medical Malpractice

Plaintiff's **1/95** Pap showed mild dysplasia. Her **10/96** Pap was read as normal. Plaintiff's expert interpreted the slide as showing moderate-severe dysplasia. In **4/97**, her OB/GYN visit resulted in a normal pelvic exam. In **12/97**, a 5 cm. vaginal tumor was discovered. Plaintiff contended that an adequate pelvic exam would have disclosed a small lesion at a stage which was curable.

Damages: Stage IV vaginal cancer
Plaintiff's Experts: Kenneth McCarty, M.D.;
Howard Homesley, M.D.;
John Burke, Jr., Ph.D
Defendant's Experts: Gregory Feczko, D.O.
John Karlen, M.D.;
Martin Schneider, M.D.
Settlement: **$1,000,000.00**

Floretta Graham v. Ali Halabi, M.D.
Court and Judge: Cuyahog County Common Plea; Judge Nancy McDonnell
Judgment: May, **1999**
Plaintiff's Counsel: HOWARD D. MISHKIND
BECKER & MISHKIND CO., LPA
Defendant's Counsel: Stephen S. Crandall
Insurance Company: Frontier Insurance Company
Type of Action: Medical Malpractice

Plaintiff developed femoral vein stenosis following an inguinal hernia repair. Plaintiff has pain and swelling in her left leg, but is not at an increased risk for any further complications. Plaintiff does not need any future surgery.

Damages: Femoral vein stenosis
Plaintiff's Experts: Dr. Richard Schlanger; Dr. Jeffrey Alexander
Defendant's Experts: Dr. Paul Skudder
Judgment: $105,000.00

Michelle Dziedziak, etc., et al. v. Southwest General Hosp., et al.
Court and Judge: Cuyahoga County; Judge Patricia Cleary
Judgment: May, **1999**
Plaintiff's Counsel: RICHARD J. BERRIS
WEISMAN, GOLDBERG & WEISMAN CO., LPA
Defendant's Counsel: Donald Switzer
Insurance Company: Phico
Type of Action: Medical Malpractice

After physician ordered an emergency c-section, Defendant hospital delayed the procedure for one hour and' 43 minutes. Plaintiff experienced severe birth asphyxia resulting in permanent brain damage.

Damages: Permanent central nervous system damage, including cerebral palsy and mental retardation.
Plaintiff's Experts: Bernard Gore, M.D. (OB);
Tom Barden, M.D. (OB);
Max Wiznitzer, M.D. (Pediatric Neurologist);
George Cyphers (Rehabilitation Counselor);
John Burke, Ph.D.
Defendant's Experts: Frank Boehm, M.D. (OB);
Robert Vanucci, M.D. (Pediatric Neurologist);
Geoffrey Altchuler, M.D. (Pathologist)
Judgment: $2.1 Million

John Doe v. John Doe
Court and Judge: Cuyahoga County Court of Common Pleas
Settlement: February, **1999**
Plaintiff's Counsel: **R.** ERIC KENNEDY
WEISMAN, GOLDBERG & WEISMAN CO., LPA
Defendant's Counsel: Withheld
Insurance Company: Withheld
Type of Action: Medical Malpractice

Due to the inappropriate recommendation of angioplasty of the lower extremities given to the 72 year old patient who had a failing health status due to multiple ailments, Plaintiff developed post surgical clotting complication leading to loss of limbs.

Damages: Bilateral amputation of lower extrimities.
Plaintiff's Experts: James Malone (Vascular Surgeon)
Defendant's Experts: Not Listed
Settlement: $750,000.00

Theresa Pratt v. Niranjana Thaker, M.D.
Court and Judge: Cuyahoga County; Judge Nancy Fuerst
Settlement: June, 1999
Plaintiff's Counsel: HENRY W. CHAMBERLAIN
WEISMAN, GOLDBERG & WEISMAN CO., LPA
Defendant's Counsel: John Simon
Insurance Company: Ohio Insurance Guaranty Association
Type of Action: Medical Malpractice

The physician damaged Plaintiff's right ureter during a total hysterectomy procedure. Additional surgery and a stent placement were required. Defendant argued that the injury was a known and recognized complication of the hysterectomy procedure.

Damages: Injury to right ureter requiring surgery and a stent placement.
Plaintiff's Experts: Michael Brodman, M.D.;
Nehemia Hampel (Urologist);
Judith Hirshman (Psychiatrist)
Defendant's Experts: Mickey M. Karram, M.D.
Settlement: $100,000.00

AUTO INSURANCE UPDATE

Obviously, multi-volume treatises could and have been written about the intricacies of automobile insurance. Since no one can discuss all topics in a brief article, I have chosen to give you an update of what I consider to be significant legal decisions of the past few years. As you will see, uninsured motorist ("UM") and underinsured motorist ("UIM") coverages continue to be the source of most auto insurance cases coming before the courts.

Please bear in mind that this review is just a rough survey, and that the law discussed is subject to change at a moment's notice.

* * * * *

Recent Liability Coverage and Exclusion Cases

Omnibus Clause - Use by permittee.

