CATA News
Cleveland Academy of Trial Attorneys
Fall 2001

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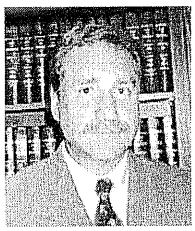
President's Message



David M. Paris

September 11, 2001. How will it change us? How will it affect the way we see ourselves and others? How will it affect the way we practice law and represent our clients?

Like most of you, I spent the rest of that week in a fog - unable to concentrate and unwilling to turn off the television - riding an emotional roller coaster between despair, anger and compassion for those who lost everything. Since then, we have all come to realize that we are a nation changed forever. ... and the impact will touch every aspect of our lives from the economy to employment, personal liberties, estate planning, personal security, travel, leisure and entertainment.

As trial lawyers, we will be challenged like never before. I know that most of you have already done so, but please consider digging deep (or deeper) into your wallets and making charitable donations to legitimate organizations providing assistance, relief and benefits to those families most affected by this tragedy. Despite the negative spin put on us by special interests, it is the plaintiff's bar that has consistently come to the aid of victims of disasters. We can and should rise to the occasion here and now and keep doing so until the need is gone. I am proud to announce that CATA sent a contribution in the amount of $1,500.00 to one of the disaster funds.

Many of us have trials scheduled in the next few months. Given the enormous physical and emotional suffering endured by approximately 6,000 killed and missing and thousnads injured along with their families, how do we keep our juries from trivializing a neck or low back injury sustained by our clients? After being pulverized with images of such vast devastation and suffering will someone's trip and fall or rear end collision ever seem significant to those eight strangers sitting in the jury box? Talk of "accountability" and "'seeking justice" have taken on whole new meanings as they continue to be used in the context of terrorists. Can we continue to use those terms in a courtroom and be taken as seriously as before'? On the other hand, one would hope that our sensitivities to the suffering of others has been heightened by these events. Certainly, we will all have to address these kinds of issues in voir dire.

There have been estimates that the insurance industry will pay out billions of dollars in life insurance and casualty claims as a consequence of this attack. Some carriers have announced that they will not enforce "Act of War" exclusions in their policies. While such

conduct might be characterized as an act of extreme generosity, will one byproduct be that the insurance carriers garner sympathy as one of the good guys in future litigation? You just know it won't be long until we start hearing that the insurance industry is weakened and in need of protection. More importantly, in an effort to stave off litigation against the airline industry, the government has implemented a taxpayer financed "no fault" claims procedure for the victims. Again, no one can argue against the benefit of rapid resolution of claims, but will this serve as a model for federal "no fault" systems in the future?

Many of us represent clients of middle eastern ancestry. It's naive to believe that we can sidestep these issues in voir dire. Will there be a temptation for jurors to disbelieve our clients' testimony because of their ancestry? Will our treating doctors or experts be viewed differently because of their accents, skin color, headdress or last names? I have already had insurance companies play these "race cards" in pre-trial negotiations,

Cross-country travel will likely become less appealing to our experts coming to Cleveland to testify. Moreover, flight connections will be missed because of delays caused by security precautions. As much as we dislike it, consideration is going to have to be given to video evidentiary depositions. On the other hand, perhaps this will provide us with opportunities to become more creative. Why not explore the use of real time video conferencing in trial situations? Can the Justice Center accommodate such technology? Five years ago we looked into it and were informed that it could only be done via cellular with antennas on the roof of the Justice Center and wiring down the stairwell to the courtroom. Totally impractical. Today, this is done via internet connection. It should be fairly routine and cost effective.

This tragedy will challenge us to be better: to be more patriotic as Americans; to be more compassionate to our neighbors; to be more loving to our families; and to be more creative and aware as trial lawyers. This is a challenge we can meet and overcome.

Remember; together we can move mountains. Alone, we're just shoveling dirt,

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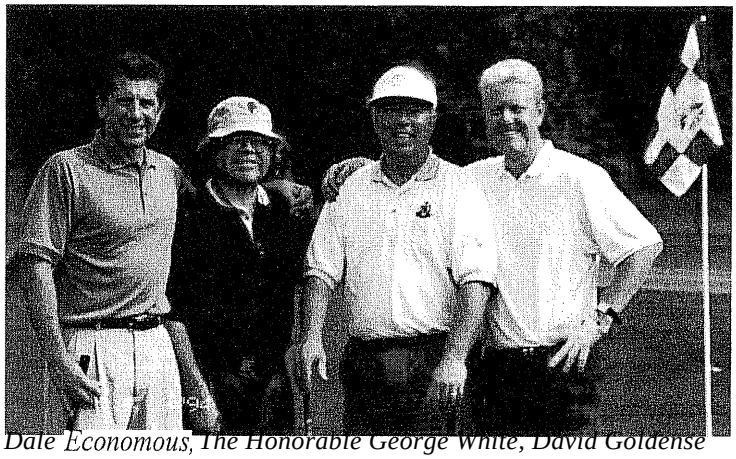

Dale Economous, The Honorable George White, David Goldense and Robert F. Linton, Jr., at the CATA Golf Outing.

Save the Date

Upcoming CATA Seminar Luncheon dates:

December 12, 2001
January 16, 2002
February 19, 2002
April1 9, 2002

There will be no Seminar Luncheon in March. 2002.

The Bernard Friedman Litigation Institute will be held on March 28, 2002, from Noon until 5:00 pm.

Homeowner's Insurance Policies:

Davidson Hasn't Ended The Inquiry.

by Steve Vanek

It has become apparent that a good many lawyers in Ohio have uninsured/underinsured motorist claims brought under homeowner's policies still pending after the Ohio Supreme Court's decision in ***Davidson v. Motorists Mutual Insurance Company*** (2001), 91 Ohio St.3d 262. The goal of this article is to bring lawyers up to date with regard to those claims, including a review of court decisions ***post-Davidson.***

I. ***Selander & Coverage*** by Operation of Law, Most of these claims were originally pled pursuant to the Ohio Supreme Court's holding in ***Selander v. Erie Insurance Group*** (1999), 85 Ohio St.3d 54 1 and/or the district court's decisions in ***State Automotive Mutual Insurance Company v. Lopez*** (Sept. 23, 1999), Tenth App. Dist. Case No. 99AP-15, unreported, and ***Goettenmoeller v. Meridian Insurance Company*** (June 25, 1996), Franklin County Court of Appeals, Case No. 95APE1 l-1553, unreported. A brief history of these cases is instructive.

In *Selander*, the Ohio Supreme Court found that a general business policy was an "automobile policy" for purposes of R. C. $3 93 7.18, because it extended liability coverage for "hired" and "non-owned" automobiles. ***Selander*** did not involve a homeowner's insurance policy. The plaintiffs, Eugene and Glenn Selander were brothers, and electricians, who operated a partnership known as Twin Electric. They were involved in a serious motor vehicle collision caused by an underinsured motorist. Eugene Selander was killed in the accident and Glenn was seriously injured. Eugene's estate and Glenn Selander recovered the available liability limits from the responsible party's carrier, which was $103,500.00. They also recovered on an underinsured motorist policy covering the vehicle they were operating at the time of the collision. This policy was issued by Erie Insurance and paid the estate of Eugene Selander $200,000.00. Glenn Selander received $1 00,000.00 under this policy.

Eugene's estate and Glenn Selander then presented claims under the Fivestar Business policy issued to Twin Electric also by Erie Insurance Company. The Fivestar

policy was a General Business policy with limits of $1,000,000.00 per occurrence and $2,000,000.00 aggregate. Erie refused payment asserting that the business policy did not provide automobile liability coverage or uninsured/underinsured motorist coverage The trial court granted summary judgment in favor of the Selanders finding that they were entitled to coverage under the Fivestar policy. The Darke County Court of Appeals affirmed the holding of the trial court, also finding coverage. The appellate court certified their decision to the Ohio Supreme Court on the basis that it conflicted with a Tenth District Court of Appeals decision in another case. The certified question was "Do the provisions of R. C. 3937.18 apply to a policy of primary insurance which provides coverage for claims of liability arising out of the use of hired or non-owned automobiles, but is not issued for delivery with respect to some particular motor vehicle?"

The Supreme Court in answering the certified question in the affirmative, held that where motor vehicle liability coverage is provided, even in limited form, uninsured/underinsured coverage must be provided." *Id.*, at 544, 1163. It was this legal concept which would give rise to UM/UIM claims under homeowner's policies. The Ohio Supreme Court reached this holding despite the fact that the policy was not issued with respect to a particular motor vehicle and did not specifically comply with Ohio's financial responsibility law, R.C. Chapter 4509. The ***Selander*** Court also stated that one must look to the type of coverage offered and not to the label or designation of the policy as applied by the insurance company. The Court cogently stated that:

> The type of policy is determined by the type of coverage provided, not by the label affixed by the insurer, Otherwise, it would be a simple matter for insurers to evade the requirements of [Ohio] law by changing the title of the policy. * * * Therefore, the fact that [the] policy is labeled as a comprehensive general liability policy does not mean it is not also an automobile liability policy under the [Uninsured Motorist Act].

Id., citing ***St. Paul Fire & Marine Ins. Co. v. Gilmore*** (1991), 168 Ariz. 159, 812 P.2d 977 at 165, 812 P.2d at 983. Several other district court appellate cases coupled with the opinion in ***Selander*** suggested that it was possible to have UM/UIM coverage arise by operation of law in a policy other than a typical "motor vehicle" policy.'

In Wodrich v. Farmers Insurance of Columbus, Inc. (May 21, 1999), Green App. No. 98CA103, unreported, the plaintiffs sought underinsured motorist coverage under their homeowner 's policy. The appellate court observed that:

> The Wodrichs' fifth argument is based on their homeowners policy, which had liability limits of $500,000. In this regard, the Wodriches claim the policy also qualifies as vehicle insurance, for which they did not reject UM/UIM coverage. Consequently, they contend they are entitled to $500,000 UM/UIM benefits under that policy as a matter of law.
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> ***
>
> [T]he policy extends liability coverage to its insureds for bodily injury to residence employees caused by the use of a motor vehicle. In two similar situations, we have extended UM/UIM coverage by operation of law. First, in ***Speelman v. Motorists Mut. Ins. Co.***, 1995 Ohio App. LEXIS 5835 (Dec. 29, 1995), Montgomery App. No. 15362, unreported, we considered a business auto policy which covered vicarious or imputed liability due to negligent use of a hired or non-owned auto.
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> ***
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> Subsequently, in ***Selander v. Erie Ins. Group***, 1997 Ohio App. LEXIS 6059 (Dec. 31, 1997), Darke App. No. 97CA1432, unreported, we considered a general liability policy issued by Erie to Glenn Selander and Eugene Selander dba Twin Electric.
>
> ***
>
> Based on the reasoning in ***Selander***, underinsured motorists coverage would apply to the Farmers' homeowners policy by operation of law. As we noted above, motor vehicle liability coverage was provided to the insured for bodily injury or property damage caused to residence employees. Therefore,-because automobile liability coverage was extended to the Wodriches, the policy was a ""motor vehicle liability policy" under R. C. 3937.18. [*52] Moreover, even though coverage would not have been provided to Wodrich if he were at fault in the accident, that is irrelevant.

In ***Goettenmoeller v. Meridian Insurance Company*** (June 25, 1996), Franklin County Court of Appeals, Case No. 95APE 11-1553, unreported, a case decided well before the ***Selander*** case, the Tenth District held that a farm owner's policy issued to the Goettenmoeller 's was a " motor vehicle liability policy" which was subject to the mandates of R.C.§3937.18. The Goettenmoeller's daughter was injured in a motor vehicle accident with an underinsured motorist. She sustained serious injuries, the value of which exceeded the tortfeasor's available coverage as well has her own underinsured motorist coverage. The Goettenmoeller's were also insured

under a farmowner's policy issued by Meridian Insurance Company. Plaintiffs brought a claim under the Meridian policy arguing that by extending liability coverage for damage caused by recreational motor vehicles while on the insured's premises, the policy qualified as an motor vehicle liability policy.

The Meridian policy contained the following exclusion:

> 1. Under Coverage F – Bodily Injury Liability
>
> a. To bodily injury or property damage arising out of the ownership, maintenance, operation, use , loading or unloading of
>
> (1) any aircraft;
>
> (2) any motor vehicle owned or operated by, or rented or loaned to any Insured; but this subdivi sion (2) does not apply to bodily injury or property damage occurring on the insured premises if the motor vehicle is not subject to motor vehicle registration because it is used on the insured premises or kept in dead storage on the insured premises;
>
> or
>
> (3) any recreational motor vehicle owned by any Insured, if the bodily injury or property damage occurs away from the insured premises; but this subdivision (3) does not apply to golf carts while used for golfing purposes.

The policy did not exclude liability coverage for recreational motor vehicles while on the insured premises.

The Tenth District held that not only did the offer of limited liability coverage rendered the policy an automobile/motor vehicle liability policy, but that because this coverage arose by operation of law, any of the exclusion or restrictions in coverage, contained in the liability portion of the policy, were inapplicable to the uninsured/ underinsured motorist coverage. The holding in *Goettenmoeller* stood for the proposition that UM/UIM coverage could arise by operation of law where automobile liability coverage was extended in a policy.

In ***State Au tomotive Mutual Insurance Company*** v. Lopez (Sept. 23, 1999), Tenth App. Dist. Case No. 99AP- 15, unreported the Tenth Appellate District found UM/UIM coverage in a homeowner's policy. The policy provided coverage for liability arising out of the use of recreational vehicles in limited circumstances. The court, citing the decisions in *Selander* and *Goettemoeller* held that UM/UIM coverage arose by operation of law in amounts equal to the liability coverage issued on the policy.

IL *Davidson* & **Footnote No. 2**

Based upon the foregoing, attorneys representing injured parties that were un- or under-compensated began bringing UM/UIM claims under their client's homeowner policies based upon one of two general legal theories: 1) that UM/UIM coverage arose by operation of law due to an extension of automobile liability coverage for recreational and off-road vehicles; or 2) that UM/UIM coverage arose by operation of law due to an extension of automobile liability coverage for the use of a vehicle by a "residence employee" of the insured. Early on, some insurers paid the claims, but perhaps due to the pervasive nature of the policy language at issue and the rise in the number of claims, insurer quit voluntarily paying under homeowner's policies and the litigation commenced. The one case many lawyers were watching was ***Davidson v. Motorists*** *Mutual* ***Insurance Company,*** and it was anticipated that the Supreme Court would once and for all answer the question with regard to UM/UIM coverage and homeowner's policies. When the opinion was released, it was apparent that only half of the issue had been decided as the discussion below will reveal. The recreational and off road issue appeared have been answered by the ***Davidson Court.***

In *Davidson*, the Supreme Court held:

> A homeowner's insurance policy that provides limited liability coverage for vehicles that are not subject to motor vehicle registration and that are not intended to be used on a public highway is not a motor vehicle liability policy and is not subject to the requirement of former R.C. 393 7.18 to offer uninsured and underinsured motorist coverage.

Id. at syllabus. The issue before the court was whether "limited liability coverage for certain vehicles rendered the policy a motor vehicle liability policy, subject to the requirement of former R.C. 3937.18 to offer UM/UIM coverage." At issue in that case was whether a liability coverage extension for the use of recreational vehicles rendered the policy a motor vehicle liability policy. The Court held it did not. However, the Court stated that the appellee in ***Davidson*** raised for the first time on appeal the argument that the policy also contained a "residence employee" exclusion which extended liability coverage for automobiles. This is the other half of the equation. With regard to this argument, the Ohio Supreme Court noted in the (now infamous) footnote 2 that:

> Appellees further contend that the homeowner's policy is a motor vehicle liability policy because it contains a "residence employee" exclusion, affording protection against liability to employees for injuries occurring in the course and scope of their employment and arising out of the use of a motor vehicle. Because this argument was not raised in either the trial court or court of appeals, we decline to address it. See *Kalish v. TransWorld Airlines* (1977), 50 Ohio St.2d 73, 4 O.O.3d 195,362 N.E.2d 994.

Id. It was the Court's deferment of the issue that has resulted in diverging opinions.

The "residence employee" language usually appears as a exception to a general exclusion for the use of automobiles, aircraft and water-craft in most homeowner's policies. The following is the typical language from a State Farm policy, although most policies have some form of the same provision:

> SECTION II - LIABILITY @OVERAGES
>
> COVERAGE L - PERSONAL LIABILITY
>
> If a claim is made or suit is brought against an insured for damages because of bodily injury or property damage to which this coverage applies, caused by an occurrence, we will:
>
> 1. pay up to our limit of liability for the damages for which the insured is legally liable; and
>
> 2. provide a defense at our expense by counsel of our choice. We may make any investigation and settle any claim ro suit that we decide is appropri ate. Our obligation to defend any claim or suit ends when the amount we pay for damages, to effect settlement or satisfy a judgment resulting from an occurrence equals our limit of liability.

The exclusions to the liability coverage part usually provide the following:

> SECTION II - EXCLUSIONS
>
> 1. Coverage L and Coverage M do not apply to:
>
> e. bodily injury or property damage arising out of the ownership, maintenance, use, loading or unload ing of
>
> (1) an aircraft;
>
> *(2)* a motor vehicle owned or operated by or rented or loaned to any insured; or
>
> (3) a watercraft
>
> * * *
>
> This exclusion does not apply to bodily injury to a residence employee arising out of and in the course of the residence employee's employment by an insured.

Insurers are quick to argue that regardless of the fact that the "residence employee" language was not passed upon, the supposed '"logic" of the Court may be extended to find that this coverage is also "incidental" and therefore does not invoke the mandatory requirements of Revised Code §3937.18(A). It isn't quite that simple, and, more importantly, that conclusion ignores the legal basis upon which ***Davidson*** was decided.

The *Davidson* Court distinguished that case from *Selander*, in part, upon the fact that the coverage extension at issue in ***Davidson*** was for the use of off-road vehicles, not subject to motor vehicle registration, or for use on the insured's property. The Court noted:

> In *Selander*, we were construing a general business liability policy that expressly provided insurance against liability arising out of the use of automobiles that were used and operated on public roads. Since there was express automobile liability coverage arising out of these automobiles, we reasoned that UM/UIM coverage was required. That holding comports with the requirement under R. C. 3 93 7.18 that UM/UIM coverage must be offered where the policy is an automobile or motor vehicle liability policy. In contrast, the policy at issue in this case is a homeowner's policy that does not include coverage for liability arising out of the use of motor vehicles generally. Instead, the homeowner's policy provides incidental coverage to a narrow class of motorized vehicles *that are not subject to motor vehicle registration and designed for off-road use or are used around the insured's property.* (Emphasis added.)
>
> These distinctions are significant. Clearly, the policy in *Selander* was deemed an automobile liability or motor vehicle liability policy precisely because there was express liability coverage arising from the use of automobiles. Furthermore, automobiles, unlike the vehicles listed in the homeowner's policy in this case, are subject to motor vehicle registration and are designed for and are used for transporting people on a high way. Thus, based on these distinctions, it makes perfect sense to allow UM/UIM coverage in *Selander* but to restrict coverage under a homeowner's policy that provides incidental coverage for a very limited class of motorized vehicles *that are neither subject to motor vehicle registration nor designed to be used on a public highway*. (Emphasis added.)
>
> * * *
>
> Instead, *Selander* stands only for the proposition that UM/UIM coverage is to be offered where a liability policy of insurance expressly provides for

> coverage for motor vehicles without qualification as to design or necessity for motor vehicle registration.

The distinction between the decision in ***Davidson*** and the decision in ***Selander*** is critical. In ***Selander***, the court held that liability coverage extended to motor vehicles that are operated on the highway requires the corresponding offer of UM/UIM coverage and will invoke the requirements of R.C. 393 7.18. In contrast, where liability coverage was extended to off-road vehicles and those used exclusively on the insured's premises and which are not used on public roads the requirements of R.C. 3937.18 will not be invoked when the extension occurs in a homeowner's policy. There is a clear distinction as to the type of vehicles covered by the policy. In every reference in the ***Davidson*** opinion to coverage, the Court consistently noted referred to the fact that it was vehicles: 1) subject to motor vehicle registration and 2) for use of public roadways that were under consideration. Even the holding reinforces this limitation. There is simply no way to take the holding in ***Davidson*** and apply it to the "residence employee" language in a homeowner's policy and reach the same conclusion, since the policies generally extend coverage for automobiles subject to motor vehicle registration and for use on public roadways.

