CATA News
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President's Message

Romney B. Cullers

Ohio's 166 hospitals earned record profits of $1.48 billion in 2004. This figure represents a 57.8% increase from 2003. These statistics were cited in an article published in the business section of the Plain Dealer on December 16, 2005. The article sets forth additional details of a report sponsored by the Service Employees International Union. The purpose of the report was to increase government oversight and accountability of non-profit hospitals. The conclusion of the report? The industry has run amok. In our last newsletter, we cited statistics demonstrating that the business of medical malpractice insurance has been highly profitable, as well, during the past five years.

While hospitals and medical malpractice insurers were busy earning unprecedented profits in Ohio, our legislature worked feverishly to pass tort reform. Where was the "crisis"? Now we have caps. Record profits will continue to be made on the backs of our clients. Our legislature abandoned every injured person in the state by pushing the insurance lobby's tort reform agenda without determining the facts. Information about the profitability of the business of healthcare was available to our legislature well before the new medical malpractice laws were passed. It was simply ignored. Thankfully, we have hard-working judges in our county who comprehend the injustice caused by these unnecessary changes in the law. Leveling the playing field in the trial court is the only way we can obtain relief for our people.

It's important to stick together during tough times. We are here. If you have questions, or need assistance locating an expert, whatever it is, ask. The Academy will help. We look forward to continuing success.

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Announcements

The law firm of Greene & Eisen Co., LPA is pleased to announce that **Laurel A. Matthews, MD, JD** (formerly of Kampinski & Matthews Co., LPA) is now of counsel with the firm. 1300 East 9th Street, Suite 1801, Cleveland, Ohio 44114. Telephone: 216-687-0900.

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A Danger Zone Within The Doctrine Of Agency by Estoppel – Comer v. Risko

by Rick Stege and Dan Applegate[1]

A. The *Comer* Decision

The Ohio Supreme Court recently addressed the applicability of the doctrine of agency by estoppel in *Comer v. Risko,* 106 Ohio St.3d 185, 2005-Ohio-4559. Although the Court's decision was limited to the context of the statute of limitations, the decision may have broader implications. The holding of the case permits hospitals to escape liability for the negligent actions of the independent contractor physicians that they retain under certain circumstances. *Comer* is yet another "land mine" in medical malpractice litigation in Ohio.

The Supreme Court established the test in Ohio for agency by estoppel in the hospital setting in *Clark v. Southview Hosp. & Family Health Ctr*., 68 Ohio St.3d 435, 1994-Ohio-519 (hereinafter "*Southview*"). In *Southview*, the Court found that agency by estoppel exists between a hospital and an independent contracting physician when the hospital 1) holds itself out to the public as a provider of medical services and 2) in the absence of notice or knowledge to the contrary, the patient looks to the hospital, as opposed to the individual practitioner, to provide competent medical care. *Id*. at 444-45. The *Southview* decision broadened the previous test created by the Court in *Albain v. Flower Hospital*, (1990) 50 Ohio St.3d 251, which had proven to be unworkable and an unfair obstacle for plaintiffs to overcome.[2]

The Court was invited by the defense bar to revisit this test in *Comer*. On July 17, 2000, the plaintiff sued Knox Community Hospital and her primary physician for medical negligence in failing to diagnose her cancer before it became untreatable. *Comer v. Risko*, supra. at ¶ 3-5. In framing her claim against the hospital, the plaintiff alleged that the two radiologists who read her x-rays at the hospital interpreted her films, resulting in a failure to properly diagnose her cancer. *Id.* at ¶ 4. The radiologists were independent contractors and the plaintiff did not name them as defendants, presumably in reliance on *Southview*. *Id.* at ¶ 5. After the statute of limitations for a claim against the radiologists expired, the hospital moved for summary judgment on the theory that no viable claim existed against the hospital because the statute of limitations against the radiologists themselves had expired. *Id.* The Knox County Court of Common Pleas agreed. *Id.*

The plaintiff appealed to the Fifth District Court of Appeals. The appellate court considered the question of whether a plaintiff must include the independent contractor physician in a lawsuit in order to maintain a viable claim against the hospital. The court concluded that "a plaintiff may pursue a claim based upon agency by estoppel against a hospital even if it has not named the independent contractor tortfeasor as a party and/or a claim against the tortfeasor is not viable, if the hospital meets the criteria of [*Southview*]." *Clark v. Risko*, 2003-Ohio-7272 (5th Dist.), ¶ 20.

The appellate court's rationale was based upon the logic of the decision in *Holman v. Grandview Hospital Medical Center* (2nd Dist. 1987), 37 Ohio App.3d 151, which stated that a suit against a hospital arising from the negligence of an employee may proceed even if the negligent employee is not a party to the case. *Clark v. Risko*, supra. at ¶ 19-20. The Court of Appeals coupled *Holman* with public policy statements in *Southview* to reach its result. The court referenced the difficulty a patient faces in differentiating between an employee and an independent contractor. *Id.* at ¶ 20-21. The court reasoned that claims against a hospital that meet the *Southview* criteria are no different than claims against a hospital for the acts of an actual employee or agent. *Id.* at ¶ 20. Using *Holman* as a foundation, the Court of Appeals held that claims against the hospital based upon agency by estoppel resulting from negligent care provided by an ostensible agent are viable, despite the fact that the statute of limitations had run against that agent and the agent is an independent contractor, not an employee.[3]

The Supreme Court overruled the Court of Appeals, holding that the hospital cannot be held vicariously liable under an agency by estoppel theory if the independent contractor physician is not liable by virtue of the statute of limitations. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, at ¶ 2. In other words, if the statute of limitations applicable to a claim against the independent contractor physician has run, there can be no claim against the hospital. *Id.*

The Court's decision was based in large part on common law agency theories. Under general agency law, as explained by the Court, the principal is liable for the torts of its agent only when an actual agency relationship exists, such as between a hospital and its employee. *Id.* at ¶ 18. In the context of agency by estoppel, a fictional agency relationship is created between the hospital and an independent contractor, who is not an agent of the hospital and over whom the hospital cannot exercise control. *Id.* at ¶ 19. In an agency relationship the agent is primarily liable for his actions, and the principal only secondarily liable, with the principal's liability coming through the agent. *Id.* at ¶ 20. Within this context, the Court held that "a direct claim against a hospital premised solely upon the negligence of an agent *who cannot be found liable* is contrary to basic agency law." ¶ 25.

The Court stated:

> [a]gency by estoppel is not a direct claim against a hospital, but an indirect claim for the vicarious liability of an independent contractor with whom the hospital contracted for professional services. Furthermore, if the independent contractor is not and cannot be liable because of the expiration of the statute of limitations, no potential liability exists to flow through to the secondary party, i.e., the hospital, under an agency theory.

Id. at ¶27. The Court then rejected what it called the appellate court's "expansion" of *Southview* allowing a plaintiff to join a hospital as a defendant for liability through agency by estoppel, without a timely claim pending against the independent contractor physician who is primarily liable.

The dissenting Justices disputed the majority's interpretation of agency law and its application to hospitals under the *Southview* decision and agency by estoppel. The dissent noted that in *Southview*, the tortious independent contractors were originally named defendants but settled their claims prior to trial, leaving only the hospital as a defendant. *Id.* at ¶ 32 (Pfeifer, J., dissenting). The dissent argued, in light of that aspect of *Southview*, that the majority's argument that "the release of a primarily liable party also releases a secondarily liable party is less than convincing in this context." *Id.* at ¶ 32 (Pfeifer, J., dissenting).

B. ***Comer*** **for the Plaintiffs' Practitioner**

How can this *Comer* pitfall arise as a practical matter? In three ways: (1) Counsel sends a 180 day letter to the hospital, before the one year statute is about to expire, but does not send one to the independent physician upon whose shoulders the liability of the hospital rests; (2) Counsel sues the hospital within the limitations period but fails to join the independent physician, and; (3) Counsel assumes that a physician (upon whose shoulders the hospital's liability rests) is an employee and joins only the hospital, later to find that the physician is really an independent contractor. In short, be careful!

Two further observations are worth noting. What about the scenario in which the hospital is joined and the offending independent physician is "John Doe #1," to be joined later? May the hospital escape liability? In our opinion, the hospital may not escape liability in this fashion if the John Doe allegations in the complaint are done properly, the apparent agency allegations against the hospital are carefully drafted, and the real John Doe is joined later in the proper manner. Again – be careful.

Also, how do we protect against a further attack on the doctrine set forth in *Southview*? Obviously, the defense bar would love to see *Southview* overruled completely. We should protect against this to the extent possible by making a good record of the impossible burden faced by the helpless patient under these circumstances.

The *Comer* decision makes it clear that a plaintiff must file suit against (or send 180-day letters to) all potentially liable physicians for injuries suffered within the hospital environs on the chance that one or more of them might be independent contractors, since knowledge as to their status may not be developed until after the expiration of the statute of limitations. In other words, if in doubt, join in a timely manner all individual defendants.[4]

Endnotes

1. Rick Stege is a partner in the firm of Stege & Michelson Co., LPA. Dan Applegate will graduate from Case Western Reserve University Law School in May 2006.
2. The test in *Albain* was set forth at paragraph four of the syllabus: "A hospital may, in narrowly defined situations, under the doctrine of agency by estoppel, be held liable for the negligent acts of a physician to whom it has granted staff privileges. In order to establish such liability, a plaintiff must show that: (1) the hospital made representations leading the plaintiff to believe that the negligent physician was operating as an agent under the hospital's authority, and (2) the plaintiff was thereby induced to rely upon the ostensible agency relationship."
3. The Court of Appeals' decision mirrored the conventional wisdom within both the Plaintiffs' and defense bar on the meaning of *Southview* at the time.
4. General Counsel for the hospital may be of assistance in sorting this out, assuming that time permits.

Law Updates

by **John R. Liber, II**
Stephen Vanek
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Civil Procedure – Transfer of Venue Intrastate Based on Doctrine of Forum Non-Conveniens Rejected

***State ex rel. Smith v. Cuyahoga County Court of Common Pleas*, 106 Ohio St.3d 151, 2005-Ohio-4103.**

On April 2, 2003, as the Administrator of the estate of her deceased son, Edward Smith, II, Carla Smith ("Smith") filed a medical malpractice and wrongful death action in the Cuyahoga County Court of Common Pleas against the Cleveland Clinic Foundation and Rajyalakshmi Rambhatla, M.D, among others. Defendants moved to transfer the case from Cuyahoga County to Wayne County, arguing that because several Defendants were located in Wayne County and a substantial portion of the treatment rendered to Edward Smith, II occurred in Wayne County, it was a more appropriate venue. Defendants' motion was granted, and venue was transferred. Though Smith appealed the change of venue, the Cuyahoga County Court of Common Pleas dismissed the appeal for lack of a final, appealable order.

Smith reached a partial settlement with the parties, and voluntarily dismissed her remaining claims against Dr. Rambhatla and the Cleveland Clinic. She timely refiled her claims in the Cuyahoga Court of Common Pleas, and the case was again transferred to Wayne County upon Defendants' motion. On February 11, 2005, the Wayne County Court of Common Pleas granted Smith's motion to reject the transfer of venue, and transferred the case back to the Cuyahoga County Court of Common Pleas. The Cleveland Clinic again successfully moved to transfer venue to Wayne County. Smith filed an action with the Supreme Court of Ohio seeking a writ of mandamus to compel the Cuyahoga County Court of Common Pleas to vacate the order transferring venue to Wayne County, accept venue of the medical malpractice case, and adjudicate the case on its merits.

The Ohio Supreme Court found that, in continuously ordering the transfer of the case to Wayne County, the Cuyahoga County court implicitly relied upon the doctrine of *forum non conveniens*, which allows a court to reject jurisdiction even when proper if public and/or private interests so warrant. Factors which a court may consider in applying this doctrine include "the ease of access to sources of proof, the availability of witnesses, and the local interest in having localized controversies decided at home." *Gulf Oil Corp. v. Gilbert* (1947), 330 U.S. 501, 508-509, 67 S.Ct. 839.