Drake v. State Farm Ins. Co., No. **73502, 1998 WL 723176** (Cuyahoga Cty. App., October **15, 1998).**

Where the owner of a car had given her mother unrestricted permission to drive, the mother got drunk and asked an acquaintance at the bar to drive her home in the car, and the acquaintance caused an accident, the acquaintance was insured as a permittee of the owner-policyholder. Under an omnibus clause, a permittee of the policyholder or a subsequent permittee is covered under the insurance policy so long as the use by that permittee served some

benefit or purpose to the first permittee and there is no express prohibition by the car's owner.

Omnibus Clause - Use by permittee.

Davis v. Commercial Union Ins. Co., No. **73286, 1998 WL 546150** (Cuyahoga County App., August 27, **1998).**

An unlicensed driver was driving the insured vehicle with the permission of the owner and got in an accident. The owner had not known that the driver was unlicensed. The insurer refused to cover, claiming the driver could not reasonably have believed he was entitled to use the car without a license. The court held that the test under the car owner's policy was not whether the unlicensed driver believed he was licensed to drive but whether he reasonably believed he had the owner's authorization to drive the car at the time of the accident. Furthermore, the court noted that if the insurer had wanted to prohibit its insureds from allowing unlicensed drivers to use covered vehicles, it should have done so in plain language.

Liability Coverage - Family exclusion provision enforceable.

Ringling v. Allstate Ins. Co., No. **3:97** CV **7340 (N.D.** Ohio, **1997).**

The plaintiff-insured was involved a car accident as a result of which her daughter, who was a passenger in the car, died. The daughter's estate brought a wrongful death action against the plaintiff, but the insurer refused to defend, pointing to a family exclusion provision. The court held that such exclusionary clauses are enforceable under Ohio law. As such, the plaintiff had no

right to have the defendant defend or indemnify her in a wrongful death action filed by her daughter's estate.

Liability Coverage - Can a lease or rental agreement eliminate coverage?

Rhodes v. Cincinnati Ins. Cos., **H-98-017, H-98-011, 1999** WL **11067** (Huron Cty. App., March **5, 1999).**

Ayres V. All America Ins. Co., No. **97-T-0218, 1998** WL **964589** (Trumbull Cty. App., December **18, 1998).**

In each of the above cases, the injured person was driving a leased or rented car. The vehicles were insured under the owners' policies, but the lease/rental agreements clearly stated that no coverage was provided to the customer and that the customer was to provide his or her own insurance. The courts held that because the owners' policies did not incorporate the terms of the lease/rental agreements, the policies covered the customers. Thus, an insured automobile leasing/rental company cannot by a separate agreement lease one of its vehicles to a third party without the benefit of the insurance coverage the leasing/rental company has on the vehicle through its insurance carrier unless the insurance policy incorporates the terms of the separate agreement.

Liability Limits - Per person limit enforceable.

Smith v. Mancino, **119** Ohio App.3d **418, 695 N.E.2d 354 (1997).**

Coletta v. Yang, No. **17289, 1999** WL **12724** (Montgomery Cty. App., January **15, 1999).**

In each case, a fiduciary of the estate of an automobile accident victim brought a wrongful death action and challenged the legality of the per-person limit in an automobile liability insurance policy. The courts held that R.C. 3937.44, the statute permitting automobile policies to apply single per-person limits to all claims resulting or arising out of any one person's bodily injury, including death, does not limit civil damages for wrongful death, and therefore, does not violate the constitutional prohibition against limiting the amount of damages recoverable by civil action for wrongful death The courts found that civil damages differ from the right to recover benefits under an insurance policy

Recent Uninsured/Underinsured Motorist Cases

Applicable Law - Savoie or S.B. 20?

Ross v. Farmers Insurance Group of Cos., 82 Ohio St 3d 281, 695 N.E.2d 732 (1998).

Senate Bill 20 amended R C 3937 18, effective October 20, 1994 Under the new rsion of the law, neither of the claimants in the case would have been entitled to UIM benefits under their respective policies since the tortfeasor's policy limits were equal to the limits of their own policies

Under former R C 3937 18, as interpreted by the Supre Court in Savoie v. Grange Mut. Ins. Co., the claimants would have been entitled to recover UIM benefits for damages that exceeded the tortfeasor's limits

The Supreme Court found that the insured's rights were governed by pre-S.B. 20 law even though the accident occurred after the effective date of the amendment. The court held:

> "[F]or the purpose of determining the scope of coverage of an underinsured motorist claim, the statutory law in effect at the time of entering into a contract for automobile liability insurance controls the rights and duties of the contracting parties."

Definition of Insured - Persons entitled to recover.

King v. Western Reserve Group, No. **789, 1997 WL 778833** (Monroe Cty. App., December 1, **1997).**

The decedent, her sister, and her parents, were named insureds on the parents' insurance policy. The decedent's three adult brothers, who were no longer residing at home at the time of the accident, were not named insureds. But the policy provided coverage for "any person for damages that person is entitled to recover because of 'bodily injury' to which this coverage applies sustained" by an insured. The court thus held that the three adult brothers were themselves "insureds" within the meaning of the insurance policy because they were entitled to recover damages for a named insured's wrongful death. (But the brothers could also have recovered under Holt v. Grange Mut. Cas. Co. See discussion below).

Definition of Insured - Child of separated or divorced parents a resident of both households.