III. *The post-Davidson* Thicket

In the wake of the ***Davidson*** opinion, trial courts were left with an undecided coverage issue and there has been a wide divergence of opinion as to its ultimate resolution. It is not surprising then, that opinions issued by the courts are in conflict. The following is a discussion of some of them to date.

a. Courts Finding Coverage

In ***Cincinnati Insurance Company v. Gregory L. Torok,*** et al. (May 22, 2001), Jefferson Cty. C.C.P. Case No. 00-CV- 147, unreported, the Cincinnati policy contained the "residence employee" extension of automobile liability coverage. Judge John J. Mascio held that:

> This sub-section f. provides that the exclusion does not apply to the recreational type vehicles as contmplated in the cases cited by Plaintiff. However, the language previously stated with respect to the residence employee's employment would make this policy, in the opinion of this Court, a motor vehicle policy as contemplated by the ***Seelander*** (sic) and ***Wodrich*** courts so that the Plaintiff is liable to the Defendants.

The court held that the residence employee coverage was sufficient in order to invoke the requirements of the statute.

In ***James F. Turner Jr., et al. v. Phillip J. Plfeager,*** et ***al.*** (June 5, 2001), Delaware County C.C.P., Case No. 99CV-C-12-432, unreported, the court examined a Nationwide policy also containing an extension of automobile liability coverage for residence employees. The court stated:

> Therefore, the question becomes whether or not the parties reasonably contemplated motor vehicle liability coverage resulting from the subject homeowner's policy.
>
> The fact that a "homeowners policy" is a issue is not determinative. ***Selander***, at 1164-l 165. The question turns on "the type of coverage provided, not by the label affixed by the insurer." *Id*. The policy at issue excludes liability coverage for occurrences arising out of the use and operation of the insured's motor vehicle. However, the policy does provide coverage where bodily injury results to a residence employee and occurring in the insured's motor vehicle. Certainly, the policy language suggests the parties contemplated coverage for incidents involving the Plaintiffs' vehicle. The fact that the policy limits its coverage to instances where the residence employee is injured does not change the fact that the policy expressly provides a "limited form" of motor vehicle liability coverage. Thus, the policy language manifested an intention to provide motor vehicle liability coverage.
>
> In view of the foregoing, this Court finds that the homeowner's policy at issue in the instant case provided a limited form of motor vehicle liability coverage. Thus, the homeowner's policy was subject to the provisions of Section 3937.18(A) of the Revised Code requiring Defendant Nation wide Insurance to offer uninsured/underinsured motorist liability coverage. There is no evidence suggesting that Nationwide offered such coverage to Plaintiffs. Therefore, uninsured motorist coverage arises by operation of law. ***Gyori, 76*** Ohio St.3d at 568.

In ***Joyce Lloyd, et al. v. Randall Hogue, et al.*** (June 14, 2001), Hamilton County C.C.P. Case No. A-98-06365, unreported, another ***post-Davidson*** decision, the Court cited with approval the ***Turner*** case and referred to its reasoning as "compelling" in finding that there was underinsured motorist coverage available to the claimants under the terms of a homeowner's policy.

The Stark County Common Pleas Court held in ***Raymond Mattox, et al. v. Allstate Insurance Company*** (July 11, 2001), Stark Cty. C.C.P. Case No. 2000CV00225, unreported that the plaintiff was entitled to UM/UIM coverage pursuant to the terms of his Allstate homeowner 's policy. Judge Richard Reinbold distinguished the ***Davidson*** opinion and held that the

"residence employee" extension of coverage was more "akin to the ***Selander*** and *Goettenmoeller* cases" than it was to the coverage at issue in ***Davidson.*** Moreover, because the Supreme Court declined to address the 'residence employee" exclusionary language and because this language provided liability coverage for vehicles that "are being used on public roads" the court found that UM/UIM coverage was required to have been offered. Because Allstate failed to offer UM/UIM coverage, it arose by operation of law.

In ***Joseph*** *Pickett,* ***et al.*** *v.* ***Eric*** *Strouble,* ***et al.*** (July 9,200 1), Stark Cty. C.C.P. Case No. 2000CV02260, unreported, Judge Sinclair held that a policy covering "mobile equipment" which is subject to motor vehicle registration is distinguishable from the result in ***Davidson,*** and that under the holding in *Selander*, uninsured/underinsured motorist coverage must be offered or it arises by operation of law. The court stated:

> In ***Selander*** *v.* ***Erie Ins. Group*** (1999), 85 Ohio St.3d 541,544, the Supreme Court examined a general business liability policy and held that where motor vehicle liability coverage is provided, even in limited form, uninsured/underinsured motorist coverage must be provided.
>
> In the instant case, the policy insures the highway use of "'mobile equipment' registered in your name under any motor vehicle registration law * * *." Thus, "mobile equipment," as defined in the policy includes vehicles which qualify as "motor vehicles" under Ohio law and bring it within the ambit of R.C. 3937.18.

* * *

The instant case does not involve a homeowner's policy but a general commercial policy issued for a term of three years. The policy at issue insures "mobile equipment" registered in your name under any motor vehicle registration law, and any person is an insured while driving such equipment along a public highway with your permission." It is therefore ORDERED that the plaintiffs' motion for summary judgment is herein GRANTED.

Although not a homeowner's policy case, the court still applied R. C. §3 93 7.18 to the policy because it extended liability coverage for those vehicles used on public roadways, again, a correct interpretation and application of the holding in ***Selander.***

In ***Doris*** *Hoke* ***v. State Farm Fire & Casualty Company*** (July 17, 2001), Licking Cty. C.P.P. Case No. OOCV987, unreported, Judge Gregory Frost found that the residence employee exception provided automobile liability coverage which triggered the mandatory offering of UM/UIM coverage. Dennis Lloyd was killed in a motor vehicle collision caused by the negligence of one Grady O. Edwards. Edwards had a 100/300 liability policy issued by Westfield. Doris Hoke, Lloyd's mother was insured under a homeowner's policy issued by State Farm Fire & Casualty Company. The policy contained the residence employee extension of coverage. The court observed:

> In response, and in support of her Motion for Summary Judgment, Plaintiff relies on a number of different Ohio decisions. ***See, Cincinnati v. Torok*** (May 22, 2001), Jefferson County Common Pleas Court Case No. 00-CV-1417, unreported; *Turner* v. *Pfleager* (Jun. 5, 2001), Delaware County Court of Common Pleas Case No. 99CV-C-12-432; and ***Lloyd*** *v. Hogue*, Hamilton County Common Pleas Case No. A-98-06365 (undated entry granting plaintiff's motion for summary judgment). These decisions more narrowly construe the holding in ***Davidson,*** and conclude the residence employee exception presently considered is distinguishable from the exception for recreational vehicles considered in ***Davidson.*** These cases recognize the residence employee exception is included in policies because it envisions the need to provide coverage for injuries sustained by a residence employee from the use, maintenance, and operation of a motor vehicle which is intended for use on public highways and is subject to motor vehicle registration. Accordingly, these courts have found this narrow provision of coverage constitutes motor vehicle liability coverage which must be offered in compliance with the uninsured/underinsured statute. These cases likewise discuss the above-mentioned broader interpretation of ***Davidson,*** but ultimately conclude the ***Davidson*** decision, which did not abrogate ***Selander,*** leads to the result UM/UIM coverage must be offered at the time a policy with the residence employee exception is issued, or such coverage will exist by operation of law.
>
> Once case cited by Plaintiff, *Turner* ***v.*** *Pfleager* (Jun. 5, 2001), Delaware County Common Pleas Case No. 99CV-C-12-432, unreported, provides a particularly detailed, sound, and reflective analy sis. The ***court*** in ***Turner*** takes into consideration each facet of the ***Davidson*** decision, including the need to consider the parties' intentions, the need to construe policy language, the need to consider whether the specific vehicle is one intended for use on a public highway, and whether the specific vehicle is subject to motor vehicle registration in Ohio.

* * *

> Based on the above, the ***court*** in ***Turner*** held the homeowner's policy was subject to the provisions of R.C. 3937.18.

> Turning to the case at bar, this Court finds that Plaintiff's Motion for Summary Judgment on Count One of the Amended Complaint must be granted, and Defendant's Motion for Summary Judgment must be denied. First, the ***Davidson*** syllabus compels consideration of certain elements. Specifically, this Court must consider whether the residence employee exception in the homeowner's policy issued by Defendant provides limited liability coverage for vehicles subject to motor vehicle registration and intended to be used on public highways. In considering these factors, the Court finds the residence employee exception at issue does provide limited coverage for vehicles subject to registration and intended to be used on public highways. Thus, the "type" of coverage provided in the residence employee exception is motor vehicle liability coverage, which provides coverage for specific instances which occur in the insured's motor vehicle. By including such language, the Parties intended to include limited motor vehicle liability coverage in the homeowner's policy issued by Defendant. Whether or not the ***Davidson*** opinion is deemed a departure from the Ohio Supreme Court's previous holdings in the area of uninsured/underinsured motorist coverage law, the analysis demonstrates the policy provides limited motor vehicle liability coverage. Therefore, the policy is subject to the dictates of R.C. 3937.18, and gives rise to UM/UIM coverage as a matter of law.

Id., at 7-8. Based upon the foregoing, the court found UM/UIM coverage in *Hoke*.

In Larry ***E. Clevinger, et al. v. James P. Timson,*** et ***al.*** (August 9, 2001), Licking County C.C.P. Case No. 00CV789, unreported, Judge Jon R. Spahr denied Erie Insurance Company's motion for summary judgment based upon the decision in ***Hoke v. State Farm Fire & Casualty Company.***

In ***Libby Trussell v. United Ohio Insurance Company*** (August 23, 2001), Perry County C.C.P., Case No. OO-CV-25342, unreported, the plaintiff filed a complaint for declaratory judgment seeking UM/UIM coverage on a homeowner's policy issued by United Ohio Insurance Company. Trussell was injured in a motor vehicle collision caused by an underinsured motorist. The United Ohio policy contained an exclusion for bodily injury for claims arising in the ownership or operation of a motor vehicle, but also contained an exclusion for claims made by "domestic employees" against Trussell. A "domestic employee" was defined in the policy as:

> * * * a person employed by an insured to perform duties that relate to the use and care of the insured premises. This includes a person who performs duties of a similar nature elsewhere for an insured. This does not include a person performing duties in connection with the business of an insured.

Judge Linton D. Lewis, Jr. held that the United Ohio policy was in fact a "homeowner's policy which provides personal liability coverage resulting out of Plaintiff Trussell's use of a motor vehicle. In that said motor vehicles are to be subject to motor vehicle registration laws and are designed for use on public roads, Davidson does not exclude coverage in the case at bar." Judge Linton held that the plaintiff was entitled to UM/UIM coverage in an amount equal to the liability limits of the homeowner's policy.

In ***Susan E. Caylor, Etc., et al. v. Pacific Employers Insurance Company, et al.*** (August 3, 2001), Miami County C.C.P. Case No. 99-400, unreported, Judge Robert J. Lindeman citing *Davidson* and *Selander*, held that UM/UIM coverage arose by operation of law in a commercial general liability policy issued by Cincinnati Insurance Company to the First United Methodist Church (FUMC). In ***Caylor,*** the plaintiff was returning from a Boy Scout activity at a local park when he was involved in an accident with underinsured motorist. Caylor was a volunteer with Boy Scout Troop 82 which was sponsored by the First United Methodist Church. Caylor was a member of the church, but not an employee. He sought UIM coverage under the CGL policy issued by Cincinnati to FUMC.

While the court held that Caylor was not entitled to coverage under a ***Scott-Pontzer*** analysis, as he was not an employee, the court found that the Cincinnati policy extended liability coverage for parking an auto on the insured's premises. The court held that this extension of automobile liability coverage mandate a corresponding offer of UM/UIM coverage because the liability coverage extended applied to vehicles subject to motor vehicle registration and for use on public roadways. Judge Lindeman distinguished the holding in ***Davidson*** on this basis and found that UM/UIM coverage existed in the CGL policy by operation of law.

b. Courts Finding No Coverage

However, other courts have taken a more expansive view of the holding in *Davidson* and have held that the extension of automobile liability coverage or "residence employees" is insufficient in order to render the policy an automobile liability policy of insurance and thereby invoke the mandatory offer requirements of R.C. § 3937.18(A).

In ***Lynn Davis v. Shelby Insurance Company*** (June 14, 2001), Eighth District C.A. No. 78610, unreported, the Eighth District found that there was no coverage in a homeowner's policy under the "residence employee" language.' In ***Davis.*** Judge Timothy E.

McMonagle, writing for the panel, stated:

> We acknowledge that the *Davidson* court did not specifically address whether a residence employee exclusion in a homeowner's policy could be construed so as to provide UM/UIM coverage. Id. at 265, fn. 2. We see no reason, however, not to extend the reasoning of *Davidson* to the policy at issue in this case.

* * *

> Common sense alone dictates that neither the insurer nor the insured bargained for or contem plated that such homeowner's insurance would cover personal injuries arising out of an automobile accident that occurred on a highway away from the insured's premises, *Davidson*, 91 Ohio St.3d at 269.

The problem with this analysis is that is assumes too much. It can hardly be reasoned that this type of coverage was not "bargained for" or "within the contemplation of the parties" when the insurer's underwriting department undertook to specifically insert this "residence employee" exception to a broader exclusion of coverage. This language is clearly a part of the insurance contract and, as such, was bargained for as part and parcel of the coverage obtained by the insured. That the insurer did not foresee the result of its inclusion of this language does not translate to its being "unanticipated." Insurers have consistently stated in oral argument that this policy language was intentionallv placed in homeowner's policies to address a situation in which the insured would not be covered by their own personal automobile liability policy. Therefore, there was clear reason to include this coverage in the homeowner's policy to protect the insured. This flies in the face of the court's decision in *Davis* and its assertion that the coverage was not "bargained for." Moreover, because the coverage extension clearly applies to automobiles for use on public roadways and subject to motor vehicle registration, there is absolutely no basis for the court's broad assertion that there was no contemplation that the policy would "cover personal injuries arising out of an automobile accident that occurred on a highway away from the insured's premises."

The Eighth District also recently decided another case, *Martin Hillyer v. State Farm Fire & Casualty Company* (August 13,200 1), Eighth District C.A. Case No. 79 176, unreported,[3] again finding no UM/UIM coverage in a homeowner's policy based upon the "'residence employee" language. In *Hillyer*, Judge Diane Karpinski, writing for the panel stated that:

> Extending the reasoning of *Davidson* to the policy at issue, this court in *Davis* held that the policy at issue cannot be construed so as to provide UM/UIM coverage.
>
> We agree with this analysis. If any UM/UIM coverage should have been offered, it would have been limited to the residence employee only. It would not have extended to any family member of the insured. The trial court correctly granted summary judgment in favor of the insurer because the insured had no UIM coverage for his daughter under his homeowner's policy.

The problem with the court's reasoning in *Hillyer* is that the Supreme Court had already addressed the issue of the scope of coverage found to exist by operation of law, and had specifically held otherwise. In *Selander*, Justice Frances E. Sweeney observed that:

> [I]n *Demetry v. Kim* (1991), 72 Ohio St.3d 692, 595 N.E.2d 997, the Tenth District Court of Appeals rejected the argument that to qualify for "implied underinsured coverage],] appellant's decedent must first fit within the liability coverage afforded by the policy." The court held that "there is nothing, absent clear language evidencing an intent to do so, to prevent uninsured/underinsured coverage from being broader than liability coverage." *Id.* at 698,595 N.E.2d at 1001.

Therefore, even though the decision by the court in *Hillyer* was supposed to have been an extension of the logic in *Davidson*, it clearly it not supported by the *Davidson* opinion itself.

In *Carol Brad, et al. v. State Farm Fire & Casualty Co., et al.* (May 15,200 1), Montgomery Cty. C.C.P. Case No. 00-2900, unreported, Judge John Kessler held that there was no coverage under the plaintiff's homeowner's policy under application of the Supreme Court's decision in *Davidson*. It appears that the claimed right to coverage was due to an extension of liability coverage in the policy for recreational and utility vehicles. As such these would not have been vehicles subject to motor vehicle registration and not for use on public roadways. Therefore, it would appear that to apply the holding in *Davidson* would have been appropriate based upon the nature of the coverage extended.

Judge David T. Matia held in *Ann Duchez v. State Farm Fire & Casualty Company, et al.* (June 5, 2001), Cuyahoga County C .C.P. Case No. 4 19770, unreported, that there was no UM/UIM coverage on the plaintiff's homeowner's policy. Judge Matia stated:

> It is unfortunate that the *Davidson* court refused to decide that question, but this Court hereby declines to find that the policy language of a

homeowner's policy covering residence employees leads to implied UM/UIM liability coverage. The reasoning utilized by Judge Francis E. Sweeney, Sr. is equally persuasive on the "residence employee" issue. Neither the insurance company nor the policyholder contemplated or bargained for automobile liability coverage for personal injuries suffered by Ann Duchez, particularly as she is not an employee working in the home. Principles of contract dictate that the intention of the parties is paramount. The extension of the homeowner's policy coverage propounded by plaintiff, and consequently, the implication plaintiff is asking the Court to make, belie that intent.

As discussed above, it is clear that automobile liability coverage was intended by the insertion of the '"residence employee" policy provisions, so it would appear that the real intention of the parties was to include this coverage. That the insurer appreciated the full scope of this inclusion is irrelevant. *Duchez* is another example of a court making a very broad interpretation of *Davidson*, and overlooking the actual syllabus in order to stretch the *dicta* in the *Davidson* opinion to resolve the case.

In Holly ***Bergstrom v. State Farm Fire & Casualty Company*** (June 1, 2001), Cuyahoga County C.C.P. Case No. 410020, unreported," Judge Kathleen Ann Sutula also held that there was no UM/UIM coverage available under the plaintiff's homeowner's policy. The Court stated that while it recognized that the "residence employee" language was not passed upon in *Davidson*, the direction of the Court was apparent from its reasoning. Again, the court based its holding upon the alleged "intent of the parties" and asserted that "nothing in the record even begins to suggest that the Plaintiff intended to purchase motor vehicle liability insurance when she purchased the homeowner's policy, or that State Farm intended to sell such insurance when it sold this policy to Plaintiff." On that basis the Court stated that it "elects to follow the lead of the Ohio Supreme Court in *Davidson* and concludes that the homeowner's policy is not a motor vehicle liability policy of insurance for purposes of O.R.C. section 3937.18 analysis."

In ***Carmen Marino, Etc. v. Cincinnati Insurance Company*** (May 14, 2001), the court again focused on the intent of the parties to find that there was no UM/UIM coverage available to the plaintiff under her homeowner's policy. The Court observed that:

> It strains logic and even common sense to read uninsured/underinsured motorist coverage into Mrs. Marino's homeowner's insurance policy on the basis of an implied limited motor vehicle liability coverage. Moreover, to do so does not advance any public policy served by O.R.C. § 3937.18.

Perhaps the court should have re-examined the statute, as the mandatory offer of UM/UIM coverage when there is automobile liability coverage issued in a policy is in fact a public policy furthered by the statute which seeks to protect persons injured by uninsured/underinsured motorists.

In ***Mary Ann Radachy Carlile v. USAA Casualty*** Co., et ***al.*** (April 20, 2001), Cuyahoga County C.C.P. Case No. 4 10675, unreported, the court stated that "[t]wo things are clear about ***Davidson.:*** one, the Court uses strong language in enforcing the intention of the parties' to the homeowner's insurance contract; and two, the Court intended to rein in its decision in *Selander*." The court went on to find that any extension of automobile liability coverage was incidental, secondary and minor and the policy was not an automobile liability policy. It is interesting, however, that if the intention of the Supreme Court was so strong as to have meant its decision in *Davidson* to answer the "residence employee" issue, then it seems unlikely that the Court would not have gone ahead and decided the issue anyway. The fact that the Court did not do so leaves wide open the possibility that the outcome would have been markedly different in application.