While the doctrine of *forum non conveniens* is often employed by courts seeking to transfer cases from one state to another or from one country to another, the Ohio Supreme Court has expressly rejected its application to intrastate transfers from one county to another. See *State ex. rel. Lyons v. Zaleski*, 75 Ohio St.3d 623, 624, 1996-Ohio-267, quoting *Chambers v. Merrell-Dow Pharmaceuticals, Inc.* (1988), 35 Ohio St.3d 123, 132, 519 N.E.2d 370. Indeed, the Supreme Court has held that Rule 3(C)(4) of the Ohio Rules of Civil Procedure limits intrastate transfers to those situations wherein it appears that a fair and impartial trial cannot be had within the county of a case's original filing, and even then the case may only be transferred to an adjoining county. In this case, the Supreme Court noted the complete absence of any evidence which would indicate Defendants' inability to receive a fair trial in Cuyahoga County and condemned such evidence, had it been introduced, as insufficient, since Wayne County does not adjoin Cuyahoga County.

Upon concluding that the case had been improperly transferred to Wayne County pursuant to the doctrine of *forum non conveniens*, the Supreme Court next addressed whether Smith had met the legal standard entitling her to a writ of mandamus. In order to succeed, Smith must establish a clear legal right to both the vacation of the transfer orders and an order compelling Cuyahoga County to adjudicate her malpractice claims on the merits, a clear legal duty of Cuyahoga County Court of Common Pleas to perform the requested acts, and the lack of an adequate remedy in the ordinary course of the law. The Supreme Court concluded that she satisfied the first two prongs of the applicable legal standard because Smith established that the Cuyahoga County court relied upon the doctrine of *forum non conveniens* in error, and that jurisdiction in Cuyahoga County is proper.

Less easy, reasoned the Supreme Court, was Smith's task in satisfying the final prong, since appeal of a final judgment is traditionally considered an adequate remedy when challenging a court's decision regarding change of venue. However, as the pattern of behavior suggested

that the two courts would continue to refuse to exercise jurisdiction over Smith's case and transfer it back and forth between them, the Supreme Court recognized the probability that the case would not proceed to judgment, such that Smith would be deprived of any appeal. Accordingly, the Supreme Court granted a peremptory writ of mandamus compelling the Cuyahoga County Court of Common Pleas to vacate its orders transferring the case, to accept venue over the case, and to adjudicate the merits of the case.

Class Actions – Issues of Standing, Commonality Addressed in Granting Class Certification

***Chris Arndt v. P&M Ltd., et al.*, 11th District App. No. 2004-P-0009, 2005-Ohio-4481, 2005 WL 2077386.**

P&M Estates is a mobile or manufactured home park located in Garrettsville, Ohio. The park contains approximately 233 lots. The park is bisected by Mahoning Creek, a tributary of Eagle Creek, creating in the center of the park a "hundred year flood plain", that is, an area adjoining a river or stream inundated with a flood having a one percent chance of being equaled or exceeded in any given year, as established by the Federal Emergency Management Agency.

A class action complaint was filed against P&M Estates by the current residents on behalf of all natural persons who have resided in P&M Estates since January 1, 1992. The complaint alleged that P&M had built a bridge over a culvert that, due to the inadequacy of the design, obstructed the natural flow of the creek and caused flooding. According to the complaint, there had been repeated and regular flooding of the Mahoning Creek since 1992. The worst incident was in July 2003 when flood waters covered 40 lots within the park. However, only four of five homes suffered "substantial damage" as defined by OAC 3701-27-01(AA). An Ohio Department of Health Report indicated that 18 homes suffered damage, ranging from damage to skirting to damage to flooring and porches.

The complaint sought both preliminary and permanent injunctions requiring P&M to remove the culvert bridge, to erect a new and appropriately designed bridge, to provide all of the reporting documents to the Ohio Department of Health as required by the Ohio Administrative Code, to submit a flood management plan, and to refrain from increasing rent during the pendency of the class action. The complaint further sought a declaratory judgment that Plaintiffs had a private cause of action under Ohio Revised Code Chapter 3733, along with compensatory damages, punitive damages and attorney's fees.

A motion for class certification was filed on July 17, 2003. In September 2003, the trial court granted Plaintiffs' motion to bifurcate the issues of compensatory damages from liability. In October 2003, the court magistrate issued an order granting in part, and denying in part, Plaintiffs' motion for class certification. The magistrate's decision divided the class into three separate subclasses, which is authorized under Civ. R. 23(C)(4)(b). The magistrate recommended certification of a class consisting of 1) all current P&M residents for purposes of injunctive relief; 2) a class consisting of park residents since January 1, 1992 for claims for loss of use of the common areas; and 3) a class of those seeking compensatory damages for particular damage to property. In January 2004, the trial court adopted the magistrate's decision, however, it did not certify the class claiming loss of use/loss of enjoyment as the court found that Plaintiffs had failed to prove that the claims of the individual tenants were similar enough to warrant a finding that questions of law or fact were common to the class, or that the claims of the representative parties were typical of the claims of the purported class. Both parties appealed the trial court's ruling.

On appeal, the Eleventh District addressed several assignments of error raised by P&M. The first concerned the propriety of the trial court's class certification for the purposes of injunctive relief. The court noted that the magistrate's decision contained and addressed the seven affirmative findings required for class certification. P&M argued that because only 18 residents of the park sustained physical damage, only those 18 have standing to bring suit. The appellate court disagreed. The court noted that the standing requirement, as it applied to a proceeding to determine class certification, applied to the named representatives. The class membership prerequisite requires only that the representative have proper standing, *i.e.*, that he have a basis for injunctive relief in his own right.

In this case, the court observed that the basis for injunctive relief was statutory. Under R.C. §3733.10, the owners of the park had a duty to keep the premises in fit and habitable condition and to keep the common areas in safe and sanitary condition. Under these provisions, any resident of the park affected by such failure had standing to seek injunctive relief.

P&M also argued that the Plaintiffs had to exhaust available statutory remedies before they had standing to sue, specifically providing written notice of the alleged statutory violations. However, the court noted that another section of the Revised Code provided for injunctive relief as well as compensatory damages without reference to the section which addressed special statutory remedies. Therefore, because the Plaintiffs were not seeking the special statutory remedies, they were not required to give written notice.

Next, P&M argued that there were not sufficient common issues of law or fact as to the various parties affected, as found by the trial court. The appellate court held that specific questions as to individual owners or residents were secondary to the ultimate question of whether P&M was in violation of the duties and obligations imposed by R.C. §3733.10 with respect to the recurrent flooding. If P&M was determined to be in violation, then the Plaintiffs would be entitled to injunctive relief to enforce compliance.

The Plaintiffs, on appeal, challenged the trial court's refusal to certify a class for loss of use/loss of enjoyment damages and for property damages. Because the Plaintiffs failed to file objections to the magistrate's decision on the issue of property damage, that issue was not preserved for appeal and was waived.

With regard to the loss of use/enjoyment issue, the trial court found that there was a common basis of liability with respect to both injunctive relief and loss of use/enjoyment, along with a common nucleus of operative facts. As a result, the court held that the trial court abused its discretion in not certifying a class for the purposes of loss of use/enjoyment damages. The court remanded the case for certification of a loss of use/loss of enjoyment subclass and for further proceedings.

Employment Law - Breach of Contract; Plaintiff May Testify as to Value of Professional Services He Rendered

***Clapp v. Mueller Electric Co., et al.*, 8th Dist. App. No. 85447, 2005-Ohio-4410, 2005 Ohio App. LEXIS 3990.**

Plaintiff, Harry Clapp, the former CFO of Defendant, Mueller Electric, brought suit against the company and its owner (Emerson) after he was terminated for monies allegedly owed to him for services he provided but was not paid for. He asserted claims for breach of contract, unjust enrichment, and promissory estoppel, but later dropped the promissory estoppel claim.

Clapp, a CPA, was hired as Mueller's CFO in November 1996 and received significant raises and bonuses over the next several years. When Mueller terminated its CEO in November 1997, Clapp was asked to perform the CEO duties in addition to his own CFO responsibilities. Sometime in 1997 or 1998, Mueller Electric's owner, Scott Emerson, terminated the controller for Brighton Manor, which he also owned. Brighton Manor operates four hotels in northern Ohio. Emerson hired an accounting firm to oversee the financial operation of the hotels but later became aware that the firm had been having difficulties handling the bookkeeping. Emerson approached Clapp and asked him to review the books and bookkeeping procedures and to advise him on the extent of the problems. Clapp learned that no bank

reconciliations had been performed for any of the four hotels over the past 18 months and that Brighton Manor's books were $800,000 out of balance. To get them back in balance, hundreds of thousands of transactions would have to be traced, and this task was complicated by the fact that all four hotels were intermingled in one joint bank account. In addition, Clapp advised that accounting procedures would have to be designed and implemented and that accounting staff would have to be trained or replaced at the hotels. Clapp advised Emerson that he could either hire an outside accounting firm to create a new accounting system and train personnel (at the cost of approximately $200,000), or that he could hire an experienced CFO for Brighton Manor (at an approximate salary of $125,000). Emerson thereafter approached Clapp and asked him if he would be interested in taking on the task. Since it would involve a significant amount of additional work, Clapp inquired as to his compensation for these additional responsibilities. Although Emerson did not give a number, he allegedly stated that he would pay Clapp "fairly."

From February 2000 until he was terminated in May 2001, Clapp continued to perform his CFO and CEO duties at Mueller Electric, while simultaneously working as CFO at Brighton Manor. By February 2001, he had completed the task of balancing Brighton Manor's books and implementing a new bookkeeping system. When he approached Emerson for payment, Emerson told Clapp that he would only pay him after an outside accounting firm reviewed Clapp's procedures and signed off on them. After that was done, Clapp once again approached Emerson for payment. This time, Emerson told Clapp that he wanted an outside consultant, Ala Deen, to review Clapp's work. Although Clapp correctly surmised that Emerson had actually hired Deen to replace him at Brighton Manor, Clapp advised and trained Deen regarding the procedures he spent a year implementing. On May 1, 2001, after Clapp had completed Deen's training, Emerson advised Clapp that he was terminated effective immediately. In light of Clapp's senior position, Emerson asked him to report on various issues and strategies. Because his employment had been terminated, Clapp informed Emerson that he wanted six months severance pay in exchange for the reports. Emerson allegedly nodded his head in response, and Clapp thereafter spent several days developing a list of key issues regarding Mueller Electric. After meeting with Emerson with his report, Clapp asked Emerson about his severance package. Emerson told Clapp that he had not gotten around to it yet. Emerson would then not return Clapp's telephone calls about the severance package. He thereafter called Clapp with an angry tone, accused him of wrongdoing, and told him he would not be paid for his work at Brighton Manor and would not be receiving severance pay. A jury returned a verdict for Clapp in the amount of $115,000, and Defendants appealed.

The first issue on appeal involved the propriety of Clapp's testimony regarding the value of his own professional services. Clapp testified at trial that he had been a CPA for 15 years and that in light of *his* experience working with and reviewing the bills from public accounting firms over the past 20 years, the value of his services as a licensed CPA was anywhere from $125.00 to $175.00 per hour. At the rate of $150.00 per hour, he estimated that the value of the services he provided to Brighton Manor was $232,000. Defendants argued that the trial court erred in allowing Clapp to testify over their objections as to the value of his services on the purported basis that he was not qualified as an expert witness.

The Eighth District disagreed. A witness need not be qualified as an expert to testify regarding the value of his own services. See *Mid-States Development Co. v. Celotex Corp.*, (2nd Dist.) 1983 WL 4943 (witness testimony regarding reasonable value of services rendered for repair and replacement of roof); *Rose v. Brandewie* (1950), 60 Ohio L. Abs. 260 (witness testimony regarding value of board, lodging and laundry services provided to defendant's decedent); *Frank v. Frank* (1930), 9 Ohio L. Abs. 486 (plaintiff not required to be qualified as expert to testify regarding value of services provided on defendant's farm).

Here, there was no question that Clapp had sufficient experience as a CPA to testify regarding the value of the services he provided as CFO to Brighton Manor. Nevertheless, Defendants claimed that Clapp's testimony was improper because he actually gave *expert* testimony without first being qualified as an expert. The Eighth District again disagreed, noting that Clapp testified in light of *his* extensive experience that *his services* as a CPA were valued between $125 to $175 per hour. Although he testified that he knew what the hourly rate of a licensed CPA in Ohio within the past 15 years was, he did not testify what that rate was when Defendants' counsel objected to the answer. Thus, he testified only as to *his* own value, not the market value for every CPA with 15 years of experience. Moreover, even if the admission of this testimony was in error,

which it was not, the Eighth District held that it would constitute harmless error.

Defendants also claimed that the trial court erred in failing to direct a verdict on Clapp's unjust enrichment and breach of contract claims. They insisted that Emerson's alleged statements that he would pay Clapp "fairly" fails to establish a contract price, one of the essential elements of a claim for breach of contract. They also claimed that a nod of the head was insufficient to establish an agreement regarding the alleged severance package.

