CATA News
Cleveland Academy of Trial Attorneys
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President's Message

Michael F. Becker

Missing – Plaintiff's Medical Negligence Verdicts

"WAADSS UPP?" as former Cleveland Indian Manny Ramirez used to say. Some of us have recently experienced that the plaintiff's medical negligence verdicts seem harder to come by than yesteryear. A few personal observations about this:

1. Today's climate, with doctors threatening to leave the State and donation-seeking politicians clamoring for reform, has heightened jury bias in favor of the medical provider. Physicians' massive grass roots campaign, the political strategy du jour of "blame the lawyers" and a deferential media has had a greater impact than we had feared.

2. Clever defense attorneys are exploiting and distorting the Ohio Jury Instructions (OJI) to empower biased jurors. I am not sure whether the plaintiffs' bar was asleep at the switch or arguments fell upon deaf ears when the current medical malpractice OJI was formulated. First, the title of Chapter 331 in OJI is "Malpractice and Professional Negligence." The word "malpractice" should be removed and replaced with "negligent healthcare." Furthermore, the word "malpractice" should never be used at trial as it implies "malice" or "intent."

The "malpractice" jury instructions also misleadingly use the term "ordinary care" to define negligence. Webster's New World Dictionary lists one definition of "ordinary" as "relatively poor or inferior." This more negative and less forgiving connotation is the one used by jurors in the setting of medical negligence litigation. In truth, negligence is the failure to use "reasonably safe, careful and prudent care that is ordinarily provided." In jurors' minds, once told that ordinary care will do, just showing up and providing *some* medical care seems to meet the legal standard. The phrase "ordinary care" should be avoided like the plague and plaintiff's counsel should advocate against its usage. Remember that just because an instruction appears in OJI does not mean that it should be blindly followed! More importantly, why would a judge ever give a definition that is subject to two diametrically opposing interpretations and inherently prone to confusion when another clearer definition is available?

The "bad result" charge set forth at OJI 331.01(2) is also extremely prejudicial to the plaintiff. This charge reads as follows: "...that the doctor's service did not fulfill expectations does not prove, without more, that the doctor was negligent...." This charge has more impact than appears on the surface. Subconsciously, the instruction eliminates "unacceptable complication" as a basis of liability for the plaintiff. During deliberations, jurors remember only that they can simplistically ignore the fact that there was a bad outcome

without analyzing whether the bad outcome should have been avoided through proper care. The instruction is simply a restatement of the legal requirement that a plaintiff must set forth a prima facie case in order to withstand a directed verdict. It is the court's job, not the jury's job, to see that this is done. As such, this instruction, really a misleading admonition, is duplicitous and misleading. Again, this charge should be avoided.

The final jury charge that is being abused and exploited by defense counsel is the "different methods" charge at OJI 331.02(3). This charge states that "although some other medical provider might have used a method of diagnosis or treatment different than used by the defendant, this circumstance will not by itself, without more, prove the defendant was negligent." There is a grave risk that jurors will rely on the "different methods" defense when there is merely expert disagreement on treatment or diagnostic standards. Jurors are inclined to want agreement among experts. When experts disagree, jurors are apt to infer that it is an honest disagreement between experts simply representing two different schools of thought; hence, no negligence. This charge in reality does not apply in most medical malpractice cases. In fact, it is a rare circumstance that there is truly "different methods" of care that both comply with accepted standards of care.

Courts abuse this instruction by giving it in the garden variety medical negligence case at defense counsel's invitation. Defense counsel first misleads the trial court into believing that the instruction is applicable. To set the judge up, defense counsel will ask their client, the defense expert or even the plaintiff's expert to acknowledge that, *in general*, "doctors frequently disagree about the best way to treat various medical conditions," that "there can be different schools of thought about the management of medical conditions," "that doctors often use their clinical judgment and it is not always in agreement with another doctor's clinical judgment," that "there is not always consensus in medicine" or that "there are many controversies in medicine about the right way to do things." Note that, given the general nature of these questions, defense counsel never elicits testimony about the specific clinical facts at issue. Trial courts will remember hearing testimony about "two schools of thought" or "controversies" and be fooled into believing that such a charge is appropriate. Whenever possible, do not tolerate this practice or this jury charge.

An OATL committee was recently asked to recommend changes to the OJI within the last year. It is my understanding that significant changes were urged by this committee to a panel of judges appointed by the Supreme Court. We anxiously await the Supreme Court's recommendations for amendments to the OJI. Hopefully, any new proposals to the OJI will be fair to the plaintiff and will remove these prejudicial instructions.

Of course, we can never give up fighting for these healthcare victims no matter what the odds! We should never accept a settlement that is not fair to our client. We simply have to be wiser and more aggressive, not only in advocating our case to the jury, but also in educating our judges and resisting prejudicial instructions.

Sponsors

Please remember to patronize the advertisers of this Newsletter. These sponsors help us immensely in defraying some of the expense of this publication, and they provide top notch services.

Please remember that justice just doesn't happen. We have to make it happen. This is your job and my job. Keep up the fight. Best regards.

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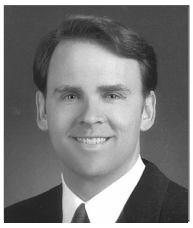

Mark Weaver, Esq.

As you read this, big business and insurance lobbyists are secretly meeting behind closed doors. And they're trying to change your life and the life of your clients.

These are the same power players who helped rush Senate Bill 80 through the Ohio Senate last year. And now they're plotting the strategy to push it through the House of Representatives and into Ohio law.

Senate Bill 80 is what some people call "tort reform." But reasonable people call it extreme and unfair.

This legislation will radically change Ohio law by limiting the rights of injured victims to hold lawbreakers fully accountable in court and place severe limitations on the ability of Ohio jurors to fully compensate innocent victims of corporate wrongdoing.

SENATE BILL 80: THE BASICS

This extreme proposal is so far-reaching that many attorneys aren't even aware of how damaging it really is. Here are some highlights of this measure.

Limits on Noneconomic Damages
Regardless of the facts of an individual case and in spite of the independent decision by the jury that hears all of the facts, the legislation imposes an arbitrary cap on a jury's ability to decide non-economic damages. It limits non-economic damages to the greater of $250,000 or three times the economic loss, up to a maximum of $350,000. The cap for each occurrence that is the basis for that tort action (including claims by all family members) is $500,000. For the rarest cases and the most serious injuries, the cap is to $500,000 for each plaintiff or $1 million for each occurrence if several narrow conditions are met.

Limits on Punitive Damages
Punitive damages are society's way to punish corporations and others whose conduct goes beyond simple negligence and borders on criminal activity. The goal is to send a message to others that such conduct will not be tolerated. Without consideration of the facts in specific cases, the legislation caps punitive damages for most cases at $100,000.

Statute of Repose/Statute of Limitations
Even though we may expect a product or building to last longer than 10 years, Ohio law would be changed to immunize these corporations for any injuries their products cause after 10 years. Simply put, if Senate Bill 80 passes this year, innocent victims who are seriously injured by a product made before 1995 would be unable to recover their lost wages, medical bills and non-economic damages.

Limitation on Contingency Awards
Senate Bill 80 places artificial limits on the fees that victims may choose to pay their lawyer. Legal fees are artificially capped at 35% on the first $100,000 of representation, 25% on the next $500,000, and 15% above $600,000. As you might imagine, the legal fees that negligent corporations pay their lawyers are not capped.

THE PHONY 'FRIVOLOUS LAWSUIT' ARGUMENT

Big corporations and insurance companies would have us believe that all lawsuits are frivolous. As attorneys know, there are several provisions in Ohio law and the Rules of Civil Procedure. These measures are rarely used because the reality is that there are very few truly frivolous suits filed.

Senate Bill 80 has very little to do with frivolous lawsuits. In fact, despite several official requests from the Chairman of the House Judiciary Committee, supporters of tort reform have been unable to provide any documentation of the claim that Ohio's legal system is beset by frivolous lawsuits.

THE FALSE ECONOMIC ARGUMENT

One of the main selling points that tort reform backers use is the allegation that limiting the rights of innocent

victims will attract new business to Ohio at a time when our state economy is in trouble. But the facts show that this argument is flat-out false.

A November 2003 study by "Site Selection" magazine found that Ohio has the 4th best business climate in the nation and also found several other indicators that our business climate is excelling. Ohio ranked second in new and expanded facilities per one million residents and per 1000 square miles. It ranked fourth in the number of new and expanded facilities in 2002 and fifth in the number of those facilities between 2000 and 2002. Ohio ranked 14th in the executive survey portion, up from 24th in 2002.

THE INACCURATE ARGUMENT THAT SENATE BILL 80 IS ABOUT FAIRNESS

Some supporters assert that Senate Bill 80 will bring more fairness to Ohio law. But because it would create arbitrary limits to what an independent jury can award a victim for "noneconomic damages," the legislation is both discriminatory and unfair.

By treating economic and noneconomic damages differently, arbitrary caps create a two-tiered legal system. Caps unfairly discriminate against those who either earn a lower income or have no income at all. Senate Bill 80 sets up a system where the more someone earns, the more they deserve to be compensated for any pain and suffering they endure. It would mean that a rich person's disability is worth more than a poor person's disability. It would mean that a wealthy individual's eyesight is more valuable than a minimum wage earner.

Government should not pass legislation that places a value on someone's worth based merely on their occupation, gender or age. But that's exactly what it does. The bill discriminates specifically against women, children and senior citizens because of their unique circumstances.

Senate Bill 80 Hurts Women

If a bank executive and a stay-at-home mom both become permanently disabled because of an injury from the same defective product, the banker may be able to recover millions for lost wages. However, the stay-at-home mom has no income, so she has no lost wages. Most of her compensation will come from non-economic damages, which would be drastically limited.

Senate Bill 80 Hurts Children

Limiting compensation for a reduced quality of life has a tremendously negative affect on the permanently injured, especially children. Infants and children who suffer permanent brain damage and other catastrophic injuries may live a normal life span, but their quality of life is anything but normal. Because they have no jobs, it is virtually impossible to recover for lost wages. Also, no one can accurately predict all of the medical expense that may be necessary to care for a child who lives with severe injuries for many years. When those costs arise, some children and their families must rely on the non-economic damages they received from their lawsuit. Senate Bill 80 caps those awards.

Senate Bill 80 Hurts The Elderly

Senior citizens often have no income, but are trying to live out their golden years on savings and Social Security. If they are injured by someone's preventable mistake, they likely will not be able to recover lost wages. The overwhelming majority of their compensation would come from non-economic damages. By defining a person's "worth" in purely economic terms, caps devalue older Ohio citizens.

THE LAUGHABLE ARGUMENT THAT SENATE BILL 80 HELPS OHIOANS

If Senate Bill 80 passes, law abiding Ohioans who are severely injured by a lawbreaker will have a very limited ability to hold that wrongdoer accountable. In all too many cases, an injured Ohioan will be unable to hire an attorney to assist them and a jury will be unable to hold the lawbreaker fully accountable.

Last year, legislators heard powerful expert testimony about how Senate Bill 80 could allow drunk drivers, rapists, and child molesters to be shielded from a portion of the damages they cause to their victims. Legislators saw that, in addition to its many other flaws, the bill has the unintended consequence of holding criminals less accountable to their innocent victims. That's just one reason why the Ohio Fraternal Order of Police announced its strong opposition to Senate Bill 80 last year.

DESPITE THESE FLIMSY ARGUMENTS FOR SENATE BILL 80, IT STILL IS IN SERIOUS DANGER OF BECOMING LAW

Many lawyers assume that the merits described above are enough to stop the Ohio House of Representatives from passing Senate Bill 80. But many State Representatives haven't heard the facts about this bill – because they are being besieged by calls, letters, and visits from big business and insurance interests. Sadly, the voices of victims are not being heard.

That's why your help is needed.

By spending just 10 minutes a week contacting your legislator and Committee Members, you can make the difference and stop this extreme legislation.

WRITE, CALL, OR VISIT YOUR REPRESENTATIVE

Here are some of the points you should make.

1. **All the available data proves there is no tort crisis in Ohio, thus making the so called "reforms" unnecessary.** The National Center for State Courts, which collects and analyzes state court filings across the country, has determined that between 1991 and 2000, tort filings in Ohio decreased 15%. Also, insurance rates are high, but tort reform does not lower insurance rates. The President of the American Tort Reform Association publicly said: "We wouldn't tell you or anyone that the reason to pass tort reform would be to lower insurance rates."

2. **If you think Ohio's economy will be helped by tort reform, think again.** According to "State Rankings 2003," states without tort reform have experienced higher economic growth (3.4%) than states that have passed tort reform (3.1%). According to U.S. Labor Department statistics, states without caps on jury awards have lower unemployment rates (5.3%) than states with caps (5.5%). According to Fortune magazine, states without caps on jury awards for non-economic damage average over twice the number of Fortune 500 companies than states who passed tort reform.

3. **Even if you ignore the facts that there is no lawsuit crisis, Senate Bill 80 is an extreme response and has several unintended consequences.** S.B. 80 discriminates against women, children, and the elderly. It also has the horrible result of helping drunk drivers, child molesters, rapists and corporate polluters. Civil lawsuits against these lawbreakers will be harder to bring, and innocent victims will be less able to hold them fully accountable for their illegal acts.

4. **Both the Ohio State Bar Association and former Ohio Supreme Court Justice Craig Wright have opined that much of S.B. 80 is unconstitutional.** Justice Wright said the award caps in Senate Bill 80 are "not going to survive in the Ohio Supreme Court," the measure would "eviscerate 400 years of common law," and it would "prevent injured Ohioans from access to the courts, and once in court, it arbitrarily and unconstitutionally limits the damages for catastrophic injuries."

For more details on how you can help, simple go to **www.thislawhurts.com/help**.

UPDATE ON LEGISLATION PENDING BEFORE THE OHIO GENERAL ASSEMBLY-MARCH 2004

HOUSE BILLS:

HB 212 - This bill changes the pre-judgment interest rate from 10% to a floating rate of the federal short term-interest rate plus 3%. This rate will change annually. The rate for 2003 is 6%. The bill passed the Senate Insurance Committee by a vote of 9 - 1 with Senator Ray Miller (D-Columbus) voting no. The bill also would change the date the interest is calculated from the date of the plaintiff's injuries to the date from which the defendant first received notice of claim, or the date on which a complaint against a defendant was filed, whichever is earlier. OATL opposed the bill but Representative Seitz (R-Cincinnati) had given us an opportunity to review a draft of the bill prior to introduction and incorporated a number of our concerns. Also, the Attorney General had requested an amendment to allow a floating rate but cap it at 10% for public entities. OATL opposed that provision since the sponsor's goal was to have the interest rate reflect current economic times. The amendment was withdrawn due to lack of necessary votes for passage and therefore did not become part of the bill.

HB 215 – This legislation requires medical claims against health care providers to be reviewed by a medical review panel, consisting of three doctors, prior to the claim proceeding in court. Because such an obstacle to justice is neither fair nor warranted, we rallied strong opposition to the bill. OATL member Gerry Leeseberg provided compelling testimony about how this review panel would not be fair and impartial and that this bill would actually add delay and expense to medi-

cal malpractice cases, not expedite them. A group of interested parties have been meeting over the last several months to find creative ways to address the increase in doctors malpractice insurance rates without furthering limiting victims rights. HB 215 is pending in the House Insurance Committee.

HB 223 – This bill specifies conditions under which chemical testing of an employee may establish a rebuttable presumption that the employee's injury was proximately caused by use of alcohol or an unprescribed substance. OATL's Vice President, Phil Fulton, has been working with interested parties to obtain a number of pro-claimant changes into the bill. HB 223 is still pending in the House Commerce and Labor Committee.

HB 292 – Establishes minimum medical requirements for filing asbestos-related claims and establishes limitations on successor asbestos-related liabilities relating to corporations. The provisions of this bill were originally included in SB 80 but then amended out and dealt with separately. HB 292 passed the House and is pending in the Senate Judiciary Committee.

HB 300 – This legislation modifies the civil rights laws in employment discrimination cases. This bill would radically dismantle laws that protect innocent Ohioans from illegal discrimination base on age, sex, race, disability and religion. It also places new restrictions on the Ohio Civil Rights Commission's authority to investigate and prosecute discrimination. The Academy strongly opposes this bill and with the help of OATL's President-elect Fred Gittes, we are forming a coalition of opposition to the bill. HB 300 is pending in the House Civil and Commercial Law Committee.