Two other cases from the federal court have also found no UM/UIM coverage in homeowner's policies. In ***Robert Mizen, Etc. v. State Farm Fire & Casualty Company*** (July 2, 2001, N.D. Ohio), U.S. District Ct. Case No. 1:00CV1249, unreported and ***Lashawn Rogers, et al. v. State Farm Fire & Casualty Company*** (July 2, 2001, N.D. Ohio), U.S. District Ct. Case No. 1 :00CV23 17, unreported,' Judge Patricia Anne Gaughan granted summary judgment in favor of State Farm in both cases Both cases involved UM/UIM claims under the plaintiffs' homeowner's policies and both were premised upon the "residence employee" language in the policies. Judge Gaughan held that the policies were not automobile policies and therefore subject to R.C. $3937.18 because "the Court cannot conclude that plaintiff herein would have expected coverage for injuries sustained in an automobile accident based upon an exception contained in the policy covering automobile injuries for residence employees ." The "expectation" test was again used by the court to hold that there was no reasonable contemplation of coverage. However, given that the insurer purposely inserted the residence employee exception language into the policy. it

cannot be concluded that automobile liability coverage was not within the "'expectation of the parties." That the scope of the coverage was unforeseen by the insurer has never been a determinative factor,

In *Wodrich*, *supra*, the court dismissed the insurer's argument regarding intent of the parties stating "in *Selander* * * * we rejected several of the insurer's arguments, including the fact that the policy expressly excluded automobile coverage, and that a fair reading of the policy indicated that the parties never intended UIM coverage to be provided." In *Selander*, Erie Insurance had argued that the Fivestar General Liability policy it had issued to the plaintiffs was never intended to provide UMIUIM coverage, and pointed to the fact that the plaintiffs had obtained UM/UIM coverage through Erie's Pioneer Commercial Automobile Policy, thus negating any assertion that they intended the CGL policy to provide this coverage. The court was unpersuaded, stating "contrary to appellant's argument, the fact that the Selanders had obtained uninsured/ underinsured coverage through a separate policy in no way indicates that they did not intend to obtain additional coverage under the Fivestar policy. See, *Speelman*."[6] Because the policy language is clear, and not ambiguous with regard to the "residence employee" extension of coverage, a determination of the "intent of the parties" is not necessary. As the Supreme Court observed in *Scott-Pontzer*, "as the law is clear in this regard, we will not guess at the intent of the parties to the insurance contract * * * ." Id., 85 Ohio St.3d at 666,710 N.E.2d at 1121.[7]

In short, where the policy extends automobile liability coverage for motor vehicles subject to motor vehicle registration and for use on public roadways, this is clearly sufficient under R. C. § 3 93 7.18 to invoke the mandatory offer of UM/UIM coverage contemplated by the legislature for the protection of Ohio motorists.

IV. H.B. 261 & Homeowner's Policies.

No discussion of homeowner's policies would be complete without some reference to H.B. 261 and the impact that it may have upon these claims for coverage. Effective September 3, 1997, H.B. 261 added section (L) to R.C. $3937.18. Section (L) provides:

> As used in this section, "automobile liability" or "motor vehicle liability policy of insurance" means either of the following:
>
> (1) Any policy of insurance that serves as proof of financial responsibility, as proof of financial responsibility is defined by division (K) of section 4509 .0 1 of the Revised Code, for owners or operators of the motor vehicles specifically identified in the policy of insurance.
>
> (2) Any umbrella liability policy of insurance written as excess over one or more policies described in division (L)(1) of this section.

Insurers arguing the application of the revised version of the statute will argue that the homeowner's policy does not serve as proof of financial responsibility and, as a result, the policy is not an "automobile liability" policy of insurance. Counsel should be cognizant of several approaches.

Under the holdings in *Wolfe v. Wolfe* (2000), 88 Ohio St. 3d 246, and *Ross v. Farmers Group of Insurance Cos.* (1998), 82 Ohio St.3d 28 1, the amended version of the statute may not even be applicable. In *Wolfe*, the Supreme Court held that:

> "the guaranteed period mandated by R.C. 3937.3 l(A) is not limited solely to the first two years following the initial institution of coverage. Rather, the statute applies to every new automobile insurance policy issued, regardless of the number of times the parties previously have contracted from motor vehicle insurance coverage."

In *Ross*, the court held that:

> For purposes of determining the scope of cover age 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.

In'., at syllabus. Using the foregoing, it may be possible, depending upon the inception date of the policy to argue that the revised statute was not incorporated into the policy and is inapplicable. A set of interrogatories and/ or requests for production of documents served early on in a case can be used to identify the policy's inception date, if it appears that H.B. 26 1 may be an issue. In the event that the policy is controlled by the revised statute, the argument may be advanced that the policy does in fact meet the requirements of 4509 .0 1 of the Revised Code. This section provides that:

> "Proof of financial responsibility" means proof of ability to respond in damages for liability, on account of accidents occurring subsequent to the effective date of such proof, arising out of the ownership, maintenance, or use of a motor vehicle in the amount of twelve thousand five hundred dollars because of bodily injury to or death of one person in any one accident, in the amount of twenty-five thousand dollars because of bodily injury to or death of two or more persons in any one accident, and in the amount of seven thousand five hundred dollars because of injury to property of others in any one accident.

It can be argued that because most homeowner's are issued for amounts of at least $100,000, that the policy fulfills the requirements of the statute, at least with respect to the scope of the liability coverage offered in the policy. Again, there is nothing preventing the UM/UIM coverage created by operation of law from being broader than the liability coverage in the policy. *Selander*.

CONCLUSION

It is unclear whether the Ohio Supreme Court, when and if, it decides to address this issue will hold to the distinction it made between ***Selander*** and ***Davidson*** or backtrack on the cover issue completely. However, until such time, there are strong and well reasoned arguments to support claims for UM/UIM coverage in homeowner's policies under the extension of automobile liability coverage to residence employees.

1. Although ***Scott-Pontzer*** was not a homeowner's case, it went a long way toward bringing about a clearer understanding of the concept of coverage created by "operation of law."
2. The decision in ***Davis*** has been appealed to the Ohio Supreme Court on a discretionary appeal and has been assigned case number 01-1128.
3. The decision in ***Hillyer*** has been appealed to the Ohio Supreme Court on a discretionary appeal and has been assigned case number 01-1474.
4. The decision in ***Bergstrom*** has been appealed to the Eighth District Court of Appeals and has been assigned court of appeals case number 79775.
5. Both ***Mizen*** and ***Rogers*** have been appealed to the Sixth Circuit Court of Appeals, motions have been filed in both cases asking the appellate court to certify the legal question of coverage to the Ohio Supreme Court for a decision.
6. ***Speelman v. Motorists Mutual Insurance Co.*** (1995), Second District C.A. Case No. 15362, 1995 Ohio App. LEXIS 5835, unreported.
7. ***Scott-Bontzer v. Liberty Mutual Insurance Company*** (1999), 85 Ohio St.3d 660, 710 N.E.2d 1116case, it went a long way toward bringing about a clearer understanding of the concept of coverage created by "operation of law."

Law Update

by Stephen T. Keefe, Jr.

Insurance Law - OIGA Coverage - Excess Policy

Rushdan v. Baringer (Aug. 30, 2001), 2001 Ohio **App.** LEXIS **3827,** Cuy. App. **No. 78478, unreported** (plaintiff entitled to additional $300,000 from OIGA under excess policy of insurance when OIGA stipulated that the value of plaintiff's claims exceeded the policy limits of the primary policy of insurance).

Defendant, Ohio Insurance Guaranty Association ("OIGA"), appealed the trial court's decision holding that plaintiff-appellee, Regina Rushdan, was entitled to recover an additional $300,000 from OIGA under an excess or umbrella policy of insurance issued to defendant, David Baringer, M.D. after his liability insurer became insolvent. The Eighth District affirmed.

Defendant Baringer had a primary policy of insurance with limits of $1 million and an excess policy with additional limits of $1 million. Both policies were issued by PIE. When PIE was declared insolvent and ordered into liquidation, OIGA assumed Baringer's defense pursuant to the Ohio Insurance Guaranty Act, R.C. Chapter 3955. In August 1999, a partial settlement agreement was reached between OIGA and Rushdan, and *the OIGA stipulated that the value of Rushdan's claims against Baringer totaled $1. 3 million.* Rushdan agreed to accept the OIGA's offer of $300,000 (i.e., its statutory limit per RC. 3955.01(D)(2)(b)), plus a Class 2 claim in the amount of $1,000,000).

Despite the settlement, Rushdan maintained the she had a separate covered claim under Baringer's excess policy and was therefore entitled to an additional payment of $300,000 from the OIGA. Rushdan amended her complaint to name the OIGA as a new party defendant and added a claim for declaratory relief. The parties filed cross-motions for summary judgment, and the trial court ruled in Rushdan's favor. In doing so, the trial court rejected OIGA's argument that Rushdan was not entitled to recover under the excess policy because she only received $300,000 and not the $1 million limit under the primary policy:

> . . . [T]he OIGA must meet P.I.E.'s obligations under the Excess Policy as if the full limits of the primary policy had been available for payment. OIGA's attempts to use [the] P.I.E. insolvency to shield its obligations under the excess policy is not permissible under the Act. Indeed, OIGA has already acknowledged that the full $1.3 million settlement value would have been payable by P.I.E. but for its insolvency. Thus, OIGA is obligated under the terms of the excess policy as if Rushdan had been paid the full $1 million under the primary policy.

On appeal, OIGA argued that (1) the trial court erred in finding that Rushdan had two separate covered claims, and (2) even if the statute can be interpreted to find two separate covered claims, there is no coverage under the excess policy because the $1 million limit has yet to be paid under the primary policy.

Regarding OIGA's first assignment of error, R.C. 3 955.0 1 (D)(1) defines a "covered claim" as "an unpaid claim.. .which arises out of and is within the coverage of *an insurance policy* to which Sections 3955.01 to 3955.19 of the Revised Code apply, when issued by an insurer which becomes an insolvent insurer. ..". The appellate court agreed with plaintiff-appellant that the language "an insurance policy" in the definition of a "covered claim" intimates that there may be one claim under the primary policy and one claim under the excess policy. Finding the statute to be unambiguous, the Eighth District observed that "[h]ad the General Assembly intended to limit coverage to one set of circumstances or one particular event it could have done so. This it did not do and we are without authority to add words to the statute that are not there nor delete words that are". In so holding, the court distinguished and refused to follow the law of other jurisdictions which have found one single covered claim even when an insured like Dr. Baringer has purchased both a primary and excess policy from insolvent insurers.

First, the court found the OIGA's reliance on Havens *Steel Co. v. Missouri Property & Cas. Ins. Co. Guar. Assn.* (MO. 1997), 956 SW. 2d 906 and *North Carolina Ins. Guar. Assn. V. Burnette* (1998), 131 N.C. App. 840 to be misplaced. In *Havens,* the insured obtained a primary policy with limits of $1 million and an excess policy with limits of $4 million. Reimbursement in the amount of $5 15,000 was sought from the Missouri Insurance Guaranty Association. *Because this amount was less than the insured's limit under its primary policy, coverage under the excess policy would never have been available had the primary insurer not become insolvent.* In *Burnette,* there was no value attributed to the third-party's claims against the insured. In this case, by contrast, the parties agreed that Rushdan's claims had a reasonable settlement value of $1.3 million,

In addition to distinguishing and refusing to follow the foregoing cases, the appellate court looked to the express language of the PIE policies for guidance. The excess policy provided that "[PIE] agrees to indemnify [Baringer], in accordance with the applicable provisions of the Underlying Insurance for the amount of Loss which is in excess of the applicable limits of the Underlying Insurance described in the Declarations". Based on this language, and more notably on the stipulation of the parties that Rushdan's claims totaled $ 1.3 million, the court held:

> It is undisputed that Rushdan has a covered claim under the primary policy and therefore is entitled to coverage based on the parties' stipulated reasonable settlement value of $1.3 million. What is disputed is whether there exists a covered claim under the excess policy. We conclude that Rushdan does have a covered claim under that policy. But for its insolvency, PIE would have paid $1 million under the primary policy and a claim under the excess policy would have been made for the remaining $300,000.00. Had the reasonable settlement value been less than $1 million, coverage under the excess policy would never have been available.. . .In such a case, OIGA's liability would have been statutorily limited to $300,000.00. But that is not the case here. *Because the parties stipulated that the reasonable settlement value of exceeded the limit under the primary policy, a covered claim arose under the excess policy to which OIGA must provide coverage.* (Emphasis added).

Regarding OIGA's second assignment of error, the appellate court agreed with OIGA's reasoning that it is only liable for the same claims as the insolvent insurer would have been. However, the court once again pointed out that in this case, "PIE was found liable for $1.3 million". The court therefore concluded that "[m]erely because OIGA is momentarily limited by statute as to the amount it will pay on a covered claim should not render meaningless the fact that, but for PIE's insolvency, the latter would have paid the sum of $1 million under the primary policy thereby invoking coverage under the excess policy".

Insurance Law - Underinsured Motorist Coverage

Stafford v. Soha (Aug. 16, 2001), 2001 Ohio App. LEWIS 3599, Cuy. App. No. 78666, unreported

On April 4, 1997, plaintiff Stafford was a passenger in a 1990 Buick operated by his former girlfriend, defendant Virginia Gullion. The vehicle was titled in the name of Gullion's estranged husband, defendant Ronald Coleman. A vehicle driven by defendant Barbara Soha collided with the Buick, resulting in serious injuries to Stafford. On the date of the accident, Mercedes Coleman, the mother of the titled owner of the Buick and Gullion's mother-in-law, was insured under a Nationwide auto liability policy. The policy's Declarations identified the insured vehicles as a 1993 Ford Escort and a 1985 Toyota Van, *but not the 1990 Buick.* The policy provided UM/UIM coverage in the amount of $100,000/$300,000. The policy also contained an endorsement providing UM/UIM coverage to any person who suffers bodily injury in a vehicle being driven by a relative of the policyholder.

After Soha's insurer tendered limits, Stafford sought UIM overage under Mercedes Coleman's Nationwide policy on the basis that he was a passenger of a vehicle being operated by a relative of Mrs. Coleman. Nation-

wide and Stafford filed cross-motions for summary judgment. The trial court granted summary judgment in favor of Nationwide, holding that Gullion, who was related by marriage to Ronald and Mercedes Coleman, was not a resident relative for purposes of insurance coverage because she was estranged from, and living apart from, Ronald Coleman, and because her prior living arrangements with Mercedes Coleman were irregular and transient.

The Eighth District reversed:

> "In order for Stafford to be eligible to recover under Mrs. Coleman's UM coverage as an insured for having suffered injuries while occupying an other motor vehicle driven by a relative (Gullion) of the policyholder, it must be shown that Gullion, at the time of the accident, was a relative under the terms of the policy. The policy, as previously detailed, requires two predicate conditions for someone to be considered a relative . . . , First, the putative relative must be related to the policyholder by blood, marriage or adoption. Gullion satisfies this first condition because, at the time of the accident and despite her estrangement from her husband at that tirne, she was related by marriage to the policyholder; Gullion was Mrs. Coleman's daughter-in-law. The second condition is that, allowing for temporary living outside the policyholder's household, the putative relative regularly lives in the policyholder's household. This second condition is more problematic.. . .Despite [the] irregular, intermittent pattern of moving in and out of the policyholder's home by Gullion, and the fact that Gullion was not living in the policyholder's home at the time of the accident, we are forced to apply the version of R.C. 3937.18(A)(1) as it existed at the time of the 1996 renewal of the policy in question. See *Wolfe v. Wolfe* (2000), 88 Ohio St.3d 246, paragraph two of the syllabus (The commencement of each policy mandated by R.C. 3937.3 l(A) brings into existence a new contract of automobile insurance, whether the policy is catergorized as a new policy of insurance or a renewal of an existing policy); *Ross v. Farmers Ins. Group of Cos.* (1998), 82 Ohio St.3d 281 (the law in force at the time an insurance contract is made defines the rights and duties of the parties to the contract). Also, we must give effect to the pronouncement that insurance policies with uninsured/ underinsured motorist provisions excluding relatives who do not live with the policyholder violates R. C. 3937.18(A)(1). See Moore *v. State Auto Ins. Co.* (2000), *88* Ohio St.3d 27, 3 l-33. Accordingly, Gullion was an insured person under the terms of the policy for purposes of R.C. 3937.18(A)(1).
>
> * * *
>
> In addition to arguing that UM coverage is precluded because Gullion was not a relative who regularly lived in the policyholder's household, Nationwide argues that the vehicle driven by Gullion was not an insured vehicle under the terms of the policy because (1)the vehicle was not specifically listed in the Declarations page of the policy as a covered vehicle.. .and (2) the vehicle was owned by Ronald Coleman, a relative of the policyholder, and is therefore precluded UM coverage by virtue of Endorsement 2352, Other Persons, paragraph 2(d)(l), which excludes coverage of other motor vehicles which are driven by a relative and which are owned by.. .a relative.' Applying the 1996 version of R.C. 3937.18, both of these supplemental arguments lack merit since the purported exclusions are unenforceable as a matter of law. In *Martin v. Midwestern Group Ins. Co.* (1994), 70 Ohio St.3d 478, paragraph three of the syllabus, the Supreme

> Court held that the other owned vehicle exclusion, which eliminates UM coverage for persons who are injured while occupying a motor vehicle owned by an insured, but not specifically listed in a policy, violates R.C. 3937.18 and is invalid.. . .In *Nationwide Mut. Ins. Co. v. Jones* (1994), 70 Ohio St.3d 491, the Supreme Court, based on *Martin,* invalidated a UM policy exclusion precluding coverage for vehicles owned by a relative of the policyholder. In summary, UM coverage, as a matter of law, is available to Stafford through the policy in issue up to the policy limits of $100,000 and the trial court erred in granting summary judgment to Nationwide and denying summary judgment to Stafford.

Insurance Law - Class Action - Subject Matter Jurisdiction - Primary Jurisdiction

Lazarus v. The Ohio Casualty Group (July 12, 2001), 2001 Ohio App. LEXIS 3095, cuy. App. No. 77791, unreported.

Plaintiff filed a class action complaint alleging that she and 75 0 similarly situated individuals paid multiple premiums for UM/UIM coverage, subsequent to October 5, 1994, which was simultaneously in effect and applicable to the same persons in the same household. Plaintiff's claims were based on the Ohio Supreme Court's holding in *Martin v. Midwestern Group Ins.* (1994), 70 Ohio St.3d 478 which eliminated the other owned vehicle exclusion for UM/UIM coverage. Prior to *Martin,* an injured person was covered by UIM only if he or she was in a vehicle covered by UIM coverage. In *Martin,* the Court held that because UIM coverage protects persons, not vehicles, coverage follows the insured persons regardless of whether or not they were in a covered vehicle at the time of the accident, as long as they were in a vehicle owned by a relative living in the same household who was the insured person. In light of *Martin,* a family needed coverage on only one vehicle in the household to insure all the relatives living in that household while they were injured riding in any vehicle owned by the insured.

Plaintiff alleged that she and other similarly situated individuals were deceived because the insurer never informed them of the change in the law as a result of *Martin,* and they therefore continued to pay for UIM coverage individually on each vehicle in their household when the family in that household would have been covered by paying for only one vehicle. Plaintiff's complaint contained counts for breach of contract, breach of fiduciary duty, misrepresentation and fraud, negligence, conversion of additional multiple premiums, and unjust enrichment.

Defendant filed a motion to dismiss for lack of subject matter jurisdiction, arguing that plaintiff-appellant failed to exhaust her administrative remedies. More specifically, defendant claimed that plaintiff was complaining about a rate, which is in the exclusive jurisdiction of the superintendant of insurance, such that the trial court lacked jurisdiction until plaintiff brought her case before the Ohio Department of Insurance, The trial court agreed with defendant and granted the motion.

The Eighth District reversed, holding in part that the defendant-insurer is mistaken that plaintiff's cause of action falls *exclusively* within the category of rate-making. While the appellate court conceded that the approval and disapproval of insurance rates submitted by an insurer are within the exclusive jurisdiction of the superintendant of insurance, the court concluded that plaintiff's six causes of action, none of which is exclusively rate-making, focus not on the actual rate charged but rather on the information provided by the insurance company regarding what the rates cover. "In other words ," according to the court, "the issues are fraud and deceptive practices, unjust enrichment, conversion, breach of contract and fiduciary duty and negligence, not whether the rate charged was acceptable or not".