The court of appeals addressed Clapp's unjust enrichment claim first and held that Clapp proved all elements of this claim. The elements for unjust enrichment are: (1) a benefit conferred by the plaintiff upon the defendant, (2) knowledge by the defendant of such benefit, and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment. Here, there was sufficient evidence as to all of these elements. Moreover, Emerson's promise to pay Clapp "fairly" would permit a jury to reasonably conclude that it would be unjust for Emerson to retain the benefits provided to Brighton Manor without paying for it. Because the jury returned a general verdict, the court of appeals was unable to ascertain whether the jury found in Clapp's favor on his unjust enrichment claim, his breach of contract claim, or both. However, because there was sufficient evidence to support the jury's verdict on his unjust enrichment claim, the court held that it need not address Defendants' arguments regarding Clapp's breach of contract claim.

Employment Law - Issue of Fact Over Whether Dedicated Truck Driver was Employee of Company for Whom He Exclusively Hauled

***Robert Below v. Dollar General Corporation, et al.*, 3rd District App. No. 9-05-08, 2005-Ohio-4752, 2005 WL 2179424.**

Robert Below was hired as a truck driver for U.S. Express, and as a dedicated driver for Dollar General. He hauled exclusively Dollar General Merchandise. In April 2002 he was injured while unloading merchandise at a Dollar General Store in Marion, Ohio. As a result, he suffered a herniated disk and was unable to work. All of Below's medical expenses were paid through U.S. Express' workers' compensation policy.

In November 2002, Below and his wife filed a complaint for damages against Dollar General alleging that it was negligent in its loading of trailers which resulted in his injury. Dollar General filed a motion for summary judgment, arguing that Plaintiff was an employee of Dollar General because it controlled the means and manner of his work, and therefore it was entitled to immunity under R.C. §4123.74. Defendant offered as evidence the affidavits of Ron Dennis and William Farris, which stated that U.S. Express agreed to have their drivers follow certain procedures mandated by Dollar General. These procedures were embodied in the U.S. Express guidelines for those drivers dedicated to Dollar General, and set forth delivery parameters, store delivery procedures, certain safety rules, backhaul procedures, on-time delivery expectations, Dollar General seal procedures, and other requirements.

Plaintiffs opposed the motion, claiming that Dollar General did not control the means or manner of Below's work and that he was an employee only of U.S. Express. They attached a transportation and delivery agreement between U.S. Express and Dollar General that indicated that U.S. Express was an independent contractor and that it controlled and directed the persons operating the equipment or otherwise engaged in such services. U.S. Express further assumed full responsibility for the drivers' actions and omissions and had to pay the workers' compensation contributions and taxes.

The trial court granted Dollar General's motion for summary judgment and Plaintiffs appealed. On appeal the court found that there was a genuine issue of material fact as to whether or not Below was an employee of Dollar General, and the trial court erred in granting summary judgment in Defendant's favor. Since Plaintiffs were able to show that U.S. Express provided its drivers with trucks, maintained control of scheduling, maintained control of dispatching and contact with the driver, provided its drivers with route information, provided payment to its drivers and paid for all workers' compensation and unemployment payments, there was evidence that in fact Plaintiff was the employee of U.S. Express. In addition, the transportation delivery agreement between U.S. Express and Dollar General provided that U.S. Express maintained exclusive control over its employees. There was a genuine issue of fact over who controlled the day to day manner and means of Plaintiff's employment that should be submitted to a jury.

Employer Intentional Tort – Level of Proof Required to Withstand Summary Judgment

***Pettit, et al. v. Clarion Technologies, et al.*, 6th Dist. App. No. WM-04-014, 2005-Ohio-4435, 2005 WL 2048929.**

On April 26, 2001, Robbin Pettit climbed on top of an injection molding press in the scope and course of his employment as a maintenance technician for Clarion Technologies. Pettit intended to repair the improperly functioning press, and climbed on top of the press using the machine's built-in ladder. Pettit sat on the beam on which the machine's robotic arm tracks, and climbed out to the area of the robotic arm. After successfully completing the repair, Pettit fell approximately twelve feet from the beam to the concrete floor below, sustaining serious injuries.

Pettit and his wife filed an intentional tort claim against Clarion, alleging that Clarion knew that the only way to repair the press was to climb on to it, and that, despite its knowledge of the danger inherent in such activity, it continued to require Pettit to perform the repair in this manner. Clarion moved for summary judgment, which the trial court granted. The trial court concluded, based upon the affidavits submitted in support of its motion for summary judgment, that Clarion had provided its maintenance technicians with a forklift and basket for use in making repairs, and that such equipment would successfully enable an employee to conduct the repairs performed by Pettit just prior to his fall. Since Pettit voluntarily chose to forego a safer method of repair as provided by Clarion, the court reasoned that Pettit had failed to demonstrate the existence of an intentional tort.

Pettit argued on appeal that, since material facts are in dispute, the trial court's grant of summary judgment was erroneous. The appellate court referred to the well settled law which requires a plaintiff making an intentional tort claim against an employer to prove "(1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, the harm to the employee will be a substantial certainty; and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task." *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, ¶1 of syllabus.

In both his deposition and his affidavit submitted in support of his memorandum in opposition to Clarion's motion for summary judgment, Pettit indicated that he received no special training as to how to repair the press at issue, and that the forklift and basket as offered by Clarion did not enable him to reach the area he was required to repair, because even had he used the forklift and basket he still would have had to crawl onto the beam in order to facilitate the repair. Given the conflicting evidence regarding the sufficiency of the forklift and basket, the appellate court concluded that material issues of fact remain for jury consideration, and accordingly reversed the trial court's grant of summary judgment.

Insurance Law - Dual Residency Doctrine - Ambiguity Regarding "Additional Driver" Coverage Resolved in Favor of UIM Coverage in Amount Equal to That Provided for Named Insureds

***Jensen v. State Auto Mut. Ins. Co.*, 10th Dist. App. No. 04AP-837, 2005-Ohio-4354, 2005 Ohio App. LEXIS 3948.**

This is an appeal by State Auto of the trial court's order granting partial summary judgment on the coverage issue in Plaintiff's favor. On October 14, 2000, an automobile driven by Jonathan Park struck Plaintiff Mark Jensen when he was in a crosswalk located at the northeast corner of Lane and Neil Avenues in Columbus. Jensen sustained serious injuries to his pelvis, hips, groin and right knee. At the time of the collision, Jensen was 35 and employed full time as a golf professional by the Columbus Country Club. According to Defendant State Auto, he resided at an apartment on Highland Road in Columbus, where he allegedly lived since 1996. Plaintiff testified that he also considered himself to be a resident of his parents' home in Oregon, Ohio. At the time of the collision, Plaintiff's parents had a personal auto liability policy with State Auto. The declarations page of the policy listed Mr. and Mrs. Jensen as "named insureds," and Plaintiff was also listed as a "driver" at the bottom of this page. He testified that his parents let him drive their "extra" cars to get back and forth from Columbus to Oregon and that he never purchased his own insurance policy for these vehicles. In a sworn statement, Mr. Jensen testified that his son Mark lived with him and also maintained a residence in Columbus, that he paid a premium to include Mark on his policy since he was 16, and that it was his belief that Mark would be

insured under the State Auto policy if he drove any of the vehicles so long as he remained a resident of their household. He further testified that Mark would stay at their house at least once a month and for long periods of time when the country club was closed in winter.

Plaintiff filed suit against the tortfeasor and against State Auto for UIM benefits. After conducting a hearing, the trial court found that R.C. §3503.02, the statute which defines "residence" for purposes of voter registration, was applicable to the facts of this matter. The court also focused on the fact that Plaintiff still maintained his bank account in Oregon, Ohio, returned home at least once a month and stayed in Oregon for extended periods during the winter months. The trial court entered partial summary judgment in Plaintiff's favor and State Auto appealed.

The Tenth District affirmed, focusing first on the fact that Plaintiff was designated as an "additional driver" on the policy's declarations page and that a premium was charged for this supposed coverage. Here, the policy did not define "additional driver," nor did it assign coverage limits for an "additional driver." Plaintiff argued that this created an ambiguity in the policy which must be construed in his favor with a finding of UIM limits equal to that of the named insured. State Auto argued that an "additional driver" is not entitled to the same coverage as a "named insured" and that Plaintiff would have been entitled to coverage *if* he was operating a covered auto at the time of the accident as opposed to being hit as a pedestrian. In resolving this issue, the court of appeals looked to the General Definitions and UIM provisions of the policy. "Family Member" is defined as "a person related to you by blood, marriage or adoption who is a resident of your household, and "insured" for purposes of the UIM endorsement is defined as "you or any 'family member.'"

Citing *Roelle v. Coffman* (3rd Dist.), 1997 Ohio App. LEXIS 5289, the court of appeals held that the "additional driver" provision and the policy's failure to contain policy limits or coverage information with respect to an "additional driver" were ambiguities which must result in UIM coverage equal to the limits afforded to named insureds. In *Roelle*, the defendant's father was a "named driver" under the policy, and the court was faced with the similar issue of whether he also qualified as a "named insured." In *Roelle*, the defendant's step-mother

was listed as the "named insured," and the policy did not expressly provide insurance coverage for named drivers who did not otherwise qualify as named insureds or a family member of a named insured. The trial court granted summary judgment in favor of the insurer, but the reviewing court reversed. In reversing, it held that the policy was ambiguous since a "named driver" other than a "named insured" was neither defined nor assigned any coverage limits in the policy. To construe the policy as the insurer wanted would be unreasonable, most notably since a premium was charged for this alleged coverage. As a result, the ambiguity was construed in favor of coverage for the "named driver."

Here, the Tenth District reached the same result as the *Roelle* court. In so doing, it noted that State Auto had admitted in Plaintiff's Requests for Admissions that Plaintiff is entitled to UIM coverage and general automobile insurance coverage as a rated driver. Moreover, as in *Roelle*, the term "additional driver" was neither defined nor assigned any coverage limits, yet a premium was charged by State Auto for this supposed coverage. According to the court, to find other than that Plaintiff was covered in amounts equal to that provided for named insureds would "contravene the intention of the parties." The court also rejected State Auto's "covered auto" defense, finding that UIM coverage is not limited to an insured's use of a particular automobile when, as here, he is a pedestrian.

Insurance Law – Coverage Provided Under Business and Umbrella Policies for Eight-Year-Old Passenger in Rental Car Driven by a Minor

***Passmore v. Universal Underwriters Ins. Co., et al.*, 11th Dist. App. No. 2003-A-0016, 2005-Ohio-4484, 2005 WL 2077251.**

On June 10, 1999, Deborah Butcher took her car to Nassief Pontiac Cadillac, Inc. for repairs and obtained a rental car to use while her car was being serviced. Mrs. Butcher and her husband, Robert Butcher, were listed on the rental agreement as authorized drivers. The agreement provided that "under no circumstances shall anyone under 21 years of age operate this vehicle." Three days later, with his parents' permission, the Butchers' 12-year-old son was driving the rental car up and down their street, doing "burn-outs" and "fish-tailing." The boy picked up two of his friends in the car, nine-year-old David Bradnan and eight-year-old Brian E. Passmore, II. All three children were in the front of the vehicle. Passmore was seated next to the passenger window and was not wearing a seatbelt. During one of the trips down the street, the car veered off the road into a ditch, flipping over and expelling Passmore. Passmore died as a result of the crash.

Plaintiffs settled claims with the tortfeasor's liability insurer and recovered from their personal automobile insurer's underinsured motorist coverage. Plaintiffs filed an action in Ashtabula County Court of Common Pleas seeking additional coverage, including from a business automobile insurance policy issued by Cigna/ACE USA Property & Casualty ("ACE") to GMAC, the owner of the rental car, and from a policy issued by Universal Underwriters Ins. Co. ("Universal") to Nassief, the dealer that rented the car to the Butchers. Each party filed a motion for summary judgment. The trial court entered summary judgment in favor of Plaintiffs, finding that they were entitled to coverage under the policies issued from both ACE and Universal. Universal appealed the trial court's judgment, asserting in its sole assignment of error that Plaintiffs are not entitled to coverage under either the business or umbrella policies issued to Nassief.

Universal first argued that Passmore was not an "insured" under the subject policy. An "insured" was defined in the policy in part as "any other person while occupying a covered auto." The court of appeals noted that "covered auto" is defined by the policy as "any land motor vehicle, trailer or semi-trailer designed for travel on public roads which is insured by this Coverage Part and shown on the declarations." Since no vehicles were in fact listed on the declaration, the court of appeals found the policy ambiguous, and looked to the intent of the parties to determine if Passmore was an "insured."