HB 342 - Establishes minimum medical requirements for filing certain silica claims or mixed dust disease claims, establishes premises liability in relation to those claims, and prescribes the requirements for shareholder liability for those claims under the doctrine of piercing the corporate veil. David Forrest, OATL member, testified in opposition. He stated that he brought a unique perspective to the issue because he worked in four aluminum foundries from 1972 to 1976 while in college. He concluded his testimony by saying, "this is, in effect, an immunity statute. I don't know why we would be offering immunity to an industry that injured so many people some years ago." The bill is still pending in the House Civil and Commercial Law Committee.

HB 348 - This legislation requires clerks of courts of common pleas to provide the Department of Insurance and the Supreme Court certain information regarding tort actions and creates the Commission on Responsible Legal Reform. The bill received sponsor testimony by Representative John Willamowski (R-Lima) before the House Civil and Commercial Law Committee. OATL strongly supports this bill, as we know that information is needed before any changes should be made to our civil justice system in Ohio. The Academy will testify in support of the bill.

SENATE BILLS:

SB 80 – This bill is an extreme and far-reaching attack on Ohio's civil justice system. The business community and insurance industry convinced Senator Stivers (R-Columbus) to introduce their "wish list" of tort reform in May 2003. Although the Senate quickly passed the measure, the House has taken a slow and deliberate approach. The four major provisions of SB 80 are: caps on non-economic damages, caps on punitive damages, caps on attorney contingency fees and establishes a 10-year statute of repose. This bill is currently pending in the House Judiciary Committee.

SB 161 - This bill provides a qualified immunity from civil damages to a manufacturer or supplier of food or a nonalcoholic beverage for a claim of weight gain, obesity or a related health condition resulting from the consumption of the food unless certain circumstances are proven by the claimant. The proponents testified before the Senate Agriculture Committee arguing that this bill is necessary so no frivolous suits are filed in Ohio. OATL distributed a letter written by our executive director, Richard Mason, of opposition stating "our legal system has multiple procedural safeguards to protect defendants' rights. The fact that the cases in question have all been dismissed is proof positive that the system works." The bill is pending in the Senate Agriculture Committee.

Copies of the bills and their analysis are available at www.legislature.state.oh.us. Please call or e-mail me with any questions you many have.

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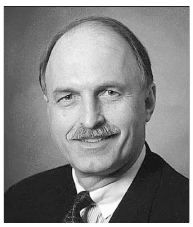
Big Award From A Small Case



by Michael E. Jackson

All of us have listened to excellent CATA and OATL speakers and have read their detailed outlines regarding how to gain larger awards from the "small case," particularly the so-called soft tissue injuries resulting from automobile collisions. When preparing for the jury trial described in this article, I tried to utilize many of the points suggested by these speakers. Hopefully, the results of this Cuyahoga County case before Judge Boyko in October 2003 will become the norm rather than the exception. This case is summarized in the Verdicts and Settlement section of this Newsletter.

The Collision and Treatment

Joe Mack, a 35-year-old laborer at a building supply store, suffered a neck and back injury when he slammed into a guardrail at 60 mph after he was cut-off by the defendant who was changing lanes on Interstate 71. He did not go to the emergency room after the collision because "nothing was broken." The next day his back started to hurt when he arrived at work. He then went to the emergency room where he was diagnosed with a neck and back strain. Thereafter, he saw his family physician for four treatments and participated in 11 sessions of physical therapy. Over the next year, he saw a physician rehabilitation specialist five times. He then had eight visits with a neurologist over the next one and a half years, and he also had eight additional physical therapy sessions. In total, he saw a physician 17 times and had 19 physical therapy sessions over a 43-month period before trial. (The time to get to trial was delayed because I tried to settle the case with State Farm before filing a Complaint, and thereafter the case was delayed because the Defendant, the president of a dot.com company, filed personal bankruptcy.)

Three years after the collision, Mack's neurologist opined that his injury was a sprain, not a strain, that his injury was chronic in nature, and that his condition was now permanent. The neurologist also stated that Mack's pre-existing degenerative disc condition at L-1/L-2 – a condition not known to Mack before his ER x-rays – was not aggravated by the collision. The plaintiff suffered $1,800 in lost wages, because he was off work for 30 days after the collision. Thereafter, however, he did not miss any work. His medical bills were approximately $7,900, of which prescriptions for pain and muscle relaxers totaled $2,300. His special damages were approximately $9,700.

The Verdict

Many would expect a verdict in the range of $15,000 to $25,000, and, based on these facts, there have been far too many cases where a plaintiff has received only special damages, $9,700 in this case. Jury Verdict Research® suggested $21,000 was a likely jury verdict in Cuyahoga County. I am pleased to report that the jury returned a verdict for $57,000 and $7,000 for his wife's consortium claim. In contrast, State Farm's only settlement offer was $7,500. That offer was made before the lawsuit was filed, and State Farm never increased it, even though Mack's case became stronger as trial approached. To settle, I demanded $85,000 and reduced that demand to $55,000 three months before trial. After the verdict, State Farm settled Mack's motions for PJI, expenses, including attorney's fees, under Civ.R. 37(C), and video deposition costs for $13,655. The total recovery was $77,655. I believe four factors contributed to this result.

1. Jury Selection

I believe that jurors probably fall into two distinct camps when deciding negligence cases, especially automobile cases. The first camp has a view of life that can be called "things happen" or "s*** happens," as expressed on a bumper sticker. This view acknowledges that all of us get "roughed-up" as we go through life, that we should "get over it," and "move on" when confronted with these events. Moreover, we should not file claims when such things happen, particularly when someone did not really intend to cause us harm, as in the Mack case, where the defendant was simply trying to change lanes on I-71 during rush hour when people are trying to get home. Generally speaking, jurors who hold this view may be willing to award payment of medical bills, lost wages and property damage, but not much else, particularly when the claim is a soft tissue injury. After September 11th, and especially since our armed forces are serving in Iraq and Afghanistan, this view may be even more widely held today.

However, jurors in the "accountability" camp believe that people should be responsible for their actions. When a fair settlement cannot be reached, there is nothing wrong with bringing a claim to court, even one that might

be a small claim. Jurors in the "accountability" camp are obviously preferred. The goal is to identify the jurors who identify with one camp or the other.

The safest way to identify those jurors in the "things happen" camp is to start questioning jurors by discussing only this view, and by doing so in an even manner, or, better yet, with a favorable tone so that no juror will perceive there is anything wrong with this view. If jurors identify with this viewpoint, they must feel comfortable to raise their hand when called upon to do so. When the "things happen" view was described and explained in the Mack case, two jurors raised their hands when asked who followed this view. After follow-up questions, I asked if any others identified with their views after listening to these jurors, and one more juror raised her hand. That is only one short of half of the first eight potential jurors, or 37.5%.

The first juror who raised his hand was a white male pediatric emergency room physician in his late thirties. The second was a white male bartender in his early thirties, and the third was a retired white woman in her mid-60s. All were very presentable and articulate jurors. Of the three, the emergency room physician's views were most illuminating. The doctor said that individuals should be held accountable when they intended to cause the accident that led to plaintiff's injury. This juror had earlier explained that his wife and child were recently severely injured in an automobile collision when a driver ran a red light and crashed into them. He also said that he and his wife were pursuing a claim against the driver. When asked how he could reconcile filing a claim against that driver, given his views, he answered without hesitation. The doctor explained quite persuasively that the driver who injured his family was intoxicated when he ran the red light, and, as such, his conduct was so reckless that his family was entitled to compensation. Absent similar conduct, the doctor did not believe that individuals should be compensated. Although not specifically asked, I believe the doctor would, if permitted to remain on the jury, award only payment of medical bills, property damage and lost wages, but not much more. The bartender and the retiree agreed with the doctor's thoughts.

If these jurors had been asked whether they could be fair and objective, or even if any defendant should be held accountable for their actions, all would have said "yes" to these questions, and they would have believed these answers were truthful. In addition, the usual questions about following the law and following the judge's instructions would have been answered "yes" for the same reasons. The problem, of course, is that their view of the legal threshold of recovery is significantly higher than the legal standard permitting a plaintiff to recover under the law of negligence. However, by explaining and questioning them about the "things happen" view of life as if this viewpoint was perfectly acceptable, these jurors felt comfortable in expressing their true thoughts. Otherwise, I doubt that I would have discovered their true beliefs.

I challenged for cause the three jurors with the "things happen" viewpoint and argued that all of their opinions were strongly held, heartfelt, and that no matter what instruction the Court gave, these individuals would not be able to set aside these views and award fair compensation to the plaintiff. The judge agreed and added that the demeanor of these witnesses clearly indicated that nothing was going to change their minds and that no rehabilitation could alter their views.

The remaining panel members were asked if they followed the "things happen" view and none raised their hands. When asked if they followed the other view – that people should be held accountable for their actions – all of them raised their hands. In response to questioning, one or two jurors explained what they meant by holding someone accountable, and these jurors provided typical responses that indicated they were quite willing to hold someone to the negligence standard, and, more importantly, provide fair compensation for someone who has failed to abide by that standard. As we progressed through the jury selection process, each of the new potential jurors were asked which view they followed and by the time the panel was selected, all had said they followed the "accountability viewpoint." Looking back, however, I am not sure that all actually followed this view. After the verdict was announced, the jurors were polled and then released. Later I obtained the jury verdict forms and they reflect that only seven jurors signed the Joe Mack verdict form, with a six to one vote in his favor, and only six jurors signed the verdict form for his spouse on her consortium claim. Of the two who did not sign the consortium verdict, one also did not sign Joe Mack's verdict form. Presumably, this juror believed that both awards were too high. In the end, perhaps this juror really did not accept the "accountability" view.

If any of the "things happen" jurors who were excused for cause had remained on the jury, the amount of compensation would have been less. I was able to find out

about these views because both the "things happen" and the "accountability" were presented in a fair and evenhanded way so that it was acceptable for a jury member to have either belief. While Judge Boyko concluded that these jurors could not be rehabilitated, there are, of course, many judges would not have accepted my reasons for cause to excuse these three jurors and who would have attempted to rehabilitate them.

The law certainly supports the court in this regard. The determination whether a prospective juror should be disqualified for cause is a discretionary function of the trial court, and that determination will not be reversed on appeal, absent an abuse of discretion. *Berk v. Matthews* (1990) 53 Ohio St.3d 161, syllabus. Moreover, the recent case from the Eighth District Court of Appeals, *Chang v. Cleveland Clinic Foundation*, 2003-Ohio-6167, 2003 WL 22724751, illustrates the length to which a trial court will go to rehabilitate a witness to avoid dismissal for cause, as well as the support that will be provided by a court of appeals to uphold the trial court's determination.

There is also little dispute regarding the law when jurors should have been excused for cause. "[A] litigant is entitled to a full panel of qualified jurors before making peremptory challenges, and it is error for a court to force a party to exhaust his or her peremptory challenges on persons who should have been excused for cause because the effect of the court's action is to abridge the party's right to exercise peremptory challenges." 64 O.Jur. 3d Jury § 224. Thus, a trial court commits reversible error when it refuses to remove a member of the venire for cause, forcing the plaintiff to use one of the three peremptory challenges that she used to remove that member who should have been excused for cause. *McGarry v. Horlacker*, 149 Ohio App.3d 33, 2002-Ohio-3161, (2nd Dist. Montgomery County). If a party does not exhaust all peremptory challenges and states satisfaction with the jury, that party cannot successfully raise an objection thereafter. O.Jur., supra. Fortunately, the trial judge excused the three jurors that I had identified as following the "things happen" viewpoint, but if my request to remove them for cause had been denied, I believe I had created a sufficient record for an appeal.

As a result of identifying and removing these jurors, I was able to select a jury that gave the Plaintiff a fighting chance to obtain a larger award for a soft tissue injury. Whether that was going to occur depended upon the evidence itself, which leads to the next factor that influenced the jury to render a large amount for this "small" case.

2. The Physical Therapist and The Independent Witness

As witnesses, both Plaintiffs presented themselves as solid citizens who testified very well under direct and cross-examination. Nevertheless, I believe two other witnesses, a physical therapist and a contractor who had observed the Plaintiff at work both before and after Mack's collision with the guardrail, were key to gaining a larger award.

I am a strong believer in physical therapists explaining a plaintiff's injury and how various physical therapy treatments are designed to assist the plaintiff in recovering or adapting to these injuries. Jurors seem quite willing to listen to physical therapists explain how the plaintiff is responding to treatment and what this treatment is to accomplish. For the most part, I believe that jurors better understand the testimony of a physical therapist and identify more with physical therapists than with doctors. I usually have the physical therapist bring various measuring devices and gauges used to determine range of motion, strength testing, and the like, and have the therapist demonstrate these devices by putting me through various movements or exercises with the physical therapist measuring or testing me in front of the jury.

I use the physical therapist to objectify, if possible, the subjective expressions of pain and discomfort that the plaintiff has described to the physical therapist during sessions. For example, the various levels of pain expressed by Mack, such as a pain level of six out of ten, were compared to the lack of strength or loss of range of motion as measured by the physical therapist. I also try to summarize all of the physical therapy visits by using a large board to show a timeline or progression of a particular injury to show how that injury has responded. To make the case as credible as possible, I acknowledge when the plaintiff is getting better, but obviously spend more time when the pain in a particular area extends over a period of time. For example, if a pain in the arm stops at some point in time, the physical therapist will note when the pain started and that it continued to a later date, for a total of "x" days or months. During closing argument, I ask for compensation for that injury only for that time and then focus on other injuries that continue beyond that date. This builds credibility with the jury. Since these facts are indisputable, it is much better for plaintiff's counsel to use these points in a positive way, rather than have the defendant's counsel point out these facts, or worse suggest that the plaintiff is asking for too much or that he is not being straightforward.
In the Mack case, the physical therapist treated the plaintiff soon after his injury and approximately a year and a

half later. As a result, the physical therapist was able to compare the results of the two sessions. The jury could see the similarities and differences in Plaintiff's condition. I believe the jurors found this testimony compelling because nearly all of the jurors were taking notes as I was placing on the board the various degrees of loss of range of motion that occurred over time.

I also prefer that the physical therapist testify after the treating physician or expert doctor, particularly if the doctor is testifying by videotape. This allows me to ask certain questions of the physical therapist that may have been overlooked or that need clarification after the doctor's videotape was played. In addition, and to the extent possible, I try to integrate both sets of records. All of this tends to reinforce the doctor's testimony and allows the jurors to hear similar testimony from a second witness who is testifying live and who is likely to be well-received.

One interesting point occurred on cross-examination of the physical therapist. Defense counsel tried to make the point that the plaintiff "quit" his first physical therapy sessions by not attending the last two scheduled sessions. While the physical therapy records only indicated that the plaintiff called in to report that he was not coming to those sessions, the physical therapist volunteered that she did not believe the plaintiff had quit, but rather, he did not come because his workers' compensation request had not been approved for the remaining two sessions. She further volunteered that workers' compensation typically only approves ten physical therapy visits when the treating physician had ordered 12 sessions. She explained that the Plaintiff would have been responsible to pay the bills for the remaining two sessions and that may be the reason why he chose not to attend.

This was the first time that the issue of workers' compensation came to light during the trial. While the jury knew that the plaintiff was driving his employer's vehicle home the evening of the collision, I do not believe that many of the jurors suspected or believed that he was receiving workers' compensation benefits. I did not want it to appear that my witness had stated anything inappropriate, so I did not object, nor did I request the Court to instruct the jury regarding workers' compensation benefits. Before trial, the judge had already agreed to my instruction on workers' compensation, and the judge also agreed to my request that jury instructions would be read before closing arguments, so I knew that I would have an opportunity to discuss in my closing argument the workers' compensation issue. In closing argument, I did more than request that the jury follow this instruction. I stated that I would be more than happy to explain why this was the result after the trial, if they wanted to know the answer.[1]

In retrospect, I do not believe the testimony about workers' compensation affected the size of the award.
Because much of Plaintiff's physical limitation resulting from the Defendant's negligence revolved around his work, I wanted a witness who had observed Mack at work both before and after his injury. As a laborer in a building supply business that sold roofing materials to contractors, Plaintiff would lift and carry bundles that weighed between 75 and 125 pounds for a substantial part of the day. One of his customers, a roofing contractor who employed 15 people, testified how Plaintiff loaded and unloaded the roofing materials before and after he was injured. This contractor presented a real life image of this work, because he left a job site to testify in his dirty clothes and work boots. The contractor presented himself as an honest hard-working small business owner who gave clear examples of the Plaintiff's limitations. The contractor explained that his employees now assisted the Plaintiff in performing work when they did not do so before, and he explained that he was willing to do this because the Plaintiff and the owner of the supply company were "good people" who had helped his small company grow. The contractor testified that before the collision, the Plaintiff could hoist roofing materials on a conveyor at a speed that would keep three of his men busy unloading the materials at the top of the conveyor. After the injury, the contractor said he could only keep one of the individuals busy. The jurors took many notes regarding to his testimony, and they clearly thought the examples that he mentioned were important. I used the three to one example in closing argument to illustrate the real limitations experienced by the Plaintiff.