The Eighth District also rejected the insurer's argument that the authority of the superintendant extends to any issue in which an insurance rate or premium is involved. The court held:

> The authority of the superintendant of insurance is conferred by R.C. 390 1.04 l... .Appellee fails to demonstrate, however, that all the issues complained of are within the superintendant's duties and powers.

Nothing in the statute, for example, provides any authority to the superintendant for negligence. Absent the superintendant's express authority over this issue, the court could clearly proceed on appellant's claim of negligence. While the superintendant of the department of insurance has jurisdiction over the remaining claims, this jurisdiction is not exclusive. For example, he does not have exclusive jurisdiction over consumer complaints of insurance practices which are unfair or deceptive. While the superintendant has the authority to intervene to stop the deceptive actions complained of, and even has the authority to order reimbursement of the overcharged premiums, and thus has authority over a portion of some of the claims, the superintendant does not have the authority to award attorney, accountant or auditor fees, costs, or compensatory or punitive damages. The remedies available to the superintendant fall short of what is requested.

* * *

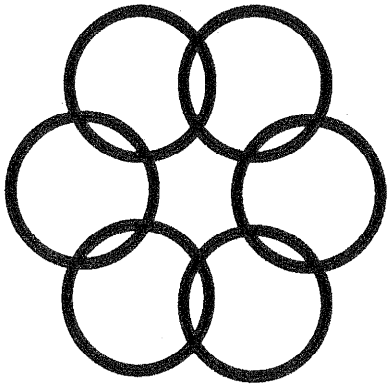
When authority is shared, the question is whether the superintendant has primary jurisdiction.. . .Under this doctrine the superintendant is allowed to establish a policy concerning a narrow issue prior to court review. The doctrine of primary jurisdiction comes into play if the use of administrative proceedings will contribute to a meaningful resolution of the lawsuit.. . . [A]ppellant is not required to bring a small portion of its claims to the Superintendant of the Department of Insurance before bringing its whole claim to the court. As the Supreme Court of Ohio said, potential referral of an issue to an administrative agency under the primary jurisdiction doctrine where an action is filed does not deprive the court of jurisdiction over the matter so as to require dismissal of the case. *Banc One Corp. v. Walker* (1999), 86 Ohio St.3d 169, 17 1. Rather than dismiss the case, the proper procedure is for the trial court to stay the case and refer to the office of superintendant those issues which the superintendant can help resolve. After that office has resolved the issues that are within its jurisdiction, the case should return to the trial court for adjudication of any remaining matters.. . .After reviewing the applicable statutes, we hold that the common pleas court has subject matter jurisdiction over the case at bar.

Insurance Law - Evidence of Non-Use of Seatbelt Not Permissible - Pre-H.B. 350 Version of R.C. 4513.26(F) Applicable

Rivera v. Overman (July 5, 2001), 2001 Ohio App. LEXIS 3012, Cuy. App. No. 78013, unreported.

Plaintiff-appellant suffered head, neck and shoulder injuries in a September 17, 1997 motor vehicle accident. Defendant stipulated to liability. Suit was filed on September 13, 1999. Defendant failed to raise plaintiff's failure to wear a seatbelt as an affirmative defense when answering the Complaint In April 2000, defendant requested leave to file an amended answer to raise the affirmative defense of contributory negligence for failure to wear a seatbelt. The trial court granted defendant's motion. Plaintiff filed a motion in limine to preclude defendant from arguing the seatbelt issue. The trial court denied plaintiff's motion and allowed this evidence to go to the jury. The jury found both plaintiff and defendant to be negligent and that the negligence attributable to plaintiff was 60%.

On appeal, plaintiff-appellant argued that the court erred as a matter of law by applying R.C. 45 13.263, as amended by H.B. 350, even though the legislation had been declared unconstitutional by the Ohio Supreme *Court* in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St. 3d 45 1. The Eighth District agreed and reversed and remanded for a new trial. In doing so, the court rejected defendant's argument that the H.B. 215 version of R.C. 4513.263, which



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permits the issue of seatbelt non-use to be presented to the-jury, should be applied because it was enacted *after* H.B. 350. The court observed that the H.B. 215 version of R. C. 45 13.263 contained the exact same wording as the H.B. 350 amendment to R.C. 45 13.263. Following *Stevens v. Ackman* (2001), 91 Ohio St. 3d 182, the **court** concluded that where the H.B. 2 15 amendment does not change the language of a statute enacted in the Tort Reform Act, H.B. 2 15 does not enact or reenact the statute. As such, the court held that the pre-Tort Reform version of R.C. 45 13.26(F) should have been applied to this case and the trial court should not have permitted the jury to hear evidence that appellant failed to wear a seatbelt.

Insurance Law - UM/UIM Coverage - Independent Corroborative Evidence Test

***Musaelyants v. Allstate Ins. Cu. (July 5,* 2001), 2001 Ohio App. LEXIS 3038, Cuy. App. No. 78797, unreported.**

On March 14, 1998, plaintiff-appellant was involved in a car accident while driving on Interstate 90 in New York. Plaintiff alleged that the accident was caused by a truck that clipped his vehicle as the truck was changing lanes, thereby causing his vehicle to spin **out** of control. The driver of the truck did not stop at the scene of the accident. Plaintiff made a claim with his insurer, Allstate, under the UM/UIM provisions of his policy. Allstate denied the claim on the basis that the particulars of the hit and run accident had not been corroborated by an independent witness. After suit was filed, Allstate moved for summary judgment. In response to Allstate's motion, plaintiff offered a letter from a driver on the highway who was directly behind him at the time of the accident and who observed the collision, as well as the testimony of his front seat passenger, Artem Petrenko. The trial court granted summary judgment for Allstate.

Applying the corroborative evidence test set forth in *Girgis v. State Farm Mut. Auto Ins. Co.* (1996), *7.5* Ohio St.3d 302, the Eighth District Court of Appeals reversed and remanded:

> In *Girgis*.. .the Ohio Supreme Court held that R. C 393 7.18, as well as public policy, precludes contract provisions in insurance policies from requiring physical contact as an absolute prerequisite to recovery under the uninsured motorist coverage provision.. . [I]n such instances, the test to be applied in lieu of requiring physical **contact** 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 the proximate cause of the accident. Thus, the independent witness must verify not only [the] existence of another vehicle, but also that the driver of the other vehicle proxirnately caused the accident in question.
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> * * *
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> Unfortunately for the appellant, the letter from the other driver on the road at the time of the accident was not in affidavit form or in other manner authenticated. The letter is not even dated. Accordingly, the letter could not have been considered by **the** trial court in ruling on the motion for summrary judgment and does not satisfy the *Girgis* independent corroborative evidence test. The testimony of Petrenko does satisfy the independent corroborative evidence test.. . . Although Petrenko did state that he hit his head when the car struck the guardrail and has trouble recalling some details of the incident, there is no indication that his memory is deficient as to the events that transpired prior to the car striking the guardrail. The appellee asserts that Petrenko is not an independent witness because he is a potential claimant under appellant's automobile insurance policy for injuries arising out of the same accident. We are aware of no precedent holding that a friend or acquaintance riding in the same car as the insured cannot be considered independent for the purposes of satisfying the corroborative evidence test of *Girgis.*

As a final note, because the accident occurred in New York, the Eighth District was called upon to decide a choice-of-law issue. Indeed, where a no-fault state such as New York does not recognize a claim against the tortfeasor-motorist, the Ohio insured is not entitled to collect UMIUIM benefits, [Citation omitted], Noting the lack of contacts with New York state, the court held that Ohio law governs. The insurance contract was made in Ohio, the insured vehicle was garaged in Ohio and the insureds are Ohio residents dealing with an Ohio insurance company. Further, there was no evidence that the tortfeasor was a resident of New York, and the court refused to make a presumption that a tractor-trailer traveling upon a freeway in New York state is driven by a New York resident or owned by a New York corporation.

Insurance Law - Cases of Interest From Around the State

Ferrando v. Auto-Owners Mut. Ins. Co. (Aug. 31, 2001), 2001 Ohio App. LEXIS 3914, Ashtabula App. No. 2000-A-0038, unreported.

In February 1994, plaintiff Ferrando was employed by the City of Ashtabula and was driving a vehicle owned by the city. After observing some debris falling off a dump truck, Ferrando stopped his car, engaged the hazard lights and exited the vehicle. While Ferrando was bent over picking up the debris, the dump truck backed up and struck his head. On May 20, 1997, Ferrando and his wife entered into a settlement agreement with the tortfeasor, Douglas Marvin, for Marvin's $12,500 policy limits. The Ferrandos' insurance company, Auto-Owners, gave the Ferrandos permission to settle with Marvin.

The Ferrandos then pursued a UIM claim against Auto-Owners. In the process, it was discovered that the City of Ashtabula carried UIM coverage through Personal Service for the vehicle involved in the accident. Personal Service received notice of the accident and lawsuit when Auto-Qwners sought to bring it into the lawsuit filed by the Ferrandos. The original suit was dismissed without prejudice. It is undisputed that Personal Service did not know about the Ferrando's settlement with Marvin or consent to his release.

On January 12, 1999, the Ferrandos refiled their complaint for declaratory judgment against Auto-Owners and Personal Service. They sought a determination from the trial court that UIM coverage was available to them under both policies. On February 2, 1999, Personal Service answered the complaint, raising as a defense that the release of the tortfeasor without its knowledge voided any UIM coverage that the Ferrandos might otherwise be entitled to receive, Personal Service thereafter filed a motion for summary judgment arguing that (1) the Ferrandos' act of settling with the tortfeasor constituted a material breach of the insurance contract thereby precluding coverage, and (2) the Ferrandos did not provide prompt notice of the accident as required by the policy.

The Ferrandos responded by arguing that they did not learn that Personal Service's insurance contract with the City of Ashtabula included UIM coverage until after entering into the release with the tortfeasor. The Ferrandos argued that notice to Personal Service was timely under the circumstances of the case, and that Personal Service was not prejudiced by the release because Auto-Owners had performed an asset check on the tortfeasor and found him to be uncollectible. The only evidence offered in support of this latter contention was a letter from Auto-Owners' attorney stating that his client agreed to waive its subrogation against the tortfeasor.

The trial court ruled in favor of the Ferrandos, holding that (1) Personal Service received reasonable notice of the Ferrandos' claim once it was discovered that the City of Ashtabula maintained UIM coverage for its employees, and (2) Personal Service was not prejudiced by any late notice because the tortfeasor was uncollectible.

In its sole assignment of error on appeal, Personal Service contended that the Ferrandos committed a material breach of the insurance contract, thereby resulting in the loss of their right to recover under the policy. While not disputing that the Ferrandos were covered persons under the policy pursuant to *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St.3d 660, Personal Service argued that the Ferrandos were not entitled to recover based on a policy exclusion for any claims settled without the insurer's consent. The Eleventh District agreed with the insurer's arguments and

reversed and entered judgment for Personal Service. More specifically? the appellate court determined that the contract required the insured, as a precondition to coverage, to notify Personal Service before any settlement was agreed upon and entered into, and that the Ferrandos's settlement with the tortfeasor was therefore a material breach of the contract that precluded coverage. While recognizing that a clause in an insurance contract requiring immediate or prompt notice of an occurrence is interpreted to mean that the notice must take place within a reasonable time under the surrounding facts and circumstances of a given case, the court held that the 3 ½ year delay before Personal Service learned of the possible claim was prejudicial as a matter of law. The court relied on the fact that (I) the Ferrandos had already settled their claim against the tortfeasor before Personal Service received *any* notice at all of the accident, and (2) the Ferrandos were unaware of the potential coverage due to their own failure to investigate or inquire into the scope of the city's insurance coverage. Finally, the appellate court determined that the Ferrandos failed to meet their burden of rebutting the presumption of prejudice to the insurer. Noting that there was no evidence in the record that an asset check was performed regarding the tortfeasor, the court determined that there was insufficient evidence that the tortfeasor was judgment proof as the Ferrandos claimed.

As a final note, because the Ferrandos settled with the tortfeasor *before* providing notice to Personal Service, the appellate court distinguished the facts of this case from those set forth in *McDonald v. Republic-Franklin Ins. Co.* (1989), *45* Ohio St.3d *27.* In *McDonald,* the Ohio Supreme Court held at paragraph three of the syllabus to its decision that:

> when an insured has given his underinsurance carrier notice of a tentative settlement prior to release, and the insurer has had a reasonable opportunity to protect its subrogation rights by paying the underinsured motorist benefits before the release but does not do so, the release will not preclude recovery of underinsurance benefits.

Luckenbill v. Hamilton Mut. Ins. Co. (Aug. 31, 2001), 2001 Ohio App. LEXIS 3856, Darke App. No. 1524, unreported (reluctantly following the Ohio Supreme Court's decision in *Littrell v. Wigglesworth* (2001), 91 Ohio St.3d 425).

Editor's Note: Given the voluminous nature of this opinion, as well as the lengthy discussion of UM/UIM principles and recent Ohio Supreme Court cases discussed therein, it is not possible to provide a brief, yet informative summary of this opinion. The Editor recommends that CATA Members read this opinion in its entirety. Indeed, this opinion illustrates the confusion and unanswered questions that remain in the wake of the Ohio Supreme Court's recent decision in *Littrell v. Wigglesworth, supra.*

One part of this opinion bears mentioning, however. Plaintiffs-appellants argued that the manner in which insurers charge premiums for coverages they will never have to pay to an insured violates R.C. 390 1.20. Although the Second District did not decide this issue, its observations are interesting:

> According to appellants, tortfeasors are required by statute to maintain a minimum of $12,500 in liability coverage. Appellants believe that if *Derr v. Westfield* (1992), *63* Ohio St.3d 537 is not applied, at least this much money would be deducted from every UIM claim. Consequently, insurers are charging premiums for coverages they will never have to pay an insured, regardless of the number of insureds or their damages. Appellants claim that this practice directly violates R.C. 390 1.20. Hamilton objects to consideration of this point, since appellants did not discuss the issue in the trial court. R. C. 3901.20 provides that:
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> > no person shall engage in this state in any trade practice which is defined in sections 390 1.19 to 2901.23 of the Revised Code as, or determined pursuant to those sections to be,

> an unfair or deceptive act or practice in the business of insurance.
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> We have previously held that R.C. Chapter 2901 does not create an implied private right of action. [Citations omitted]. However, the lack of a private cause of action does not mean that courts are necessarily precluded from considering the content of R.C. Chapter 390 1 within the context of a different cause of action.. . . [T]he trial court in this case may have been able to consider the impact of statutory violations on the validity of particular insurance policy provisions. However, we need not decide this point, since we agree with Hamilton that appellants did not properly raise this matter in the trial court.

Lemm v. The Hartford (Oct. 4, 2001), 2001 Ohio App. LEXIS 4468, Franklin App. No. 01AP-251, unreported (finding that UIM coverage was available to the plaintiffs in light of the "residence employee exclusion" in their homeowner's policy, and certifying a conflict to the Ohio Supreme Court on this issue).

On March 21, 1997, prior to H.B. 261's amendments to R.C. 3937.18 (effective September 1997), Ernest and Alice Lemm were involved in an automobile accident with a vehicle driven by Charles E. Palmer. On that date, Palmer lost control of his vehicle, drove left of center and collided with the Lemm's vehicle. The Lemms suffered permanent injuries. Palmer's insurer, State Farm, paid the $100,000 policy limits to the Lemms. The Lemms then sued Hartford Insurance Company ("Hartford"), seeking a declaration that they were entitled to UIM benefits under their homeowner's policy. The trial court granted the Lemm's motion for partial summary judgment on this issue, and Hartford filed a Notice of Appeal from that ruling.

The Tenth District initially dismissed the appeal for lack of a final, appealable order, noting that the trial court had not yet determined damages. The parties then sought to supplement the record with a stipulation that the parties had settled the damages but had failed to make the settlement part of the record on appeal. In light of those circumstances; the Tenth District granted the motion to reconsider and to supplement the record.

The Tenth District then affirmed the trial court's ruling in favor of the Lemms. The court held that, in light of the express liability coverage that is provided via the residence employee exclusion, the homeowner's policy was a motor vehicle policy of insurance and was therefore subject to the requirement of former R. C. 3 93 7.18 to offer UM/UIM coverage:

> We interpret "incidental coverage" as used in *Davidson* to apply to the limited types of vehicles covered and not that coverage is to be found in an exception to an exclusion in a homeowner's policy. Given the language used by the *court* in *Davidson* and the distinctions the court drew between the policies involved in *Davidson* and *Selander*, we find that this policy falls within the court's analysis in *Selander*. The policy at issue is a homeowner's policy and does not include coverage for liability arising out of the use of motor vehicles generally; however, the policy does provide, in the residence employee exclusion, express liability coverage arising from the use of automobiles which are subject to motor vehicle registration and designed for and used for transporting people on a public highway. The policy provides express liability coverage for damages arising from a motor vehicle accident when the injured party is the homeowner's residence employee and the injury occurred in the course and scope of that employment. Thus, it is a motor vehicle liability policy subject to the requirement of former R. C . 393 7.18 to offer uninsured and underinsured motorist coverage.

In reaching its decision, the Tenth District noted that *Davidson v. Motorists Mut. Ins. Co.* (2001), 9 I Ohio St.3d 262 was decided after the trial court decided the instant case. However, the court concluded that "*al-*

though the policy in Davidson contarned a residence employee exclusion, similar to the one in thrs case, the Supreme Court declined to decide the issue concerning the residence employee exclusion because it had not been argued to the lower courts in that case." *See Davidson,* at 256, fn. 2.

Finding its decision to be in conflict with the Eighth District's holding in *Davis v. Shelby Ins.Co.* (June 14, 200 1), Cuy. App. No. 78610, unreported, the Franklin County Court of Appeals certified the record of this case to the Ohio Supreme Court for review and final determination on the following issue:

> When a homeowner's insurance policy provides express liability for damages arising from a motor vehicle accident when the injured party is the homeowner's residence employee and the injury occurred in the course of that employment, is the policy deemed an automobile liability or motor vehicle policy subject to the requirement of former R.C. 3937.18 to offer uninsured and underinsured motorist coverage?

Henry ***v. Wausau Business Ins. Co.*** **(S.D. Ohio, Sept.** 27, **2001),** Case No. C-P-00-642, unreported (holding that plaintiff was entitled to UM benefits under a business auto liability policy issued to a school district under the reasoning set forth in *Scott-Pontzer,* but that plaintiff was not entitled to UM benefits under an education liability policy issued to the school district under the reasoning set forth in *Davidson).*

On September 2 1, 1998, plaintiff's decedent, Carol Henry, was killed when a motor vehicle driven by Todd Hyde collided with the vehicle she was operating. The collision was caused by Hyde's sole negligence, and Hyde was an uninsured motorist. On the date of the fatal accident, decedent was operating a vehicle which she owned, and she maintained an automobile insurance policy with Westfield Insurance Company with UM/UIM limits of $100,000. Plaintiff, as executor of decedent's estate, settled the UM claim with Westfield for the policy limits of $100,000.

On the date of the accident, decedent was an employee of the Madison Local School District ("Madison"), but she was not acting in the course and scope of her employment. Madison had a business automobile liability policy of insurance with Wausau in effect on September 2 1, 1998 with a policy period of September 1, 1998 to September 1, 1999. Madison was the only named insured listed on the policy. The policy contained UM/UIM limits of $2,000,000 for "owned 'autos' only", which were described in the Business Auto Coverage Form as "only those 'autos' you own". Under the "Schedule of Covered Autos You Own" were listed one private passenger vehicle, one light/medium truck, one trailer and nineteen school buses. The Business Auto Coverage Form provided descriptions of various categories of covered autos. Symbol "9" referred to "nonowned 'autos' only" - i.e., "only those 'autos' you do not own, lease, hire, rent or borrow that are used in connections with your business". No autos classified as "nonowned 'autos"' were listed as covered under the Business Auto Declarations. The Business Auto Coverage Form, as amended by an Endorsement effective September 1, 1998, defined "insured" in pertinent part as "You for any covered 'auto'", Paragraph one of this Endorsement stated "any employee of yours is an insured while using within the scope of his or her employment a covered 'auto' which is owned by that employee or a member of his or her household". An Endorsement to the policy entitled "Ohio Uninsured Motorists Coverage - Bodily Injury" provided that defendant will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by an insured.