Plessinser v. Cox, Nos. 1428, **1429, 1997** WL **797689** (Darke Cty. App., December **31, 1997).**

A dispute arose as to whether a father's UM policy covered his four-year old daughter who had sustained severe injuries as the result of a motorcycle accident that occurred during court-ordered visitation with the father. In finding that the daughter was entitled to benefits under her father's policy, the Court of Appeals held that "in cases involving minor children of divorced parents, who both have custody or visitation rights, . . . the minor is deemed to have dual residencies for insurance purposes,, at least in cases where the minor is in the custody, care, supervision, and control of the insured parent at the time of the accident pursuant to the court's custody and/or visitation order." This appears to establish a bright-line test modifying the "totality of circumstances" approach.

Definition of Insured - Who is insured under employer's policy?

Headly v. Ohio Government Risk Management Plan, No. CT-97-0017, 1998 WL 517691 (Muskingham Cty. App., March 20, 1998).

Plaintiff was an employee of a trucking company. He was also the township clerk for a local township. In September 1995, the plaintiff was injured in a car accident caused by an underinsured motorist, but plaintiff was not in the scope of employment or driving a company car at the time. The proceeds of both the plaintiff's and the tortfeasor's UIM policies were exhausted, leaving the plaintiff not totally compensated for his losses.

The plaintiff sought coverage under both employers' policies. Both insurers denied the plaintiff's claims on the basis that

neither he nor his wife, who had a loss of consortium claim, were "insureds" under the respective policies.

In the section entitled "Who is an Insured?", the policies listed four categories of covered entities: "(1) You [meaning the policyholder], (2) if you are an individual, any 'family member,' (3) anyone else 'occupying' a covered 'auto' or a temporary substitute for a covered 'auto' [and] (4) anyone for damages he or she is entitled to recover because of 'bodily injury' sustained by another 'insured.'" The court found that the language was not ambiguous, even though a corporation obviously cannot incur bodily injury. It held that the employee and his wife did not fall within any category of "insured." This case is now before the Ohio Supreme Court.

Wrongful death - Who can recover under decedent's policy?

Holt v. Grange Mut. Cas. Co., **79** Ohio St.3d **401,** 683 N.E.2d **1080 (1997).**

Decedent was killed in a motor vehicle accident with an uninsured motorist. Both he and his wife were the named insureds under an automobile policy providing UM/UIM coverage of $250,000.00 per person and $500,000.00 per accident.

The decedent's estate received $250,000.00 under the policy. The estate also sought to recover on behalf of the couple's two sons. The insurer denied coverage based on its decision that policy language excluded each son from being classified as an "insured".

The Supreme Court stated that coverage for the wrongful death claims of statutory beneficiaries "must be part and parcel of the uninsurance/underinsurance coverage of the decedent's policy." The court held that "the wrongful death claims are inseparably bound to the insured decedent's wrongful death, and the only way to reconcile the requirements of former R.C. 3937.18(A) and R.C. Chapter 2125 is to require coverage." Thus, the court ruled that "an uninsurance/underinsurance motorist coverage provider's use of restrictive policy language defining an 'insured' is ineffectual to exclude from coverage the claim of an uncompensated wrongful death statutory beneficiary seeking to recover under the uninsurance/underinsurance provision of the decedent's policy, since the correct focus for wrongful death recovery under a decedent's policy . . . is whether the decedent was an 'insured.'"

In other words, any statutory beneficiary of the insured decedent is entitled to seek UM/UIM benefits under the decedent's policy, regardless of whether the beneficiary is an insured under the policy.

Wrongful death - Can a beneficiary still recover under his own policy?

Holcomb v. State Farm Ins. Cos., No. 98-AP-353, 1998 WL 938594 (Franklin Cty. App., December 24, 1998).

The Holt decision, id., seemed to imply that all next-of-kin were to recover through the decedent's policy alone. But apparently, beneficiaries can recover under their own policies as well. The court concluded that the children of a woman killed in

an automobile accident were entitled to UIM benefits under policies issued to their household even though the decedent was not a member of that household.

Wrongful death - Bodily injury: Post-S.B. 20 - Must the bodily injury or death be suffered by an insured?

Holcomb v. State Farm Ins. Cos., No. 98-AP-353, 1998 WL 938594 (Franklin Cty. App., December 24, 1998).

Most insurers and defense lawyers believed that S.B. 20 overruled Sexton v. State Farm Mut. Auto. Ins. Co., in which the Supreme Court had held that under R.C. 3937.18, it is not required that the person who has sustained the bodily injury be the insured. Under Sexton, policy language having a contrary effect was unenforceable. But S.B. 20 amended R.C. 3937.18(A)(2) to provide, in part, that underinsured motorist coverage "shall provide protection for insureds thereunder against loss for bodily injury, sickness, or disease, including death, suffered by any person insured under the policy."

The Holcomb court, with grammatical justification, has rejected the notion that the statute requires that an insured sustain bodily injury for there to be a recovery. The court essentially reads that amended phrase to mean that what must be suffered by an insured is the loss, not the bodily injury or death.

Holcomb has now been certified as in conflict with two decisions of the Cuyahoga County Court of Appeals, Kocel v. Farmers Ins. Co. of Columbus, Inc., No. 69058, 1996 WL 100943 (Cuyahoga

Cty. App., March 7, 1996) and Wilson v. Nationwide Ins. Co., No. 71734, 1997 WL 723419 (Cuyahoga Cty. App., November 20, 1997). The precise question certified to the Supreme Court is as follows:

> "Whether R.C. 3937.18(A)(2), as amended by Am, Sub. S.B. 20, legislatively overrules Sexton v. State Farm Mut. Automobile Ins. Co. (1982), 69 Ohio St.2d 431 and now allows an automobile insurance policy to limit recovery of underinsured motorist benefits to cases in which an insured has suffered physical injury, sickness, or disease, including death."