The physical therapist and the contractor provided objective factors that demonstrated the Plaintiff was permanently injured as stated by his treating physician. The testimony of these witnesses enhanced Mack's opportunity to gain a larger award.

3. Awarding Compensation to a Plaintiff Whose Job Exacerbates His Injury

When I decided to demand an award in excess of $100,000, I knew one of the challenges was that Mack continued to work at a job that aggravated his back condition. Mack missed 30 days of work after the collision, but when he returned to work, he did not miss another day. While he was on light duty for a substantial period of time – approximately eight months – he continued to receive his full pay, and during this time there was a noticeable drop

in visits to his doctors, as well as a drop in the need for medication. When he returned to full duty, there was a corresponding increase in the number of doctor visits and the need for medication. After a full day of work, he arrived home exhausted, irritable, and he only wanted to lie down, take his medication, do his home exercises, and go to bed.

One obvious conclusion from these facts is that the Plaintiff is in the wrong job for his back condition, and that he should avoid the kind of physical labor that exacerbates that condition. My concern was that the jury would not award adequate compensation to him because he continued to work that job, particularly when his neurologist noted in a progress note that Plaintiff should change jobs to reduce the strain on his back.

To set the groundwork for why Mack was entitled to a large award even though he still worked at the same job, he testified that he looked for other work, but all of the jobs for which he was qualified paid 50% less than he was making, with few or no medical benefits. He explained that he could not afford to take these jobs, given the family financial obligations of a home mortgage and raising three children, two of whom are teenagers. His wife worked part-time, but could not work full-time because of a leg injury she suffered at work. Their efforts to put money away for their children's college education coupled with their mortgage payments required that he remain in his present job at least for the next five years. After that time, two of his daughters would be over 18 years old and either working or in college, and he could realistically look for a different type of work, or he could take the time off to educate or retrain himself. During this five-year period, he testified that he would take his medications, do his home exercises, be careful at work, and need the continuing assistance from his customers. To my surprise, defense counsel did not cross-examine the Plaintiff very vigorously regarding any of his testimony.

During closing argument, I reiterated the point that Mack's back injury was permanent and that he would suffer from that injury for the remainder of his life. I argued that some portion of his compensation should also reflect the fact that he has to make adjustments to his life because of this injury that was caused by the Defendant. Part of that adjustment would involve a change of job because of the nature of his injury. So, in addition to compensating him for the injury itself, I argued that part of the compensation should allow Plaintiff to move to a new job that will lessen the strain on his back. I used Plaintiff's testimony and the neurologist's progress note to support the need to change jobs. I did not engage a vocational specialist, with an anticipated cost of $5,000, to quantify this amount or to identify the types of jobs that could be available to him. I thought I could gain the same testimony from the Plaintiff and his doctor, and I counted on the fact that the jurors would use their common sense and experience to understand there would be a cost involved in changing jobs.

The key component of this argument was the need for a higher level of compensation that was tied directly to a use of the funds to help the Plaintiff. While there are risks to approaching this argument in this way, I thought the jury would better identify with this approach and would be more willing to award greater compensation if there was a recognizable and reasonable purpose for the money. I requested that the jury render an award in the amount of $125,000 based on this view. The jury returned a verdict for $57,000. In a discussion with the jurors after the verdict, they mentioned that the amount of money they awarded was based, in part, on providing the Plaintiff with the opportunity to re-educate himself to gain another position and avoid the stress to his back in his present position. Clearly, the jury understood and valued that view, and they thought it appropriate that the Plaintiff be compensated with these factors in mind. Without this argument, I believe the jury would have awarded less.

As a compliment to this argument, I also presented the more traditional view of quantifying pain and suffering by using a mathematical formula to focus on the amount of days that had elapsed from the date of the injury until trial and the number that would occur in his future work life. I presented this compensation model based on the per day argument using one dollar, five dollars and ten dollars per day. The five dollars per day totaled $137,000. I thought this approach would be meaningful to at least two of the jurors, one a retired accountant, and the other a retired general contractor. The mathematical formula was presented as a method to evaluate the case in and of itself, or as a method to test any other valuation that the jurors used to determine their view of fair compensation.

After talking to the jurors when the case was over, it was clear they struggled with both the issue of compensating the Plaintiff, as well as his wife's consortium claim. The verdict was seven to one in favor of Mack with regard to his $57,000 verdict and six to two in favor of his wife's $7,000 consortium claim. One juror did not sign either verdict form, which suggests that she did not agree with either verdict. In the end, however, when the jurors were asked to explain what they considered important, they said Mack was entitled to compensation that included an amount to change his job and to develop a new occupation.

4. The Defendant Admitted Liability, But He Came To Trial

The last factor that led to a larger award centers on the Defendant's admission of liability and his attendance at trial. I thought each of these points had to be addressed in a manner favorable to Mack.

Beginning with settlement discussions with State Farm that occurred before the complaint was filed, the Defendant denied any liability and claimed that a "phantom" driver caused the collision. Even though two witnesses identified the Defendant's car, the Defendant took this position in answering Interrogatories, Admissions, and during his deposition. One witness even followed the Defendant after the accident and got his license plate number as he proceeded down I-71 at a high rate of speed. The other witness identified the Defendant's vehicle as he aggressively and recklessly drove to the entrance ramp to I-71. On the eve of trial, the Defendant changed course and admitted that he was the sole cause of the injuries to the Plaintiff. I accepted this stipulation with some reluctance because I thought the case was better if these witnesses could testify as to the Defendant's driving conduct prior to and after the collision. However, by way of the stipulation and the Court's ruling regarding the effect of Defendant's admission of liability, I could not ask questions regarding the Defendant's aggressive and reckless driving before the accident, nor could I ask questions about the Defendant leaving the scene after the accident.

I did not want the jury simply to be told that the Defendant had admitted liability. This seemed far too sterile and removed the drama of events that led to Mack's injuries. As a result, I thought it important to have at least one independent witness testify about the events that resulted in the collision and Plaintiff's injuries, particularly when these witnesses had a clear view of how the accident occurred. In order to present a proper case with regard to damages, I argued to the Court that one of these witnesses should testify how Plaintiff's vehicle was spinning across I-71 and slamming into the guardrail. That witness also stopped to see if the Plaintiff was injured and she could testify as to his state of mind and physical condition immediately after the collision with the guardrail.

Equally important, I thought the jury needed to hear from an independent witness the nature of the accident rather than have me describe the accident in opening statement or have the Plaintiff describe, to the limited degree that he could, what happened prior to the collision. In preparation for what I thought was going to be a liability trial as well as damages, I had already prepared a large board showing I-71,[2] and the witness was prepared to explain these events by using the board. The Court agreed and permitted this witness to testify, which only took about 20 minutes. Curiously, defense counsel cross-examined her regarding her ability to see the accident even though the Defendant had stipulated to liability. I thought this hurt the Defendant's case because in his opening statement, Defendant stated that he wanted the jury to render a fair award on behalf of the Plaintiffs, but that we disagreed as to what amount was fair. I did not object to this cross-examination because the witness was handling these questions well and the Defendant gave the appearance that he was not trying to live up to his admitted liability by trying to find holes in the witness' statement.

I was concerned, however, that the Defendant might testify, even though he had admitted liability. During opening statement, defense counsel stated that the Defendant was a "good guy" who was in court to acknowledge his responsibility for the injuries that he caused. These statements suggested to me that the Defendant might take the stand and apologize for his conduct in an effort to drive down the award for damages. In truth, I hoped that he would testify because that would give me an opportunity to cross-examine him on why he waited so long to accept responsibility. In the end, the Defendant did not testify, but I did not want the jury to have the impression that his mere presence in the courtroom was an acknowledgement that he was a responsible person, that he was a "good guy," as characterized by defense counsel in opening statement. To reduce this risk, in closing argument I reminded the jury that there was no evidence that he was a "good guy" and that the only thing they could draw from his presence in the courtroom is that he had exercised his right by sitting through this trial.

I also suggested to the jury that there are a lot of questions they may have about the accident and Defendant's conduct, but because of the stipulation, neither side could elaborate on those points. Since the jury is bound to accept the stipulation, I urged the jury not to impute any good conduct by Defendant by his appearance in the courtroom. I mentioned that he could have testified, but he chose not to, which was his right. I think this approach helped to explain this presence in the courtroom, but did not allow the Defendant to obtain any benefit by sitting through the trial.

Conclusion

The results of this case should encourage all of us to continue our efforts to gain a big award from a small case. Using the "things happen" approach to identify jurors unwilling to grant higher awards increased the likelihood of a larger award. Having an independent witness verify the nature of the plaintiff's injury – whether the focus is at work, at home, or limitations on the general enjoyment of life – is a key factor in validating the true nature of the plaintiff's injuries. The testimony of a physical therapist in support of a treating physician or expert adds objective evidence to document pain suffered by a plaintiff, and this testimony also helps to establish the efforts made by the plaintiff to overcome his injuries to the extent possible. In addition, we must answer the questions that are likely to be on a jury's mind and weave these answers into the theme of our case. For example, we must answer the question why would a defendant attend the trial but not testify when he admitted liability. Of course, it helps immeasurably to have likable plaintiffs who have a compelling story, and we had the opportunity to try that case before a knowledgeable and fair judge. If most of these factors are present in your case, you should receive a larger rather than a smaller award.

End Notes

[1] I inform the jury that it is understandable to want an explanation for some of the instructions, such as the one for workers' compensation or "collateral benefits". I tell them that if the Court had to explain all the reasons for an instruction, it would take far too long and that is why they are called "instructions" rather than "explanations" of the law. The offer to explain an instruction after the trial is an attempt to remove speculation among the jurors about that instruction because they can find out why later, albeit after the trial, if they wish.

[2] The Cuyahoga County Engineer has actual aerial photographs of each street in the county and you can purchase a CD of that location for $25. Then, you can blow-up the photo of a location and place it on a poster board.

Law Updates

by Stephen T. Keefe, Jr.
Mary A. Cavanaugh
Stephen S. Vanek
Mark E. Barbour
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Arbitration Provisions - Stay Pending Arbitration (Class Action)

***Maestle v. Best Buy Company* (December 24, 2003), 100 Ohio St. 330; 2003-Ohio-6465.**

This case is a certified conflict as to whether R.C. 2711.02 and R.C. 2711.03 must be read *in pari materia* and require a court to conduct a hearing to determine whether the parties entered into a valid and enforceable arbitration agreement. The Supreme Court held that it was not error for the trial court to not hold a hearing pursuant to R.C. 2711.03 before ruling on the motion for stay premised on R.C. 2711.02. The court held that there is no need to read the two statutes *in pari materia*.

Here, Plaintiffs were retail store customers who, as class representatives, sued Best Buy and a related company in the store's credit card bank to recover damages for improperly accessed card finance and interest charges. Applying R.C. 2711.03, the Cuyahoga County Court of Appeals reversed an R.C. 2711.02 stay for arbitration, holding that a trial court could not deny a motion for a stay unless it followed the procedures of R.C. 2711.03. The appeals court reversed and then remanded for further proceedings in conformity with R.C. 2711.03.

The Supreme Court held that a trial court considering whether to grant an R.C. 2711.02 motion to stay proceedings pending arbitration (1) did not have to hold a hearing pursuant to R.C. 2711.03 (which applied when a party wanted an order for the parties to arbitrate) when the motion was not based on R.C. 2711.03, and (2) had discretion to hold a hearing to consider whether an R.C. 2711.02 stay was warranted.

R.C. 2711.02(B) provides that "if any action is brought upon any issue referable arbitration under an agreement in writing for arbitration, the court for which the action is pending upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration, shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement, provided the applicant for the stay is not in default in proceeding with arbitration."

R.C. 2711.03 provides that "(A) [t]he party aggrieved by the alleged failure of another to perform under a written agreement for arbitration may petition any court of common pleas having jurisdiction of the parties so failing to perform for an order directing that the arbitration proceed in the manner provided for in the written agreement....The court shall hear the parties, and, upon being satisfied that the making of the agreement for arbitration or the failure to comply with the agreement is not an issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the agreement. (B) If the making of the arbitration agreement or the failure to perform it is in issue in a petition filed under division (A) of this section, the court shall proceed summarily to the trial of that issue."

A party seeking to enforce an arbitration provision may choose to move for a stay under R.C. 2711.02 or to petition for an order for the parties to proceed to arbitration under R.C. 2711.03 or to seek orders under both statutes. If, however, the party moves for a stay pursuant to R.C. 2711.02 without also petitioning under R.C. 2711.03, the trial judges consideration is guided solely by R.C. 2711.02 without reference to R.C. 2711.03. Consequently in that situation it is not necessary for a trial court to comply with the procedural requirements of R.C. 2711.03 since only R.C. 2711.02 is involved.

Therefore, a trial court considering whether to grant a motion to stay proceedings pending arbitration filed under 2711.02 need not hold a hearing pursuant to R.C. 2711.03 when the motion is not based on R.C. 2711.03. While it is within a trial court's discretion to hold a hearing when considering whether a R.C. 2711.02 stay is warranted, that statute does not on its face require a hearing, and it is not appropriate to read an implicit requirement into the statute.

Attorney Client Privilege – Representation of Corporations and Officers – Discovery

***Stuffleben v. Cowden, et al.* (November 26, 2003), Cuyahoga App. 82537, 2003-Ohio-6334.**

The representation of a corporation by an attorney does not extend to individual officers or shareholders of that corporation absent a specific agreement to the contrary. Secondly, a waiver of the attorney-client privilege sub-

mitted by the shareholder was defective because the shareholder could not waive the attorney-client privilege as to the corporation.

In this case, the Plaintiff was the managing shareholder, president and chief operating officer of two companies. The companies hired the Defendant to perform certain legal work related to the management, structure, and financing of these businesses. The relationship between the parties deteriorated, and Plaintiff filed a complaint alleging legal malpractice and fraud through its representation of he and his companies. Specifically, Plaintiff claimed that the law firm failed to properly represent his interest or disclose conflicts of interests which allegedly caused him to lose control of his business, caused the business to fail and caused him to be personally liable for the financial loss of the business.

As part of this lawsuit, the parties exchanged discovery. The law firm refused to disclose certain information on the basis it was protected under the attorney-client privilege, attorney work product and/or as proprietary confidential information. The Plaintiff filed a motion to compel. Plaintiff asserted that he sought the law firm's advice beginning in June of 1998 on a variety of legal issues, including the selling of his company to an interested buyer, possible causes of action against his former law firm and accounting firm, and the representation of his company and the defense of collection suits filed against both his company and himself personally. Plaintiff claimed that as a result of the advice of the law firm, the company suffered severe financial loss and he suffered personal liability. Plaintiff contended that the Defendant law firm not only represented his corporation, but also personally represented him at the same time.

The Defendant law firm argued that the Plaintiff was never a client. Instead, it claimed that he approached the law firm as a corporate officer seeking advice on corporate business matters, and therefore, the firm represented only the corporate entities and not Plaintiff as a shareholder.

Regarding the discovery dispute, the trial court denied the Defendants' motion to strike Plaintiff's motion to compel and granted Plaintiff's motion. The trial court held that the Plaintiff, as the sole shareholder, founder and president of the corporate entity, appeared to believe that the law firm was representing him personally. Therefore, Defendants were ordered to produce the documents requested.

Based on the trial courts order, the law firm appealed immediately, raising four assignments of error. The re-

viewing court held that the discovery of privileged information is a provisional remedy under R.C. 2505.02(A)(3). As communications between an attorney and his or her client are confidential and privileged pursuant to R.C. 2317.02, once the documents and information are disclosed, the information will no longer be confidential, thereby precluding the law firm from obtaining a judgment in its favor regarding the provisional remedy at the close of trial and eliminating any meaningful or effective remedy on appeal. Therefore, the trial courts order is a final appealable order vesting the court with jurisdiction.