The court determined that the policy was issued to Nassief to cover vehicles used in Nassief's business. This would include vehicles rented to Nassief's customers. The court concluded that it was the intent of the parties to provide coverage for the rental car provided to the Butchers, and said vehicle is a "covered auto" as defined by the policy. Therefore, based on the definition of "insured" as stated above, Passmore was covered by the policy because he was a "person…occupying a covered auto."

Universal further argued that, even if an "insured," Passmore should be denied coverage based on an exclusion in the policy that provides: "[t]his insurance does not apply to:…(f) Anyone using a vehicle without a

reasonable belief that the person is entitled to do so." Universal contends that Passmore was not entitled to be a passenger in the subject vehicle, and therefore this exclusion should apply. The court of appeals rejected this argument, holding that the evidence demonstrated that Passmore "was permitted to be in the vehicle at the time."

Universal also argued that Plaintiffs have no standing to assert that Passmore is an "insured" under the policy because Plaintiffs are not parties to the contract. Universal cites *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, for the proposition that a determination of whether an individual is an insured under a policy "should not be interpreted in favor of one who was not a party to the contract." *Id.* at ¶ 49. The court of appeals rejected this interpretation of *Westfield*, finding that Plaintiffs have standing in this case.

Finally, the court of appeals determined that the subject insurance policy did not conform with the requirements of *Linko v. Indem. Ins. Co. of NA*, 90 Ohio St.3d 445, 2000-Ohio-92, to properly offer underinsured motorist coverage. The *Linko* requirements mandate that an insurer must: "(1) inform the insured of the availability of UM/UIM coverage, (2) set forth the premium for UM/UIM coverage, (3) include a brief description of the coverage, and (4) expressly state the UM/UIM coverage limits in its offer." *Id*. at 447-448. In the instant case, the policy did not contain a rejection form, a premium or description of the coverage, nor the policy limits. The court therefore held that Universal did not properly offer UM/UIM coverage, and the $500,000 underinsured motorist coverage under the policy applied.

In dissent, Judge Christley agreed that Passmore was initially qualified as an "insured" under the subject policy, however she concluded that the exclusionary provision of the policy should have resulted in a denial of coverage. As a matter of law, Passmore could not have believed that he was entitled to use the vehicle driven by a twelve-year-old child. The dissent contends that the majority incorrectly relied on the fact that Passmore was given permission to be in the vehicle, which is different than having a legal entitlement.

Insurance Law - Other Owned Vehicle Exclusion, Wrongful Death Claims Not Excluded by Exclusionary Language "Because of Bodily Injury"

***Nancy E. Hall v. Nationwide Mutual Fire Insurance Company*, 10th District App. No. 05AP-305, 2005-Ohio-4572, 2005 WL 2100627.**

Christopher D. Hall died as a result of injuries he sustained in an automobile accident caused by Courtney Bailey. Bailey was insured under a liability policy with limits of $15,000 per person. Nancy Hall, mother and Administrator of the Estate of Christopher Hall, accepted the $15,000 in exchange for a full release of liability. Both the Logan County Probate Court and Nationwide approved the settlement.

Nancy Hall, as administrator, then presented a claim under a Nationwide policy issued to her and her husband, seeking UM/UIM coverage for the wrongful death of Christopher. The Nationwide policy contained UM/UIM limits of $100,000 per person/$300,000 per accident. At the time of the accident Christopher was driving a 1998 Chrysler Sebring that was not insured under the Nationwide policy, however the parties agreed that Christopher was covered as a resident relative under the policy. Nationwide denied the claim under the "other owned vehicle" exclusion in its policy.

The parties filed for partial summary judgment in the trial court. Plaintiff argued that the Nationwide policy covered wrongful death damages even if decedent was not driving a vehicle specifically identified in the policy. Nationwide claimed the other owned vehicle exclusion precluded coverage. The trial court granted Plaintiff's motion, finding that the phrase "for bodily injury" in the other owned vehicle exclusion in the UM/UIM provision was ambiguous. Construing that ambiguity in favor of the insured resulted in wrongful death damages for the estate. Nationwide appealed.

The policy's exclusionary language provided that:

> This coverage does not apply to anyone for bodily injury or derivative claims:
> * * *
> 3) While any Insured operates or occupies a motor vehicle:
> a) owned by;
> b) furnished to; or
> c) available for the regular use of;
> you or a relative, but not insured for Auto Liability coverage under this policy. It also does not apply if any insured is hit by any such motor vehicle.

The main portion of the policy defined "bodily injury" as "physical injury, sickness, disease or resultant death; of any person which results directly from a motor vehicle accident." The trial court held that this policy language was ambiguous because it could be interpreted either to include or exclude damages for wrongful death.

The court referred to *Newsome v. Grange Mut. Cas. Co.* (10th Dist.), 1993 WL 51140, in which it found similar language to be ambiguous because it failed to specifically mention wrongful death claims. The court held that the phrases "because of bodily injury" and "for bodily injury" are not the same and are not interchangeable in all situations. Wrongful death claims are not claims "for" bodily injury but are "because of" bodily injury. Since the Nationwide policy at issue used the language "for bodily injury," the exclusion would not eliminate wrongful death claims. The court chose to follow the precedents with which the instant case was closely aligned.

Additionally, Nationwide argued that wrongful death claims were subsumed into the derivative claim language of the policy. The appellate court soundly rejected this argument, noting that the Supreme Court had addressed this issue and found that wrongful death claims are not derivative, but rather are a separate cause of action.

Medical Malpractice – No Viable Claim Based on Agency by Estoppel Against Hospital When Statute of Limitations Has Expired Against Independent Contractor Physicians

***Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559.**

Patricia Clark, now deceased, filed suit against James Risko, M.D. and others for medical negligence, including the failure to timely diagnose and treat her cancer. Comer was thereafter substituted as administrator for her estate. An agency by estoppel cause of action was asserted against Knox Community Hospital ("Hospital") based on allegations that decedent had relied on the Hospital to provide necessary and proper radiology services and interpretations. The x-rays were interpreted by two doctors (Wall and Schlesinger). Neither of their reports mentioned the presence of a large mass on the films. It was not until decedent underwent a third x-ray several months later that doctors detected a cancerous mass. Neither Wall nor Schlesinger was named in the lawsuit. The Hospital moved for summary judgment on the purported basis that no viable agency by estoppel

claim could exist against the Hospital since the statute of limitations had expired against Wall and Schlesinger. The trial court granted the motion and dismissed the Hospital. The court of appeals reversed and remanded, holding that a plaintiff may pursue an agency by estoppel claim against a hospital even if he or she has not named the independent-contractor physicians so long as the hospital meets the criteria set forth in *Clark v. Southview Hosp. & Family Health Ctr.* (1994), 68 Ohio St. 3d 435.

The Ohio Supreme Court accepted a discretionary appeal in this matter and began its analysis by noting that "[t]he *narrow issue* before us is whether, within the constraints of *Clark v. Southview*, a viable claim exists against a hospital under a theory of agency by estoppel for the negligence of an independent-contractor physician when the physician cannot be made a party because the statute of limitations has expired." 2005-Ohio-4559 at ¶1 (emphasis added). Deciding that agency by estoppel is a *derivative* claim of vicarious liability where a hospital's liability flows through the independent-contractor physician, the Court answered this question in the negative. Analyzing the history of hospital liability in Ohio, the Court agreed with the Hospital that the court of appeals' decision would create a new and direct cause of action imposing primary liability on a hospital in a manner that violates the agency principles underlying vicarious liability. The majority of the Court also expressed its belief that the appellate court expanded the scope of the *Clark v. Southview* by suggesting that primary liability could be imposed on the hospital in the absence of a liability determination as to the independent-contractor physicians. The Court further observed and/or held as follows:

> An agent who committed the tort is primarily liable for its actions, while the principal is merely secondarily liable. *Losito v. Kruse* (1940), 136 Ohio St. 183; *Herron v. Youngstown* (1940), 136 Ohio St. 190. The liability for the tortious conduct flows through the agent by virtue of the agency relationship to the principal. If there is no liability assigned to the agent, it logically follows that there can be no liability imposed upon the principal for the agents' actions. *Losito*; *Herron*....Consequently, a direct claim against a hospital premised solely upon the negligence of an agent who cannot be found liable is contrary to basic agency law. If we affirmed the appellate court's expansion of hospital liability, hospitals would in effect become primary insurers for any negligence occurring in the hospital, whether by an agent or nonagent. Instead of the secondarily liable party being in effect an excess insurer for the primary liability of the negligent party, the hospital becomes primarily responsible under what is, in effect, strict liability or liability without fault. Consequently, the court of appeals' expansion of hospital liability from indirect to direct is contrary to law. Agency by estoppel is not a direct claim against the hospital, but an indirect claim for the vicarious liability of an independent contractor with whom the hospital contracted for professional services. Furthermore, if the independent contractor is not and cannot be liable because of the expiration of the statute of limitations, no potential liability exists to flow through to the secondary party, i.e., the hospital, under an agency theory.

In a well-written dissenting opinion, Justices Pfeifer and Resnick noted that the success or failure of an agency by estoppel claim against a hospital, while dependent on the negligence of the medical provider at issue, is *not* dependent on whether that provider is part of the lawsuit. Indeed, in *Clark v. Southview*, the Court previously held that "[a] hospital may be held liable under the doctrine of agency by estoppel for the negligence of independent medical practitioners practicing in the hospital if it holds itself out to the public as a provider of medical services and in the absence of notice or knowledge to the contrary, the patient looks to the hospital, as opposed to the individual practitioner, to provide competent medical care." *Clark*, at 444-445. Moreover, the negligent doctor and his practice group in *Clark* were not even parties to that case at the time of trial.

The dissent also notes that the cases cited by the majority involve the situation where a party settles with and releases the independent-contractor physician, which is "an issue not at play in this case." Moreover, the dissent points out that the *Losito* opinion relied on by the majority actually stands for the proposition that "[f]or the

wrong of a servant acting within the scope of his authority, the plaintiff has a right of action against *either* the master or the servant, or against both, in separate actions, as a judgment against one is no bar to an action or judgment against the other until one judgment is satisfied." Finally, the dissent observes that (1) the idea that it is a plaintiff's duty to include all potential parties in order to preserve the rights of a particular defendant is at odds with Civ. R. 14(A), which permits a defendant to bring in other defendants, and (2) the failure to sue a negligent doctor before the expiration of the statute of limitations does not destroy the hospital's right of indemnity, since an indemnity action by a secondarily liable party may be filed after resolution of the plaintiff's case.

Editors' Note: Despite the fact that the majority begins its opinion with the cautionary language that the "narrow issue" involved in this case is whether a viable agency by estoppel claim exists against a *hospital* when the *independent-contractor* physicians have not been sued within the statute of limitations, it is yet to be seen whether the *Comer* decision may have broader implications for non-medical cases. Indeed, despite the "narrow issue" decided by the Court with regard to a *hospital's* vicarious liability, one can expect that defendants will argue that *Comer* may be read to hold that, in order to hold *any* employer or principal vicariously liable for the acts of its employee or agent, the plaintiff must also sue the employee or agent within the statute of limitations period. However, most, if not all, of the discussion in *Comer* refers specifically to the concept of agency by estoppel where vicarious liability is premised upon the actions of *independent contractors*. A strong argument therefore exists that *Comer* does not apply to situations where a traditional employer/employee or principal/agent relationship exists.

Medical Malpractice - Expert Testimony Incorporated Into Affidavit Required To Oppose Summary Judgment; Res Ipsa Loquitor Does Not Excuse Failure To Present Standard of Care Testimony

***Cunningham v. Children's Hospital, et al.*, 10th Dist. App. No. 05AP-69, 2005-Ohio-4284, 2005 Ohio App. LEXIS 3888.**

This is an appeal by decedent's personal representative of a trial court order granting summary judgment to Defendants in this medical malpractice action. On May 30, 2003, Plaintiff filed her complaint for medical malpractice and wrongful death against Children's Hospital, Dr. Steven Teich, Columbus Pediatric Surgical

Associates, Inc., Dr. William Wallace and unindentified John Doe Defendants. These claims arose as a result of the death of her daughter Kirsten, who was born on February 17, 1999. On March 9, 1999, Kirsten was admitted to Children's Hospital, where she remained until she was discharged on August 27, 1999. After her discharge, Plaintiff traveled across the street to the Ronald McDonald House, where she had been staying during Kirsten's hospitalization. She noticed Kirsten's labored breathing and immediately returned Kirsten to Children's Hospital, where she died the same day. In her complaint, Plaintiff alleged that Defendants fell below the standard of care by failing to timely assess the signs and symptoms Kirsten exhibited in the days before her discharge and in failing to recommend immediate surgical or medical intervention. She also alleged that Defendants' negligence caused Kirsten to be prematurely discharged and to expire before she left the hospital campus.