In addition, the Endorsement defines "Who is an Insured" in pertinent part as:

> 1. You,
>
> 2. If you are an individual, any 'family member ',
>
> 3. Anyone else 'occupying' a covered 'auto' or a temporary substitute for a covered "auto"'.

The Endorsement excluded bodily injury sustained by "You while 'occupying' . . .any vehicle owned by you that is not a covered 'auto' for Uninsured Motorists Coverage under this Coverage form".

Madison also had an education liability policy of insurance in effect on September 2 1, 1998 with a policy pe-

riod of February 1, 1998 to February 1, 1999. Once again, Madison was the only named insured listed on this policy. A Coverage Endorsement effective February 1, 1998 stated that the insurer will pay all sums "you legally must pay as damages because of bodily injury to your employees, provided the bodily injury is covered by this endorsement". The Endorsement further stated that the bodily injury to which the insurance applies must arise out of and in the course of the injured employee's employment. Moreover, the policy stated that the insurance did not apply to "any liability arising from the ownership, operation, maintenance or use of any owned or non-owned 'automobile'. . .". Finally, the policy stated that this exclusion shall not apply to "on premises or between premises use of golf carts or tractors".

After Wausau denied coverage under both policies, plaintiff and defendant filed cross-motions for summary judgment. Acknowledging that it is the federal court's duty to anticipate how the state court would rule, the U.S. District Court for the Southern District of Ohio held that plaintiff was entitled to UM benefits under the business auto liability policy under the reasoning set forth in *Scott-Pontzer*, but that plaintiff was not entitled to UM benefits under the educational liability policy pursuant to the reasoning set forth in *Davidson v. Motorists Mut. Ins. Co.* (2001), 91 Ohio St. 3d 262.

Regarding the business auto liability policy, the Court noted, and defendant conceded, that the policy language at issue did not differ from that employed in *Scott-Pontzer* and that the definition of the insured was the same. Accordingly, the Court determined that employees of the school board were insureds under the policy. The Court also observed that the Business Auto Coverage Form, Section I, refers to Item Two of the Business Auto Declarations for descriptions of covered autos for each of the coverages. Item Two designates for UM coverage the numerical symbol "2", which Section J, "covered autos", defines as "owned 'autos' only". Under the reasoning of *Scott-Pontzer*, the Court concluded that "'autos' you own" includes autos the employees of the school district own since "you" (the insured) must be construed to cover employees of the school district. Further, the Court concluded that "any other language in the policy which may create an ambiguity as to whether an auto owned by an employee is a covered auto for uninsured motorist coverage must be construed in favor of plaintiff '.

The Court rejected defendant's argument that defendant may deny UM coverage on the basis that the school board lacked authority to purchase such coverage for employees injured or killed outside the scope of employment or in an accident not involving the operation of a district-owned or operated vehicle. In so holding, the Court followed the reasoning set forth in *Chidester v. Wausau Business Ins. Co.* (S.D. Ohio), 200 1 WL 506520, unreported, and expressly refused to follow the decision of the Cuyahoga County Court of Common Pleas in *Mizen v. Utica National Ins. Group*, Case No. 408 130, unreported (distinguishing *Scott-Pontzer* and *Ezawa* and holding that R.C. 3313.203 does not authorize a school district to purchase UM/UIM coverage for off-duty employees or family members). The Court reasoned that *Chidester* is more indicative of how the Ohio Supreme Court would rule on the issues presented in this case. More specifically, the Court held:

> The Ohio Supreme Court has broadly construed the reach of uninsured motorists policy provisions and has held insurers strictly responsible for the language they use in drafting policies. This Court believes that consistent with the Ohio Supreme Court's expansive interpretation of such provisions, that Court would hold defendant responsible for the policy language it drafted and extend coverage to plaintiff in accordance with the terms of the policy, irrespective of whether the school board had exceeded its statutory authority in purchasing such coverage.

Regarding plaintiff's claim for UIM benefits under the educational liability policy, however, the Court determined that plaintiff was not entitled to such benefits based on the Ohio Supreme Court's recent decision in *Davidson*. Like the policy at issue in *Davidson*, the Court found that the education liability policy provided limited liability coverage for vehicles that are not subject to motor vehicle registration and/or that are not intended to be used on a public highway but are instead designed for off-road use or are used around school property. As such, the Court determined that the educational liability policy did not qualify as a "motor vehicle liability policy-' and was therefore not subject to R.C. 3937.18's requirement that the insurer offer UM/UIM coverage.

Intentional Tort - Negligent Infliction of Emotional Distress

Padney v. MetroHealth Medical **Center** (Aug. 30, 2001), **200**1 Ohio App. LEX*IS 3825,* Cuy. App. No. *78264.*

Decedent Edward Padney was employed as a "diener" (i.e., an assistant in performing autopsies) at MetroHealth. He contracted multi-drug resistant tuberculosis while assisting in an autopsy on September 25, 1992 on a cadaver infected with that disease. This strain of tuberculosis does not respond to usual treatments and poses a high risk of mortality (50%) for anyone with the active disease. The patient who was autopsied had not been treated for the last two weeks of her life, thus increasing the contagiousness of the disease. In addition, she suffered from AIDS, which resulted in the dissemination of tuberculosis throughout her body. The tuberculosis became active in Padney in April 1995. He suffered respiratory failure in September 1995 and was placed on a ventilator. While on the ventilator, he developed a blood clot in his leg which required amputation. Prior to passing in March 1998, Padney's wife and daughter contracted multi-drug resistant tuberculosis from him, although it remained latent in them at the time of trial.

In 1990, the CDC implemented guidelines for preventing the transmission of tuberculosis in healthcare settings. These guidelines recommended that autopsy rooms have, amongst other things, ventilation which provides at least 12 total air changes per hour. The ventilation room where the autopsy was performed was providing 18.5 air changes per hour when it went into use in 1970, but on August 6, 1982, the room was functioning at only 6 air changes per hour. It was not modified from that date until the date of the autopsy that caused decedent to contract tuberculosis. Although there was testimony that the system was tested approximately every year, MetroHealth could not locate any other quantitative studies of the ventilation in the isolation room from before the date decedent was infected. However, a 1986 memorandum from the plant engineering department indicated that the system met applicable standards.

In addition to the ventilation system, there were also ultra-violet lights in the autopsy suite which reduced the risk of infection. Plaintiffs' expert testified that with 6 air changes per hour, the likelihood of infection from one hour of exposure to an infectious disease was 60% to 65%, but with the ultraviolet lights this risk was reduced to 25 % to 30%. Plaintiff's expert then testified that the risks could have been further reduced by the use of a personal respirator and that they would have been eliminated by a positive air pressure respirator.

Plaintiffs filed suit in November 1996. After Padney's death, a final Amended Complaint was filed in June 199 8. It alleged that plaintiffs' decedent contracted multi-drug resistant tuberculosis while employed by MetroHealth, that MetroHealth failed to employ adequate controls to prevent the transmission of tuberculosis to employees, that MetroHealth knew that the conditions created by these failures constituted a dangerous instrumentality within its business and that it was substantially certain that an employee subjected to these conditions would be harmed. In addition to the intentional tort claim, plaintiffs asserted various other claims: including a claim that MetroHealth negligently caused decedent's wife and daughter to suffer emotional distress, mental anguish, loss of enjoyment of life, and fear of physical peril because they have tested positive for tuberculosis.

At the close of the plaintiffs' case; defendant moved for a directed verdict. Defendant argued that it was not substantially certain that decedent would contract tuberculosis, nor was he required to assist in the autopsy. Regarding the claims of Padneys' wife and daughter, defendant claimed that they should also fail as derivative claims, or alternatively, that they did not owe a duty to the wife and child of an employee. The trial court granted MetroHealth's motion for a directed verdict without stating the basis for its decision.
The Eighth District Court of Appeals reversed. Relying on the tripartite analysis set forth in *Fyffe v. Jeno's Inc.* (1991), 59 Ohio St.3d 115 and progeny, the appellate court concluded:

> There was evidence in the record from which a jury could find MetroHealth knew of the existence of a dangerous condition within its business. Among other things, there was evidence that MetroHealth was aware of the CDC standards for preventing the transmission of tuberculosis in a hospital setting

at the time Padney was infected.. . . There was evidence that MetroHealth's autopsy isolation room did not comply with the CDC standards, first because it had only half the recommended number of air changes per hour, and second because it did not include the use of personal respirators among its standard safety precautions.. . .MetroHealth claims it did not know the conditions in the autopsy room were dangerous because there was no evidence anyone had ever contracted tuberculosis in its autopsy rooms. Simply because people are not injured, maimed or killed every time they encounter a device or procedure is not determinative of the question whether that procedure or device is dangerous or unsafe. *Cook v. Cleveland Elec. Illum.* Co. (1995), 102 Ohio App. 3d 4 17,429. Further, there is evidence that MetroHealth was aware that the danger of transmission was magnified in this case because the strain of tuberculosis involved was multi-drug resistant, the decedent was untreated, and she had AIDS, which resulted in the dispersal of the tuberculosis throughout the body.

* * *

Second, there was evidence from which a reasonable jury could find that MetroHealth knew that harm to employees was substantially certain to occur if they were subjected to this danger. According to plaintiffs' expert, the risk of contracting tuberculosis from a one-hour exposure to an infectious does under the conditions in the isolation room at the time Padney was infected was 25% to 30%... .If a person present during the autopsy contracted tuberculosis, there was a further 5% to 10% chance that the disease would become active in them. If the disease became active, there was a 50% chance that multi-drug resistant tuberculosis would be fatal. MetroHealth concludes from this that it was not substantially certain that Padney would contract a fatal disease from performing this particular autopsy; however, we are not assessing only the risk that Padney would die. Even latent tuberculosis constitutes an injury, particularly when that disease is drug resistant.. . .MetroHealth invites us to quantify a substantial certainty and suggests that a 75% likelihood of injury is the appropriate standard. We reject such a numerical gauge. While statistical assessments may be helpful in determining whether harm is substantially certain to occur, they are not conclusive. Among other things, the determination whether harm is substantially certain to occur involves not only a consideration of the likelihood that harm will occur but also an assessment of the seriousness of the harm if the risk does come to pass. A substantial certainty that a condition will cause an injury which may result in death may differ from a substantial certainty of an injury which is not life-threatening. Consequently, we cannot attach decisive significance to statistical risk assessments.

* * *

Finally, MetroHealth urges that Padney, as a supervisor, did not have to perform this autopsy but could have assigned it to another diener. That Padney could have placed another employee at risk does not negate the fact that MetroHealth requires employees to incur the risk. The-job duties of a diener require him or her to assist in all autopsies, including those involving infectious disease. One of the dieners testified that dieners were assigned to cases involving infectious diseases by rotation and that he routinely assisted in approximately four tuberculosis cases per year.

> Thus, there was evidence from which a jury could have found MetroHealth required its dieners, including Padney, to assist in autopsies under these unsafe conditions.

The Eighth District also reversed and remanded with respect to plaintiffs' negligent infliction of emotional distress claim. MetroHealth contended that it did not owe a duty to Padney's family, and that the risk of injury to Padney's family was not foreseeable to them because the risk of harm to Padney was not foreseeable. The court rejected this argument, noting that there was evidence from which a jury could conclude that the transmission of tuberculosis under the conditions in the isolation room were not only foreseeable *but substantially certain.* Further, the court concluded that it is foreseeable that a contagious disease acquired by an employee at work will be transmitted to persons with whom he or she has close contact, such as family members. Citing *to Mussivand v. David* (1989), *45* Ohio St.3d 3 14, the court determined that MetroHealth owed a duty to Padney's wife and daughter and that a reasonable jury could conclude that MetroHealth breached its duty of care to Padney's family by failing to take any action to prevent the transmission of tuberculosis to them or to warn them of the risk. Finally, although the disease is presently latent in Padney's wife and daughter, there is a 50% mortality rate if it does become active. The court classified this as a "real danger", as opposed to a "nonexistent peril", and observed that "because the emotional distress fo which plaintiffs seek recovery is associated with a real physical peril...the emotional injury need not be severe or debilitating to be compensable."

Loc. R. 21.1 - Applicable to Defendant Doctor Testifying as Expert on Own Behalf

Vaught v. The *Cleveland Clinic* **Foundation** (Sept. *6,* 2001), 2001 Ohio App. LEXIS 3958, Cuy. App. No. 79026, unreported (holding that Loc. R. 21.1 applies when a defendant-doctor intends to testify as an expert on his or her own behalf).

After suit was filed in this medical malpractice action, the trial court established deadlines for expert reports. On the day that the defendant's report was due, his counsel requested an extension of time on the purported basis that reviewing physicians had not been able to complete their review within the original deadline. The trial court granted an eighteen day extension, but defendant failed to produce a report within this time frame. One week before trial, defendant filed a trial brief in which he identified himself as both treating physician and expert witness. Because defendant failed to comply with the requirements of Loc. R. 2 1.1, the court granted plaintiff's motion in limine to preclude defendant from testifying as an expert on his own behalf. At the close of testimony, the jury returned a verdict in plaintiff's favor,

The issue in this appeal is whether a defendant-physician who, on the eve of trial chooses to act as his own expert in a medical malpractice case after having been previously deposed by the plaintiff as a fact witness, is required by Loc. R. 2 1.1 to submit an expert report identifying his opinion that he did not breach the relevant standard of care.

On appeal, the defendant-doctor argued that the trial court erred in interpreting Loc. R. 21.1(B) & (C) to mean that a *party* who seeks to testify as an expert on his own behalf must submit an expert report. Defendant contended that a commonsense reading of Loc. R. 2 I. 1 and other applicable rules of civil procedure demonstrates that the notice provisions of expert testimony apply only to *retained experts*, **not** those who are parties to the action.

The Eighth District rejected this proffered distinction and affirmed, noting that the goal of preventing surprise at trial means that opposing counsel must have access to the expert's reports and opinions so that he or she may be adequately prepared for trial. The court noted that defendant was not identified as an expert during discovery, nor did he, when deposed, give any opinions on whether his standard of care adhered to applicable standards. In affirming the trial court, the Eighth District distinguished its holding in *Luke v. Cleveland Clinic Foundation* (March 28, 1996), 1996 Ohio App. LEXIS 1202, Guy. App. No. 69049, unreported.

The appellate court was also called upon to decide whether the trial court abused its discretion in refusing to permit defendant to testify as an expert as a sanction for failing to identify himself as an expert prior to trial. Holding that the trial court had not abused its discretion,

the reviewing court noted that defendant's conduct was "somewhat suspect in that throughout the entirety of the pretrial proceedings" he represented that he had been trying to procure an expert witness.

Negligence - Failure to Perform in Workmanlike Manner - Statute of Limitations

Santora v. Pulte Homes of Ohio Corp. (July 26, 2001), 2001 Ohio App. LEXIS 3309, Cuy. App. No. 77825, unreported.

Plaintiff homeowners noticed several defects after moving into their new home in January 1994 and advised their builder of the defects. Although repair attempts were made, plaintiffs were not satisfied. In June 1997, more extensive repairs were done which required plaintiffs to move into a hotel. On October 5, 1998, plaintiffs filed suit alleging breach of contract fraudulent inducement, common-law fraud, negligence, express warranty, gross negligence, unjust enrichment, and violations of the Consumer Sales Practices Act. Defendant moved for summary judgment on all counts. The trial court granted summary judgment as to the negligence counts only, holding that the statute of limitations had expired. The Eighth District affirmed, rejecting plaintiffs' argument that the statute of limitations did not begin to run until they were forced to leave their residence in June of 1997. The court reaffirrned the principle that a negligence action against a developer-vendor of real property for damages to the property accrues and the four-year statute of limitations set forth in R.C. 2305.09(D) commences to run when it is first discovered, or through the exercise of reasonable diligence it should have been discovered, that there is damage to the property. Because plaintiffs discovered numerous problems with their home in March of 1994 and communicated these problems to the builder, it was incumbent upon them to bring their negligence action by not later than March 1998.

After the trial court granted summary judgment on the negligence claims, plaintiffs decided to only pursue claims for common-law fraud, express warranty and CSPA violations. At the same time, defendant moved to exclude the testimony of plaintiffs' anticipated expert witness ("Engelke") on the basis that his identity was previously undisclosed. The trial court granted the motion, limiting Engelke's opinions to those contained in his first report and excluding any testimony pertaining to the opinions contained in his supplemental report. After this ruling, plaintiff failed to call Engelke as a witness and made no attempt to elicit his anticipated testimony that was the subject of defendant's motion in limine. The trial court thereafter granted a directed verdict for defendant on plaintiffs' remaining claims. On appeal, plaintiffs-appellants argued that the trial court erred in granting defendant's motion in limine, thereby jeopardizing their ability to prove their damages and survive a motion for a directed verdict. The Eighth District affirmed, holding that this alleged error was not preserved for appeal. While plaintiffs attempted to proffer Engelke's supplemental report, the court observed that "a proffer of evidence of one who has not been called as a witness.. .does not obviate the requirements necessary to preserve an issue as error on appeal".

Ohio Lemon Law - Presumption of Recovery Under R.C. 1345.73(B)

*R*oyster v. *Toyota Motor Sales, U.S.A., Inc.* (2001), 92 Ohio St.3d 327 (consumer enjoys a presumption of recovery under R.C.1345.73(B) if vehicle is out of service by reason of repair for a cumulative total of thirty or more calendar days in the first year of ownership regardless of whether the vehicle was successfully repaired at some point beyond that thirty day period).

Nine months after she leased a new 1996 Toyota 4-Runner, Royster 's vehicle had to be towed to the dealer for a leaking head gasket that needed to be replaced. The dealership had difficulty locating the correct part, such that the vehicle was out of service for forty-five days. The dealership provided Royster with a replacement car throughout this time period at no charge.

In May 1997, after her car was repaired, Royster filed a Lemon Law claim against Toyota. Both parties moved for summary judgment. The trial court granted Royster 's motion, holding that she had demonstrated her right to recovery based upon the Lemon Law's presumption in favor of recovery if a vehicle is "out of service by reason of repair for a cumulative total of thirty or more calendar days" in the first year of ownership. The court awarded Royster and her lienholder $38,565.54 and also entered an additional $7,649.00 judgment against Toyota for Royster's attorney fees. The Eighth District re-

versed, holding that the trial court erred in finding that the car's length of time out of service created a presumption of recovery. The court concluded that the dealership made a reasonable number of attempts to repair the vehicle and was ultimately successful in conforming the vehicle to its warranty. The court further reasoned that Royster would have a valid claim only if the vehicle had not conformed to its warranty after the dealership's "reasonable number of repair attempts".

The Ohio Suprerne Court allowed a discretionary appeal in this matter. After observing that "the car buying experience may be the most complicated mating dance in all of the animal world", one riddled with "half-truths", "double meanings", "semantic gymnastics", and "white lies", the Court reversed and remanded:

> While R. C.1345.72(A) attaches a clear duty on sellers and gives them the opportunity to preclude recovery by making prompt repairs, R.C. 1345.72(B) provides consumers a swift and simple remedy should the car not be made right within a reasonable number of attempts.. . .Lest there be any doubt, and subsequent exhaustive litigation, as to what constitutes "a reasonable number of repair attempts," R.C. 1345.73 sets limits. During the time at issue it provided:
>
> It shall be presumed that a reasonable number of attempts have been undertaken by the manufacturer, its dealer, or its authorized agent to conform a motor vehicle to any applicable express warranty if, during the period of one year following the date of original delivery or during the first eighteen thousand miles of operation, whichever is earlier, any of the following apply:
>
> (A) Substantially the same nonconformity has been subject to repair three or more times and either continues to exist;
>
> (B) *The vehicle is out of service by reason of repair for a cumulative total of thirty or more calendar days;* [Emphasis added].
>
> (C) There have been eight or more attempts to repair any nonconformity that substantially impairs the use and value of the motor vehicle to the consumer;
>
> (D) There has been at least one attempt to repair a nonconformity that results in a condition that is likely to cause death or serious bodily injury if the vehicle is driven, and the nonconformity continues to exist
>
> * * *
>
> The subsection that applies to this case, R.C. 1345.73(B), marks as thirty days the limit that a consumer need tolerate having his or her vehicle out of service in the first year of ownership. Whether the vehicle is driveable after that thirty days is irrelevant. Indeed, the statute speaks in terms of a *cumulative* thirty days out of service.. . . The *unavailability* of the new car is the key element.. . .By leaving little room for interpretation, R. C. 1345.73 leaves little room for litigation. As a consumer protection law, the Lemon Law must be simple and must have teeth in order to be effective. The law is designed for self-help without protracted litigation. To work well, the statute needs a harsh remedy at a time certain.