Second, the reviewing court held that in determining whether an attorney-client relationship exists, the court must determine whether the potential client reasonably believed that he had entered into a confidential relationship with the attorney. An essential element is the determination that the relationship invokes such trust and confidence in the attorney that the communication became privileged, and thus the information exchanged was so confidential as to invoke an attorney client privilege. Moreover, the potential client must have reasonably believed that the relationship existed. The Court of Appeals held that the test for determining the existence of an attorney-client relationship is both a subjective and an objective test. The trial court must determine what the potential client believed and whether or not that belief was reasonable based on the surrounding circumstances. The court found that the record was incomplete and that it could not make a determination as to the reasonableness of the Plaintiff's belief. It then noted that the mere fact that the law firm represented the Plaintiff in one matter does not mean that it continued to represent him simultaneously while representing the corporations. The court held that it was incumbent upon the trial court to determine whether the law firm represented the Plaintiff personally, and then to order the release of only those documents pertaining to the personal representation of the Plaintiff.

Plaintiff argued that he was entitled to the requested documents, because his interests were indistinguishable from the corporations'. However, the reviewing court held that that argument contradicts basic corporate law. A corporation is a separate legal entity from its shareholders even when there is but one shareholder. An officer cannot manipulate the corporate entity to serve his or her own personal interests. Most importantly, Ohio law has consistently held that an attorney's representation of a corporation does not make that attorney counsel to the corporate officers and directors as individuals. Absent sufficient evidence that an attorney acted in a capacity other than that of the corporations' lawyer, a corporate officer cannot in-

voke an attorney-client relationship for his or her own personal benefit.

Finally, Plaintiff attempted to waive any attorney-client privilege of the corporations in order to obtain the requested materials through discovery. The Court of Appeals held that it is well-settled that a corporation is a legal creature that exist only through its employees and agents. The attorney-client privilege attaches to a corporation by way of its corporate representatives seeking legal advice on behalf of the corporation. Accordingly, the corporate attorney-client privilege may be asserted only by a corporate representative who is authorized to do so. The manager, however, must exercise the privilege in a manner consistent with his or her fiduciary duty to act in the best interest of the corporation and not that of himself. The Court of Appeals held that the waiver executed by the Plaintiff was executed in his own interest and not on behalf of the corporations. Thus, it was a deficient waiver. The Plaintiff could not waive the corporations attorney-client privilege under the facts of this case.

Employer Intentional Tort – Expert Testimony Proper To Establish Employer's Knowledge That Injury Was Substantially Certain To Occur

***Braglin v. Lempco Industries, Inc.*, Fifth Dist. App. No. 03 CA 13, 2004-0hio-291, 2004 Ohio App. LEXIS 270**

Plaintiff's decedent, Andrew Braglin, Jr., worked at Defendant Lempco Industries Inc.'s metal products plant for 30 years where he was exposed to potentially carcinogenic compounds. In 1997, Braglin was diagnosed with pancreatic cancer. He died of the disease in 1998. Plaintiff filed an employer intentional tort action against Lempco Industries. The trial court granted Lempco's motion for summary judgment. The Fifth District Court of Appeals reversed, holding that under the complex circumstances of the case, summary judgment was not warranted under the requirements set forth at *Fyffe v. Jeno's, Inc*. (1991), 59 Ohio St. 3d 115.

The Court found the first *Fyffe* element was established by evidence demonstrating that, as part of Lempco's operations, numerous lubricants and solvents were used, many of which contained potentially carcinogenic compounds. Lempco had received approximately 100 material safety data sheets (MSDS) outlining the properties and describing applicable governmental regulations and safety precautions, including those pertaining to respiratory protection. Several MSDS forms contained specific warnings that the substance "may adversely effect the pancreas." Lempco's purchasing manager inventoried chemicals brought to the facility and reviewed the hazards associated with each. The evidence established that Plaintiff's decedent was regularly exposed to chemical mist emitted from machinery, that employees' clothes and bodies came into contact with such mists, that employees complained to management that gloves were falling apart due to exposure to chemicals and that on at least one occasion Lempco's safety committee was made aware that the plant's ventilation system was not effective. Lempco produced evidence of working ceiling fans which pulled dust and fumes out of the plant and the installation of an exhaust fan and airflow system. Lempco also submitted evidence that Plaintiff's claims of "pervasive" dust, mist and over spray were exaggerated.

Regarding the second element of *Fyffe*, the reviewing court cited to *Ailiff v. Mar-Bal, Inc.* (1990), 62 Ohio App. 3d 232, 240 and noted that the existence of MSDS sheets containing "harm may occur" language is not determinative in and of itself of knowledge by the employer of substantial certainty of injury. In addition, however, Plaintiff produced a deposition of a toxicology expert and a six page affidavit by a certified industrial hygienist. Those experts concluded, based upon Lempco's lack of a job hazard analysis, the MSDS sheets describing adverse effects of exposure and required but not provided respiratory protection, that Lempco knew that if an employee was subjected to the described conditions that harm to that employee would be a substantial certainty. Citing *Walton v. Springwood Products, Inc.* (1995), 105 Ohio App. 3d 400, 405, the court noted that Ohio law permits Plaintiffs to present expert testimony to demonstrate that an employer was aware that injury was substantially certain to occur. It therefore found reasonable minds could come to different conclusions regarding the second *Fyffe* component.

Regarding the third *Fyffe* element, the reviewing court cited *Gibson v. Drainage Products, Inc.* (2002), 95 Ohio St. 3d 171 for the proposition that the employer does not have to expressly order the employee to engage in the dangerous task. Rather, in order to overcome a motion for summary judgment, the third requirement can be satisfied by presenting evidence that raises an inference that the employer, through its actions and policies, required the employee to engage in the dangerous task. Because genuine issues of material fact existed on all three *Fyffe* requirements, judgment was reversed and the case was remanded.

Employment Law - Age Discrimination - Statute of Limitations

***Yovanno v. Rider Systems, Inc., et al.*, Ninth Dist. App. No. 21528, 2003-Ohio-6824, 2003 Ohio App. LEXIS 6159** (each incident of discrimination, such as termination, failure to promote or refusal to hire, constitutes a separate and distinct cause of action triggering its own statute of limitations).

Plaintiff John Yovanno was hired by Defendant Rider Systems, Inc. on February 1, 1971, ultimately rising to the rank of Service Team Leader at Rider's Akron, Ohio location. On June 21, 2001, after working for Rider for 28 years, the 51-year-old Plaintiff was terminated. At the time of his termination, Plaintiff executed a severance agreement and release. On January 3, 2002, Plaintiff first became aware of a job opening as a Service Team Leader at Defendant's Akron location and contacted Defendant to inquire of the position. The following day, Defendant changed the title of the job opening to Shop Foreman but failed to alter the job description in any way. Plaintiff applied for the Shop Foreman position on January 24, 2002. The next day, Defendant changed the title of the position back to Service Team Leader. On January 31, 2002, Defendant posted the position titled Service Team Leader on a national employment clearinghouse web site. On March 6, 2002, Plaintiff contacted Defendant and expressed his interest in any full time position available in northeast Ohio, be it Shop Foreman, Service Team Leader or Supervisor. Plaintiff was instructed by Defendant's HR Supervisor to fax his resumé to Defendant, which he did. Defendant did not contact or interview Plaintiff. On June 1, 2002, a Service Team Leader position became available at Defendant's Walton Hills location. Plaintiff was never interviewed or contacted regarding this position either.

On July 28, 2002, Defendant hired an individual who was substantially younger than Plaintiff to fill the Walton Hills position. On December 3, 2002, Plaintiff filed suit against Defendant alleging that Defendant's failure to hire or consider him for employment was due to Plaintiff's age and constituted age discrimination in violation of R.C. 4112.02(N). Plaintiff filed a first amended complaint on February 24, 2003 that specified July 28, 2002 as the date of Defendant's refusal to hire him for the Walton Hills position. Defendant filed a motion to dismiss Plaintiff's claim pursuant to Civ. R. 12(B)(6) on the grounds that the event associated with Plaintiff's termination and his failure to be rehired occurred out-

side the 180 day statute of limitation governing age discrimination claims. The trial court found that Plaintiff's termination on June 21, 2001 constituted the discriminatory act and that its failure to hire Plaintiff for the Walton Hills position on July 28, 2002 merely constituted the injury resulting from the wrongful termination of June 21, 2001. Based on this finding, the trial court determined Plaintiff's claim was filed beyond the 180 day statute of limitations set forth in R.C. 4112.02(N) and granted Defendant's motion to dismiss.

On de novo review, the reviewing court reversed and remanded. Citing *National Railroad Passenger Corp. v. Morgan* (2002), 536 U.S. 101, it noted that if a job applicant is a former employee applying for either a new or his former position with his former employer, a failure to hire claim arises if the employer makes a hiring decision with regard to the former employee that is in contravention of Chapter 4112. Whether the prior termination of the former employee was lawful or unlawful is irrelevant with respect to a former employee's failure to hire claim. A failure to hire claim is a stand alone cause of action triggering its own statute limitation governed by Chapter 4112. In the case of a former employee as a job applicant, the statute of limitations for a failure to hire claim dates back to the date of the failure to hire, not the date of the former employee's termination.

Insurance Law - Ohio Supreme Court Cases

***Saunders v. Mortensen, et al.*, 101 Ohio St.3d 86, 2004-Ohio-24** (underinsured motorist recovery for injury to one person limited to per person limit under unambiguous endorsement).

In September 1995, Patrick Saunders II was injured in an automobile collision with Mortensen, an underinsured motorist. Mortensen died in the collision. Patrick and his parents obtained a judgment against Mortensen's estate then filed a supplemental action for underinsured motorist benefits against their carrier, Nationwide Mutual Fire Insurance Company. The Saunders sought a declaration that Patrick's claim and the derivative claims of his parents constituted three separate claims subject to the policy's per-occurrence limit of $300,000. Nationwide defended on the basis that its Endorsement No. 2352 unambiguously limited all claims for injury to one person to the single per person limit of $100,000.

The trial court held that the claims were all covered, but that the endorsement's language was ambiguous. Construing the provision in favor of the insured, the trial court ruled that there was $300,000 in coverage. The appellate court affirmed the trial court's decision and then *sua sponte* certified its decision to the Supreme Court as being in conflict with the 10th District's decision in *Nicolini-Brownfield v. Eigensee* (September 16, 1999), Franklin App. No. 98AP-1244, 1999 Ohio App. LEXIS 4238.

Here, Endorsement No. 2352 provided that Nationwide would pay for losses caused by an uninsured or underinsured motorist up to the limits of liability subject to the following:

> The bodily injury limit shown for any one person is for all legal damages, including all derivative claims, claimed by anyone arising out of and due to bodily injury to one person as a result of one occurrence.
>
> The per-person limit is the total amount available when one person sustains bodily injury, including death, as a result of one occurrence. No separate limits are available to anyone for derivative claims, statutory claims, or any other claims made by anyone arising out of bodily injury, including death, to one person as a result of one occurrence.
>
> Subject to the per person limits, the total limit of our liability shown for each occurrence is the total amount available when two or more persons sustain bodily injury, including death, as a result of one occurrence. No separate limits are available to anyone for derivative claims, statutory claims or any other claims arising out of bodily injury, including death, to two or more persons as a result of one occurrence.

Applying S.B. 20 (eff. 10/24/94) to the Nationwide policy, the Supreme Court concluded that, when read together as a whole, the endorsement was not ambiguous and the Saunders' claims were limited to the per person limit because only one person suffered bodily injury. Justice Resnick dissented and would have found the endorsement ambiguous.

Insurance Law - 8th District Cases of Interest

***Leffler v. State Farm* (December 4, 2003), Eighth Dist. App. No. 83009, 2003-Ohio-6487**

Insureds brought a declaratory judgment action to determine whether they were entitled to UIM coverage. The Court of Appeals determined that no coverage exists because of the anti-stacking provisions of the policy, despite the fact that UIM coverage arose by operation of law due to an invalid rejection.

The Plaintiffs were injured in an automobile accident. At the time of the accident, they had policies of insurance with State Farm which provided automobile liability coverage. The policies contained UM/UIM rejection forms signed by the insureds but which were invalid pursuant to Ohio law. Therefore, the UIM coverage arose by operation of law. State Farm argued that when UIM coverage arises by operation of law, the terms and conditions of the UIM provisions expressly set forth in the policy should control and that the anti-stacking provisions contained in the policy should be applied. Here, the State Farm policy contained UIM provisions, but that coverage was waived by the Lefflers, albeit ineffectively. State Farm argued that had the coverage not been waived, the relevant anti-stacking exclusion would apply to the subject accident and prohibit coverage. The Court of Appeals held that where a policy of insurance specifically sets forth UM/UIM coverage, but such coverage is not explicitly purchased or rejected but instead arises by operation of law, the restrictions contained in the policy remain.

The Plaintiffs also argued that the anti-stacking provisions contained in the policy are only valid if presented by clear and unambiguous language and that such provisions should be strictly construed. Rejecting the argument that the provision was ambiguous, the reviewing court relied on the Supreme Court decision in *Wallace v. Balint* (2002), 94 Ohio St.3d 182, which held that similar language was unambiguous. It then held that the anti-stacking provisions contained in the policies were valid and that the trial court erred in granting the Lefflers' summary judgment motion on this issue.

***Estate of Nord v. Motorists Mut. Ins. Co.*, Eighth Dist. App. No. 82857, 2003-Ohio-6345** (holding that reasonable minds could conclude that an EMT's act of dropping a syringe into decedent's eye during transport to hospital arises out of the ownership, maintenance or use of an uninsured motor vehicle).

Decedent Paul Nord was being transported by a Cleveland EMS ambulance on February 26, 2001 when a paramedic dropped a syringe into his eye. The parties agreed that the syringe was accidentally dropped. Nord later died from unrelated causes and his estate pursued a UM claim against Motorists, claiming that decedent's injuries arose out of the ownership, maintenance or use of an uninsured motor vehicle. The trial court disagreed and granted summary judgment for Motorists. In so holding, the court reasoned that the instrumentality causing the injury was not an uninsured motor vehicle, but instead the EMS technician occupying the ambulance.

The Eighth District Court of Appeals reversed, first noting that owners and operators of vehicles who have immunity under R.C. 2744, such as ambulance operators, are within the definition of "uninsured motorists." It then held that reasonable minds could conclude that decedent's injuries arose out of the ownership, maintenance or use of the ambulance (i.e., an uninsured motor vehicle). The reviewing court focused on the word "use" and followed the direction of other courts which have held that the word "use" has a broader meaning than the word "operate." Adapting those courts' holdings, the Eighth District held that "a motor vehicle may be in the owner's use, even though the owner is not operating the vehicle, when the vehicle is being used for the owner's benefit, advantage, purpose, or in furtherance of the owners' interests." *Citing to Plessinger v. Cox*, Darke App. Nos. 1428, 1429, 1997 Ohio App. LEXIS 5963; *Grange Mut. Cas. Co. v. Darst* (1998), 129 Ohio App. 3d 723, 727.

Here, the reviewing court reasoned that the ambulance, by its very nature, is equipped with syringes for use by EMTs, and that the presence of the syringe and technician could be viewed as "part and parcel of the ownership, maintenance or use of the ambulance." The reviewing court did caution, however, that if the underlying facts established an act wholly disconnected from the use of the ambulance (i.e., such if the EMT shot the decedent with a gun), a different conclusion would be reached.

This is a 2-1 decision. In a dissenting opinion, Judge Conway Cooney would have affirmed summary judgment in Motorists' favor. The dissenting opinion focused on the fact that the EMT had no control over the ambulance necessary for liability to attach and that the instrumentality that caused the accident was a syringe rather than a vehicle.

Justin Sprouse v. Michael Kall **(January 29, 2004), Eighth Dist. No. 82388, 2004-Ohio-353** (no duty for insurer to defend against claims of independent negligence in intentional tort action).

Justin Sprouse lost part of his thumb on a rotary lift while working for Kall's Sunoco Service Station. An expert who inspected the lift reported that a locking lever had been deliberately cut off and proximately caused Sprouse's injury. Alleging that he was employed by either or both Kall and Sunoco, Sprouse brought employer intentional tort claims against both.

Kall was insured by Motorists Insurance Company under a commercial liability policy. The Motorists policy identified Sunoco as an additional insured "but only with respect to [its] liability because of acts or omissions of an insured." The policy also provided that Motorists would defend, but not in any suit seeking damages to which the coverage did not apply. Motorists initially defended both under a reservation of rights. A year later, Sprouse amended his complaint, because discovery had indicated that he was not employed by Sunoco. The amended complaint stated the employer intentional tort claim only against Kall and included a negligence claim against Sunoco on the grounds that it owned, maintained, altered, manufactured, installed, inspected or otherwise negligently handled the rotary lift involved in Sprouse's injury.