In August 2004, Defendants filed for summary judgment. Plaintiff opposed the motion and attached her own affidavit, along with an unsigned and unsworn letter purportedly authored by Alison St. Germaine Brent, M.D. On appeal, under her single assignment of error, Plaintiff claimed that she submitted sufficient evidence to overcome the dispositive motion. She also claimed that she was not required to produce expert evidence in support of her claims, and that the doctrine of res ipsa loquitor applied and obviated any need for expert evidence in support of her claims. The Tenth District Court of Appeals disagreed and affirmed the trial court's ruling.

The dispositive motion filed by Defendants was supported by the affidavit of Defendant Steven Teich, M.D. In that affidavit, which set forth his competency to render expert testimony, he claimed that the medical and surgical care provided to Kirsten throughout her stay at Children's Hospital met and complied with the requisite standard of care and had no proximate causal relationship to her death. In its decision granting summary judgment, the trial court found that Plaintiff failed to present expert evidence regarding the applicable standard of care and Defendants' alleged failure to conform to that standard to rebut Dr. Teich's expert opinions. According to the court of appeals, "[i]n the absence of an opposing affidavit of a qualified expert witness for the plaintiff, a defendant-physician's affidavit attesting to his compliance with the applicable standard of care presents a legally sufficient basis upon which a trial court may enter summary judgment in a medical malpractice action."

The reviewing court held that Dr. Brent's unsigned letter is not the type of evidence permitted under Civ. R. 56(C). Instead, the proper procedure for introducing evidentiary matter of a type not listed in Civ. R. 56(C) is to incorporate the material by reference into a properly framed affidavit. While a party may introduce expert opinion contained in a letter by incorporating it into a properly framed affidavit, that was not done here. Citing to *El-Mahdy v. Univ. Hosps. of Cleveland*, (8th Dist.) 2005-Ohio-2830, the court held that an expert's letter not incorporated into a properly framed affidavit lacks any evidentiary value and must be disregarded for summary judgment purposes. Thus, the Tenth District concluded that the trial court did not err in refusing to consider this evidence.

In addition, the reviewing court noted that the letter did not demonstrate Dr. Brent's competency to render expert testimony. Civ. R. 56(E) requires that affidavits supporting or opposing summary judgment must "show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." Moreover, to be competent to testify on liability issues in a medical malpractice action, the individual must be licensed to practice medicine and devote at least one-half of his or her professional time to active clinical practice in the field of licensure or to its instruction at an accredited school. See Evid. R. 601(D). According to the court of appeals, Dr. Brent's letter failed to establish her competency to render such opinions.

Plaintiff also argued that expert testimony was not required since laymen can reasonably evaluate Defendants' conduct. In support of her argument that the "common knowledge" exception applied, Plaintiff claimed that Kirsten's death, immediately after leaving the hospital, constitutes a "ringing endorsement of a premature discharge." While conceding that no expert testimony is required to establish a medical malpractice claim when the defendant's lack of skill or care is so apparent as to be within the comprehension of laymen, the court reiterated that expert evidence "*is* required where the inquiry pertains to a highly technical question of science or art or to a particular professional or mechanical skill." *Jones v. Hawkes Hosp. Of Mt. Carmel* (1964), 175 Ohio St. 503. The court then observed that the "common knowledge" exception has a limited scope in the world of increasing medical complexity, and that it

generally has been applied to cases dealing with gross inattention during patient care and/or instances of miscommunication with a patient. This case, according to the court, "involves neither administrative or supervisory negligence nor miscommunication between a doctor and a patient. Rather, appellant's allegations of negligence revolve around appellees' decision to discharge Kirsten, a determination that required the exercise of appellees' professional judgment." The court went on to hold that the decision to discharge is analogous to a paramedic's decision on whether to transport a patient to the hospital after responding to an emergency call. Citing to *Wright v, Hamilton* (2001), 141 Ohio App.3d 296, for that proposition, the court of appeals noted that expert testimony was required to establish the appropriate standard of care.

Finally, the court rejected Plaintiff's res ipsa loquitor argument. Although conceding that this doctrine may be applied in medical cases, the court stated that "it is only a rule of evidence that allows the trier of fact to draw an inference of negligence from the facts presented." Citing to *Johnson v. Hammond* (8th Dist. 1988), 47 Ohio App.3d 125, the court reiterated that "[t]he doctrine of res ipsa loquitor does not relieve the plaintiff in a medical malpractice case of the burden of presenting expert medical testimony on the requisite standard or care and skill. The plaintiff must present evidence to show that the injury would not have occurred in the ordinary course of events if ordinary care had been observed before an instruction of res ipsa loquitor would be justified..." Thus, according to the reviewing court, the doctrine of res ipsa loquitor does not excuse Plaintiff's failure to present expert testimony on the requisite standard of care.

Medical Malpractice – Testimony Referring to Professional Literature Admissible

***Beard v. Meridia Huron Hospital, et al.*, 106 Ohio St.3d 237, 2005-Ohio-4787.**

Plaintiff brought a medical malpractice claim against Defendants. Defendant, Dr. Oscar Nicholson, performed an elective hernia repair operation on Ralph Moss. Moss died one week later. Plaintiff argued that Defendant should not have performed the operation because Moss's white blood cell count was below the normal range, preventing him from being able to fight infection.

At trial, Dr. Nicholson testified that Moss suffered from benign familial neutropenia, a condition characterized by chronically low white blood cell counts. He stated, however, that patients with this condition do not have a lowered ability to fight infection. He further testified that if the white blood cell count is over 1,000, such patients can safely undergo surgery, "[a]nd this is something that's documented in the medical and surgical literature." He went on to say that his opinion "is based on the fact that the medical and surgical literature states that patients who have benign familial neutropenia can be operated on safely with white blood cell counts greater than a thousand."

Plaintiff timely objected at trial to Defendant's references to medical and surgical literature as inadmissible hearsay. The trial judge overruled the objections, and the jury found in favor of Defendants. The Eighth District Court of Appeals reversed the judgment, holding that Dr. Nicholson's references to professional literature were hearsay and constituted prejudicial error. The matter was appealed to the Ohio Supreme Court.

The Supreme Court reversed the court of appeals' decision, concluding that references to professional literature in this case were not inadmissible hearsay. The

Court, citing *Piotrowski v. Corey Hospital*, (1961), 172 Ohio St. 61, acknowledged that works of professional literature "are inadmissible as independent evidence of the theories and opinions therein expressed." Such an exclusion of evidence is necessary because of the lack of opportunity to cross-examine the authors of the literature regarding their opinions and conclusions.

The Court, however, distinguished between references to professional literature as *substantive evidence* and an expert's reference to such works as forming a part of the basis of his own opinions. The Court held that the latter use of such evidence is proper. Evidence Rule 702(B) acknowledges that an expert witness becomes qualified as such in part because he or she has absorbed information from sources that may otherwise be inadmissible. Prior decisions in Ohio have found testimony by experts regarding the information that forms the basis of their opinions admissible. Further, Evid. R. 706, which allows impeachment of an expert with statements from a learned treatise, contemplates that an expert is likely to rely on such material.

Applying the above to the instant case, a majority of the Court held that Dr. Nicholson did not offer precise statements from the professional literature that could independently be considered to prove that he acted within the standard of care. Instead, the Court stated that his testimony referenced medical literature only as a partial basis of his own opinions in the case. The Court concluded that such testimony is admissible pursuant to the Ohio Rules of Evidence. The Court also noted that even if this testimony was improper, it did not prejudice Plaintiff's substantial rights because Dr. Nicholson's opinions were otherwise admissible even if his references to the literature had been stricken. Moreover, two other expert witnesses testified the Dr. Nicholson met the standard of care.

In dissent, Justices Resnick and Pfeifer scolded the majority, which they said "[lost] focus on the true issue, misperceive[ed] the prejudicial nature of the testimony at issue, and reverse[d] a well-reasoned judgment, thereby reinstating a flawed verdict." The dissent agreed with the court of appeals that Dr. Nicholson's reference to medical literature was used as substantive evidence, not merely as a general basis for his opinion. Dr. Nicholson specifically testified that the medical literature documented that it is safe to operate on patients with benign familial neutropenia with white blood cell counts over 1,000. The dissent likened this testimony to "relying on a phantom expert to support [Dr. Nicholson's] opinion." The dissent also concluded that admitting such testimony was significantly prejudicial to Plaintiff, thereby necessitating a new trial.

Medical Malpractice - Spoliation of Evidence, Use of Learned Treatises

***Gwladys Thomas v. Cleveland Clinic Foundation*, 8th District No. 85276, 2005-Ohio-4564, 2005 WL 2100922.**

Gwladys Thomas, 73 years-old, went to the Cleveland Clinic Foundation for back surgery. She had had a prior spinal fusion and needed replacement of the hardware in her spine. The anesthesia team assigned to her care attempted to place a CVP line in her, allowing them to administer stronger doses of medicine and more closely monitor important vascular pressures during the operation because she had a history of coronary artery disease and asthma, and because the surgery presented a higher than usual risk of bleeding. During insertion of the CVP line, the patient's carotid artery was perforated. A surgeon was immediately called in to repair the artery, a potentially life-threatening complication. Several weeks after the repair, the back surgery was performed without incident.

Subsequently, Ms. Thomas sued Defendant for malpractice for the perforation of her carotid artery. A variety of damages were claimed, including great emotional distress for the unsightly scar on her neck. In addition, she filed a claim for spoliation of evidence because the anesthesia team either lost or destroyed its record of the procedure. At trial, the jury found that the Defendant was not negligent.

Plaintiff appealed, alleging four assignments of error. The first challenged the trial court's granting of a motion for a directed verdict on the spoliation of evidence claim. There are five elements to the tort of spoliation: 1) pending or probable litigation involving the plaintiff; 2) knowledge on the part of the defendant that litigation exists or is probable; 3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case; 4) disruption of the plaintiff's case; and 5) damages proximately caused by the defendant's acts. The appellate court held that Plaintiff failed to produce any evidence of the willful destruction of evidence. A doctor testified that he made a note of the incident and placed it with the other loose papers in the Plaintiff's chart. He could not say what happened to the note after that. The court stated that Plaintiff could not show that the note was either lost

or destroyed for the purpose of disrupting her case.

Moreover, Plaintiff failed to show that the absence of the note actually disrupted her case. At no time did any of the Defendants deny the existence of the event or deny that there was a complication while attempting to insert the CVP line. The critical issue in the case was whether the puncture of the Plaintiff's carotid artery constituted malpractice.

In her second assignment of error, Plaintiff argued that the trial court erred in failing to allow her to examine/cross-examine key witnesses with a learned treatise when the foundation for the treatise had been laid pursuant to Evidence Rule 706. Plaintiff's counsel attempted to use an article from the New England Journal of Medicine during his examination of his own expert, Dr. Tirgen. Defendant's objection to the use of the article was sustained. The court held that learned treatises may only be used during cross-examination, and then only to impeach an expert who relied upon the article. Since there was no evidence that her expert relied upon the article, Plaintiff argued in the alternative that she should have been permitted to impeach Defendant's expert with the article since Dr. Tirgen deemed the material reliable and authoritative. The court rejected this argument because there was no evidence that Dr. Lozada relied upon the article in forming his opinions in the case.

Plaintiff also argued that the trial court erred in excluding a drawing from the New England Journal of Medicine and markings that a witness made on the drawings. The appellate court noted that Plaintiff had failed to point to the location in the record where the trial court prevented the witness from marking the drawing, and, more importantly, Plaintiff never attempted to proffer the drawing in court. The appellate court noted that where the record indicates that the appellant failed to proffer any evidence allegedly excluded by the trial court, the party waives that issue on appeal.