Political Subdivision Immunity - Failure to Report Suspected Child Abuse

Campbell v. Burton (2001), 92 Ohio St.3d 336 (neither political subdivision nor its employees enjoy political subdivision immunity for failing to report known or suspected child abuse, because the duty to report is expressly imposed by R.C. 2 15 1.42 1)

In March 1996, an eighth grade student ("Campbell") in the Fairborn City School District reported to a teacher

("'Mallonee") that a family friend ("'Burton") had engaged in inappropriate behavior towards her. Nallonee advised the Campbell to tell her mother about the incident with Burton and to stay away from him. However, Mallonee failed to report Campbell's concerns to anyone. Thereafter, Burton allegedly continued to engage in inappropriate conduct towards Campbell.

In March 1997, Campbell's parents filed an action against Burton and various school defendants. Thereafter, the Campbells filed a separate action against Mallonee. Both complaints alleged that defendants failed to report, pursuant to R.C. 215 1.421, the suspected abuse and that Campbell suffered psychological and permanent injuries as a result. The trial court granted summary judgment in favor of the school defendants on the basis that they were immune from liability pursuant to 2744.02(A)(1) and 2744.03(A)(6). The court of appeals affirmed, holding that R.C. 2 15 1.42 1 did not expressly irnpose liability on the school defendants within the meaning of 2744.02(A)(1) and 2744.03(A)(6).

The Ohio Supreme Court allowed discretionary appeal and determined that a conflict existed on this issue. The certified question presented to the Court was:

> "For purposes of the immunity exceptions in 2744.02(B)(5) and 2744.03(A)(6)(c), does R.C. 2151.421 expressly impose liability on political subdivisions and their employees for failure to report child abuse?".

Following the three-tiered analysis set forth in *Cater v. Cleveland* (1998), 83 Ohio St.36 24, 28, the Court answered this question in the affirmative. The Court relied in large part on the express language of R. C. 2 15 1.42 1 (A)(l)(a) which mandates the immediate reporting of known or suspected child abuse. The Court also observed that R. C . 2 15 1.42 l (A)(l)(b) lists "school teachers, school employees, school authority" and other professionals as persons required to report known or suspected abuse. Relying on language in R.C. 2744.02(B)(5) and 2744.03(A)(6)(c) that denies immunity if ""liability is expressly imposed.. .by a section of the Revised Code", the Court held that both a political subdivision and its employees may be held liable for failure to report known or suspected child abuse, which is a duty expressly imposed by R.C. 2151.421,

Editor's Note: ***Compare Butler v Jordan*** (2001), 92 Ohio St.3d 354 (reinstating trial court's decision dismissing claims against Department of Human Services for negligent and/or reckless licensing of daycare facility resulting in death of child, because R. C. 5 104.11 *did nut expressly impose liability* on the DHS for failure to inspect or for negligent certification of daycare).

Sanctions - Civ. R. 37 - Default Judgment as a Discovery Sanction

Wagner v. Nestle, USA, Inc. (July 19, 2001), 2001 Ohio App. LEXIS 3220, Cuy. App. No. 78113, unreported.

Plaintiff was terminated from employment and sued defendant for age and handicap discrimination. Throughout the course of discovery, defendant repeatedly failed to provide discovery, notwithstanding court orders directing it to do so. In November 1998, the court held a pretrial and ordered defendant to produce discovery by December 4, 1998. On January 8, 1999, when the discovery was not produced, the court held a hearing on plaintiff's motion to compel. At the hearing, the court put defendant on notice that it intended to enforce its discovery orders to the extent of entering default. On March 15, 1999, the court conducted a default hearing and thereafter entered default judgment in plaintiff's favor. Defendant filed a motion for reconsideration which was denied by the trial court.

On appeal, defendant argued that the trial court abused its discretion by entering a default judgment and by failing to grant its motion for reconsideration. The Eighth District affirmed, noting that the record was replete with examples of defendant's flagrant disregard of the discovery rules and the court's orders. Moreover, defendant was given ample opportunity to comply and was put on notice that default judgment would be entered for noncompliance with its orders.

Trial - Directed Verdict - Proper on Issue of Defendant's Liability When

Reidy v. Morley (Aug. 9, 2001), 2001 Ohio App. LEXIS *3480,* Cuy. App. Nos. 78081 & 78247, un-*reported.*

In December 1998, plaintiff-appellee ("Reidy") was injured in a shopping mall parking lot when a vehicle driven by defendant-appellant ("Morley") struck her. Reidy claimed to have been proceeding through the parking lot toward a restaurant when she was initially hit from behind and then hit again when Morley's car drove over her foot. Morley testified that he did not see Reidy before the incident, he did not see his vehicle contact her, and that he only realized that something happened after his wife directed him to stop the car. At trial, a podiatrist testified as to Reidy's injuries and opined that the crush fracture Reidy sustained was consistent with a car running over her foot. Morley presented no expert testimony but his counsel nevertheless argued that the law of physics did not support Rediy's injuries if the accident occurred as she testified. The trial court granted a directed verdict in Weidy's favor on the issue of liability.

On appeal, Morley argued that the directed verdict was improper, as he had presented an alternate theory of the accident which should have been resolved by the jury. Morley argued that he raised the defense of comparative negligence in his answer and that an inference may be made either that (1)Reidy did not travel the route to and from her vehicle the same way she testified, or that (2)Reidy failed to use care to prevent her injury. As noted above, Morley's counsel also argued that the laws of physics did not support Reidy's theory of the case. Citing to *Westinghouse Elect. Corp. v. Dolly Madison Corp.* (1975), *42* Ohio St.2d 122, Morley further argued that where there is a reasonable inference that there are other causes, the plaintiff has failed to supply proof of probable cause and a directed verdict is improper.

The Eighth District affirmed, holding that Morley failed to meet his burden of proof on the defense of comparative negligence:

> . . .the burden of proving [an] affirmative defense is on defendant. It has also been held that in order to withstand a directed verdict motion on the issue of proximate cause, the party with the burden of proof must produce evidence which does more than furnish a basis for a choice among various possibilities, the party must produce evidence to provide a reasonable basis for sustaining his claim. . . . The parties bearing the burden of proof must present evidence which, when favorably construed, permits a finding that the parties have met their burden without requiring speculation or a leap of logic regarding an essential element of the claim.. , .Thus, it is clear that a case may not be based upon conjecture or speculation. Suggestion of other causes are limited only by the limits of the human imagination, and are not a basis for taking a case to the jury. The mere presentation of a theory without any supporting evidence is not sufficient. In the case sub judice, the trial court properly granted [Reidy's] motion for directed verdict.. . . [Reidy] presented her version of events and supported that version with evidence. [Morley] has another version, which, on the surface, seems to raise a simple issue of fact which would preclude a directed verdict. However, outside of making the assertion, [Morley] presented no evidence, let alone expert testimony, that his version of the facts was even possible. The jury requires evidence upon which to make a decision, not conjecture.

Trial - Directed Verdict - Motion for New Trial - Irregularity in Proceedings

Vicario v. Prime Medical Services, Inc. (Aug. 23, 2001), 2001 Ohio App. LEXIS **3733, Cuy.** App. No. **78796,' unreported,**

Plaintiff Shirley Vicario was injured while moving a portable anesthesia cart from a truck. In March 1999, plaintiffs filed suit against various defendants claiming that

they failed to use reasonable care for Vicario's safety, failed to warn her of latent defects, and failed to maintain safe work premises. The matter proceeded to trial before a visiting judge on October 11, 2000. At trial, plaintiffs testified and three depositions were read to the jury, including the depositions of two experts. At the close of plaintiffs' case, the court directed a verdict for defendants.

Plaintiffs thereafter filed a timely motion for a new trial pursuant to Civ. R. 59(A)(1), citing irregularities by the trial judge as the basis for their motion. In an affidavit offered in support of this motion, plaintiffs' attorney averred that the judge was rude to him, rushed him in the presentation of his case, that he left the bench for the entire time that 2 of the 3 depositions were read into the record, and that the judge told the court reporter, before the depositions were read into the record, that she would be done with the case after lunch. The trial court denied plaintiffs' motion for a new trial.

On appeal, plaintiffs asserted that they were entitled to a new trial, because the trial court had already decided to enter a directed verdict prior to the close of plaintiffs' case. In support of this assignment of error, plaintiffs cite the facial expressions of the trial judge, the judge's short voir dire, and the judge's admonitions to plaintiffs' counsel.

The Eighth District reversed and remanded for a new trial:

> Pursuant to Civ.R. 59(A), the trial court may grant a new trial to any party on any issue upon any number of specified grounds, including: "Irregularity in the proceedings of the court . . by which an aggrieved party was prevented from having a fair trial" . . . With regard to the alleged irregularities cited in this instance, we note that a trial judge is presumed not to be biased or prejudiced, and the party alleging bias or prejudice must set forth evidence to overcome the presumption of integrity. [Citations omitted]. . . . It is also axiomatic that a trial judge has supervisory authority over the action and the role of the judge is to keep errors to a minimum and prevent deviation from proper presentation of the case.. . , In this instance, plaintiffs' attorney averred, in an affidavit in support of his motion for a new trial, that prior to the entry of the directed verdict, the trial judge left the bench for the entire time that two (2) of the three (3) depositions were read into the record and retired to his Chambers. Nothing was offered by defendants or the trial judge to refute this claim and there is nothing in the record from which we may conclude that the trial judge had previously read the depositions before directing a verdict for defendants. Accordingly, we conclude that the conduct of the trial judge was prejudicial herein in light of the trial judge's duty to evaluate all the plaintiffs' evidence before directing a verdict.. . .Moreover, the depositions of the doctors required the judge to determine whether they qualified as medical experts. Finally, we note that while the absence of the judge may in certain instances be permitted, Sup.R. ***13(B)(5)*** provides that in the absence of the judge, a responsible officer of the court shall remain with the jury and there is no indication that this portion of the rule was complied with herein.

Workers Compensation - Reimbursement of Attorney's Travel Expenses

Kilgore v. Chrystler Corp. (2001), 92 Ohio St.3d 184 (In workers compensation appeal brought pursuant to R. C . 4 123.5 12(A), attorney's reasonable travel expenses incurred in taking expert deposition are a reimbursable "cost of any legal proceedings" under R.C. 4123.512(F)).

In January 1988, Kilgore suffered a work-related injury while employed by Chrystler Corporation. In October 1990, Kilgore filed a motion to have his claim allowed for conditions in addition to those previously recognized by Chrystler. Kilgore's motion was denied at the administrative level, and that decision was appealed to the

trial court As part of the appeal, the parties agreed to depose Kilgore's expert who had moved to South Carolina. Chrystler was to conduct a discovery deposition on March 9, 1995, followed by a video deposition by Kilgore's counsel on that same date. Thereafter, three separate trips to South Carolina were necessitated by circumstances beyond Kilgore's control.

Kilgore prevailed on his appeal in September 1995, and Chrystler was ordered to pay the costs of the action. Chrystler appealed that decision but then withdrew its appeal. On March 1, 1999, Kilgore filed a petition for attorney fees and costs pursuant to 4 123.5 12. Kilgore sought payment of his counsel's three trips to South Carolina at a total cost of $1,845. The trial court granted Kilgore's petition for costs with respect to two of the three trips. Chrystler, the Industrial Cornmission and the Bureau of Workers' Compensation all appealed. The appellate court affirmed.

The Ohio Supreme Court permitted a discretionary appeal and certified a conflict on the issue of whether an attorney's travel expenses incurred in taking an expert's deposition are reimbursable "costs of any legal proceeding" under R. C . 4 123.5 12(F). The Court affirmed, holding in pertinent part that:

> The overarching consideration in this case is the requirement imposed by R.C. 4123.95 that workers' compensation statutes are to be "liberally construed in favor of employees". We have held in the past that statutes to reimburse plaintiffs who win workers' compensation appeals are "designed to minimize the actual expense incurred by an injured employee who establishes his or her right to participate in the fund". Moore v. *Gen. Motors Corp.* (1985), 18 Ohio St.3d 259, 261-62. This court also noted that by enacting such statutes, the General Assembly "has demonstrated its intent that a claimant's recovery shall not be dissipated by reasonable litigation expenses connected with the preparation and presentation of an appeal".
>
> * * *
>
> R.C. 4123.5 12 addresses the *reimbursability of certain claimants' expenditures incurred in bringing workers' compensation appeals. R. C. 4 123.5 12(D) concerns payment for physicians' depositions filed with the court. No matter the outcome of the appeal, claimants are reimbursed for that cost.. . .R. C. 4 123.5 12(F) is different. It addresses a broader class of reimbursable costs that are payable to a claimant who is adjudged on appeal to be eligible to participate in the fund . . . . R.C. 4123.512(F) applies to claimants who may rightfully participate in the fund but have been denied that right and have been forced to appeal. These claimants incur out-of-the-ordinary expenses in order to establish their right to participate, additional expenses that other claimants do not incur. While just as worthy, their award becomes functionally less than other claimants with the same injury. WC. 4123.5 12(F) serves to diminish that incongruity

In so holding, the Court rejected appellants' reliance on *State ex rel. Williams v. Colasurd* (1995), 7 1 Ohio St.3d 642, because *Williams* interpreted the "cost of deposition" language of R.C. 4 123.5 12(D) as opposed to the "cost of any legal proceeding" language of *Moore* and R.C. 4123.5 12(F).

In rendering its decision, however, the Court cautioned that "our decision today does not allow reimbursement for everyday costs of doing business. It applies to costs bearing a direct relation to a claimant's appeal that lawyers traditionally charge to clients and that also have a proportionately serious impact on the claimants award."

[1]**Note**: Despite its holding in favor of plaintiff, the court observed that "these exclusions would be enforced if the current version of R.C. 3937.18(J)(1), effective September 2 1, 2000, were applicable".

Verdicts & Settlements

Joyce Doe, etc. v. ABC Hospital

Type of Case: Medical Malpractice/ Wrongful Death
Settlement $2,500,000
Plaintiff's Counsel: Charles Kampinski, Christopher M. Mellino, Laurel A. Matthews
Defendant's Counsel: With held
Court: Cuy. County Common Pleas
Date: June, 2001
insurance Company: Not Listed
Damages: Death

Summary: Jane Doe was a healthy 32-year-old woman who worked for ABC Hospital as an activities director in its skilled nursing facility. She initially presented to the Emergency Department at ABC Hospital on September 29, 1999, complaining of left earache and headache, Jane was subsequently diagnosed with a left ear infection and prescribed the antibiotic, Zithromax, which she took as directed. She was instructed to seek further medical attention if she got worse.

The following day, on September 30, 1999, Jane's condition had worsened significantly and she had a fever, In keeping with the instructions given to her, Jane returned to ABC Hospital with a perforated right eardrum and complaining of unrelenting pain in her other ear, headache, fever and chills. She is described in the hospital records as being in obvious distress and crying. Despite these presenting complaints, which are suggestive of a progression to meningitis no neck exam was performed, no diagnostic studies were performed and her antibiotics were not changed. Instead, she was given pain medication and instructed to return for follow-up in four days, Had Jane been appropriately evaluated and treated on that day, she would be alive and well today.

Two days later, on October 2, 1999, Jane's mother brought her back to ABC Hospital complaining of throbbing headache, drowsiness, photophobia and a very stiff neck. It was apparent on the presentation that Jane had meningitis. Her drowsiness should have alerted the physicians that she might have early signs of increased intracranial pressure, and if so, there was a risk of brain herniation with lumbar puncture.

Instead of serially monitoring her mental status, Jane was inappropriately given a dose of Demerol and Compazine. When her mental status further deteriorated over time, this was erroneously attributed to the administration of these drugs, Had the emergency room doctor ordered a CT scan it would have been apparent that Jane had increased intracranial pressure, Instead, he performed a lumbar puncture in the face of this increased intracranial pressure and her brain herniated,

The paramount concern in a patient suspected of having bacterial meningitis is the timely administration of an appropriate antibiotic dosage, Despite this, Jane was not given her first dose of antibiotic until nearly two hours after initial evaluation, and she was given a suboptimal dose,

Plaintiff's Experts: Thomas Hooten, M.D. (Infectious Disease Specialist); James Ungar, M.D. (Emergency Medicine); John F. Burke, Jr,, Ph.D. (Economist)
Defendant's Experts: David Talan, M.D. (Emergency Medicine); Charles Citrin (Neuroradiologist)

Robert Doe v. XYZ Radiology Group, et al.
Type of Case: Medical Malpractice/ Wrongful Death
Sefflement: $1,900,000
Plaintiff's Counsel: Michael F. Becker
Defendant's Counsel: With held
Court: With held
Date: July, 2001
Insurance Company: PHICO plus Pro-National
Damages: Wrongful death of a 62-year-old woman from an approximate 4 year delay in diagnosing kidney cancer,

Summary: Back in 1994 Plaintiff was admitted to a local hospital with acute abdomen secondary to ruptured appendix. Preoperatively a CT scan of her abdomen was performed which demonstrated a small kidney cancer, Four years later Plaintiff had gross bloody urine wherein the cancer was diagnosed at a late stage, She survived for approximately 6 months prior to her death,

Plaintiff's Experts: Frances Barnes (General Surgery)
Defendant's Experts: Dr. Berlin (Radiology); David Grishkan (General Surgeon)

Jane Doe, etc. v. ABC Defendant
Type of Case: Medical Malpractice/ Wrongful Death
Settlement: $950,000
Plaintiff's Counsel: Michael F. Becker
Defendant's Counsel: Withheld
Court: Withheld
Date: March, 2001
Insurance Company: Self-insured plus OHIC
Damages: Wrongful death of a 24-year-old mother of a surviving &year-old daughter.

Summary; Plaintiff decedent was 3 months pregnant, obese and was actually presenting with signs of pulmonary embolism (passing out and abnormal EKG). Plaintiff decedent was discharged and expired approximately three days later from a massive pulmonary embolism,

Plaintiff's Experts: Michael Jastremski, M.D. (ER Physician)
Defendant's Experts: Bruce Janiak, M.D.

Jane Doe v. *The* ABC Clinic
Type of *Case:* Medical Malpractice
Settlement: $1,150,000
Plaintiff's Counsel: Michael F. Becker
Defendant's Counsel: Withheld
Court: Withheld
Date: October, 2001
Insurance Company: Self-Insured plus OHIC
Damages: Delay in diagnosing lobular breast cancer of approximately 14 months.

Summary: Plaintiff made repeated visits to her gynecologist with complaints of a lump. A mammogram was done which was read as normal, The same was not immediately biopsied, rather 14 months passed before Plaintiff sought a second opinion, Plaintiff had 9 out of 13 lymph nodes positive at the time of diagnosis, Plaintiffs argued that the Defendant's negligence reduced life expectancy of Plaintiff considerably, However, Plaintiff remains metastasis free three years since the diagnosis of her cancer.