Motorists then notified Sunoco that it no longer had a duty to defend and would no longer be providing a defense in the action, because the complaint no longer alleged a claim against Sunoco that was based upon the act or omissions of Kall. Sunoco filed a third party complaint for declaratory judgment and breach of contract action against Motorists. Motorists filed an answer an counterclaim for declaratory judgment. Sprouse's claims against Kall were subsequently settled and dismissed with prejudice. Motorists filed a motion for summary judgment and Sunoco filed a cross motion. The trial court ruled that Motorists (1) had no duty to defend Sunoco after the amended complaint was filed, and (2) did not breach the contract. Sunoco subsequently settled with Sprouse on the negligence claim.

On appeal, Sunoco argued that the trial court erred in finding that the insurance policy did not require Motorists to defend Sunoco under the claims in the amended complaint. The appellate court reviewed the amended complaint and determined that "additional insured" policy provision in the Motorists policy was intended to protect Sunoco from vicarious liability for the acts or omissions of Kall, the primary insured. This contractual duty did not extend to any claim based upon Sunoco's independent acts or omissions. The court held that because Kall was Sprouse's employer, he could not be held liable for negligence, only for an intentional tort. Because Sunoco's liability under the contract attaches only when the primary actor is liable, Sunoco could be vicariously liable only for Kall's intentional tort, not for his negligence.

The reviewing court held that the complaint was silent, and that there was no evidence in the record, on the issue of Sunoco's vicarious liability for Kall's alleged intentional tort. Sprouse had not shown that Kall was Sunoco's agent in order to show that Sunoco was secondarily liable for Kall's intentional tort. Moreover, there was no evidence of Sunoco's control over Kall's daily operations by which to prove agency. Nor was there any evidence of Kall's actions benefitting Sunoco or having been done at Sunoco's instruction.

The court concluded that Sprouse's claims against Sunoco were based upon its independent acts of negligence and not on Kall's conduct. This being the case, Motorists had no duty to defend Sunoco against the claims presented by Sprouse.

***William Young, Etc. v. Cincinnati Insurance Company* (January 8, 2004), Eighth Dist. No. 82395, 2004-Ohio-54** (S.B. 267 does not interrupt 2 year guarantee period under *Wolfe v. Wolfe*).

On December 18, 2000, Margaret Young died from injuries she sustained in an automobile accident caused by Steven Hubbard. William Young, her husband and the executor of her estate, settled with Hubbard's liability carrier for its $500,000 limits. The probate court allocated the entire $500,000 to Mr. Young. Margaret Young was survived by her daughter, Kathleen Lapeus, and Kathleen's three minor daughters. Kathleen and her daughters were insured by Motorists Insurance Company and presented claims to Motorists under *Sexton* and *Moore* for the death of Margaret Young. Motorists denied coverage claiming that Margaret was not a resident relative and therefore not an "insured." The Lapeuses argued that the law in effect on the origination date of the policy controlled and did not permit an amendment of the contract.

Motorists first issued the policy to Lapeus on October 1, 1993. The policy's declarations page indicated that the policy period was for six months; however, it was guaranteed for a two year period. Motorists argued that the policy renewed on October 1, 2000 — after the effective date of S.B. 267 (Sept. 2000), which revived the requirement that an insured sustain bodily injury. Thus, Motorists argued that the Lapeuses' *Sexton/Moore* claims were eliminated. The Lapeuses argued that because the policy periods must be counted in two year increments, the policy renewed in 1999 and was not up for renewal until 2001, at which point S.B.267 would be incorporated. The trial court agreed and granted the Lapeuses motion for summary judgment.

On appeal, the Eighth District held that the Supreme Court's decision in *Wolfe v. Wolfe* (2000), 88 Ohio St.3d 246, was applicable. Moreover, R.C. §1.58(A)(1) provides that statutory amendments do not "affect the prior operation of the statute or any prior action taken thereunder." Further, R.C.§1.58(A)(2) provides that such amendments do not "affect any validation, cure, right, privilege, obligation or liability previously acquired, accrued, accorded, or incurred thereunder." Because the version of R.C.§3937.18 applicable defined a policy period as "two years," the policy did not incorporate the amended statute until its renewal in October, 2001. The court held that any other interpretation would affect the prior operation of the statute and divest rights previously accrued by omitting the two-year guaranteed "policy period" that vested on October 1, 1999. Such a construction would be retroactive and would violate R.C.§1.58(A)(1) and (2).

Insurance Law - Cases of Interest From Around The State

***Safe Auto Insurance Company v. Corson* (January 23, 2004), First Dist. Nos. C-030276, C-030311, 2004-Ohio-249** (holding city liable for accident caused by off-duty officer where city was self insured in the practical sense).

Jamie Corson was injured in a collision with a City of Cincinnati police officer. The officer was within the course and scope of her employment when the accident occurred and the officer was negligent. The officer was not responding to an emergency call when the accident occurred so there was no immunity for her negligence. The city refused to pay Corson's claim and instead pointed the finger at Corson's insurer, Safe Auto Insurance Company. Safe Auto sued Corson and the City of Cincinnati in a declaratory judgment action. In response, Corson sued the City and Safe Auto.

In a humorous opinion, Judge Mark Painter affirmed the trial court's decision entering summary judgment in favor of Safe Auto. The City of Cincinnati argued that it was "uninsured." It had not followed the Revised Code's certification methods for attaining self insured status, but was instead paying claims directly from its coffers. However, because it had no insurance policy, and because the claimant/plaintiff had uninsured motorists coverage, the City contended that Safe Auto should pay the claim. The appellate court rejected that argument, instead finding that liability and insurance status were separate. While the City may not have liability coverage through an insurer, it still was liable for the loss, ahead of the claimant's uninsured motorist carrier. Because the officer was not responding to an emergency call, the City did not have immunity, and was therefore liable.

***Brenda Dickerson v. State Farm Mutual Automobile Insurance Company* (December 15, 2003), Third Dist. No. 4-03-12, 2003-Ohio-6704** (named driver exclusion does not preclude wrongful death claims).

The named driver exclusion in a liability policy was held not to exclude UIM coverage for wrongful death losses where the claimant did not sustain the bodily injury or death.

On November 2, 1997, Brenda Dickerson obtained an automobile liability policy from State Farm which included UM/UIM coverage. The policy contained a named driver exclusion which excluded any and all coverage under the policy for any loss caused by Dickerson's daughter, Adele Parrish. On November 16, 1998, both Parrish and Dickerson's son, Gregory Parrish, were killed when a vehicle driven by Adele collided with a tractor trailer. Adele was insured through Progressive Insurance Company which tendered its $12,500 liability limits to Gregory Parrish's estate. Dickerson presented a claim to State Farm under her UIM policy. State Farm denied the claim, asserting that the named driver exclusion eliminated any UIM coverage since State Farm was not required to supply coverage for any losses caused by Adele. The trial court granted State Farm's motion for summary judgment and Dickerson appealed. On appeal, the court reversed and remanded. Here, the H.B. 261 version of R.C. §3937.18 (eff. 9/3/97) and provided as follows:

> The coverages offered under division (A) of this section or selected in accordance with division (C) of this section may include terms and conditions that preclude coverage for *bodily injury or death suffered by an insured* under any of the following circumstances:
>
> * * *
>
> (3) When the *bodily injury or death* is caused by a motor vehicle operated by any person who is specifically excluded from coverage for bodily injury liability in the policy under which the uninsured and underinsured motorist coverages are provided.

The appellate court held that because the statute only allows the exclusion to operate as to any bodily injury or death suffered by an insured, and because Dickerson was presenting a wrongful death claim, not a claim for her own bodily injury or death, the exclusion was not applicable as to her. While the appellate court was adamant that the exclusion did not operate as to Dickerson, it did state that the exclusion would have operated to preclude coverage to Gregory Parrish had he survived and suffered injury, or if Dickerson's claim were based upon Gregory's right to recover. However, because Dickerson's claim was a wrongful death claim, and independent of Gregory's claim, the statute did not permit the exclusion of her claim.

***Gerald Reed v. Allstate Insurance Company* (January 28, 2004), Ninth Dist. No. 03CA0027, 2004-Ohio-325** (insurer was not bound to provide liability coverage because of adverse inter-company decision which it then mistakenly paid).

On January 30, 1999, Gerald Reed caused an automobile accident and injured several individuals. Although Reed told the reporting officer that his vehicle was insured under a liability policy issued by Allstate, the policy had actually lapsed approximately nine months earlier for non-payment of the premium. State Farm, the injured parties' UM carrier, subrogated the property damage claims to Allstate. The property damage claims were submitted to inter-company arbitration. Allstate objected, claiming it did not insure Reed. On State Farm's motion, the arbitration panel considered the claim and issued an order awarding State Farm partial reimbursement of the property damage claim it paid. Allstate paid the award but later claimed that this payment was a mistake.

State Farm also paid uninsured motorist benefits and sued Reed to recover from him those payments made to its insureds. That case was eventually dismissed without prejudice. Reed, in turn, sued Allstate claiming breach of contract and bad faith and seeking declaratory judgment that he was entitled to liability coverage from Allstate on the basis that Allstate was estopped from denying coverage due to the arbitration decision in State Farm's favor. At a bench trial, the trial court dismissed Reed's complaint.

On appeal, the issue was whether Allstate was bound by the arbitration award under the doctrine of res judicata. The court of appeals affirmed the trial court's dismissal of Reed's action. Here, the inter-company arbitration agreement provided that, with respect to claims submitted to arbitration, only the issues actually submitted are to be decided, and then only with the consent of both parties. Because the only issue submitted to arbitration was property damage, and not the issue of liability coverage or the amount of State Farm's subrogation under bodily injury payments, the only issue that the arbitration panel could (and did) decide was the property damage issue. That being the case, the issue of liability coverage for the injury claims did not operate as res judicata or have any collateral estoppel effect. Moreover, the arbitration had no bearing on Reed's entitlement to liability coverage from Allstate.

***Mason v. Royal Insurance Company of America* (December 22, 2003), Fifth Dist. No. 2003 CA 00029, 2003-Ohio-7047** (other owned vehicle exclusion does not apply to UM/UIM coverage implied by law).

Daniel Mason was killed in a motorcycle/auto collision on August 8, 1998. Mason's motorcycle was struck by a vehicle operated by Janelle Brown. At the time of the accident, Mason resided with his son, Heath Mason. Motorists Mutual Insurance Company insured Daniel's pickup under a $500,000 single limit policy which had uninsured/underinsured motorists coverage with a reduced limit of $35,000. Another Motorists policy covered Daniels motorcycle and a third was issued to Heath on his personal vehicle.

The only policy at issue on the appeal was the personal automobile policy covering Daniel's pickup. Heath filed a declaratory judgment action seeking coverage under that policy. Motorists filed a motion for summary judgment alleging that no UM/UIM coverage existed due to the "other owned auto" exclusion in the policy. The trial court granted Motorists motion for summary judgment. Heath Mason appealed.

On appeal, the court held that Motorists failed to produce a *Linko* complaint rejection of matching UM/UIM limits, such that the policy's UM/UIM coverage was implied by law in the amount of $500,000. Also, because the UM/UIM coverage was implied by law, the liability section, not the UM endorsement, provided the definition of who was an insured. Under the liability provisions, since Heath was a resident relative, he was also an insured. Lastly, with regard to the other owned vehicle exclusion, the court noted that while the exclusion was valid under the H.B. 261 version of R.C.§3937.18, the statute only provides that insurers *may* include such language in their policies, not that it is mandatory. In this case, because the exclusions in the UM endorsement were not applicable to coverage implied by law, the other owned vehicle exclusion did not operate to exclude coverage to Heath Mason. The court reached this decision based upon its view that when UM/UIM coverage arises by operation of law, any language in the policy restricting liability coverage does not carry over to restrict UM/UIM coverage.

***Peck v. Serio* (December 9, 2003), Tenth Dist. No. 03AP-278, 2003-Ohio-6561.**

Christina Peck was injured while a passenger in a vehicle operated by her mother, Betty Serio. Serio was traveling southbound on Cleveland Avenue in Columbus, Ohio, and was attempting to make a left hand turn at an intersection. Serio's vehicle was struck by another car driven by Willetha Carmichael who was proceeding straight through the intersection. Serio claimed that she turned on a left turn arrow, and Carmichael claimed that she had a green light to proceed through the intersection. There was no other testimony offered at trial other than that of the two drivers, each claiming the right of way. Peck did not see the light prior to the collision.

At the close of the evidence at trial, Peck moved for a directed verdict on the basis that the theory of alternative liability operated to compel a verdict in her favor against both appellees (Serio and Carmichael). The magistrate denied the motion. Appellant sought a specific jury instruction on alternative liability, which was also denied.

On appeal, Peck argued that the trial court erred in not applying "alternative liability" either as to the directed verdict or in the jury instructions. The appellate court disagreed. The court stated that the term "alternative liability" is misleading as the liability itself is joint and several, but it is the causation that is in the alternative. The "classic" illustration of alternative liability was set forth in *Summers v. Tice* (1948), 33 Cal.2d 80, 199 P.2d 1. In *Summers*, three quail hunters were hunting and proceeded up a hill in such a manner that their positions formed a triangle. One hunter flushed a quail and two of them turned and fired, unfortunately in the direction of the third hunter, who sustained facial injuries from the shots. Both hunters were negligent, but it was impossible to prove from which gun the pellets were discharged. In that case, the court concluded that when the negligence of both defendants is established, but it cannot be established which person's negligence caused the plaintiff's injuries, there exists a "practical unfairness of denying the injured person redress simply because he cannot prove how much damage each did, when it is certain that between them they did all." In the classic alternative negligence case, there are at least two defendants who were both unquestionably negligent.

The appellate court contrasted that case with the instant appeal wherein it could not be shown that both Serio and Carmichael were negligent. Either one or the other had to be, but both could not have been negligent. Alternative liability is only properly used to shift the burden of proof of causation when the negligence of two parties has been established. In Ohio, the doctrine has never been used to shift the burden of proof of negligence, as Peck had requested the trial court to do. Because Peck did not produce evidence showing that both defendants

were negligent, the doctrine did not operate to shift the burden of causation, and the trial court was correct in denying the motions and the jury instruction.

Hollon v. Clary **(October 24, 2003), Montgomery App. No. 19826, 155 Ohio App.3d 195, 2003-Ohio-5734** (reiterating that a written offer and rejection of UM/UIM coverage is not valid if it fails to set forth a premium for the coverage).

Plaintiff was injured in an automobile accident and sought coverage under a policy of insurance issued by Twin City Mutual Fire Insurance Company. The trial court found that no UM/UIM coverage existed, because there was a valid written offer and rejection of UM/UIM coverage. Plaintiff appealed, contending that the written offer and rejection of UM/UIM coverage was not valid because it failed to meet the requirements of *Linko v. Indemnity Ins. Co. of North America* (2000) 90 Ohio St.3d 445, and more specifically, because it failed to set forth the premium for coverage as required by *Linko*.

The Second Appellate District agreed, concluding that the *Linko* requirements applied and that the written offer and rejection was invalid because it failed to set forth the premium for coverage as required by *Linko*. Here, coverage was deemed to arise by operation of law in amounts equal to the liability limits of the policy. Most importantly, the Second Appellate District overruled its decision in *Manalo v. Lumberman's Mut. Cas. Co.*, Montgomery App. No. 19391, 2003-Ohio-613 to the extent that it was inconsistent with the holding here. The policy at issue in this case was written after the enactment of H.B. 261 and before the enactment of S.B. 97. Thus, the requirements of *Linko* applied.

In *Manalo*, the same court stated that extrinsic evidence of an offer of insurance company in the form of affidavits satisfied the requirements of *Linko.* The court reversed itself here and determined that an offer of UM/UIM insurance must state the premium to be charged for the coverage even if there is extrinsic evidence that the insured is already aware of the premium.

Hawthorne v. Estate of Joseph M. Migoni**, Fifth Dist. App. No. 2003 AP 070054, 2004-Ohio-378, 2004 Ohio App. LEXIS 334** (emotional distress does not constitute "bodily injury" under insurance policy at issue).

Here, coverage was deemed not available where Plaintiff witnessed decedent's suicide and brought an action to recover for emotional distress under a homeowner policy providing coverage for "Bodily Injury," which was defined as "bodily injury, sickness or disease."