Plaintiff asserted that the trial court erred in allowing Dr. Lozada, an anesthesiologist, to render an opinion as an expert when he failed to comply with Local Rule 21.1 and provide a report. The court held that there is no prohibition against treating physicians' providing expert testimony about the applicable standard of care in which they provided their medical expertise. In this case, Dr. Lozada could properly testify as an expert under Evid. R. 601(D), as he was not only the patient's attending anesthesiologist during surgery, but was also in charge of the nurse who assisted him. The court further stated that the local rules provide that if the expert is a treating physician, the court shall have the discretion to determine whether the hospital and/or office records of that physician's treatment which have been produced satisfy the requirements of a written report. Plaintiff received medical records during discovery from which Dr. Lozada testified, so she could not claim surprise or prejudice by the testimony, even though a written report was not provided.

Plaintiff similarly challenged whether the attending nurse should have been permitted to testify as an expert without producing a written report. Although the court agreed with the premise of Plaintiff's argument, it found that Plaintiff had invited this error. In her case in chief, Plaintiff called the nurse as a witness and asked, as if on cross examination, about the manner in which she was trained to insert a CVP line. She described each step she routinely would take to insert a CVP line, but acknowledged that the procedure may be different elsewhere. The court concluded that the nurse's testimony that she met the standard of care in this case was limited to the standard she was familiar with, not in the entire population of nurse anesthetists. When she testified in Defendant's case in chief, her testimony did not deviate from her previous testimony. Moreover, even if the admission was improper, Plaintiff failed to articulate any prejudice resulting from her testimony. The appellate court overruled each of Plaintiff's assignments of error.

Medical Malpractice – Court Rejects Request for Protective Order to Prohibit Production of Documents Based on Physician/Patient Privilege

***Richards, Exr., et al. v. Kerlakian, et al.*, 1st Dist. App. No. C-040825, 2005-Ohio-4414, 2005 WL 2045804.**

Sandra Richards, individually and as executor of the estate of her late son, Brett Thomas Richards, filed a wrongful death action against the surgeon, hospital, and others after Brett died following gastric bypass surgery. Within the lawsuit, Richards asserted a claim of negligent credentialing against Samaritan Hospital, the employer of the surgeon who operated upon Brett. During discovery, Richards requested that the surgeon, Dr. Kerlakian, produce redacted copies of all operative reports for gastric bypass surgeries he had performed throughout his employment with Good Samaritan Hospital. Kerlakian moved the trial court for a protective order on the grounds that disclosure would violate the

physician-patient relationship as provided for in R.C. §2317.02, and that the records were unnecessary to the claims pursued by Plaintiffs. The trial court compelled production of the documents, though it ordered that information identifying former patients be redacted, that the information contained within the records not be shared with anyone outside of the litigation, and that the records be returned at the conclusion of the litigation.

Dr. Kerlakian appealed the trial court's order on the grounds that the disclosure violated R.C. §2317.02, which establishes the testimonial privilege between physicians and their patients. While agreeing that the records requested fall within the ambit of R.C. §2317.02, the appellate court reminded that the privilege is not absolute. Indeed, the Ohio Supreme Court has allowed for the disclosure of otherwise confidential information as long as the identity of the former patients is sufficiently protected.

The appellate court dismissed Dr. Kerlakian's argument that the information sought is unnecessary to the Plaintiffs' claims. The court concluded that the information was germane to Plaintiffs' claim of negligent credentialing against Good Samaritan Hospital, and that, even if the records themselves were not ultimately admissible, they were reasonably calculated to lead to admissible evidence. The court further explained that the records could be properly used to impeach Dr. Kerlakian's deposition testimony.

The appellate court concluded that the trial court did not abuse its discretion in balancing the risk of disclosure of the otherwise protected information against the Plaintiffs' compelling need for the information, and in ruling in favor of disclosure.

Motor Vehicle Accident - Jury Award of Zero Damages Against the Manifest Weight of the Evidence

***Timothy Drehmer v. Ivan M. Fylak*, 2nd District App. No. 20635, 2005-Ohio-4732, 2005 WL 2175965.**

Plaintiff Drehmer was injured in an automobile accident caused by Defendant Fylak. The trial proceeded mainly on the issue of damages, with Plaintiff claiming injuries to his mid-section and internal organs caused by his seatbelt, and an aggravation of a pre-existing left shoulder injury that required surgery. The issues before the jury included the existence of the alleged injuries, proximate cause, and Plaintiff's claims for medical expenses, lost wages and pain and suffering.

The jury returned a verdict in favor of Plaintiff in the amount of $5,250.55, consisting of $4,950.55 for medical expenses, $300 for lost wages and zero dollars for pain and suffering. The award reflected evidence presented for the claimed medical expenses and wages caused by the internal injuries, however, the jury awarded nothing for the shoulder injury.

Plaintiff moved for a new trial on several grounds. The trial court rejected all but one argument — the failure of the jury to award even nominal damages for pain and suffering for the uncontroverted seat belt injury. The trial court ordered a retrial of all claims for relief and rejected defendant's request to limit the retrial to the pain and suffering claim for the seatbelt injury.

Both parties appealed. The Defendant argued that the trial court abused its discretion in awarding Plaintiff a new trial and in finding that the jury's verdict was against the manifest weight of the evidence. The appellate court upheld the decision of the trial court, holding that the award of zero damages for the seatbelt injury could not be reconciled with the undisputed evidence in the case. There was ample testimony showing the pain associated with the injury, in addition to the evidence that the Plaintiff missed time from work and requested pain medication in the emergency room. Photographs showed the severe bruising sustained by the Plaintiff. None of this evidence was contradicted.

The appellate court further held that the jury considered all elements of damage, rejecting the argument that it was an oversight to mark the pain and suffering line with a zero, as opposed to simply awarding nothing. However, such a verdict could not be reconciled with the uncontradicted evidence in the case, and therefore the trial court's holding that the verdict was against the manifest weight of the evidence was proper.

The Defendant's second assignment of error was upheld by the appellate court. The trial court abused its discretion in ordering a retrial of all claims, as opposed to limiting the new trial to the seatbelt injury claim. The claim for damages resulting from Plaintiff's shoulder injury was rejected by the jury. This finding was not affected by an award of zero dollars for pain and suffering for the seatbelt claim. The trial court's order failed to give the jury's decision the proper deference on issues

that were correctly decided, and a retrial of those issues was not warranted. Since the Defendant's negligence was undisputed, the shoulder injury was not intertwined with the issue of proximate cause. Therefore, the claims based on the two injuries were separate and distinct.

The Plaintiff's appeal focused on the admission of an alleged prejudicial hearsay document concerning his military record. Plaintiff testified at trial that references to his shoulder injury were contained in his military records. Defendant produced a document from the United States Department of Veterans Affairs indicating that no such record could be found. The court held that the trial court abused its discretion in admitting the document as it was not properly authenticated, however, the court went on to find the error to be harmless.

Motor Vehicle Accident – Improper Jury Instruction Regarding Nominal Damages Reversible Error

***Lautner v. Lin*, 10th Dist. App. No. 04AP-983, 2005-Ohio-4549, 2005 WL 2087886.**

Plaintiff Shawn C. Lautner was involved in a rear-end motor vehicle collision in which he sustained personal injuries. He filed suit against Defendant. The case proceeded to a jury trial, and the Defendant stipulated that she negligently caused the collision. The trial judge instructed the jury that it could award nominal damages in a negligence personal injury case, and the jury awarded Lautner $625 in total compensation.

Though Lautner raised several issues on appeal, the appellate court considered only the assignment of error wherein Lautner alleged that the trial judge's jury instruction regarding nominal damages was improper. When the jury questioned the trial court during deliberations as to whether it could find for Lautner but award no damages, the trial judge responded, in relevant part, "if you find for the Plaintiff and that some injury to the Plaintiff was done by the Defendant, but the Plaintiff failed to prove by the greater weight of the evidence any amount of damages, you may award the Plaintiff nominal damages."

The appellate court cited *Younce v. Baker* (2nd Dist. 1966), 9 Ohio App.2d 259 and *Lyle v. Aron* (6th Dist.), 1997 WL 679528, for the proposition that because actual injury is a necessary element of a cause of action for damages for personal or bodily injury, nominal damages alone are not available. The cause of action necessarily fails when actual damages cannot be proven, such that an instruction regarding nominal damages is reversible error. Accordingly, the appellate court reversed and remanded the case for further proceedings.

Premises Liability – Notice Sufficient to Impose Liability on Landlord for Defective Condition; Reasonable, but Unsuccessful, Efforts to Notify Landlord do not Constitute Notice

***Boyd v. Hariani, et al.*, 9th Dist. App. No. 22500, 2005-Ohio-4536, 2005 WL 2087824.**

Plaintiff-Appellant Patricia A. Boyd tripped and fell on a step at the bottom of the interior staircase within the rental property in which she lived. She filed suit against Defendants-Appellants Sunil Hariani, et al., her landlords, alleging that the step on which she fell was defective due to a crack, and that the Appellees failed to maintain the stairway in a safe and secure condition in breach of the duty of care as contained in R.C. §5321.04. The trial court granted Appellees' motion for summary judgment.

On appeal, Boyd asserted two assignments of error: (1) the trial court erred in discrediting her deposition testimony as "self-serving," for this constituted an improper assessment by the judge of the credibility of her testimony, and (2) the trial court improperly failed to consider that Boyd's provision of notice of the defective condition to the Akron Metropolitan Housing Authority ("AMHA") constituted "reasonable, but unsuccessful attempts" to notify Appellees or, in the alternative, erred in finding that the Appellees did not have constructive notice of the defective condition.

Boyd first argued that the trial court's labeling of her deposition testimony as "self-serving" constituted an improper determination of the credibility of her testimony. However, the appellate court found that the trial court did not weigh the credibility of the testimony, but merely determined that the testimony, whether credible or not, was insufficient to overcome a properly supported motion for summary judgment. In support of its finding, the appellate court relied upon *Hooks v. Ciccolini*, (9th Dist.) 2002-Ohio-2322 at ¶12, *certiorari denied* 538 U.S. 910 (2003), which held that a party's unsupported and self-serving assertions, standing alone, do not demonstrate issues of fact. In support of their motion for summary judgment, Appellees provided several AMHA

inspection reports (none of which contained reference to any defective stairs inside the home) to show that AMHA had no knowledge of any such defect. Boyd offered only her own, unsupported deposition testimony in response to Appellees' motion. Since this testimony, without more, is insufficient to overcome a properly supported motion for summary judgment, the appellate court concluded that Boyd's first assignment of error was without merit.

Boyd next argued that, pursuant to *Shroades v. Rental Homes* (1981), 68 Ohio St.2d 20, in order to establish proximate cause for her injuries, she need only show that the landlord "knew of the defect, or that the tenant made reasonable, but unsuccessful, attempts to notify the landlord." *Id.* at 25-26. Boyd maintained that her notice to AMHA of the defective step constituted "reasonable, but unsuccessful, attempts" to notify her landlord. The appellate court considered the validity of the test as set forth in *Shroades* in light of the Ohio Supreme Court's subsequent decision in *Sikora v. Wenzel*, 2000-Ohio-406, 88 Ohio St.3d 493, wherein it held that a landlord's liability pursuant to R.C. §5321.04(A)(1) may be excused if the landlord had no actual or constructive notice of the defective condition. The appellate court adopted the interpretation reached by the Eighth District Court of Appeals that *Sikora* overruled *Shroades*, sub silentio, to the extent that *Shroades* implied that a tenant's reasonable, but unsuccessful efforts to provide notice to a landlord could constitute notice. In *Sikora*, the appellate court concluded, the Ohio Supreme Court narrowed the standard as set forth in *Shroades* so that tenants could no longer impute liability to a landlord based on their failed attempts to give notice as to a defective condition. Accordingly, even assuming Boyd did engage in reasonable, but unsuccessful, attempts to notify Appellees of the condition, said efforts did not constitute notice.

In the alternative, Boyd argued that Appellees had constructive notice of the defect by virtue of the notice provided by Boyd to AMHA. Even assuming the AMHA records confirm receipt of such notice (which they did not), the appellate court reasoned that since AMHA was not an agent of Appellees, such notice was insufficient.

Boyd further asserts that R.C. §5321.04 requires a landlord to inspect its rental property, and that said defect would have been discovered in the course of such an inspection. The appellate court disagreed, finding that any inspection requirement would be superseded by both *Shroades* and *Sikora*, neither of which obligates a landlord to conduct such inspections. Further, even assuming said inspections were required, the fact that the professional inspectors retained by the AMHA did not detect any cracks or other defects in the stairs in any one of their five inspections made it unreasonable to assume that Appellees would have discovered the hazard upon conducting their own inspection. As Boyd failed to prove that Appellees had notice sufficient to impose liability for the step upon which she fell, the appellate court affirmed the trial court's grant of summary judgment.