Wrongful Death - Failure to notify insures of tentative settlement.

Weiker v. Motorist Mut. Ins. Co., 82 Ohio St.3d 182, 694 N.E.2d 966 (1998).

Decedent's daughter, as administrator of his estate, entered into settlement with and release of the tortfeasor on behalf of all next-of-kin. The insured, decedent's sister, received no notice of the settlement. Two years later she learned she had a wrongful death claim and sought UIM coverage under her own policy. The insurer refused coverage, saying she had breached the provision requiring notice of tentative settlements to preserve subrogation rights.

The Supreme Court held that the insured did not breach the notice requirement of the subrogation clause by failing to tell the insurer about a wrongful death settlement between her brother's personal representative and the tortfeasor's liability insurer, where the policy's notice requirement applied only to settlements involving the "insured," and she did not participate in the settlement or receive any of its proceeds, did not know about it or

even that the representative was acting for her until after approval, and took no affirmative steps to destroy her insurer's subrogation rights.

Hit and Run - Did corroborative evidence test replace physical contact test?

Yorty v. Allstate Ins. Co., No. 96-JE-45, 1998 WL 157411 (Jefferson Cty. App., March 23, 1998).

The syllabus of the Ohio Supreme Court in Girsis v. State Farm Mut. Auto. Ins. Co., 75 Ohio St.3d 302, 662 N.E.2d 280 (1996) provides: "The test to be applied in cases where an unidentified driver's negligence causes injury is the corroborative evidence test, which allows the claim to go forward if there is independent third-party testimony that the negligence of an unidentified vehicle was a proximate cause of the accident." The court also held that policy provisions limiting UM coverage to hit and run cases involving physical contact were unenforceable.

In Yorty, the Court of Appeals held that because the language of the Girgis syllabus states "the test to be applied," rather than "an alternative test that may be applied," the Supreme Court intended the "corroborative evidence" test to replace the "actual physical contact" test in determining coverage under a UM claim. Thus, the court implied that corroborative evidence must be shown in every UM claim arising from hit and run. (But see Weinberg, below).

Hit and Run - No corroborative evidence needed where policy contains physical contact provision.

Weinberg v. Doe, No. 73671, 1998 WL 456420 (Cuyahoga Cty. App., August 6, 1998).

The insured was riding his bicycle when he was clipped by an unidentified vehicle. The policy affirmatively defined an uninsured motor vehicle as including "a hit and run vehicle whose operator or owner cannot be identified and which hits [an insured or an insured auto]." The insured was unable to produce any corroborative evidence to verify his story, and the insurer denied UM coverage citing Girgis. The trial court entered summary judgment for the insurer, but the appellate court reversed.

The Court of Appeals recognized that Girgis seems to say that in all cases where you have negligence of an unidentified driver, you must have corroborative evidence to recover under your UM policy. But the court found that the second syllabus of Girgis cannot be read in isolation from the first, which stated: "R.C. 3937.18 and public policy precludes contract provisions in insurance policies from requiring physical contact as an absolute pre-requisite to recovery under the uninsured motorist coverage provision." The court thus found it to be clear that the Supreme Court in Girgis "was expanding uninsured motorist coverage to cases were there was no contact, provided the injured party could produce some corroborative evidence." But the court continued:

> The case before us is different, This is not a no contact case. The plaintiff claims he was hit by the unidentified motorist. In such a case, the express terms of the policy provide coverage when an insured is struck by an uninsured motor vehicle. Thus, rather than

exclude coverage as the policies did in no contact cases, the policy here specifically provided coverage if the plaintiff was "hit" by a hit-and-run vehicle. The Girgis case does not deal with contact cases. It expanded coverage to no contact cases provided there was corroboration. It did not take away coverage in cases where the plaintiff was "hit". Whether plaintiff was hit is a question of fact, which is not to be decided on summary judgment.

Hit and Run - Nature of "corroborative evidence".

Lazovic v. State Auto Ins. Co., No. 72968, 1998 WL 382172 (Cuyahoga Cty. App., July 9, 1998).

The second syllabus of Girgis expressly states that the corroborative evidence test allows a claim to go forward "if there is independent third party testimony that the negligence of an unidentified vehicle was the proximate cause of the accident." But in Lazovic, the court found lesser evidence to be sufficient. The insured hit a concrete barrier when she swerved to avoid a car door she saw fall from a truck. Several witnesses testified that they had seen the door in the roadway, but no one other than the insured could say where the door had come from.

The insurer urged the court to narrowly apply the second syllabus of Girgis and hold that given the absence of witnesses to corroborate that the door had fallen from a truck and caused the accident, coverage was unavailable. But the court refused to so hold, finding that eyewitness corroboration is not required. The court found that taking into consideration the time of day the accident occurred as well as its location, it could reasonably be inferred that the car door either came off or fell from an

unidentified vehicle shortly before the insured's evasive maneuver. In sum, the court seems to have expanded the Supreme Court's holding in Girgis so as to permit corroboration by inference or circumstantial evidence.