Plaintiff William Hawthorne, a mailman, was delivering mail to the Migoni residence. Just as Hawthorne went to hand Mr. Migoni his mail, Migoni placed a gun to the side of his own head and pulled the trigger. As a result of witnessing the suicide, Plaintiff filed a complaint seeking recovery for the negligent infliction of emotion distress against the Migoni estate. Plaintiff sought coverage under a homeowner's policy issued by Grange Mutual Casualty Company to Migoni. Grange filed a declaratory judgment action on the coverage issue which was consolidated with Plaintiff's action. The Grange policy provided liability coverage for "bodily injury," which was contractually defined as "bodily injury, sickness or disease." Grange filed a motion for judgment on the pleadings which the trial court granted. On appeal, the reviewing court rejected Plaintiff's arguments that the term "bodily injury" was ambiguous and that emotional distress, which involves an injury to the human mind and creates physical manifestations, constitutes a "bodily injury." The trial court's ruling was affirmed.

***Garg v. State Automobile Mutual Insurance Company, et al.*, Second Dist. App. No. 2003 CA 12, 2003-Ohio-5960, 2003 Ohio App. LEXIS 5297** (addressing scope of discovery in claim alleging lack of good faith in determining coverage).

Plaintiff Garg owned a warehouse. On March 20, 2001, the warehouse premises and all of its contents were destroyed by fire. On July 20, 2001, the Gargs submitted a claim to Grange Mutual Casualty Company under their homeowner's policy, which contained a provision covering personal property owned by the Gargs and located "anywhere in the world." Grange conducted an investigation into the cause and origin of the fire and concluded that the fire was intentionally set by a person who had access to a key to the warehouse. On February 25, 2002, counsel for the Gargs sent correspondence to Grange requesting a determination on their claims. The correspondence indicated that if Grange failed to respond promptly and favorably, the Gargs would file suit for the amount of their loss and for bad faith on the part of Grange based on its refusal to adjust and pay the claim. On April 4, 2002, prior to Grange rendering a decision on the Gargs' claim, the Gargs filed a complaint against Grange and State Auto alleging breach of contract, bad faith and unfair claims practices and containing a request for punitive damages. Grange filed a counterclaim for a declaratory judgment, alleging that the fire was caused by arson. The Gargs' claims against State Auto were settled and State Auto was dismissed from the litigation.

On June 4, 2002, the Gargs served a request for production of documents upon Grange requesting a copy of "Grange's entire claims file pertaining to the investigation and consideration of the plaintiffs' claims." Grange responded by producing documents as well as a privilege log listing 11 documents which were either redacted or withheld from production on the bases of attorney-client privilege and/or the work product doctrine. On December 4, 2002, the Gargs filed a motion to compel discovery of the redacted and/or withheld documents. Grange opposed the motion and filed a motion to bifurcate. Grange requested that if the trial court compelled production of the disputed documents, it should enter an order bifurcating the trial of the breach of contract and unfair claims practices claims and the bad faith claim, with a stay of discovery of the bad faith claim until the resolution of the underlying breach of contract and unfair claims practices claims.

The trial court ruled that all documents in the insurance claims file created prior to denial of coverage were discoverable, notwithstanding the fact that some may contain attorney work product or attorney-client communications. Relying on *Boone v. Vanliner Ins. Co.*, 91 Ohio St. 3d 209, the trial court rejected the suggestion that "the work product doctrine prevents disclosure of information even prior to the denial of the insurance claim in a bad faith claim." The trial court did not rule on the motion to bifurcate. On appeal, Grange asserted that attorney work product materials are not discoverable under *Boone*, and that *Boone* does not require the production of attorney-client communications unless they are related to the issue of coverage. The reviewing court, after thoroughly analyzing *Boone* and *Moskoivitz v. Mt. Sinai Med. Ctr.*, 69 Ohio *S*t. 3d 638, concluded that both attorney-client communications and work product material are to be treated similarly and both are subject to disclosure during discovery on bad faith claims. Further, the Court held that under *Boone*, neither attorney-client privilege nor the work product doctrine protects materials in a claims file created prior to the denial of the claim that may cast light on whether the insurer acted in bad faith in handling an insured's claim. Because the trial court failed to rule on Grange's motion to bifurcate, it was presumed that the court overruled the motion. Regarding that claim, the appellate court held that a failure to bifurcate was an abuse of discretion. Therefore, the judgment of the trial court was affirmed in part and reversed in part, and the case was remanded for further proceedings.

***Steffy v. Blevins* (December 2, 2003), Franklin Cty. App. No. 02AP-1278, 2003-Ohio-6433, 2003 Ohio App. LEXIS 5760** (discussing sudden emergency defense).

This action arose out of a motor vehicle accident in which an employee allegedly crossed the center line and caused the decedent's death. The administrator relied on expert testimony that the decedent was in his own lane of travel at the time of impact. The defendant presented expert testimony that the decedent had crossed the center line and that the defendant-employee then crossed the center line as evasive action under a sudden emergency defense. The plaintiff-administrator appealed a verdict in favor of the defendant.

The appellate court found that the opinions of defendant's expert witness, while in conflict with the employee's own testimony, was supported by the testimony of two other witnesses and the physical evidence. Sufficient evidence existed on each element of sudden emergency. Further, the court found that the trial court did not abuse its discretion in excluding the plaintiff's rebuttal testimony on the ground that it addressed issues which were

first raised in plaintiff's case in chief, and therefore should have been addressed on redirect or cross in the case in chief.

The appellate court sets out the elements of a sudden emergency defense, whereby a defendant must show (1) compliance with a specific safety standard was rendered impossible, (2) by a sudden emergency, (3) that arose without the fault of the party asserting the defense, (4) because of circumstances over which the party asserting the defense had no control, and (5) the party asserting the defense exercised such care as a reasonably prudent person would have under the circumstances. These elements must be proven by a preponderance of the evidence. With respect to the third element, however, the defendant-employee had testified in a manner which suggested he acted without a sense of peril. The court found, however, that this is an objective standard, and a party does not have to be able to recall and testify about specifics of the reaction where there is adequate evidence to demonstrate that the defendant knew he was in imminent peril before the collision. The court found, therefore, that there was sufficient evidence to support the jury's verdict and affirmed

Medical Malpractice - Expert Testimony – Can Testify on Areas That Overlap Between One Specialty and Another

Casterline v. Khoury, M.D. **(December 5, 2003), Trumbull Cty. App. No. 2002-T-0157, 2003-Ohio-6680, 2003 Ohio App. LEXIS 5941.**

This case arose from a grant of summary judgment in favor of a defendant doctor, which was granted on the basis that the plaintiff had failed to present sufficient expert testimony where the plaintiff's expert did not practice in the same specialty as the defendant-doctor. On appeal, the trial court's grant of summary judgment was reversed.

The underlying claim arose out of vocal chord paralysis following a ventral hernia repair. The issue was whether the doctor failed to conduct proper preoperative evaluation of the plaintiff, who had previous vocal chord damage. The defendant-doctor argued that the plaintiff's expert, an otolaryngologist, was not qualified to render an opinion as to the standard of care for a general surgeon.

The appellate court noted, however, that where the fields of medicine overlap, a witness from a school or specialty other than the defendant's may qualify as an expert witness if he demonstrates sufficient knowledge of the standard of the defendant's school and specialty, enabling him to give an expert opinion as to the conformity of the defendant's conduct to those standards. In this case, since the expert was testifying as to appropriate preoperative care and procedure, and there was an overlap in these areas between the two specialties, he was qualified as an expert and the trial court erred in granting summary judgment.

Medical Malpractice - Learned Treatise Rule – Use For Impeachment But Not As Substantive Evidence

Beard v. Meridia Huron Hospital **(November 6, 2003), Cuyahoga Cty. App. No. 82541, 2003-Ohio-5929, 2003 Ohio App. LEXIS 5279.**

This case illustrates again that the Ohio Rules of Evidence do not have a learned treatise exception to the hearsay rule, and medical books and treatises are not admissible as evidence to prove the truth of statements contained therein. This case recognizes that while experts have been permitted to refer to literature generally as forming part of the basis of their opinion, there is a distinction between reference to literature as being part of the collective basis for an opinion and reference to literature as substantive evidence.

The underlying case arose out of elective surgery to repair a ventral hernia on a patient who had recently undergone treatment for colon cancer. The patient had a low white blood cell count and developed several complications which led to his death following the surgery. Expert testimony was presented on the appropriateness of conducting elective surgery when the patient had an abnormally low white blood cell count. The defendant doctor testified on his own behalf as to the standard of care, several times testifying, over objection, that the medical and surgical literature supported his opinions.

The appellate court found that the trial court erred in allowing this testimony on the ground that it was inadmissible hearsay. The question then was whether the erroneous admission of learned treatises into evidence justified reversal. To determine this, the court must not only weigh the prejudicial effect of the error but also determine whether, if the error had not occurred, the trier of fact probably would have made the same decision. The appellate court found that the error was prejudicial and that it could not say that had the error not occurred, the trier of fact probably would have made the same decision. Therefore, the case was reversed and remanded to the trial court.

Medical Malpractice - Foreign Object – Role of Expert Testimony - Use of Res Ipsa Loquitor

***Eannottie v. Carriage Inn of Steubenville,* 155 Ohio App. 3d 57, 2003-Ohio-5310, 2003 Ohio App. LEXIS 4788.**

This case helps clarify the evidence needed to prove a foreign object case in terms of both expert testimony and use of the res ipsa loquitor doctrine.

The plaintiff had surgery to remove a sarcoma, with two subsequent surgeries. Following the surgeries, the wound was treated by a nursing company. It was subsequently discovered that a sponge was left in the wound. The patient filed a claim against the nursing company and the trial court granted summary judgment to the company.

On appeal, the court found that the trial court erred in holding that expert testimony was required, pursuant to Evidence Rule 702, because the matters were within the understanding of a jury in a foreign object case. Expert testimony offered by the plaintiff to show that statistically the odds were in favor of the nursing service having committed the negligence was properly excluded. Yet such testimony was not required because the plaintiff was not required to prove who placed the sponge inside her wound since that would be a question of fact for the jury. (The plaintiff had presented evidence that the type of sponge found in the wound was consistent with the type used by the nursing service, but not by the doctors or hospital where the surgeries were performed).

The court further noted that the doctrine of res ipsa loquitor was not applicable. Here, not every potential defendant was joined in the action as required for the doctrine to apply.

Medical Malpractice - Admissibility of Prior Incidents – Use of Proffer of Evidence, Role of Expert Statistical Testimony

***Lumpkin v. Wayne Hospital* (January 23, 2004), Darke Cty. App. NO. 1615, 2004-Ohio-264, 2004 Ohio App. LEXIS 251.**

This case deals with the admissibility of evidence of prior incidents, and illustrates the need for a proffer of evidence in order to preserve objections when such evidence is excluded.

The plaintiff sued her doctor for medical malpractice arising out of an injury that occurred when the doctor transected the common bile duct instead of the cystic duct during surgery to remove the plaintiff's gall bladder. After a defense verdict, the plaintiff appealed, asserting that the trial court erred in excluding evidence that the doctor had made an identical mistake in a prior surgery on another patient and had been required to undergo a proctorship allegedly resulting from that prior mistake.

On appeal, the court held that the evidence was properly excluded regarding the prior mistake, because the plaintiff had failed to make a proffer of evidence at trial to show that the two surgeries were substantially similar. Further, the appellate court found that it would not disturb the trial court's finding because the prejudicial effect of evidence of the prior mistake would be unfairly prejudicial. The appellate court also supported the trial court's exclusion of certain impeachment evidence relating to the proctorship, although it did allow some testimony regarding it, on the basis that (1) the testimony only weakly implicated the doctor's credibility, and (2) suggesting that the prior bad result implied the doctor was incompetent would also be unfairly prejudicial.

The appellate court did conclude with some guidance in dicta, stating that:

> A fair inference of medical malpractice from prior, similar bad outcomes in similar medical procedures would seem to require, at a minimum, some expert testimony that the frequency of bad outcomes exceeds the statistical norm that would be expected in the absence of malpractice. Evidence of this kind, while not necessarily sufficient, by itself, to prove malpractice, would appear to support a fair, reasonable inference of malpractice that would make it probative and admissible.

Peer Review Documents – Record of Hearing on Discoverability

Kroboth v. North Coast Obstetrics, Et Al. **(January 21, 2004), Lorain Cty. App. No. 03CA008295, 2004-Ohio-197, 2004 Ohio App. LEXIS 178.**

This appeal arose from the trial court's granting of a motion to compel discovery which the defendant hospital claimed was protected peer review material. This decision is helpful for demonstrating the need for either a transcript of a hearing where disputed discovery issues arise or use of the Ohio App. Rule 9(C) statement setting forth the issues addressed in an unrecorded hearing.

The issue in dispute was an order by the trial court in an obstetric malpractice case that the defendant medical center produce a quality improvement document setting forth a statistical summary of childbirth delivery by induction and/or augmentation during a certain time period. On appeal, the medical center claimed that the material in issue was protected by Ohio's peer review statutes and that the trial court should have conducted an in camera review before producing it.

The appellate court held that it was the medical center's burden to provide a court record that demonstrated the errors asserted pursuant to Ohio R. App. 9(B). Because there was no record of the hearing, and there was no transcript or Rule 9(C) statement of the hearing, the court found it had no basis on which to review the trial court's determination of the discoverability of the document. Therefore, the court concluded it had to find that the trial court did not abuse its discretion.

Piercing the Corporate Veil

Stypula v. Chandler **(November 26, 2003), Geauga Cty. App. No. 2002-G-2468, 2003-Ohio-6413, 2003 Ohio App. LEXIS 5731.**

This opinion clarifies the second element necessary to pierce the corporate veil and seems to ease the burden on a party seeking to establish the element of illegal or fraudulent conduct necessary for piercing of the corporate veil.

Upon obtaining a judgment against a corporation which immediately closed and created a new corporation with the same employees, the creditor filed suit to pierce the corporate veil of the corporation to hold the shareholder personally liable for the judgment and to impose successor liability on the newly formed corporation. The trial court entered judgment in favor of the creditor, and the appellate court upheld the verdict as not against the manifest weight of the evidence.

The court applied the *Belvedere* test, whereby to pierce the corporate veil and impose personal liability on a shareholder, the plaintiff must show by a preponderance of the evidence that (1) control over the corporation by those sought to be held liable was so complete that the corporation had no separate mind, will, or existence of its own, (2) control was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate identity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong.

The court analyzed this second element and found that what was intended by the test was to allow a corporate veil to be pierced when inequitable or unfair consequences resulted, rather than specifically just fraudulent or illegal acts. Under these circumstances, the creditor was permitted to pierce the corporate veil to hold only those persons who actually exercised dominion and control to commit the wrongful act personally liable.

Political Subdivision Immunity - Issue of Fact on Willful or Wanton Conduct

Hawk v. Ketterer **(Dec. 1, 2003), Third Dist. App. No. 1-03-53, 2003-Ohio-6389, 2003 Ohio App. LEXIS 5735**

Here, an accident occurred when a volunteer fireman, driving his personal vehicle in response to an emergency notification of a motor vehicle accident with injuries, tried to pass Plaintiff's vehicle across a double yellow line. The fireman left his home in response to this emergency notification and was driving his own vehicle, which was equipped with a magnetic flashing light. Plaintiff was turning left while the fireman was passing in the no passing zone and was injured when the vehicles collided.

Plaintiff filed suit alleging that the fireman was negligent in passing in the no passing zone, and also alleging that the fireman had not made any audible signal before passing. Defendant filed for summary judgment, arguing that he was immune from suit on the basis that he was acting in the scope of his position as a volunteer firefighter. The motion was supported by the firefighter's affidavit in which he claimed that his flashing light was operating and that he was operating his horn. Hawk responded to the motion and supported it with her own affidavit, in which she claimed that she neither saw flashing lights nor heard a horn sound. The trial court granted

summary judgment to the Defendants on the basis that the volunteer fireman was immune from suit since he was operating an emergency vehicle at the time of the accident.

The Third District reversed. In so doing, the reviewing court recognized that immunity is an affirmative defense and that the firefighter had the burden of showing that he was entitled to immunity and was not acting in a reckless manner. While a personal vehicle used by a volunteer firefighter may be a public safety vehicle while responding to an emergency call if it is identified as required by the director of public safety (*see* R.C. 4511.01(E)(4)), if it does not meet the requirements, then it is not a public safety vehicle. Here, moreover, there was conflicting evidence by way of affidavit as to whether, at the time of the accident, the volunteer fireman had activated the flashing lights on top of his vehicle and was sounding his horn. To pass into a no passing zone is a per se violation of traffic laws and may be considered reckless behavior according to the reviewing court. If the volunteer fireman's vehicle was a public safety vehicle and he was using proper precautions, his behavior would not be reckless. However, if he passed in a no passing zone without using proper precautions, his behavior may have been reckless. Because these factual issues were in dispute, the reviewing court held that the trial court erred in granting summary judgment.