Premises Liability - Open and Obvious Doctrine Applied to Negate Duty in Case Involving Accumulation of Ice and Snow

***Simpson v. Concord United Methodist Church, et al.*, 2nd Dist. App. No. 20382, 2005-Ohio-4534, 2005 Ohio App. LEXIS 4124.**

This is an appeal from a trial court order granting summary judgment to Defendants Concord United Methodist Church ("Concord") and RB Services LLC ("RB") on Plaintiff's claim for personal injuries proximately caused by her slip-and-fall on snow and ice. On January 19, 2000, Plaintiff delivered her four-year-old son to a preschool facility maintained by Concord. RB had plowed Concord's parking lot and walkways. After plowing, some of the snow melted and thereafter froze in patches of ice when the temperature dropped. Plaintiff carried her son into the church building and then followed a different path on her way back to her vehicle. Though she took care for her own safety, she stepped on a patch of black ice and slipped and fell to the ground, sustaining head injuries in the process.

The trial court granted summary judgment to both Defendants on the basis that the open and obvious nature of the hazardous condition precluded liability. Despite finding that the business invitee rule applied to Plaintiff, the Second District affirmed. Although acknowledging that *Armstrong v. Best Buy*, 2003-Ohio-2578, 99 Ohio St.3d 79, did not involve snow or ice, the reviewing court relied on that decision and others to hold that the open and obvious character of the hazard absolves the landowner of a duty of care toward the invitee. Here, it was undisputed that Plaintiff was aware of the accumulation of ice and snow and the hazards they presented. Under *Armstrong*, according to the Second District, Concord owed no duty to Plaintiff with respect to the hazard. By contrast, when the hazard is latent or concealed, the law imposes a duty on the owner and/or operator of the

land to cure or warn of the hazard. Finally, the Second District distinguished cases like *Mikula v. Salvin Tailors* (1970), 24 Ohio St.2d 48, in which snow and ice accumulations conceal a hazard like a pothole. Unlike the hidden pothole in *Mikula*, reasonable minds could not find that Concord was in any better position to know of the hazardous condition here.

Products Liability – Liability of a Component Part Manufacturer for the Performance of an Integrated Product

***Wells v. Komatsu America Int'l Co.*, 1st Dist. App. No. C-040089, 2005-Ohio-4415, 2005 WL 2044956.**

Ralph Wells was laying a storm pipe at a job site in Hamilton County, Ohio in the scope and course of his employment with Performance Site Management. Another member of the excavation crew operated machinery consisting of an excavator, a hydraulic coupler, and an excavation bucket while Wells worked within an excavation trench. Wells became pinned to the concrete storm pipe when the excavation bucket suddenly detached from the hydraulic coupler. Wells died from his injuries.

His widow, Kathy Wells, filed claims against various parties, and eventually settled those claims filed against her husband's employer (Performance Site Management), the manufacturer of the hydraulic coupler component of the machinery (Hendrix Manufacturing Company), and the company that both distributed the excavator and coupler and installed the coupler on the excavator (Columbus Equipment Company). The only remaining claim was against Komatsu America Corporation, the manufacturer of the excavator component.

Plaintiff filed a motion for summary judgment against Komatsu, arguing that the Komatsu excavator was not a complete product until the Hendrix coupler was installed on it, and that Komatsu was strictly liable as the manufacturer of an integrated product or, in the alternative, as the supplier of an integrated product. Wells alleged that Columbus Equipment Company ("Columbus") served as Komatsu's agent. She then asserted that, as Komatsu's agent, Columbus sold and physically assembled the defective coupler to the excavator. Wells argued that this agency, along with the fact that Komatsu provided Hendrix with excavator measurements to facilitate Hendrix's manufacture of a coupler which would be compatible with the excavator, proved that Komatsu was the manufacturer of the integrated product which caused her husband's death. Wells further argued that Komatsu was strictly liable for failing to provide post-marketing warnings as to injuries which previously occurred after the Hendrix coupler was installed onto the excavator.

In its cross motion for summary judgment, Komatsu argued that it was merely the manufacturer of the excavator, and was accordingly entitled to the component-parts defense. Komatsu submitted that, because the excavator was not defective when it left its control, and because it did not participate in the design or assembly of the coupler, it could not be held strictly liable for the defective design of the coupler or for failing to provide post-marketing warnings regarding the coupler.

The trial court granted Komatsu's motion for summary judgment on the defective design claim on the grounds that Komatsu had not manufactured or sold the defective coupler, that it did not have an agency relationship which would make it liable for the acts and/or omissions of Columbus, and that the integrated product was not the proximate cause of Wells' injuries. The trial court similarly granted Komatsu's motion on the failure to warn claim, finding a lack of evidence that Komatsu participated in the design or assembly of the coupler.

On appeal, Wells asserted five assignments of error: (1) the trial court erred in finding that Komatsu was not the manufacturer of the integrated product; (2) the trial court erred in holding that the integrated product was not in Komatsu's control at the time it entered into the stream of commerce; (3) the trial court erred in determining that the integrated product did not proximately cause Ralph Wells' fatal injuries; (4) the trial court erred in finding that Komatsu did not have a duty to provide post-marketing warnings about the defective coupler, and; (5) the trial court erred in failing to consider whether Komatsu was a supplier of the integrated product.

In order to establish that Komatsu, the manufacturer of the excavator component, was the manufacturer of the integrated product under R.C. §2307.71, Wells had to prove that Komatsu designed, constructed, or assembled the final product. Wells submitted that, because Columbus, as Komatsu's agent, installed the coupler on the excavator, Komatsu was involved in the assembly of the final product. In support of her argument regarding the agency relationship between Komatsu and Columbus, Wells cited various provisions of the Distributor Sales and Service Agreement entered into by the parties. The appellate court found, however, that although the

highlighted portions of the Agreement demonstrated an agency relationship regarding the sale and installation of Komatsu's *own* products, they contained no language with regard to Columbus' sale or assembly of after-market attachments like the Hendrix coupler. Further, as nothing in the Agreement or conduct of the parties evidenced Komatsu's right to control the manner in which the final product was assembled, the appellate court concluded that no agency relationship had been created with respect to the assembly of the integrated product.

The appellate court further found no evidence that Komatsu was a manufacturer of the integrated product by virtue of its participation in the design process. Though Komatsu had provided Hendrix with measurements of the excavator arm to ensure compatibility with the coupler, this was insufficient to establish that Komatsu was involved in the design of the coupler. Therefore, the appellate court concluded that Komatsu, as the manufacturer only of a non-defective component part, could not be held liable for a defective integrated system which it neither designed nor assembled.

In her second assignment of error, Wells alleged that the trial court erred in finding that the integrated product was not in Komatsu's control at the time it entered the stream of commerce. As Wells' argument was based on the proposition that such control was maintained by Columbus as Komatsu's agent, and the court had already rejected a finding of agency, it overruled this second assignment of error.

Wells also argued that the trial court erroneously concluded that her husband's fatal injuries were not proximately caused by the integrated product. In her Complaint, Wells claimed that her husband's injuries were caused by the defective design of the coupler. Since Komatsu, the only remaining Defendant, neither participated in the design of the coupler nor manufactured the integrated product, it was not liable under a design-defect claim irrespective of the proximate cause determination. Accordingly, the appellate court never reached the issue of proximate causation, and overruled Wells' third assignment of error.

Wells faulted the trial court for its conclusion that Komatsu had no duty to provide post-marketing warnings regarding the defective coupler. Since Wells had to prove that Komatsu was a manufacturer of the integrated product in order to succeed on a failure to warn claim, and the appellate court already concluded she had failed to do so, it overruled this assignment of error.

Finally, Wells submitted as error the trial court's failure to consider whether Komatsu was a supplier of an integrated product. As there was no evidence to support the assertion that Komatsu played any role in the supply of the integrated product, this assignment of error was also overruled.

Workers' Compensation – Loss of Entire Single Extremity Can Equate to Loss of Two Body Parts for Statutory PTD

***State ex rel. International Paper v. Trucinski, et al.*, 106 Ohio St.3d 203, 2005-Ohio-4557.**

Appellee, Steven A. Trucinski, was employed by Appellant, International Paper. A chemical explosion at an International Paper plant caused an injury to Appellee's left leg, resulting in an above-the-knee amputation. Appellee received scheduled compensation for his injuries from the Ohio Industrial Commission under R.C. §4123.57(B). He later applied for a permanent total disability ("PTD") award pursuant to R.C. §4123.58(C). The Commission granted PTD.

Appellant unsuccessfully appealed the award of PTD to the Tenth District Court of Appeals. It thereafter filed an appeal as of right to the Ohio Supreme Court, asking the Court to deny Appellee's award of PTD and to overrule *Thomas v. Indus. Comm.*, 97 Ohio St.3d 37, 2002-Ohio-5306, which held that, for purposes of R.C. §4123.58(C), the loss of an entire single extremity can equate to the loss of two body parts and therefore give rise to a statutory entitlement to PTD.

The Court initially noted that stare decisis requires adherence to established precedent unless "(1) the challenged decision was wrongly decided at that time or changes in circumstances no longer justify continued adherence to the decision, (2) the challenged decision defies practical workability, and (3) overruling the decision would not create an undue hardship for those who have relied upon it." Citing *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849. Since Appellant cannot meet this standard, the Court declined to overrule *Thomas* and upheld the decisions of the lower courts awarding Appellee PTD.

In examining the first prong of the *Galatis* test, the Court concluded that *Thomas* was not wrongly decided. Since there is no express statutory definition of "arm" and "leg" that applies to R.C. §4123.58(C), the *Thomas* court could construe the statute as it did. Furthermore, the Court rejected Appellant's argument that the *Thomas* decision is constitutionally suspect. Since there is no dissimilar treatment among claimants, there is no violation of the equal protection clause. Also, there was no arbitrary deprivation of Appellant's property that constitutes a due process violation since the commission determined that Appellee was injured in the course and scope of his employment.

The Court rejected Appellant's claim under the second prong of the *Galatis* test, that the decision defies practical workability. There is no evidence that PTD is awarded under these circumstances with enough frequency to cause a burden on Appellant and/or the workers' compensation system. The Court noted that since *Thomas* was decided, it has decided only four such cases.

Appellant was further unsuccessful in its attempt to argue that *Thomas* creates a windfall for claimants because a statutory award of PTD is made irrespective of a claimant's ability to continue working. Appellee was able to secure employment with a prosthetic leg following his injuries. The Court ruled that the decision to grant PTD whether or not a claimant is able or is actually working is a choice of the legislature, not the Court, and does not provide a basis to overrule *Thomas*.

Finally, the Court refused to distinguish the instant case from *Thomas* because the Appellee lost a leg, whereas the claimant in *Thomas* lost an arm. The Court stated that they "decline to engage in a distinction that could be perceived as placing a value judgment on the degree and severity of the loss of an arm or leg." The judgment of the court of appeals awarding Appellee PTD was affirmed.

Verdicts & Settlements

(For members and educational purposes only)

Carpenter v. Patrick Elbert, D.D.S.
Type of Case: Dental Malpractice
Settlement: $110,000.00
Plaintiff's Counsel: Paul Grieco, Esq. and Justin Madden, Esq. of Landskroner Grieco Madden
Defendant's Counsel: Withheld
Court: Lorain County Common Pleas Court
Date: September 28, 2005
Insurance Company: Cincinnati
Damages: fractured jaw

Summary: Plaintiff was told by Defendant she needed wisdom tooth extracted. During extraction, Defendant fractured Plaintiff's jaw. Wisdom tooth did not need to be extracted. No informed consent was obtained.

Plaintiff's Experts: Jon Bradrick, DDS – Director of Oral Surgery at MetroHealth
Defendant's Experts: Michael Hauser, DMD – Beachwood, Ohio

Estate of Shari Curl v. Frank Kocab, M.D.
Type of Case: Delay in diagnosis of malignant melanoma
Settlement: $2,000,000.00
Plaintiff's Counsel: David A. Kulwicki, Esq.
Defendant's Counsel: Withheld
Court: Mahoning County Common Pleas Court
Date: May 1, 2005
Insurance Company: Withheld
Damages: Death of 38 year old woman

Summary: Dr. Kocab, a pathologist, misread mole biopsy in 1995. In 1997, cancer was discovered. No evidence of local recurrence overcome with (1) medical literature; (2) preservation of decedent's testimony.