Multiple Claimants - What does "available for payment" mean?

Estate of Fox v. Auto-Owners Ins., No. 1456, 1998 WL 309212 (Montgomery Cty. App., June 12, 1998).

An insured had underinsured motorist limits of $100,000.00 per person and $300,000.00 per accident. Her mother and sister were killed in an automobile accident. The sister's insurance company filed an interpleader and joined all parties who had been injured in the accident. The insurer deposited its per accident policy limit of $300,000.00 with the court.

The estate of the insured's mother was awarded $92,500.00, but because there were numerous claimants, the insured only received $18,500.00. The insured and the administrator of her mother's estate then sought to recover an additional sum of $300,000.00 under the insured's underinsured motorist policy. The insured denied coverage on the basis that the limits of the policy were identical to the limits under the tortfeasor's policy, and therefore the plaintiff was not entitled to any additional coverage.

The court held that while the legislature expressly overturned Savoie, it did not overturn Motorist Mutual Ins. Co. v. Andrews, 65 Ohio St.3d 362, 604 N.E.2d 142 (1992). In Andrews, the Supreme Court concluded that the amount actually available for payment

under the tortfeasor's policy should be compared with the insured's underinsured motorist coverage limits, and if the amount available is less, the insured is entitled to underinsured motorist coverage. As such, the **Fox** court found that amended R.C. 3937.18 should not be interpreted to preclude recovery where the insured's limits and the tortfeasor's limits are identical if, because of multiple claimants, the insured is unable to recover the tortfeasor's limits and thus has uncompensated damages.

Rejection of UM/UIM Limits - Effect of addition or subtraction of vehicles under policy.

Stacy v. Nationwide Mut. Ins. Co., No. E-96-053, 1998 WL 102177 (Erie Cty. App., February 27, 1998).

The plaintiff's husband had an automobile insurance policy that provided bodily injury liability coverage. Under this policy, the husband was the only named insured on the declaration page, and he had specifically rejected in writing uninsured motorist coverage equivalent to liability limits. After the husband was killed in an accident with an uninsured driver, the plaintiff argued that her husband's rejection of equivalent coverage was not effective at the time of his death because he had added and removed vehicles from the policy over the years and had not signed a new rejection of equivalent coverage each time a change was made. The court disagreed, holding that "neither the statute nor case law requires the signing of a new rejection statement each time an insured replaces a vehicle covered by the original policy." Since the policy number and the amount of coverage remained the same from the

time the decedent signed the rejection statement in **1977** until the time of his death, the insurance company was not required to ask him to sign a new statement rejecting equivalent coverage every time he switched cars under the policy.

The Stacy case has been accepted for review by the Ohio Supreme Court.

Failure to Preserve Underlying Tort Claim - Effect on UM rights.

Stover v. State Farm Ins. Co., No. **13-98-12, 1998 WL 255444** (Seneca Cty. App., May 21, **1998).**

The insured wife of a severely injured insured brought suit against the tortfeasor for her husband's injuries and her own loss of consortium. She then dismissed the claims and reached a settlement for policy limits with respect to her husband's injuries. But she did not refile within a year as to her consortium claim. She later sued for UIM benefits for her and her husband, but the appellate court held that because the underlying tort claim for loss of consortium had become time-barred, she was no longer "legally entitled to recover" from the tortfeasor and thus could not receive UIM benefits.

This case is now before the Ohio Supreme Court.

Stacking - Pre-S.B. 20 - Multiple vehicles, multiple premiums.

Mahoney v. Westfield Ins. Co., No. **97-APE05-651, 1997 WL 781898** (Franklin Cty. App., December **18, 1997).** Plaintiffs, a husband and wife, were injured by an underinsured motorist. They

had three vehicles insured under their own policy, two of which were separately covered for UM/UIM in the amount of $300,000.00 apiece. They were charged separate, identical premiums on each of the two covered cars. Plaintiffs made separate UIM claims for their own injuries, each seeking $300,000.00 in policy limits, on the theory that they paid for two distinct coverages and were each entitled to recover the limits of each. The insurer argued that the limit of liability provision in the policy restricted recovery to $300,000.00 for one accident, regardless of the number of premiums paid. Plaintiffs responded that since the Supreme Court had held that anyone "insured" under a policy which includes UM/UIM insurance is covered for any injuries caused by the operator of an uninsured or underinsured motor vehicle regardless of whether the "insured" was in a "covered vehicle" at the time of his or her injury, the only explanation for plaintiffs being charged separate premiums to cover two cars is that they were receiving two coverages. Otherwise, they were getting nothing for their money.

The court disagreed, finding that plaintiffs did receive some additional UM/UIM protection by carrying coverage on more than one of their vehicles. Specifically, individuals who are not named insureds under a policy are entitled to UM/UIM coverage under the policy only if they are injured while operating or riding in a vehicle covered by UM/UIM insurance under the policy. Thus, by carrying coverages on two of their three vehicles, plaintiffs obtained coverage for friends and family members not living with them who might ride in either of the two covered vehicles. As such, the limit of liability provision was enforced.

Stacking - Pre-S.B. 20 - Effect of failure to offer reduced premiums.

Heyman v. West American Ins. Co., No. WD-97-113, 1999 WL 55719 (Wood Cty. App., February 5, 1999).