Plaintiff's Experts: Cheryl Gelfand, M.D. (Radiologist)
Defendant's Experts: Richard Hirsh, M.D. (Radiologist); R.D. Patterson, M.D. (Radiologist); Blake Cady, M.D. (Surgeon)

Niece v. Aunt
Type of Case; Negligence/Intentional Tort
Settlement: $3,650,000
Plaintiff's Counsel: George Argie, Dennis R. Lansdowne, Jennifer Whitney Rennillo
Defendant's Counsel: Withheld
Court: Cuy. County Common Pleas,
Judge William Coyne
Date: March, 2001
Insurance Company: Withheld
Damages: Permanent brain damage

Summary: Plaintiff was seriously and permanently injured when she was sleeping in a bedroom located above an attached garage, Plaintiff claimed that her aunt negligently left her vehicle running in the attached garage for several hours while Plaintiff slept upstairs, Plaintiff was discovered unconscious. Plaintiff survived, but was diagnosed with encephalopathy and Organic Brain Syndrome secondary to carbon monoxide poisoning. Defendant disputed that she left the car running and defense experts disputed Plaintiff's injuries,

Plaintiff's Experts: Sally Felker, Ph.D.; Paul Iahn, M.D.; Suzanne Kimball, DO; Barry Layton, Ph.D.; Harold Mars, M.D.; Sandra McPherson, Ph.D.; Mary Vargo, M.D.; David Penney, Ph.D.
Defendant's Experts: Richard Naugle, M.D.; Barbara Swartz, M.D., Ph.D.

John Doe v. Anonymous
Type *of Case:* Premises Liability
Settlement: $2,100,000
Plaintiff's Counsel: Robert V. Housel, William Hawal
Defendant's Counsel: Withheld
Court: Not Listed
Date: September, 2001
Insurance Company: AIG

Damages: Subdural hematoma, craniotomy resulting in mild cognitive impairments

Summary: A case of insecticide fell 16 feet from overhead shelving onto a customer walking in an aisleway.

Plaintiffs *Experts:* Sterling Anthony (Materials Handling); James Mack, Ph.D.
Defendanf's Experts: None

Roberto Doe v. John Doe Companies

Type of Case: Employer Intentional Tort/Product Liability
Settlement: $1.33 Million
Plaintiff's Counsel: Peter J. Brodhead, Rhonda Baker Debevec
Defendant's Counsel: Withheld
Court: Not Listed
Date: February, 2001
Insurance Company: Withheld
Damages: $78,000 medical specials; $87,500 past lost wages

Summary: Plaintiff, a 32-year-old machine operator, reached through an unguarded hinged opening to clean a cylinder with a hand-tool. His left hand and arm were sucked into the pinch-point and traumatically amputated. Prior to Plaintiff's injury, at least five other employees had suffered injuries through this unguarded hinged opening, When asked why the company did not lock down the hinged opening after the most recent injury, the plant manager testified that he did not feel it was necessary. In addition to the previous injuries, former employees testified that in the mid 1980's the hinged opening had been fitted by the employer with a machine guard but it had subsequently been removed,

The product liability claims centered on the fact that the machine left the manufacturer without the guards required by OSHA and applicable industry standards, despite the manufacturer's knowledge that other injuries had occurred through the unguarded hinged opening.

Plaintiff's Experts: Simon Tamny (Engineer); Jack East (Amputee Life Care Planner)
Defendant's Experts: Hal Dunham (Engineer); Dave Moore (Engineer)

John Doe, et al. v. John Doe Insurance Co.

Type of Case: Auto - Scott/Pontzer
Settlement: $700,000
Plaintiff's Counsel: William Jacobson; Jonathan Mester
Defendant's Counsel: James Kline
Court: Cuy. County Common Pleas,
Judge Ronald Suster
Date: September, 2001
Insurance Company: Withheld
Damages: Wrongful death

Summary: A baby was killed in a motor vehicle accident when the tortfeasor (uninsured) went left of center, The baby was ejected from the vehicle and may not have been properly restrained, The mother had 2 subsequent miscarriages which Plaintiffs alleged were caused by the depression over the loss of her child.

Plaintiff's Experts: Mark Schenker, M.D.; Jes Sellers, Ph.D.
Defendanf's *Experts:* David Burkons, M.D.

John Doe v. John Doe Company, et al.

Type of Case: Product Liability
Settlement; $500,000
Plaintiff's Counsel: Thomas Mester, Jonathan Mester
Defendant's Counsel: Cash Miska, Rosemary Gold
Court: Cuy. County Common Pleas,
Judge Calabrese
Date: August, 2001
Insurance Company: Not Listed
Damages: Amputation of small finger, damage to ring finger of left hand,

Summary: Plaintiff was required by his employer to use a defective part in an extrusion machine which fractured and was thrown out of the machine causing damage to his left hand. The claim against the employer was intentional tort for requiring him to work on a defective part as well as failing to properly guard the machine, The claim against the manufacturer was in failing to adequately guard the machine at the time it was manufactured, Defendants each paid ½ of the settlement.

Plaintiff's Experts: Simon Tamny (Engineer); Robert Ancell, Ph.D. (Vocational Rehabilitation); John Burke, Ph.D. (Economist)
Defendant's Experts: James Ferrero (Metallurgical Expert); Jack Elgin Hyde, Jr. (Safety & Fire Analysis Consultant); Thomas Hilbert (Economist); Carolyn Wolfe (Vocational Rehabilitation)

Paula Stevenson, et al. v. Jeffrey Brodsky, D.O., et al.

Type of *Case:* Medical Malpractice
Judgment: $380,000
Plaintiff's Counsel: Leon M. Plevin, Ellen M. McCarthy
Defendant's Counsel: Cheryl Atwell
Court: Ashtabula County, Judge Vettl
Date: October, 2001

Insurance Company; MI IX
Damages: Aggravation of asymptomatic osteochondritis,

Summary; Defendant operated on the wrong ankle, shrinking two ligaments and causing an osteochondritis condition to be aggravated,

Plaintiff's Experts: Robert Corn, M.D.
Defendant's *Experts:* Kim Stearns, M.D.

John Doe v. ABC Corporation
Type of Case: Employer Intentional Tort
Settlement: $1,000,000
Plaintiff's Counsel: David M. Paris, Ellen M. McCarthy
Defendant's Counsel: Withheld
Court: Stark County Common Pleas,
Judge Sara Lioi
Dale: October, 2001
Insurance Company: Withheld
Damages: Fractured pelvis; sciatic stretch injury.

Summary: Defendant developed a written procedure which required its employees to walk into a pinch point. Most employees developed their own ad-hoc procedure allowing them to stay out of the pinch point with the tacit approval of management. Plaintiff, a relatively new employee, followed the written procedure and was crushed in the pinch point by moving pieces of equipment.

Plaintiff's Experts: Simon Tamny, P.E.; Gregory Vrabec, M.D.; Robert Ancell, Ph.D.; John F. Burke, Jr., Ph.D.
Defendant's Experts: Peter Barroso, P.E.; Gene Kimmel, P.E.; John Conomy, M.D.; Deborah Nolte, Ph.D.

Jane Doe v. John Doe, M.D.
Type of Case: Medical Malpractice
Settlement: $450,000
Plaintiff's Counsel: Thomas Mester; Harlan Gordon
Defendant's Counsel: Christine Reid
Court: Cuy. County Common Pleas
Judge Nancy Fuerst
Date: July, 2001
Insurance Company: Withheld
Damages: Erb's Palsy

Summary: Plaintiffs allege that the Defendant doctor deviated from the standard of care in failing to utilize the McRoberts maneuver in a delivery which encountered shoulder dystocia, Plaintiffs further contend that the Defendant physician utilized excess lateral traction on the fetal head causing a brachial plexus injury during the delivery, The brachial plexus injury resulted in Erb's Palsy. Defendant contends that he, in fact, utilized the McRoberts maneuver even though it was not documented based on his custom and practice and denied the use of excessive lateral traction,

Plaintiff's Experts: Melvyn Ravitz, M.D. (OB/GYN); Daniel Adler, M.D. (Pediatric Neurologist); Robert Ancell, Ph.D. (Rehabilitation); Norman Eckel (Economist)
Defendant's Experts: David Rothner, M.D. (Pediatric Neurologist); Justin Lavin, M.D. (OB/GY N)

Jane Doe, Adminx. v. Jane Doe Nursing Home
Type of Case: Nursing Home/ Wrongful Death
Settlement: $265,000
Plaintiff's Counsel: Jonathan D. Mester
Defendant's Counsel: Withheld
Court: Cuy. County Common Pleas
Judge Timothy McGinty
Date: August, 2001
Insurance Company: Withheld
Damages: Wrongful death

Summary: Plaintiff's decedent was a 60-year-old resident in a day care program, While there, he grabbed an orange slice off another resident's tray, choked and died, Plaintiff alleged failure to supervise as the facility was aware of his poor judgment and spontaneous conduct, Further, Plaintiff alleged the facility was incapable of caring for this man and should have gotten him to a 24 hour care facility.

Plaintiff's Experts: Byron Arbeit (Nursing Home Administrator); Donald Mann, M.D. (Neurologist)
Defendant's *Experts:* None

John Doe, Admin. v. John Doe Hospital, et al.
Type of Case: Nursing Home/Medical Malpractice/Wrongful Death
Settlement: $220,000
Plaintiff's Counsel: Jonathan D. Mester
Defendant's Counsel; Withheld
Court: Cuy. County Common Pleas,
Judge Nancy McDonnell
Date: August, 2001
Insurance Company: Withheld
Damages: Wrongful death

Summary: Plaintiff's decedent was in a ventilator unit, weaning from a ventilator. On her 28th day, she pulled out her tracheotomy and died 4 days later, As a result, Plaintiff alleged Plaintiff's decedent should have been restrained and connected to an alarm.

Plaintiff's Experts: Dennis Mazal, MD (Pulmonology)
Defendanf's *Experts:* Lawrence Martin, M.D. (Pulmonology); Nicholas MacMillan (Respiratory Therapist)

Baby Doe v. Drs. ABC
Type of Case: Medical Malpractice
Settlement: $435,000
Plaintiff's Counsel: David M. Paris, Ellen M. McCarthy
Defendanf's Counsel: With held
Court: Cuy. County Common Pleas,
Judge Christine McMonagle
Date: August, 2001
Insurance Company: Withheld
Damages: Wrongful death

Summary: Plaintiff's decedent was born with a VSD and coarctation of the aorta. Although nurses appreciated a murmur, her physician did not, At the first well visit, the parents reported symptoms including poor feeding, raspy breathing and blueness of her hands, feet and mouth, They were told to return in 1 week, The baby died 3 days later of congestive heart failure,

Plaintiff's Experts: Carol Miller, M.D.; Andrew Fryer, M.D.
Defendant's Experts: Steven G. Taylor, M.D.; Steven E. Krug, M.D.

Frank Earl, Adm. v. Grant Medical Center, et al.
Type of Case: Medical Malpractice
Judgment: $425,000 (against Grant Med. Ctr. only, Dr. Soward recv'd a verdict in his favor)
Plaintiff's Counsel: William S. Jacobson
Defendant's Counsel: Gerry Draper for Grant; Vince Lodice for Dr. Soward
Court: Franklin County, Judge Cain
Date: July, 2001
Insurance Company: Grant - Self-Insured; Dr. Sowards - Unknown
Damages: Death

Summary: Plaintiff's decedent had a long history of gastric problems and presented to Grant Emergency Room with midsternal burning pain, A chest film was done and was misinterpreted as normal. It was argued by Plaintiff that the film showed some fluid in the lungs, suggestive of congestive heart failure. She died the next day from cardiac arrest,

Plaintiff's Experts: Richard Braen, M.D.; Kenneth Lehrman, M.D.
Defendant's Experts: Daniel Schelble, M.D.; Richard Leigh, M.D.

John Doe, etc. v. John Doe, M.D.
Type of Case: Wrongful Death/ Medical Malpractice
Settlement: $1.3 Million
Plaintiff's Counsel: Eric Kennedy, David Landever
Defendanf's Counsel: Withheld
Court: Lake County Common Pleas
Date: January, 2001
Insurance Company: Withheld
Damages: No medical - death claim only.

Summary: Plaintiff was a 30-year-old female with a prior history of deep vein thrombosis in her left leg, In October of 1997 she presented to her internist with complaints consistent with both pulmonary embolism and bronchitis, The Defendant prescribed an antibiotic and sent her home, She died two days later from a pulmonary embolism. She was survived by her 31-year-old husband and two sons, ages 4 and 1.

Plaintiff's Experts: Mark Bibler, M.D. (Internist)
Defendant's Experts: Victor Tapson, M.D.

John Doe v. John Doe, M.D.
Type of *Case:* Malpractice/Wrongful Death
Settlement: $1.2 Million
Plaintiff's Counsel: Eric Kennedy, David Landever
Defendanf's Counsel: Withheld
Court: Cuy. County Common Pleas
Date: April, 2001
Insurance Company: Withheld
Damages: Death

Summary: Plaintiff was a 42-year-old quadraplegic. A mechanical pump that released medication on a continuous basis to prevent muscle spasms had been surgically implanted in his spine, The pump broke and he needed to be taken back to surgery for the repair, In his hurry to put him to sleep because of out-of-control spasms the anesthesiologist delivered the anesthetic agents too fast causing cardiac arrest, and leading to death, The patient was survived by his 40-year-old wife.

Plaintiff's Experts: David Cullen, M.D. (Anesthesiologist)
Defendant's Experts: None

Rebecca Kemmett v. Christine McCarthy
Type of *Case:* Auto/Pedestrian
Verdict: $350,000
Posf-Trial Settlement: $420,000
Plaintiff's Counsel: Mitchell A, Weisman
Defendanf's Counsel: Fred Kramer, Esq., Rick Hartman (In-house counsel for Allstate Ins, Co.)

Court: Cuy. County Common Pleas,
Judge Mary Boyle
Date: May, 2001
Insurance Company: Allstate
Damages: $6,410 (medical and lost earnings combined)
Summary: Plaintiff was a single, 22-year-old female employed by the YMCA as a coordinator of before and after school childcare programs, and by the Olive Garden as a part time waitress. On August 20, 1998, she was working at the Olive Garden in North Olmsted, Ohio, when the Defendant drove her car into a wall and window of the restaurant, striking a wooden stand which collided with Plaintiff and knocked her to the ground. She sustained a laceration of the right eyelid which required 13 stitches (but left no visible scar), contusions of the right knee and ankle, and soft tissue injuries to the lower back, An MRI taken 1 1/2 years after the accident demonstrated 2 herniated/bulging discs at the L4-L5/S1 level which did not require surgery. Plaintiff continues to suffer from intermittent back pain and has had to limit her lifting and other physical activities.

Plaintiff's Experts: Phillip C. De Mio, M.D. (Family Practitioner)
Defendant's *Experts:* Carl Metz, M.D. (Orthopedics)

Brenda Muriel, etc., et al. v. William D. Evans, et al.
Type of Case: Auto/Wrongful Death
Settlement: $700,000
Plaintiff's Counsel: Jack Landskroner, co-counsel Mati Jarve, Cherry Hill
Defendant's Counsel: Kenneth Abbarno
Court: Summit County,
Judge James R. Williams
Date: October, 2000
Insurance Company: Self-insured Yellow Freight, NCIC, U-Haul
Damages: Death by burning

Summary: Plaintiff's decedent was burned to death as a result of a rear-end collision between a Yellow Freight truck and Plaintiffs vehicle, which was being towed by the family's U-Haul truck after it broke down.

Plaintiff's Experts: Steven Schorr (Forensic Engineering Services)
Defendant's Experts: N/A

Rondy & Co., inc. v. National Union Fire Insurance Company of Pittsburgh, PA
Type of Case: Denial of Disability Claim
Settlement: $143,750
Plaintiff's Counsel: Robert P. Rutter
Defendant's *Counsel:* Andrew Dorman
Court: U.S. District Court
Date: January, 2001
Insurance Company: National Union Fire Ins. Co. of Pittsburgh, PA
Damages: Not listed

Summary; Denial of disability insurance policy. Insurer claimed that the policy exclusion applied.

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

Mitchell Reinhardt v. Joseph Kelley
Type of Case: Automobile Accident
Verdict: $35,000
Plaintiff's Counsel: Robert P. Rutter
Defendant's Counsel: William S. Derkin
Court: Cuy. County Common Pleas
Date: September, 2000
insurance Company: Allstate
Damages: Medical Specials $22,213.35
Summary: Automobile accident. Plaintiff suffered a herniated disc at L5-S1. Causation was disputed due to prior back treatment.

Plaintiff's Experts: Dr. Thomas Tulisiak; Dr. Maria Griffiths
Defendant's Experts: None

CSS Publishing Co. Inc., et al. v. American Economy Ins., et al.
Type *of Case:* Fire Loss to Publishing Warehouse
Settlement $850,000
Plaintiff's Counsel: Robert P. Rutter
Defendant's Counsel: Robert Chudakoff
Court: Allen County Common Pleas
Date: January, 2001
Insurance Company: American Economy
Damages: Declaratory judgment and bad faith action.

Summary: Insurer denied coverage for portion of claim, resulting in declaratory judgment and bad faith action. Trial court and Court of Appeals agreed that contested portion of claim was covered.

Plaintiff's Experts: John Woodward
Defendant's Experts: None

All-Ohio Buildings, Inc. v. Meridian Mutual Ins. Co.
Type of Case: Declaratory Judgment/ Bad Faith
Settlement: $325,000
Plaintiff's Counsel: Robert P. Rutter
Defendant's Counsel: Ann Leo

Court: Richland County Common Pleas
Date: October, 2000
Insurance Company: Meridian Mutual
Damages: Not listed

Summary: Denial of claim for arbitration award against general contractor/insured arising out of construction problems with job that required replacement of concrete floor stab.

Plaintiff's Experts: None
Defendanf's *Experts:* None

Jane Doe v. Joe Podiatrist

Type of *Case:* Medical Negligence
Settlement: $600,000
Plaintiffs *Counsel:* J. Michael Monteleone, M. Jane Rua
Defendant's Counsel: Withheld
Court: With held
Date: October, 2000
Insurance Company: Withheld
Damages: Loss of full use of left foot and reflex sympathetic dystrophy.

Summary: Defendants failed to diagnose the condition and performed an unnecessary podiatric surgical procedure resulting in permanent physical disfigurement and disability.

Plaintiff's Experts: Ronald E. Kendrick, M.D.; Orlando Mercado, DPM
Defendant's Experts: D. Scott Malay, D.P.M.; Gerard V. Yu, D.P.M.; Harold W. Vogler, D.P.M.; Alan R. Catamzriti, D.P.M.

Betty Worker v. Big Donut Co.

Type of *Case:* Intentional Tort
Settlement: $1 ,000,000
Plaintiff's Counsel: J. Michael Monteleone, Mark E. Barbour, Bradford D. Zelasko
Defendanf's Counsel: Withheld
Court: Withheld
Date: October, 2000
insurance Company: Self-Insured
Damages: Amputation of dominant righ hand,

Summary: Plaintiff worked in the bakery sanitation department of a large manufacturer of frozen food, She was cleaning a "Sheeter" with the power off and a co-employee told her the power must be "on". Her hand was caught between two rollers resulting in amputation.

Plaintiff's Experts: Gerald C. Rennell; Gary P. Maul, Ph.D.
Defendant's *Experts:* Triodyne, Inc.

Estate of Anonymous 13-Year-Old v. Anonymous Pediatrician, et al.

Type of *Case:* Medical Negligence/ Wrongful Death
Settlemen t: $3,500,000
Plaintiff's Counsel: J. Michael Monteleone, M. Jane Rua
Defendanf's Counsel: Withheld
Court: Withheld
Date: June, 2001
Insurance Company: Withheld
Damages: Death of a 13-year-old boy.

Summary: Plaintiffs' decedent, an 8-year-old boy, presented to Defendant pediatrician after having experienced shortness of breath over a period of several months. Defendant pediatric cardiologist was consulted and an EKG was read as normal. Approximately five years later, Decedent, who was then 13 years old, died in his sleep from a heart condition known as Long QT Syndrome which caused sudden arrhythmia.
Plaintiff alleged that: (1) Decedent was suffering from Long QT Syndrome at the time Defendant pediatric cardiologist misread the EKG as normal; (2) Defendant pediatric cardiologist misread the EKG and failed to diagnose and treat Decedent's condition; (3) Defendant pediatrician was negligent in failing to take futher action based on Decedent's continuing symptoms; and (4) Decedent died as a direct result of Defendants' negligence.

Plaintiff's Experts: Timothy Knilans, M.D.
Defendant's Experts: None

Anna Oller v. ABC Corp., et al.