Premises Liability - Slip and Fall – Minor or Trivial Defect – Duty of Care

***Hawkins v. Crestwood Local School District* (December 12, 2003), Portage App. Case No. 2002-P-0038, 2003 Ohio App. LEXIS 5990**

The Plaintiff could not bring a successful case when the cause of her injury was "a minor or trivial defect." Here, Plaintiff was a grandmother who was injured when she approached the front door of her grandson's school. She stepped on a small rock and fell, sustaining a severely broken ankle. The Portage County Court of Common Pleas granted the school board's motion for summary judgment. On appeal, Plaintiff claimed that although the trial court found the defects "minor or trivial," the attendant circumstances surrounding the fall made the defects "substantial" so as to render the walkway not reasonably safe. The reviewing court held that the doctrine of comparative negligence had not supplanted the doctrine of "minor or trivial defect." By focusing on the duty prong on negligence, the "minor or trivial defect" doctrine properly considered the dangerous condition itself, as opposed to the nature of the grandmother's conduct in approaching it. Furthermore, the grandmother realized it was dark and admitted to having some notice of the gravel on the sidewalk but choose not to pay attention to the defect. Under the circumstances, the gravel in conjunction with the lack of light did not create a greater than ordinary risk of injury. Without a greater than ordinary risk of injury, the defects in the sidewalk were "minor or trivial" even when considered in relation to the attendant circumstances identified by the Plaintiff.

Plaintiff unsuccessfully argued that the "minor or trivial defect" doctrine had been supplanted by the doctrine of comparative negligence. The reviewing court held that the defect complained of by the Plaintiff was so minor or trivial that no duty to the Plaintiff arose. Based on the tenor of its decision, the appellate court seemed to require an admission by the landowner or other evidence that others had injured themselves in the same location in a similar manner. Although noting that what may be an attendant circumstance so as to make a minor defect a dangerous condition defies precise definition, the reviewing court went on to hold that the attendant circumstances here were not sufficient to create a dangerous condition.

This is an important case for all Plaintiffs' attorneys who are contemplating a premises liability claim. As noted in the dissent by Judge William O'Neill, the majority in this case has shifted the burden of sidewalk safety on the shoulders of pedestrians and away from the property owners. As the dissent noted:

> "[T]o follow the reasoning to its logical conclusion apparently there would be no liability generated if the property owner had placed a decorative marble collection next to the sidewalk. Thus, if rainfall caused a marble or two instead of gravel to collect on the sidewalk, it is assumed all reasonable walkers would be on notice to avoid the open and obvious danger created by the wayward marble collection. Since the hazard would be open and obvious, anyone who fell on the scattered marbles would therefore be responsible for their own injuries if they were so foolish as to use such a dangerous sidewalk."

Savings Statute - May Only Be Used Once

***Gamble v. Patterson*, 155 Ohio App.3d 320, 2003-Ohio-6276, 2003 Ohio App. LEXIS 5613.**

This case is important in that it reminds all practitioners that the savings statute (R.C. 2305.19) (1) may only be used *once* to refile a claim, and (2) only if the applicable statute of limitations expires while the action is pending.

Here, Plaintiffs filed three complaints over a four year period, all arising out of a motor vehicle accident which occurred on October 8, 1996. Plaintiffs dismissed the first complaint, and the second was dismissed by the court because Defendant was never served. Plaintiffs did not file any postjudgment motions to challenge the court's dismissal. Plaintiffs filed their third complaint on June 21, 2002, and the court granted summary judgment since Plaintiff had attempted to use the savings statute twice. The reviewing court affirmed.

Settlement Agreement - Apparent Authority to Settle - Misconduct of Attorney Imputed to Client

***Lepole v. Long John Silver's* (Dec. 31, 2003), Eleventh Dist. App. No. 2003-P-0020, 2003-Ohio-7198, 2003 Ohio App. LEXIS 6506**

In this 2-1 decision, the 11th District Court of Appeals affirmed a trial court order enforcing a settlement agreement. In April 2000, Lepole sustained injuries to her teeth and jaws after eating cole slaw which contained a 2-inch foreign object at a Long John Silver's restaurant in Streetsboro. On November 19, 2001, defendants offered to settle the case for $1,500, and that offer was rejected. According to the record, plaintiff's counsel contacted Long John Silver's on August 21, 2002 regarding the settlement offer. A settlement agreement was reached, and a settlement release, dismissal entry and funds were forwarded to the attorney. On October 10, 2002, the attorney contacted defense counsel and advised that he was filing a motion to extend discovery and that plaintiff was consulting with another physician regarding her injuries. Defendants filed a brief in opposition to the request to extend discovery, requesting the court to reduce the settlement agreement to judgment. Plaintiff filed a motion to rescind the settlement agreement, arguing that, although there may have been an agreement, plaintiff did not want to sign the agreement. An evidentiary hearing was scheduled for March 9, 2002. On March 4, the attorney withdrew as counsel. At the hearing, plaintiff testified that she was aware of the $1,500 settlement offer but never gave her attorney authority to accept that amount, and that her medical bills could total as much as $20,000. The magistrate denied plaintiff's motion to rescind the settlement agreement, noting that the attorney had apparent authority to settle and that Defendants relied on that authority to settle in good faith. The magistrate's opinion also noted that "[a]ny misconduct on the part of Plaintiff's counsel should not be visited upon Defendants." Defendants' motion to reduce the settlement to judgment was granted and the case was dismissed without prejudice.

Here, the 11th District affirmed, holding that when an attorney exceeds his settlement authority, that misconduct must be imputed to the client and the client's remedy lies elsewhere. In a dissenting opinion, Judge William O'Neill noted that a verbal settlement agreement is not valid where, as here, there was a dispute over whether the settlement actually occurred.

Editor's Note: *See and compare Thirion v. Neumann*, Eleventh Dist. App. No. 2003-A-0006, 2003-Ohio-6419, 2003 Ohio App. LEXIS 5706 (refusing to enforce settlement agreement where a dispute exists as to whether a valid settlement agreement exists or the terms thereof).

Spoliation of Evidence

***Tate v. Adena Regional Medical Center* (December 19, 2003), Ross County App. No. 03CA2699, 2003-Ohio-7020, 2003 Ohio App. LEXIS 6382.**

This case demonstrates that a spoliation of evidence claim requires destruction of evidence, rather than just concealing evidence or interfering with discovery.

The plaintiff brought a medical malpractice claim against a physician who removed an ovary and fallopian tube during a laparoscopy after being first told to report any findings to the plaintiff's spouse. No cancer appeared in the removed organs. At the close of opening statements, the trial judge noted that certain anticipated defense testimony from a nurse seemed to contradict an incident report that had previously been ordered to remain confidential under a protective order. The court declared a mistrial in order for further discovery to take place, and the plaintiff was given a copy of the incident report. A post-it note that had been placed on the report was supposedly lost. It appears that there was a disputed question as to whether the post-it note con-

tained anything indicating the physician was to report the findings to the plaintiff-husband prior to removing the organs.

The trial court subsequently granted summary judgment in favor of the hospital on the spoliation claim. The appellate court found that Ohio law required actual destruction of evidence to disrupt the plaintiff's case. Interference in discovery or concealment of evidence are not sufficient. As the incident report was not destroyed, and there was no evidence to suggest that the post-it note was destroyed to disrupt the plaintiff's case, the appellate court concluded that no evidence supported a spoliation claim.

Workers' Compensation - Subrogation Claims

***Payne v. Greater Cleveland Regional Transit Authority* (November 26, 2003), Cuyahoga App. No. 83240, 2003-Ohio-6340**

The unconstitutionality of the worker's comp subrogation statute, as set forth in *Holeton v. Crouse Cartage Co.* (2001), 92 Ohio St.3d 115, does not apply retrospectively to parties who settle their subrogation claims with the BWC prior to the release of the decision.

In this case, the Plaintiff bus driver was injured after a third party motorist struck the bus he was operating. The driver collected worker's compensation benefits from the Defendant employer, The Greater Cleveland Regional Transit Authority. The driver brought suit against the motorist. The employer intervened to assert its rights to subrogation on the authority of former O.R.C. Section 4123.931. The Plaintiff challenged the constitutionality of R.C. 4123.931 and filed a motion to dismiss RTA's subrogation claim. Before any ruling on the issue, Payne settled with the tortfeasor for $40,000. As part of that settlement, Payne and the RTA agreed that RTA would take 1/3 or $13,119.71 after the deduction of certain expenses. This represented a compromise of RTA's claim.

Although the opinion does not clearly explain the procedural history of the case, the parties apparently filed summary judgment motions on the issue of whether the RTA was entitled to any amounts of the settlement. The trial court ruled in favor of the RTA on this issue. Plaintiff appealed, arguing that the *Holeton* decision made the settlement nonbinding.

The Court of Appeals upheld the settlement, relying on *Clark v. Bureau of Worker's Compensation*, Franklin App. 02AP-743, 2003-Ohio-2193, as authority for the proposition that a subsequent change in the law could not be applied retrospectively in instances in which contractual rights have arisen or a party has acquired vested rights under prior law. The court quoted extensively from *Clark*, which held that the payment of monies to the BWC arose as a result of a settlement agreement designed to avoid further litigation of the issue of the BWC's subrogation claim. In the *Payne* case, the parties agreed to terminate the subrogation litigation before the Supreme Court released *Holeton*. As the Court of Appeals stated, "once they settled the matter, contract rights vested with RTA. Consequently, *Holeton* cannot be applied retrospectively."

Workers' Compensation - Class Action To Correct Unjust Enrichment of the BWC – Jurisdiction

***Santos v. Ohio Bureau of Worker's Compensation*, 191 Ohio St.3d 74, 2004-Ohio-28.**

The Common Pleas Court has jurisdiction over the class action lawsuit to recover monies paid to the BWC under a former subrogation statute.

The Plaintiff, as the representative of a class of injured

employees, asserted a claim that the Defendant, Ohio Bureau of Worker's Compensation, did not have subrogation right at the time that it received payment from settlements or verdicts pursuant to R.C. 4123.931. Plaintiff was injured in an employment intentional tort claim which was settled with the employer. The BWC sought subrogation pursuant to the R.C. 4123.931. While the litigation was pending, former R.C. Section 4123.931 was declared unconstitutional. Here, the Bureau filed a motion to dismiss, arguing that the common pleas court lacked subject matter jurisdiction in the case. The trial court denied that motion, but the Eighth District Court of Appeals reversed, holding that the Court of Claims had exclusive jurisdiction over the case and that the trial court lacked subject matter jurisdiction.

The Ohio Supreme Court reversed and remanded, holding that a suit that seeks the return of specific funds wrongfully collected of held by the state is brought in equity and a court of common please may properly exercise jurisdiction over the matter as provided in R.C. 2743.03(A)(2). Here, the employees action seeking restitution was not a civil suit for money damages. Instead, it was an action to correct the unjust enrichment of the Bureau. Because it was a suit that sought the return of specific funds wrongfully collected by the State, it was brought in equity and could be maintained in the Cuyahoga County Court of Common Pleas. The Court also rejected the State's position that lower court was divested of jurisdiction because attorney fees, litigation expenses and court costs were sought. In rejecting that argument, the Court noted that it is well established that a court exercising equitable jurisdiction may allow attorney fees and costs to be paid out of the class action fund. The case was remanded to the Cuyahoga County Court of Common Pleas for further determinations consistent with the court's ruling.

Verdicts & Settlements

(For members and educational purposes only)

Estate of Dennis Ellis, et al v. Jeremy Warren, et al
Type of Case: Wrongful Death
Settlement: $340,000
Plaintiff's Counsel: Scott Kalish, Esq.
Defendant's Counsel: Raymond C. Mueller, Esq. for State Farm; Jeffrey L. Bramley, Esq. for Westfield Insurance; Ronald A. Rispo, Esq. for Liberty Mutual; Henry A. Hentemann, Esq. and Richard M. Garner, Esq. for Travelers Insurance; Edward Stoll, Esq. and David Mellott, Esq. for Gerling Allgemeine Versieherungs AG; Steve Janik, Esq. William Dawson, Esq. and Nadine Hauptman, Esq. for American International Insurance; James Popson, Esq. and Todd Gray, Esq. for Michigan Mutual Insurance and Amerisure Companies
Court: Cuyahoga County Common Pleas,
Case No. 00CIV0871; Judge James L. Kimbler
Date: January, 2004
Insurance Company: Progressive Insurance; State Farm Insurance Company; Michigan Mutual; Amerisure Companies; Westfield Insurance; Farmers Insurance; Citizens Insurance; Travelers Insurance; Liberty Mutual Group
Damages: Death

Summary: 22-year-old decedent died as a passenger in a motor vehicle when the driver of his car lost control and went off the road striking a tree. Plaintiff's decedent was not married and had no children. The estate recovered damages for decedent's parents and two siblings. Decedent's autopsy reflected cocaine in his blood.
Plaintiff's Experts: Coroner, Neil Grabensetter, M.D.
Defendant's Experts: None

Ernestine Farris v. Carmen Perez, et al
Type of Case: Personal Injury (underinsurance claim)
Settlement: $105,000 (insurance limits plus Med-pay)
Plaintiff's Counsel: Scott Kalish, Esq.
Defendant's Counsel: Settled prior to suit
Court: N/A
Date: December, 2003
Insurance Company: A.I.G. Insurance Company (tortfeasor) and State Farm Insurance (UIM)
Damages: Fractured femur and muscle strains to lumbar and cervical spine

Summary: In May, 2002, Plaintiff Ernestine Farris was a passenger in a vehicle when her vehicle was negligently struck by the tortfeasor's vehicle, with both cars losing control and slamming into the highway median. Plaintiff is 48, single, and had medical specials of $13,159.00. Liability was admitted by A.I.G.

Insurance, which insured tortfeasor, Carmen Perez.
Plaintiff's Experts: Robert D. Zaas, M.D.
Defendant's Experts: None

Anonymous v. Anonymous Surgeon
Type of Case: Medical Negligence/Wrongful Death
Settlement: $1,000,000.00 (policy limits)
Plaintiff's Counsel: J. Michael Monteleone, Esq. and M. Jane Rua, Esq.
Defendant's Counsel: Not listed
Court: Not listed
Date: August, 2002
Insurance Company: Withheld
Damages: Death

Summary: 61-year-old woman went to hospital for bladder repair. She underwent a laparscopic cholecystectomy, but when the surgeon encountered difficulties, it was converted to an open procedure. Following surgery, the patient was noticed to have bile leaking through a drain, but was discharged the same day. Within 12 hours, she was admitted to same hospital with extreme abdominal pain and where she developed sepsis. Nothing diagnostic was done for 48 hours, and the patient became fully septic and went into shock. Despite heroic efforts at another institution, she died from sepsis.
Plaintiff's Experts: Francis Barnes, M.D.
Defendant's Experts: Not applicable

Rebecca D. Streets, Adm. Of the Est. Of Daniel Mullen v. Ashtabula County Medical Center
Type of Case: Medical Malpractice/Wrongful Death
Verdict: $804,535.40
Plaintiff's Counsel: J. Michael Monteleone, Esq. and M. Jane Rua, Esq.
Defendant's Counsel: Sean Sweeney, Esq. and Joseph Farchione, Esq.
Court: Cuyahoga County Common Pleas, Case No. CV 02 467983
Date: June, 2003
Insurance Company: The Doctor's Company
Damages: Death of 6-year-old male child

Summary: 6-year-old male child died as a result of undiagnosed cardiac condition (Long QT Syndrome) after being evaluated as both an inpatient and outpatient.
Plaintiff's Experts: Robert Lerer, M.D. (Fairfield, OH), Timothy Knilans, M.D. (Cincinnati, OH), Linda Herman, M.D. (Wilmette, IL)
Defendant's Experts: Michael D. Freed, M.D. (Boston, MA), Gary Myers, M.D. (Rochester, NY), Steven E. Krug, M.D. (Chicago, IL), Paul Lecat, M.D. (Akron, OH), Sarah Adams, M.D. (Ravenna, OH), Mark D. Jacobsten, M.D. (Akron, OH), Irwin B. Jacobs, M.D. (Cleveland, OH)