In the Mahoney case above, the court acknowledged that the additional UM/UIM coverage afforded plaintiffs by the second premium did not, in all likelihood, expose the insurer to sufficient additional risk to justify the second premium being equal in cost to the first, but found the fact that the second UIM coverage was not a good value was not sufficient reason to negate the limit of liability provision. But in Heyman, the appellate court held that where the insurer does not reduce the UM/UIM premiums charged for multiple vehicles under a policy, the insurer cannot reduce benefits by excluding the stacking of UM/UIM limits of family members' policies. Thus, intra-family stacking cannot be precluded absent evidence that the family members received reduced premiums as a result of their multiple policies.

Stacking/Set Off - Pre-S.B. 20 - Intra-policy anti-stacking provision not enforceable.

Vennece v. Motorists Ins. Co., No. 16997, 1998 WL 639267 (Montgomery Cty. App., September 18, 1998).

A woman passenger was killed in a collision in which both drivers were negligent. The driver of the car in which the decedent had been riding was insured, and decedent was thus both a claimant against and an insured under the driver's policy. The other driver was uninsured. The insurer paid policy limits of

$300,000.00 to the estate. The estate then sought an additional $300,000.00 in uninsuredmotoristbenefits due to its claim against the uninsured driver, and a further $300,000.00 in underinsured motorist benefits for its claim against the insured driver.

The policy contained an intra-policy anti-stacking clause, which provided that the $300,000.00 limit of liability was the insurer's "maximum limit of liability for all damages . . . arising out of bodily injury sustained by any one person in any one accident." Based on this provision, and the insurer's prior payment of $300,000.00 on account of decedent's death, the insurer declined to pay the further claims for UM/UIM coverage. The court found for plaintiff, stating:

> In calculating the amount of coverage available to a claimant, therefore, any set-off of an amount paid from another coverage for which the policy provides must be deducted from the value of the claimant's uncompensated damages, not from the limits of available coverage. We note that the Tenth District Court of Appeals has reached the same conclusion. Painter v. State Auto Ins. Co. (October 31, 1996), Franklin Cty., No. 95 APE12-1558, unreported.
>
> On this record, the sum of *$300,000.00* paid by [the insurer] from its liability coverage may be set off only against the total amount of damages claimed, $1,200,000.00. Therefore, neither the available uninsured coverage of $300,000.00 nor the available underinsured coverage of $300,000.00 is diminished by the payment from liability coverage, and neither will be diminished by any payment from the other on the UM and UIM claims in the same amounts.

UM Property Damage - When is coverage "made available"?

Murray V. Woodard, 120 Ohio App.3d 180, 697 N.E.2d 265 (1997).

Plaintiff was rear-ended in an automobile collision with an uninsured motorist. The declarations page of the policy stated that coverage was provided for uninsured motorist bodily injury coverage but said nothing about UM property damage coverage. The plaintiff claimed that since she had not rejected such coverage, it thus was included by operation of law. The insurer countered that R.C. **3937.181** only requires that UM property damage coverage be "made available" to Ohio car owners and that the coverage was available to the policyholder in this case if she had requested it.

The court struck a middle ground between requiring the insurer to obtain a written rejection and permitting the insurer to do nothing. The court found that the burden is on an insurer to show that it advised its insured of the availability of UM property damage coverage and of the premium for it, and provided a brief description of the coverage. Once it is determined that the insurer made the coverage available in this way, the fact that no premium was paid for the coverage is sufficient proof that the coverage was not accepted. However, failure to sufficiently advise an insured will result in UM property damage coverage being provided by operation of law.

* * * * *

As mentioned, a multi-volume treatise could have been prepared regarding the issues described in this memorandum. The purpose here was simply to provide an update of recent decisions. In future issues of the CATA Newsletter, the Academy intends to continue to provide current information about insurance coverage issues and related matters.

CLEVELAND ACADEMY OF TRIAL ATTORNEYS
INSTALLATION DINNER
JUNE 11, 1999

By Incoming President Robert F. Linton, Jr.

They say imitation is the sincerest form of flattery. And if that's the case, Jean [McQuillan], I'm not the only one who seeks to follow in your footsteps. East year some clients who had become unhappy with their lawyers asked me to take over their case. When I received the file, I saw that it contained a copy of the trial transcript from a case Jean tried against Sam's Club a few years ago with outstanding results. The lawyers were obviously using it as a blueprint on how to build a successful case. But I don't know what impressed me more when I read the transcript, the skillfulness of Jean's advocacy or the gaffes of her adversaries. One of the occupational hazards of being a lawyer is when you embarrass yourself, people not only see it happen, but can read about it for years to come. Some of the questions and answers were so entertaining, I had to share them with you tonight. These could also be subtitled, "The Dumbest Things Said in Court":[1]

Was that the same nose you broke as a child?

Now, doctor, isn't it true that when a person dies in his sleep, in most cases he just passes quietly away and doesn't know anything about it until the next morning?

---

[1]Courtesy of the World Wide Legal Information Association, HTTP://www.wwlia.org/dumb.atm

The youngest son, the 20-year old, how old is he?

Were you alone or by yourself

What is the meaning of sperm being present?
It indicates intercourse.
Male sperm?
That is the only kind I know.

Can you describe the individual?
He was about medium height and had a bear.
Was this a male or female?