Type of *Case:* Blankenship Intentional Tort/Product Liability
Settlement: $850,000
Plaintiff's Counsel: John R. Liber, Jr.
Defendant's Counsel: Rick McDonald; Bob Blackham; Bob Eddy
Court: Trumbull County, Judge John Stuard
Date: July, 2001
Insurance Company: Hartford/Chubb
Damages: Complete traumatic amputation of four right fingers,

Summary: A 26-year-old novice machinist, Anna Oller, was startled, and her right gloved hand contacted the unguarded, rotating cutters of a 1943 Cincinnati Horizontal Milling Machine. The blades caught the glove, pulled in her hand and tore off the fingers,

Plaintiff's Experts: Igor Paul, S.cd. (Engineer, Professor); Gerald Rennell (OSHA Safety Compliance); E.A. DeChellis, D.O. (Disability Evaluation); John F. Burke, Jr. (Economist)
Defendanf's Experts: Ralph Barnett (Engineering); Richard Hayes (OSHA)

Carol Doe v. John Doe Motorist, et al.
Type of Case: Automobile Accident and Scott Pontzer Claim
Sefflement: *$800,000*
Plaintiff's Counsel: Ru bin Gu ttman
Defendant's Counsel: Donald P. Screen
Court: Cuy. County Common Pleas,
Judge Mary Boyle
Date: April, 2001
Insurance Company: CNA and CGU
Damages: Multiple fracture injuries to jaw, face, arms and legs

Summary: Defendant driver negligently operated her motor vehicle left of center and struck Plaintiffs vehicle head on, Plaintiff suffered multiple fracture injuries to the jaw, face, arms and legs, After exhausting tortfeasor's policy limits, Plaintiff proceeded to make a claim against her employer's commercial general liability carrier, CGU, who offered numerous policy defenses,

Plaintiff's Experts: Dr. Jeffrey Campbell; Terrence L. Wenger, D.D.S.; Brendan M. Patterson, M.D. (Dept. of Orthopedics}
Defendant's Experts: None

Leslie Doe v. John Doe Motorist
Type of Case: Automobile Accident
Settlement: $100,000 (policy limits)
Plaintiff's Counsel: Rubin Guttman
Defendant's Counsel: With held
Court: Not Listed
Date: April, 2001
Insurance Company: State Farm
Damages: Fracture to pelvis and ankle.

Summary: Defendant driver ran a red light and struck Plaintiff's vehicle in the side. Plaintiff suffered fracture injuries to the pelvis and ankle. Plaintiff made a speedy recovery in spite of the severity of her injuries and is currently pregnant.

Plaintiff's Experfs: Leonard Weinberger, M.D.; Richard Kucera, M.D.
Defendant's Experts: None

John Doe v. ABC Nursing Home
Type of Case: Nursing Home Negligence
Sefflement: $1,200,000
Plaintiff's Counsel: Michael Pasternak, Peter Marmaros
Defendanf's Counsel: Withheld
Court: Withheld
Date: August, 2001
Insurance Company: Withheld
Damages: Below-the-knee amputation

Summary: Plaintiff was placed in a bed that was too small for his size. A footboard caused an ulcer that ultimately lead to the amputation,

Plaintiff's Experts: Stuart Goldstein, D.O.; George Cyphers; John Burke
Defendanf's Experts: S. Kwon Lee

Angel DeJesus v. St. Joseph, et al.
Type of *Case:* Medical Malpractice
Verdict: $232,248.28
Plaintiff's Counsel; Michael B. Pasternak
Defendanf's Counsel; Craig Johnson
Court: U.S. District Court, Eastern District of Kentucky
Date: June, 2001
Insurance Company: Withheld
Damages: $9,428.28 - Medical bills; $22,820.00 - Wage loss

Summary: An emergency room physician and physician assistant failed to detect and remove a piece of glass from Plaintiff's forearm following a work-related accident.

Plaintiff's Experts: Kim Stearns, M.D.; Michael Bryan (Vocational Counselor)
Defendanf's Experts: Charles Echerline, M.D.

Gerard Tammarino v. Gwenn Maguire, et al.
Type of *Case:* Motor Vehicle Accident
Verdict: $147,057.14
Plaintiff's Counsel: Dennis P. Mulvihill
Defendanf's *Counsel:* Michael Callow; Barbara Moser
Court: Cuy. County Common Pleas,
Judge Nahra
Date: September, 2001
Insurance Company: Allstate and Farmers
Damages: $66,000 medicals

Summary: An automobile accident caused Plaintiff to aggravate the arthritis in his neck and back and caused a bulging disc in his lower back,

Plaintiff's Experts: John Collis, M.D.
Defendant's Experts: Howard Tucker, M.D.

Anonymous Administrator v. Defendant Hospital, et al.
Type of *Case:* Medical Malpractice
Sefflement: $4,100,000 (in mediation)
Plaintiff's Counsel: Cheryl O'Brien; Jerome S. Kalur
Defendant's Counsel: Withheld
Court: Withheld
Date; Not Listed
Insurance Company: Withheld
Damages: Death

Summary: This case involved a 33-year-old married mother of two girls, who had a history of worsening colitis that was refractory to medical treatment, She underwent elective colectomy with construction of a J-pouch on February 13, 1998 at Anonymous Hospital by Dr. Anonymous Colarectal (CR), She developed a vaginal fistula and was readmitted on February 24, and Dr. Anonymous CR repaired the fistula and constructed an ileostomy,

Over the next 2-3 weekend days, decedent suffered from nausea, vomiting, high output from her ileostomy and low urinary output while at home, She was re-admitted to Anonymous Hospital (Defendant) on Sunday, March 1 through the emergency room. Her diagnosis was severe dehydration and electrolyte imbalance. Intravenous fluid of Normal Saline was begun by the ER physician who contacted the on call attending and relayed the diagnosis and lab values. The IV order was subsequently changed by Dr. Anonymous CR attending to include mandatory electrolyte replacement including Potassium (K+). She was transferred to the floor and came under the care of Dr. Anonymous CR Resident (Defendant), Both the attending and the resident were aware of the patient's long-standing history of Prednisone therapy of 10mg. PO daily. Despite the added stress of recent surgery and acute exacerbation, neither doctor increased the dose or changed it to IV administration.

As early as 17:55 hrs., the attending was notified by phone of the patient's high ileostomy output and low urine output, A straight catheterization was ordered but not performed for over 3 hrs. and results were not available until after the patient died, NS with KC1 was administered until approximately 24:00 hrs. after which time the record reflects no additional fluids were given between 12 Midnight and 5:20 a.m. Despite an unusual discrepancy between the patient's recorded temperature of 104 F and a pulse of 63, on the night shift, neither physician was notified. The night shift nurse failed to record any intake or output for her entire shift Eighteen hours after admission decedent arrested and ,espite very aggressive resuscitative measures, including performance of a cricothyroidotomy, she died,

Plaintiff's Experts: Dr. Stephen Hanauer (GI Crohn's); Dr. Joel Weinberg (ICU/Electrolyte); Dr. Geoffrey Mendelsohn (Pathology); Denise Kresevic, Ph.D., R.N., C.S.; Harvey Rosen Ph.D. (Economist)
Defendant's Experts: Dr. Janice F. Rafferty (CR); Patricia D. Patterson, R.N.; Wendeline Botnik, J.D., R.N.; Dr. Indru T. Khubchandani; Dr. Henry Eisenberg

Anonymous v. Anonymous

Type of Case: Intentional Tort/ Product Liability
Settlement: $910,000
Plaintiff's Counsel: Robert F. Linton, Jr., Stephen T. Keefe, Jr., Stephen E. Bloom
Defendanf's Counsel: Withheld
Court: Withheld
Date: July, 2001
Insurance Company: Withheld
Damages: Second and third degree burns to lower extremity and Post Traumatic Stress Disorder,

Summary: A 36-year-old African American suffered thermal and chemical burns while working on an industrial tub washer, A metal cover over the chemical tank gave way because it was not properly positioned. Plaintiff alleged that the Defendant-employer had an unsafe work practice of allowing its workers to remove the tank covers to clean their tools, which created a hazardous work condition, substantially certain to injure the operator. (The operator is required to stand on the cover and use it as a work platform to perform his job responsibilities,} The employer disputed that such a practice occurred. Plaintiff further alleged that the manufacturer of the machine should have designed it with a self-retention mechanism which would have allowed the cover to remain permanently affixed to the machine and would have prevented the accident, Plaintiff had $56,043.35 in past medical expenses and also alleged an impaired earning capacity in the amount of $521,654.45, which was in dispute, Plaintiff suffered from severe Post-Traumatic Stress Disorder with flashbacks and nightmares and was unable to return to work in an industrial setting,

The case settled at the final pretrial following a day of private mediation. Motions for summary judgment were still pending on the issue of the employer's liability and the manufacturer's contention that the employer had substantially modified the machine.

Plaintiff's Experts: Simon Tamny; Rod Durgin, Ph.D.; John P. Wilson, Ph.D.; Elizabeth Dreben, M.D.; Bram Kaufman, M.D. (Plastic Surgeon); Richard Fratiane, M.D. (Plastic Surge@
Defendant's Experts: Richard Hayes

Anonymous v. Anonymous

Type of *Case;* Medical Malpractice
Settlement: $2500,000 (from ER group)
Plaintiff's Counsel: Mark W. Ruf, Robert F. Linton, Jr.
Defendant's Counsel: With held
Court: Cuy. County Common Pleas
Date: May, 2001

Insurance Company: With held
Damages: Cauda Equina Syndrome

Summary: Plaintiff was a 47-year-old woman with long-standing low back pain, After chiropractic manipulation, she experienced an inability to urinate and numbness, She went to the emergency room where she was diagnosed with urinary retention, She returned 14 hours later when she was diagnosed with acute Cauda Equina Syndrome (an acute L5-S1 disc herniation) which was then treated with emergency surgery, She remains permanently incontinent in bowel and bladder along with a permanent loss of sensation in the pelvic area. The Defendants disputed whether a 14 hour delay would have made a difference in her outcome.

Plaintiff's Experts: Dr. Herbert Bell (Neurosurgeon); Dr. Scott Shapiro (Neurosurgeon/Cauda Equina Expert); Dr. Joseph R. Yates (Emergency Medicine); Bernie Agin, CPA (Damage Expert)
Defendant's Experts: Dr. Herbert Engelhard, III (Neurosurgeon); Dr. Dean Dobkin (Emergency Medicine)

Richmond v. Kemper Insurance Companies, et al.
Type of *Case:* Intentional Tort/ Insurance Coverage
Settlement: $750,000
Plaintiff's Counsel: Robert F. Linton, Jr., Stephen T. Keefe, Jr,, Mark W. Ruf
Defendant's Counsel: Ronald A. Rispo
Court: Cuy. County Common Pleas
Date: July, 2001
Insurance Company: Kemper Insurance Companies
Damages: L4 pars fracture

Summary: A 37-year-old labor was instructed by his supervisor to climb up and manually release a pressure valve on a tanker truck, owned by his employer, which resulted in an explosion, Plaintiff suffered an L4 pars fracture, requiring surgery, Plaintiff is totally disabled and may require further surgery.

Plaintiff's Experts: Dr. James S. Anderson (Surgeon}
Defendant's Experts: None

Kenneth Orwick v. Dairymens, et al.
Type of Case: Workers' Compensation Claim
Verdict: Plaintiff is permitted to participate in the Workers' Compensation Fund for an aggravation of a degenerative disc condition,
Plaintiff's Counsel: Scott Kalish
Defendanf's Counsel: Patricia Weisberg, Eugene Meador
Court: Cuy. County Common Pleas,
Judge Burt Griffin
Date: July, 2001
Insurance Company: Not Listed
Damages: Denial of Workers' Compensation claim.

Summary: Plaintiff was in the course and scope of work at Dairymens when he fell through a catwalk, fracturing his left ankle, left knee and ribs on the right side, The only issue at trial was whether Plaintiff aggravated his degenerative disc condition in the fall, Plaintiff has not worked since the fall and therefore is claiming over $100,000 in back wages,

Plaintiff's Experts: Kenneth Chapman, M.D.
Defendant's Experts: Jack Jones, M.D.

Angel Pearn v. Chrysler Corporation, et al.
Type of *Case:* Consumer/Laundered Lemon
Verdict $319,000
Plaintiff's Counsel: Dean Young, Rocco Yeargin
Defendant's Counsel: Michael Gilbride, Denise Dickerson
Court: Summin County Common Pleas Judge Mary Spicer
Date: December, 2000
Insurance Company: N/A
Damages; Not Listed

Summary: Plaintiff was in the course and scope of work at Dairymens when he fell through a catwalk, fracturing his left ankle, left knee and ribs on the right side, The only issue at trial was whether Plaintiff aggravated his degenerative disc condition in the fall, Plaintiff has not worked since the fall and therefore is claiming over $100,000 in back wages,

Plaintiff's Experts: Kenneth Chapman, M.D.
Defendant's Expetfs: Jack Jones, M.D.

Cassandra Green v. Unviersity of Nebraska Medical Center
Type of Case: Medical Malpractice
Settlement: $575,000
Plaintiff's Counsel: Paul M. Kaufman
Defendanf's Counsel: Earl Greene
Court District Court, Douglas County, Nebraska, Judge Gregory Schatz
Date: August, 2001
Insurance Company: Nebraska Medical Malpractice Fund
Damages: Not Listed

Summary: Plaintiff, a Cleveland native attending college in Nebraska, suffered from ulcerative colitis, Defendant surgeon did a bowel resection, using a one-stage approach. Shortly after the surgery, the anastamosis broke down leading to a series of horrible complications including fistulas,

infections and abscesses, Multiple subsequent surgeries were required, Ultimately, Victor Fazio, M.D., of the Cleveland Clinic, was able to create an internal pouch which avoids the use of an external bag. However, Plaintiff must drain out this internal bag 4 to 5 times each day. This is a permanent condition for a young lady in her mid-twenties, Additionally, there was evidence that Plaintiff may be infertile due to extensive scar tissue that has built up internally.

Plaintiff's experts opined that Plaintiff was too sick to have her operation done in one state and that she required at least two stages or perhaps even three, She had failed treatment with high dose steroids and cyclosporins and was malnourished and probably septic at the time of the original operation by the Defendant surgeon, These factors would dictate doing the procedure in multiple stages.

Plaintiff's Experts: Marilyn Richardson, M.D.; Ira Kodner, M.D.; Victor Fazio, M.D.
Defendant's Experts: Robert Beart, M.D.

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LISTING OF NEW PHYSICIANS/EXPERTS

PERIOD ENDING: October 11, 2001

NAME	SPECIALTY
David Abramson, M.D.	Emergency Medicine
Walter Afield, M.D.	Unknown
Lisa Ann Atkinson, M. D .	Staff Physician
Keith Armitage, M.D.	Infectious Disease
Stanley I? Ballou, M.D.	Unknown
Mitchell Barney, D.D.S.	Dentist
W.E. Bazell, M.D.	Urology
Debbie Bazzo, R.N.	Obstetrical R.N.
Bennett Blumenkopf, M.D	Neurologist
Robert E. Botti, M.D.	Cardiology
Malcolm Brahms, M.D.	Orthopedic Surgeon
Dennis Brooks, MD.	Orthopedic Surgeon
Leo J. Brooks, M.D.	Sleep Disorders
William Bruner, M.D.	OB/GYN
Aaron Brzezinski, M.D.	Gastroenterology
Stephen Collins, M.D.	Epileptologist
Robert Corn, M.D.	Orthopedic Surgeon
Mary Corrigan, M.D.	Family Practice
Amir Dawoud, M.D.	Anesthesiologist
Robert K. DeVies, Ph.D.	Psychologist
Stephen DeVoe, M.D.	OB/GYN
Stephen DeVoe, M.D.	OB/GYN
John Distefano, D.D.S.	Dentist
Method Duchon, M .D .	OB/GYN
Stuart Edelberg, M.D.	OB/GYN
Todd D. Eisner, M.D.	Gastroenterology
Herbert Engelhard, M.D.	Weurologi st
Robert Erickson, M.D.	Orthopedic Surgeon
Steven Feinsilver, M.D.	Sleep Disorders
Robert Flora, M.D.	Infectious Disease
Ellen Flowers	Occupational Therapist
Richard Friedman, M.D.	Orthopedic Surgeon
Robert Fumich, M.D.	Orthopedic Surgeon
Debra A. Gargiulo	R.N.
Barry George, M.D.	Cardiologist
Martin Gimovsky, M.D.	OB/GYN
Ronald Gold, M.D.	Pediatrician
Daniel Goldberg, M.D.	Surgeon
Michael Gyves, M.D.	OB/GYN
William Hahn, M .D .	OB/GYN
Hunter Harnrnill, M.D.	OB/GYN
Ivan Hand, M.D.	Pediatrician
Nawar Hatoum, M.D.	OB/GYN
Phyllis Hayes	R.N.
Gary Himmel, Esq.	Attorney

Mary Hlavin, M.D.	Neurologist
Thomas Hobbins, M. D ,	Sleep Disorders/Pulmonologist
Tung-Chang Hsieh, M.D.	OB/GYN
Mary Hulvalchick, R.N.	Obstetrical R.N.
Moises Jacobs, M.D.	General Surgeon
Joseph Jamhour, M.D.	Pediatrician
Bruce Janiak, M.D.	Emergency Medicine
Mark Janis, Ph.D.	Psychologist
Allen Jones, M.D.	Emergency Medicine
Donna Joseph	R.N.
Suzanne Kimball, M. D.	General Internist
Alfred Kitchen, M. D .	Cardiology
Ralph Kovach, M.D.	Orthopedic Surgeon
Keith Kruithoff, M. D ,	Internal Medicine
Dennis Landis, M.D.	Neurologist
Alan Lerner, M.D.	Neurologist
David Longworth, M.D.	Infectious Disease
Phillip Marciano, M.D.	Maxillofacial Surgeon
Sheldon Margulies, M.D.	Neurologist
Steven Meister, M.D.	Cardiologist
Martha Miller, M.D.	Pediatrician/Neonatal
Clark Millikan	Director of Academic Affairs
Richard O'Shaughnessy, M.D.	OB/GYN
Elizabeth E. O'Toole, M. D.	Geriatric
Raphael Pelayo, M.D.	Otolaryngologist
Neal Wayne Persky, M.D.	Geriatric/Internal Medicine
David C. Preston, M.D.	Neurologist
Thomas R. Price, M.D.	Neurologist/Psychiatrist
Martin Raff, M.D.	Infectious Disease
Elisabeth Righter, M. D.	Family Medicine
Michael Rowane, M. D .	Family Medicine
Ghassan Safadi, M.D.	Pediatrician/Allergist
Sue Sanford	Director/Obstetrical Services
Craig Saunders, M.D.	Thoracic Surgeon
Craig Saunders, M.D.	Thoracic Surgeon
Debra Seaborn	R.N.
David Silvaaggio	Dept. Administrator - Family Practice
Diane Soukup	Geriatric Nursing
Kelly Sted	Manager of Enrollment
Shirley Stokley	R.N.
Vinodkumar Sutaria, M . D .	Hematologist
Elizabeth Svec	R.N.
Barbara Swartz, M.D.	Epileptologist
Laurel Thill	R.N.
Tarvez Tucker, M.D.	Neurologist
Helenmarie Waters, R.N.	Obstetrical R.N.
Steven Yakubov, M.D.	Cardiologist
Robert Zaas, M.D.	Orthopedic Surgeon
Arthur B. Zinn, M.D.	Medical Geneticist
Christine M. Zirafi, M . D .	Cardiologist

CATA VERDICTS AND SETTLEMENTS

Case Caption: _____

Type of Case: _____

Verdict: _____ Settlement: _____

Counsel for Plaintiff(s): _____
Address: _____
Telephone: _____

Counsel for Defendant(s): _____

Court/Judge/Case No: _____

Date of Settlement/Verdict: _____

Insurance Company: _____

Damages: _____

Brief Summary of the Case: _____

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_____

Experts for Plaintiff(s): _____

_____

_____

Experts for Defendant(s): _____

_____

_____

RETURN FORM TO:

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Name _____ Age: _____

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Office Address: _____ Phone no: _____

Home Address: _____ Phone no: _____

Spouse's Name: _____ No. of Children: _____

Schools Attended and Degrees (Give Dates): _____

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Professional Honors or Articles Written: _____

_____

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

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