Jane Doe v. John Doe Pathologist
Type of Case: Medical Malpractice/Wrongful Death
Settlement: $1,200,000.00
Plaintiff's Counsel: J. Michael Monteleone, Esq. and M. Jane Rua, Esq.
Defendant's Counsel: Withheld
Court: Withheld
Date: August, 2003
Insurance Company: Withheld
Damages: $217,709.31 in medical and funeral bills

Summary: Defendant pathologist interpreted a biopsy to be a benign nevus, when in fact it was malignant melanoma.
Plaintiff's Experts: William Katzin, M.D., Barry Shmookler, M.D., James Nordlund, M.D., and James Cunningham, M.D.
Defendant's Experts: Not identified

Sandra and James Cooper v. Beverly T. Mueller, et al
Type of Case: Automobile Accident
Settlement: $157,000.00
Plaintiff's Counsel: Kenneth J. Knabe, Esq.
Defendant's Counsel: N/A
Court: Lorain County Common Pleas, Judge Mark A. Betleski
Date: August, 2003
Insurance Company: Progressive
Damages: Aggravation of degenerative disc disease (L4-5; L5-S1 herniated disc)

Summary: Plaintiff was involved in two car crash. She slowly developed back complaints and underwent surgery five months later.
Plaintiff's Experts: Christian Bonasso, M.D.
Defendant's Experts: None

Mack v. Ondich
Type of Case: Automobile accident; personal injury
Verdict: $57,000 + $7,000 consortium + $13,655 for settlement of motions for PJI, Civ.R. 37(C) and video testimony costs. Total: $77,655
Plaintiff's Counsel: Michael E. Jackson, Esq. of Schwarzwald & McNair
Defendant's Counsel: Cornelius J. O'Sullivan, Esq. of Davis & Young
Court: Cuyahoga County Court of Common Pleas, Case No. CV 03 499101, Judge Boyko
Date: October, 2003
Insurance Company: State Farm
Damages: Back sprain (permanent); past, but no future lost wages: $1,800; Medical bills: $7,961.84

Summary: Plaintiff, a laborer at building supply store, was cut-off by Defendant. Plaintiff's truck went into spin and slammed into

guardrail at 60 mph. Plaintiff walked away with minor injuries; he tried to work following day, but his back hurt. Plaintiff went to ER, then sought treatment with family physician, obtained physical therapy, and saw a rehabilitation specialist and neurologist. The neurologist opined that Plaintiff's back sprain was permanent, but that a pre-existing degenerative condition at L1-L2 was not aggravated by collision. Plaintiff was unable to work without assistance after the collision.
Plaintiff's Experts: Dr. Mahajan (neurologist); Barbara Hornbeek (physical therapist)
Defendant's Experts: None, and no IME.

Jane Doe, Exec. Of estate of Jan Doe; and Jack Doe Hospital, et al
Type of Case: Medical Malpractice/Wrongful Death
Settlement: $500,000.00
Plaintiff's Counsel: George E. Loucas, Esq. and Cathryn N. Loucas, Esq.
Defendant's Counsel: Withheld
Court: Cuyahoga County Court of Common Pleas
Date: July, 2003
Insurance Company: Self-insured
Damages: Osteomyelitis, endocarditis, stroke, cardiac failure and death

Summary: Defendants failed to timely diagnose and appropriately treat osteomyelitis of the spine resulting in death. Defendants had erroneously diagnosed the decedent as having a malignant lymphoma and treated her with radiation and steroid therapy rather than antibiotics. Decedent eventually developed endocarditis from lack of proper treatment. She went on to suffer a stroke, cardiac failure and death.
Plaintiff's Experts: Gregory J. Przybylski, M.D. (neurosurgeon); Alan Feit, M.D. (cardiologist); Henry Murray, M.D. (infectious disease); Robert J. Steele, M.D. (oncologist); Michael W. Bruno, M.D. (radiologist); Kenneth McCarty, Jr., M.D. (Pathology)
Defendant's Experts: Larry Milner, M.D. (oncology); Michael E. Yaffe, M.D. (internal medicine); David A. Schwartz, M.D. (pathology); Bruce Ammerman, M.D. (neurosurgeon); Keith Armitage, M.D. (infectious disease); Steven Deutch, M.D. (radiology)

Adm. of the Estate of Jane Doe v. John Doe, M.D.
Type of Case: Medical Malpractice/Wrongful Death
Settlement: $2,100,000.00
Plaintiff's Counsel: David M. Paris, Esq. of Nurenberg, Plevin, Heller & McCarthy
Defendant's Counsel: Withheld
Court: Franklin County, Judge Bessey
Date: October, 2003
Insurance Company: Withheld
Damages: Wrongful Death

Summary: 54-year-old wife died of drug-induced liver failure, leaving husband of 31 years and 2 adult children. She was being treated with Baycol for high cholesterol by a primary care physician. The PDR recommends liver function studies before placing the patient on the drug (for a baseline) 6 weeks later, 12 weeks later, and then every 6 months. Liver function studies for the first three tests were normal. Six months later, the patient missed her follow up exam, and in that interim was placed on other medications by a mental health care professional. Four months later, her Baycol prescription ran out. She called her family doctor, and he renewed the prescription without first performing the liver function tests (as 10 months had elapsed since the last one). Four months later, patient awoke jaundiced and in fulminant liver failure. All other probably causes were ruled out. She passed away 13 weeks later, waiting for a liver transplant. Plaintiff's experts opined that the family physician was negligent in failing to perform the liver testing timely; and that had they been performed before the prescription was renewed, they would have been abnormal prompting a reversal of her condition. Defendant's expert opined that, although this was probably a drug induced liver failure, no one could state with any degree of certainty which drug or combination fo drugs were responsible or what her liver enzymes would have been if treated before her prescription was renewed.
Plaintiff's Experts: David Van Thiel, M.D.; John Burke, Ph.D.
Defendant's Experts: Frederic Askari, M.D.

Adm. Of the Est. Of John Doe, et al v. James Doe, et al
Type of Case: Auto Collision and Wrongful Death
Settlement: $2,468,000.00
Plaintiff's Counsel: David M. Paris, Esq. of Nurenberg, Plevin, Heller & McCarthy
Defendant's Counsel: James Brudny, Esq. et al.
Court: Cuyahoga County Common Pleas, Judge Michael Russo
Date: June, 2003
Insurance Company: Providence; Progressive; Allstate; Zurich; Guide One
Damages: Three wrongful deaths; and forehead laceration of male child

Summary: 65-year-old grandmother was driving her three grandchildren to a school athletic event. Defendant dump truck driver failed to stop at red light and broadsided her car. Grandmother and two grandchildren were killed instantly; third grandchild sustained forehead laceration. Grandmother was survived by seven emancipated adult children, five of whom had personal UM coverage. Scott Pontzer claims were successfully made on behalf of two adult children.
Plaintiff's Experts: Hank Lipian
Defendant's Experts: None

LISTING OF EXPERTS - CATA DEPOSITION BANK
(by specialty)

Anesthesiology
David C.Brandon, M.D.
Briccio Celerio, M.D.
Timothy C. Lyons, M.D. */Cardiothoracic*
Amir Dawoud, M.D.
Charles J. Hearn, M.D.
Stephen W. Minore, M.D.
David S. Rapkin, M.D.
Kenneth E. Smithson, M.D.
Jeffrey S. Vender, M.D.
Jean-Pierre Jarned, M.D.

Cardiology
Mark T. Botham, M.D.
Robert E. Botti, M.D.
Reginald P. Dickerson, M.D.
Barry Allan Effron, M.D.
Barry George, M.D.
Wayne Gross, M.D.
Alan Kamen, M.D.
Alfred Kitchen, M.D.
Alan Kravitz, M.D.
Raymond Magorien, M.D.
Steven Meister, M.D.
Michael Oddi, M.D. */Cardiothoracic Med*
George Q. Seese, M.D.
Bruce S. Stambler, M.D.
Thomas Vrobel, M.D. /*Intern/Pulm*
Richard Watts, M.D.
Steven Yakubov, M.D.
Christine M. Zirafi, M.D.

Cytopathology
William Tench, M.D. */Chief of Cytopathology*

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

ER Medicine/Physicians
Mikhail Abourjeily, M.D.
David Abramson, M.D.
Joseph Cooper, M.D.
Rita K. Cydulka, M.D.
Phyllis T. Doerger, M.D.
David Effron, M.D.
Charles Emerman, M.D.
Richard Frires, M.D. */Family Medicine*
Howard Gershman, M.D.
Thomas Graber
Ginger A. Hamrick, M.D.
Mark Hatcher, M.D.
Bruce Janiak, M.D.
Allen Jones, M.D.
Samuel Kiehl, M.D.
Frederick Luchette, M.D.
Jeffrey Pennington, M.D.
Norman Schneiderman, M.D.

ENT
Steven Houser, M.D.
Yunn W.Park, M.D.
Seth J. Silberman, M.D.
Barry Wenig, M.D.

Epileptology
Stephen Collins, M.D.
Barbara Swartz, M.D.

Family Medicine
Robert T. Blankfield, M.D.
Mary Corrigan, M.D.
Elisabeth Righter, M.D.
Michael Rowane, M.D.

Gastroenterology
Aaron Brzezinski, M.D.
Todd D. Eisner, M.D.
R. Kirk Elliott, M.D.
Kevin Olden, M.D.

General Internal Medicine
Thomas Abraham, M.D. */Pulmonology*
Bruce L. Auerbach, M.D.
Stephen Baum, M.D.
Frederick Bishko, M.D. /*Rheumatology*
Garardo Cisneros, M.D.
Alan J. Cropp, M.D. */Pulmonology*
Carl A. Cully, M.D.
Douglas Einstadter, M.D.
Kirk R. Elliott, M.D.
Stacy Hollaway, M.D.
Douglas Junglas, M.D.
Suzanne Kimball, M.D.
Keith Kruithoff, M.D.
Calvin M. Kunin, M.D. */Microbiology*
Lorenzo Lalli, M.D.
Peter Y. Lee, M.D.
Kenneth L. Lehrman, M.D. */Cardiology*
John Maxfield, M.D. */Emergency Medicine*
Elizabeth Dorr McKinley, M.D.
Neal R.Minning, M.D.
Darshan Mistry, M.D.

Hadley Morgenstern-Clarren, M.D.
Lorus Rakita, M.D.
Raymond W. Rozman, M.D.
Juan A. Ruiz, M.D.
Jeffrey Selwyn, M.D.
Vijaykumar Shah, M.D.
Michael Yaffe, M.D.
David Yana, M.D.

General Surgery

Samual Adornato, M.D.
Dean W. Borth, M.D.
Stanley Dobrowski, M.D.
Daniel Goldberg, M.D.
Micheal Hickey, M.D. */Trauma*
Moises Jacobs, M.D.
Frederick Luchette, M.D. */Trauma*
Donald Malone, M.D. */Psycosurgery*
Jeffrey Marks, M.D.
Dilip Narichania, M.D.
Abdel Nimeri, M.D. */Resident*
William Schirmer, M.D.

Geriatrics

Elizabeth E. O'Toole, M.D.
Neal Wayne Persky, M.D.

Hematology

Vinodkumar Sutaria, M.D.
Alan Lichtin, M.D.
Roy Silverstein, M.D.

Infectious Disease

Keith Armitage, M.D.
Robin Avery, M.D.
Robert Flora, M.D.
Steven M. Gordon, M.D.
Clark Kerr, M.D.
David Longworth, M.D.
Lawrence Martinelli, M.D.
Martin Raff, M.D.
Susan Rehm, M.D.
Raoul Wientzen, M.D.

Neonatology

Richard E. McClead, M.D.

Neurology

Bennett Blumenkopf, M.D.
Elias Chalub, M.D. /*Pediatrics*
Bruce Cohen, M.D. */Pediatrics*
Herbert Engelhard, M.D.
Mary Hlavin, M.D.
Dennis Landis, M.D.
Alan Lerner, M.D.
Donald Mann, M.D.
Sheldon Margulies, M.D.
David C. Preston, M.D.
Thomas R. Price, M.D. */Psychiatrist*
Tarvez Tucker, M.D.

Neurosurgery

Gene Barrett, M.D.
Frederick Boop, M.D. */Pediatrics*
John Conomy, M.D.
David Kline, M.D.
Frederick Lax, M.D.
Matt Likavec, M.D.
Mark Luciano, M.D. */Pediatrics*
William McCormick, M.D.
Samuel Neff, M.D.
Charles Rawlings, M.D.
Ali Rezai, M.D.

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David Burkons, M.D.
Daniel Cain, M.D.
Stephen DeVoe, M.D.
Method Duchon, M.D.
Stuart Edelberg, M.D.
John Elliott, M.D.
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Nawar Hatoum, M.D.
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John R. O'Neal, M.D.
Richard O'Shaughnessy, M.D.
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Anthony Tizzano, M.D.

Occupational Therapy

Ellen Flowers

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Howard Muntz, M.D. /*GYN Oncologist*
Howard Ozer, M.D.
David Stepnick, M.D.

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Gregory Kosmorsky, M.D.
Andreas Marcotty, M.D.
Peter J. Savino, M.D.

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William Bohl, M.D.
Malcolm Brahms, M.D.
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Richard Friedman, M.D.
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Gregory Hill, M.D.
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Andrew Newman, M.D.
Jeffrey J. Roberts, M.D.
Duret Smith, M.D.
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Otoneurology

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Pathology

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Sharon Hook, M.D.
Kenneth McCarty, M.D.
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Diane Mucitelli, M.D.
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Diane Mirabito

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Marc Cooperman, M.D.
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Mehmet C. Oz, M.D. */Cardiothoracic*
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V.C. Smith, M.D. */Cardiac Surgeon*

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Richard Paul Cambria, M.D.

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Stanley P. Ballou, M.D. /*Unknown*
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Karen Wolffe */Professional Counselor*
Arthur B. Zinn, M.D. */Medical Geneticist*

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Laura Hoover, R.N.
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Geraldine Kern, R.N.
Judith Wright Lott, R.N. */Neonatal N.P.*
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Lekita Nance, LPN
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Catherine Zalka, R.N.
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Thomas Hilbert /*Consultant*
Gary Himmel, Esq. /*Attorney*
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Sue Sanford */Dir. Obstetrical Services*
Richard W. Schule */Mgr, Surg. Process Dept.*
David Silvaaggio */Dept. Admin. - Fam. Pract.*
Stephen L. Spearing */Admin. Dir. Radiology*
Kelly Sted /*Manager of Enrollment*

CATA VERDICTS AND SETTLEMENTS

Case Caption:_____

Type of Case:_____

Verdict: **Settlement:**_____

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

Counsel for Defendant(s):_____

Court/Judge/Case No:_____

Date of Settlement/Verdict:_____

Insurance Company:_____

Damages:_____

Brief Summary of the Case:_____

_____

_____

_____

_____

Experts for Plaintiff(s):_____

_____

_____

Experts for Defendant(s):_____

_____

_____

RETURN FORM TO:

Stephen T. Keefe, Jr.
Linton & Hirshman
700 W. St. Clair Avenue, Suite 300
Cleveland, Ohio 44113
stk@lintonhirshman.com

The Cleveland Academy of Trial Attorneys
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THE CLEVELAND ACADEMY OF TRIAL ATTORNEYS
134 Middle Avenue
Elyria Ohio, 44035

Application for Membership

I hereby apply for membership in The Cleveland Academy of Trial Attorneys, pursuant to the invitation extended to me by the member of the Academy whose signature appears below. I understand that my application must be seconded by a member of the Academy and approved by the President. If admitted to the Academy, I agree to abide by its Constitution and By-Laws and *participate fully in the program of the Academy*. I certify that I possess the following qualifications for membership prescribed by the Constitution:

1. ***Skill, interest and ability in trial and appellate practice.***
2. ***Service rendered or a willingness to serve in promoting the best interests of the legal profession and the standards and techniques of trial practice.***
3. ***Excellent character and integrity of the highest order.***

In addition, I certify that no more that 25% of my practice and that of my firm's practice if I am not a sole practitioner, is devoted to personal injury litigation defense.

Name_____Age:_____

Firm Name:_____

Office Address:_____Phone no:_____

Home Address:_____Phone no:_____

Spouse's Name:_____No. of Children:_____

Schools Attended and Degrees (Give Dates):_____

_____

Professional Honors or Articles Written:_____

_____

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):_____

_____

Membership in Legal Associations (Bar, Fraternity, Etc.):_____

_____

Date:_____ Applicant:_____

Invited:_____Seconded By:_____

President's Approval:_____Date:_____

Please return completed Application with $100.00 fee to:
CATA, 134 Middle Avenue, Elyria, Ohio 44035