I show you Exhibit 3 and ask you if you recognize that picture.
That's me.
Were you present when that picture was taken?

Now, Mrs. Johnson, how was your first marriage terminated?
By death.
And by whose death was it terminated?

Do you know how far pregnant you re now?
I'll be three months on November 8.
Apparently, then the date of conception was August 8?
Yes.
What were you doing at that time?

Mrs. Jones, do you believe you are emotionally stable?
I used to be.
How many times have you committed suicide?

So you were gone until you returned?

She had three children, right?
Yes
How many were boys?
None
Were there girls?

You say that the stairs went down to the basement?
Yes.

And these stairs, did they go up also?

All your responses must be oral, ok? What school did you go to?
Oral

Are you qualified to give a urine sample?
Yes, I have been since early childhood.

Doctor, how many autopsies have you performed on dead people?
All my autopsies are performed on dead people.

Do you recall approximately the time that you examined the body of Mr. Brown?
It was in the evening. The autopsy started about 8:30 p.m.

And Mr. Brown was dead at the time, is that correct?
No. He was sitting on the table wondering why I was doing an autopsy!

Seriously, Jean, The CATA cannot thank you enough for your near decade of service, for your leadership, and for your understated, unpretentious style and grace. They say every job is a portrait of the person who did it. If that's true you've autographed your work with excellence. Please accept these [flowers and plaque] on our behalf.

People wonder what qualifications are needed to become president of the CATA. I'm told that one important criteria is to have that "presidential **look.**" I've been told more than once that I resemble a certain US President, and the resemblance is apparently striking enough that even children have commented on it. In fact, just this Wednesday the 9 year old daughter of a new client said to her mother, "look mommy, he looks just like that man on TV, the President,... President George Washington." I've seen a lot of one dollar bills and frankly I just don't see it.

I can't tell you what a honor it is to be added to the list of such distinguished trial

lawyers who have served the Academy. It doesn't feel like that long ago that I was a law student at CWRU looking for a summer job, when my Dad–who practices law in Akron--gave me some advice. He recommended two people in Cleveland who might be good to work for. One was an ex-marine, Harvard educated John Glenn look alike who defended medical malpractice cases. The other was a pretty decent plaintiff's PI lawyer, who was getting close to retiring. Perhaps the old timer would be willing to take you on and turn over his practice to you in a few years, my Dad said. Unfortunately, Craig Spangenberg never returned my calls, so I instead I joined John Jeffers at Weston Hurd.

I was a good loyal soldier there, but decided after becoming a new partner that I had reached a fork in the road. I was a plaintiffs lawyer disguised in defense clothing. We couldn't sue doctors there, or hospitals or manufacturers or even lawyers, so I decided to take the road less traveled– and that has made all the difference.

Shortly after leaving Weston Hurd, Laurie Starr invited me to join the Board of Directors of the Academy and it has been a wonderful association ever since. You have educated me, inspired me and adopted me as one of your own. I especially want to thank Bill Hawal, Dave Goldense , Rick Alkire and Jean McQuillan for electing me as an officer three years ago.

I also want to thank Toby and Ellen Hirshman for being such supportive partners, for Mark Ruf in our office whose office is lined with Supreme Court opinions in which he has authored amicus curie brief for OATLA, for the tireless support of the two best legal assistants any trial lawyer could ask for, Robin Zingales and Audrey Mills. I especially

want to recognize Audrey for organizing tonight's wonderful affair.

But most of all, I want to recognize the ones who have stood behind me and loved me, in good times and in bad. As Robert Frost said, "home is the place where...when you have to go there...they have to take you in."

Most of us have at least one strong parent in our lives, and many of us have had two, but I have been blessed with four strong role models: my Mother, who has given me unconditional love and compassion, her husband Bill who has taught me unselfishness and never tires of hearing me talk about my cases, [Justice] Debbie [Cook], who never lets politics get in the way of our mutual respect and admiration, and my Dad, the man I most admire, who has been not only a wonderful mentor but also my best friend.

To my wonderful children, Erin, Brian, Emily and Evan who live through my pretrial PMS, and most importantly, to the person who is my closest confident and inspiration, who stands by me during those dark moments when victory seems impossible... and defeat inevitable... my co-counsel in life, my wife... Kris...thank you and I love you.

I'd like to spend a few minutes talking tonight about the state of our jury trial system. The jury system is like what Winston Churchill said about Democracy–"it is the worst system devised by men...except for all the others." But despite its imperfections, a new article to be published later this month in the Ohio State Law Journal[2] proves once,

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[2]"Is the Tort System in Crisis? New Empirical Evidence," 60 Ohio St. Law Journal ___ (1999) by Professor Deborah Jones Merritt and Kathryn Barry. Available at

again that it is working. It may have needed fine-tuning along the way, but it never needed a complete overhaul.

The article offers new evidence on the so-called lawsuit crisis and need for tort reform. For those of you who are not lawyers, a tort is not an after dinner dessert, but the meat and potatoes of our practice. You no doubt have heard about the lady who recovered a bundle from McDonald's after spilling hot coffee on her lap. Perhaps you also heard about the psychic who got a million dollars for having her psychic powers supposedly destroyed by a cat scan. Those are the stories that make headlines, but what is fact and what is fiction?