Plaintiff's Experts: Rhett Fredric, M.D. (Oncology), Michael Kaufmann, M.D. (Pathology)
Defendant's Experts: Douglas Reintgen, M.D. (Surgical Oncology), Bernard Ackerman, M.D. (Dermatology)

Jane Doe vs. ABC Anesthesia Group
Type of Case: Medical Malpractice
Settlement: $2,000,000.00 (on the morning of trial)
Plaintiff's Counsel: Charles Kampinski, Esq. and Laurel A. Matthews, Esq. Kampinski,& Matthews Co., L.P.A.
Defendant's Counsel: Withheld
Court: Withheld
Date: Withheld
Insurance Company: Withheld
Damages: Death of 33 year old woman.

Summary: Jane Doe was a 33 year old obese woman who suffered from sleep apnea, but was otherwise active and healthy. On September 20, 2003, she underwent successful, uncomplicated gastric bypass surgery. At 1615, Jane arrived in the PACU intubated and accompanied by a CRNA employed by ABC Anesthesia Group. Applicable standards of care require that an obese sleep apnea patient be fully awake before her breathing tube is removed. If the tube is removed prematurely, the patient is at high risk for airway obstruction. Five minutes after Jane arrived in the PACU, and before she was awake, the CRNA negligently removed her breathing tube and put her on oxygen by face mask. By 1725, Jane's oxygen saturation started dropping rapidly, and by the time the supervising anesthesiologist arrived, she had suffered respiratory arrest. Multiple intubation attempts were unsuccessful and Jane could not be ventilated by means of laryngeal mask airway. An emergency tracheotomy was performed, but at autopsy, this tube had been placed into the esophagus. Ninety minutes later, Jane was pronounced dead. Had ABC Anesthesia Group waited until Jane was fully awake before removing her breathing tube, she would be alive and well today. She is survived by her husband and four children.

Plaintiff's Experts: David Cullen, M.D. – Anesthesiologist, Boston, Massachusetts; John F. Burke, Jr., Ph.D. – Economist, Cleveland, Ohio
Defendant's Experts: Dr. Nicholas S. Hill – Chief Pulmonary & Critical Care Division, Boston Massachusetts; Ronald J. Hurley, M.D. – Associate Director, Obstetric Anesthesia Service, Executive Vice Chairman, Department of Anesthesia, Perioperative and Pain Medicine, Norwell, Massachusetts; Thomas E. Reilley, D.O., FCCM – Associate Professor, Department of Anesthesiology, Columbus, Ohio

Thonsey Droumond v. Hammer Jacks, et al.
Type of Case: Delay in diagnosis of malignant melanoma
Settlement: $500,000.00
Plaintiff's Counsel: Andy Goldwasser, Esq.
Defendant's Counsel: Withheld
Court: Trumbull County Common Pleas Court
Date: September, 2005
Insurance Company: Lloyds of London
Damages: Below the knee leg amputation – 76 year old unemployed female.

Summary: The tortfeasor got drunk at Hammer Jacks, a bar in Warren. She pulled out of the bar and struck Plaintiff head-on.

Plaintiff's Experts: Michael Evans (toxicologist)
Defendant's Experts: None

Susan Mulhern, etc. v. Nationwide Insurance Co., et al.
Type of Case: Wrongful Death - auto
Settlement: $1,900,000.00
Plaintiff's Counsel: Mitchell A. Weisman, Esq.
Defendant's Counsel: Todd Haemmerle, Esq.
Court: Cuyahoga County Common Pleas Court
Date: July, 2005
Insurance Company: Grange – Tortfeasor's Insurance
Damages: death of Martin Mulhern

Summary: Martin Mulhern was 17 years old and a passenger in a Toyota Corolla operated by Patrick Cleary on June 26, 2003. Mr. Cleary was 18 years old and was driving under the influence of alcohol and marijuana. He lost control of the vehicle and struck two utility poles. Martin Mulhern was conscious after the accident and was transported to Lakewood Hospital, where he died about five hours later. Discovery uncovered that both Martin Mulhern and Patrick Cleary had histories of substance abuse, and in fact, one week before the accident, Patrick Cleary had told his parents he needed help. His rehab appointment was set for what became the day after the accident. Punitive damages were sought, but Judge Ralph McAllister refused to give the jury an instruction on punitive damages, even though Mr. Cleary was found guilty of aggravated vehicular homicide in the criminal case.

Plaintiff's Experts: Dr. Camille Wortman, Psychologist – grief expert/traumatic loss
Defendant's Experts: None.

Jane Doe, etc. v. Doe Hospital
Type of Case: Medical Malpractice – Wrongful Death
Settlement: $2,250,000.00
Plaintiff's Counsel: Mitchell A. Weisman, Esq.
Defendant's Counsel: Withheld
Court: Cuyahoga County Common Pleas Court
Date: May, 2005
Insurance Company: Withheld
Damages: death of 51 year old

Summary: 51 year-old male underwent surgery to repair shoulder. His intubation tube became dislodged and he was deprived of oxygen for several minutes. As a result he incurred brain damage and died six weeks later. Defendant hospital offered no defense or expert witness.

Plaintiff's Experts: None needed.
Defendant's Experts: None.

Barnes v. University Hospitals of Cleveland, et al.
Type of Case: Medical Negligence
Settlement: $3,100,000.00 compensatory, $3,000,000 punitive, $1,000,300.00 awarded for attorney fees
Plaintiff's Counsel: Michael F. Becker, Esq. of Becker & Mishkind Co., L.P.A. and W. Craig Bashein, Esq. of Bashein & Bashein Co., L.P.A.
Defendant's Counsel: Withheld
Court: Cuyahoga County Common Pleas Court
Date: May 4, 2005
Insurance Company: AIG
Damages: Wrongful death of plaintiff's decedent (24 year old special needs daughter) with resulting severe permanent psychic injury to surviving mother (plaintiff).

Summary: The plaintiff's decedent, a special needs young adult, developed a need for dialysis secondary to cystic medullary disease. Because plaintiff had to return to work, it was necessary to hire a health care professional to baby sit or otherwise watch plaintiff's decedent during dialysis. Plaintiff's decedent had previously demonstrated a tendency to play or fidget or tug at her catheter lines during dialysis if she wasn't preoccupied. The home health care group, Medlink, hired a convicted felon contrary to Ohio statute to stay with plaintiff's decedent. On the day at issue, the Medlink employee abandoned plaintiff's decedent, which enabled plaintiff's decedent to pull out her catheter line resulting in an air embolism and a severe anoxic injury. Plaintiff's decedent lived for a few weeks thereafter before dialysis was discontinued resulting in plaintiff's decedent's death. Prejudgment interest proceedings are pending. Furthermore, the defendant Medlink has appealed to the Eighth District Court of Appeals.

Plaintiff's Experts: Dr. Barry Sobel, nephrologist in Madisonville, Kentucky
Defendant's Experts: Dr. Steven Nissen, cardiologist in Cleveland, Ohio

The Estate of Jane Doe vs. Dr. Smith
Type of Case: Wrongful Death/Medical Malpractice
Settlement: $2,000,000.00
Plaintiff's Counsel: Michael F. Becker, Esq. of Becker & Mishkind Co., L.P.A. and George E. Loucas, Esq. of George E. Loucas Co., L.P.A.
Defendant's Counsel: Withheld
Court: Withheld
Date: September, 2005
Insurance Company: Withheld
Damages: Wrongful death of a 24 year old woman secondary to complications from severe pre-eclampsia with surviving husband and healthy newborn child.

Summary: The plaintiff's decedent who had chronic hypertension came to the obstetrician's office for pre-natal care. She was assigned to a midwife. Notwithstanding evidence of emerging pre-eclampsia superimposed on chronic hypertension, the midwife failed to transfer the decedent's pre-natal care directly to the attending obstetrician. The defendant/obstetrician also facilitated a short hospitalization based on signs of pre-eclampsia but never actually personally examined the plaintiff's decedent. The decedent's pre-eclampsia went on to a severe form (HELLP syndrome) which ultimately resulted in her death. An additional allegation of negligence against the obstetrician was that, after the emergency cesarean section or clear evidence of HELLP syndrome, he failed to timely administer blood products which also would have saved the decedent's life.

Plaintiff's Experts: Dr. Steven Inglis, perinatologist in New York City; Dr. Rodger Bick, hematologist in Oxnard, California
Defendant's Experts: Dr. Baha Sabai, OB/GYN in Cincinnati, Ohio; Dr. Enid Gilbert-Barness, pediatric pathologist in Tampa, Florida

James Smith, a minor, vs. Dr. Jones & XYZ Hospital
Type of Case: Medical Negligence
Settlement: $4,300,000.00
Plaintiff's Counsel: Michael F. Becker, Esq. of Becker & Mishkind Co., L.P.A.
Defendant's Counsel: Withheld
Court: Withheld
Date: May, 2005
Insurance Company: Withheld
Damages: Minor sustained permanent brain injury at or about time of birth.

Summary: Minor, James Smith, was Twin B in a twin gestation pregnancy complicated by early pre-eclampsia. The fetal surveillance and management of Twin B intrapartum was negligent due to the very high risk nature of this particular twin gestation. The plaintiffs alleged that, had appropriate management taken place, Twin B would have avoided his permanent irreversible brain damage. Twin B has spastic quadriplegia and significant developmental delays. Suit was filed against the attending obstetrician, as well as the hospital based on nursing negligence.

Plaintiff's Experts: Dr. Robert Carpenter, maternal fetal specialist, Houston, Texas
Defendant's Expert: Dr. Steven Klein, OB/GYN in Beachwood, Ohio

John Doe vs. ABC Hospital
Type of Case: Wrongful Death/Medical Negligence
Settlement: $2,500,000.00
Plaintiff's Counsel: David A. Kulwicki, Esq. of Becker & Mishkind Co., L.P.A.
Defendant's Counsel: Withheld
Court: Mahoning County Common Pleas Court
Date: November 1, 2005
Insurance Company: Withheld
Damages: Death

Summary: Inadvertent extubation of man being treated for ARDS.

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

Jane Doe vs. John Doe, M.D.
Type of Case: Wrongful Death/Medical Negligence
Settlement: $2,000,000.00
Plaintiff's Counsel: David A. Kulwicki, Esq. of Becker & Mishkind Co., L.P.A.
Defendant's Counsel: Withheld
Court: Mahoning County Common Pleas Court
Date: May 1, 2005
Insurance Company: Withheld
Damages: Death

Summary: Delay in diagnosis of malignant melanoma due to pathology misdiagnosis.

Plaintiff's Experts: Rhett Frederick, M.D. (Oncology), Michael Kaufman, M.D. (Pathology)
Defendant's Experts: Bernard Ackerman, M.D. (Dermapathology); Douglas Reintgen, M.D. (Surgical Oncology)

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Delos Cosgrove, MD
Reginald P. Dickerson, MD
Barry Allan Effron, MD
Barry George, MD
Wayne Gross, MD
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Alan Kamen, MD
Alfred Kitchen, MD
Allan Klein, MD
Alan Kravitz, MD
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Bruce S. Stambler, MD
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Thomas Vrobel, MD */Intern/Pulm*
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Steven Yakubov, MD
Kenneth G. Zahka, MD */Pediatrics*
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Benjamin Felia Zolta, MD

Cytopathology
William Tench, MD */Chief of Cytopathology*

Dentistry/Oral Surgery
Mitchell Barney, DDS
John Distefano, DDS
Michael Hauser, DDS
Don Shumaker, DDS
Pankaj Rai Goyal, MD */Oral Surgery*
John F. Zak, MD */Oral Maxillofacial Surg.*

ER Medicine/Physicians
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Albet I. King */Bioengineer*
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Ohio Rail Commission
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Kelly Sted */Manager of Enrollment*
Kelly Trease */Office Manager, Dr.Cola*

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: _____

Economic Damages: _____

Damages: _____

Brief Summary of the Case: _____

_____

_____

_____

_____

Experts for Plaintiff(s): _____

_____

_____

Experts for Defendant(s): _____

_____

_____

Counsel for Defendant:

Andrew Thompson, Esq.
Stege & Michelson Co., LPA
200 Public Square, suite 3220
Cleveland, Ohio 44114
FAX: 216.348.0803

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

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1. *Skill, interest and ability in trial and appellate practice.*
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3. *Excellent character and integrity of the highest order.*

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____

Professional Honors or Articles Written: ____________________

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

Percentage of Cases Representing Claimants: ____________________

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

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

____

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Date: ____________ Applicant: ____________________

Invited: ________________ Seconded By: ________________

President's Approval: ____________________ Date: ________

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