The study was authored by OSU law professor Deborah Jones Merritt, with help from the American Board of Trial Advocates, a nonprofit research foundation, supported by both plaintiff and defense counsel. I spoke to Professor Merritt today who described herself as an "impartial scholar and researcher." "I told the American Board that they would have live with whatever results my research disclosed, since I have no agenda," she reported.

The study monitored *every single* medical malpractice verdict and product liability verdict in Franklin County state court (Columbus, Ohio) over a 12 year period. §he selected that city because it is a favorite city selected for test marketing products and services, a true slice of Americana that "does not stand at either extreme of the nations'

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http://www.otlaw.org/Doc/Tort%20System%20In%Crisis.htm or by calling Audrey Mills at 216-771-5800.

courthouses, but includes above average rates of claims filed plaintiff wins and high verdicts."

The study offered the "first comprehensive look at product and medical malpractice verdicts in a representative urban county over a 12 year period." The 12 year period was selected because at the end of that period, Ohio enacted HB 350-- a comprehensive law designed to limit the legal rights of injured persons in Ohio."

The conclusion to the 72 page, single spaced article is as follows: "Our findings suggest, even more dramatically that those reported by other authors **that there is no crisis** in either product liability or medical malpractice verdicts. On the contrary, the number of verdicts in each of these areas is quite small and plaintiff win rates are quite low. Both recovery rates and verdict size, moreover, have been declining over the last decade. In this context, the reforms adopted by some legislatures (including Ohio) and proposed in many others are unnecessary at best and harmful at worst."

Some startling statistics :

- the annual number of product liability and med mal **cases filed is surprisingly low.** The local data tells the same story as the nationwide data. According to a Department of Justice study, PI cases make up less than **10%** of all court filings. And med mal cases make up less than ***5%*** of the PI filings and product liability claims less than **4%.**
- **The number of product liability trials per year has decreased.** Here's a multiple choice question. Was the number a) 2400 b) 240 or c) 24? If you

guessed one of those, you're wrong. The number? **A** mere **2.4 trials** per year.

- **Low win rates.** Franklin county plaintiffs won only **1 out of 5** of their product liability trials and less than **1 out of 3** of med mal cases.
- **Low awards.** Despite tales of rampant awards, **nly 6 verdicts over 1 million were returned** in product liability and med mal cases over that 12 year period.
- And despite tracking every jury verdict over an entire 12 year period in Franklin county, the OSU study found **not a single award of punitive damages** during that 12 year period in any medmal or product liability suit.
- Moreover, research, like the famous Harvard study, has shown that most tort victims never even find their way to the courthouse. In one of the leading studies of adverse medical consequences, medical reviewers found that only 2 % of those victimized by malpractice ever pursued a legal claim.
- The Article described current tort reform as a "blunderbuss." If you're like me and you're not sure what that means, Websters defines it as a "mistake made through stupidity, ignorance or carelessness." Professor Merritt concludes, "In face of this evidence-- exaggerated anecdotes and wild stories no longer have a place in the responsible review of the tort process. Rather than heed those fictions, legislators and... [courts] should turn their

attention to our growing knowledge of how the tort system truly operates."

And about that psychic. The judge in that case disallowed claims for alleged interference with her psychic abilities. Instead, the jury awarded her damages for a permanent brain injury resulting from the careless administration of dye before the CAT scan.

And the McDonald's suit? 79 year old Stella Liebeck suffered 3rd degree burns to her thighs and vaginal area after being scalded by 170 degree coffee. She was hospitalized for more than a week for painful skin grafts. She was burned over 16% of her body. Temperatures in that range cause 2nd degree burns within 3.5 seconds of hitting the skin, according to a well respected expert from a Texas medical school. Everyone expects coffee to be hot, but they don't expect to be hospitalized by spilled coffee. The evidence established that McDonald's served its coffee at temperatures considerably higher than other fast food restaurants. Moreover, this wasn't the first time or the second or even the 100th time this had happened -- at the time of Stella's accident, McDonald's had already received more than 700 *complaints* from other people scalded by their coffee, a number which McDonald's dismissed at trial as "statistically insignificant."

The jury found Leibeck 20% at fault and awarded her $200,000 for her medical expenses, pain and suffering and disfigurement. The jury then hit McDonald's with a stern warning :$2.7 in punitive damages–two days worth of coffee sales. As one juror later recalled, "it was our way of say hey open your eyes McDonald's and stop burning people." The judge eventually reduced the punitive damage award to $640,000, which

was only **3** times compensatory damages. The case was ultimately settled while on appeal.

Following the verdict, McDonald's finally turned down the boiling coffee to a temperature more in line with the rest of the industry. Mission accomplished.

So what will be our Y2K challenges as we head into the next millennium? I don't know. As Abe Lincoln wisely noted, the best thing about the future is that it comes only one day at a time. And I know we will have within us, the daily measure of courage, creativity and conviction we need to meet whatever challenge lies ahead. I don't know what the future holds, but I know who holds the future. The men and women who serve as officers and directors on the CATA are some of the brightest, most resourceful, most capable lawyers greater Cleveland has to offer. Together we can accomplish what we could not do alone. To paraphrase one of my favorite prayers, may we have the courage to change the things we can, the serenity to accept the things we can't and the wisdom to know the difference.

I recently ran across a quote that summarizes what I hope will be the state of the CATA union tonight--and always: "Remember in the race for justice, there is no finish line." May you never tire of the race.