CATA News
Cleveland Academy of Trial Attorneys
Fall 2002

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President's Message

Kenneth J. Knabe

PERSONAL BULLETIN: Ohio still enjoys an enlightened judiciary who cares more about its citizens than big business and insurance companies. Are you willing to help keep the Court system the only fair system in Ohio?

Supreme Court races have to be won. To win, we need commitment. This includes grass root pounding the pavement and contributions. For grass roots involvement, call Andrew Young at Nurenberg Plevin (216/694-5218). The time is now. Are your providing literature to all your clients? Have you volunteered to help? Have you given all you can? For contributions, contact OATL. The people of this state and community deserve respect. That respect is in jeopardy. Please do all you can to save our system.

On a lighter note, allow me to provide a CATA status report. Thanks to all who attended the Inauguration dinner at The Club on June 21, 2002. The keynote speaker was the renowned economist, Dr. John F. Burke, Jr. Ohio Supreme Court Justice Francis Sweeney provided the oath to the new officers, and Father Robert Welsh, former President of St. Ignatius, provided the invocation.

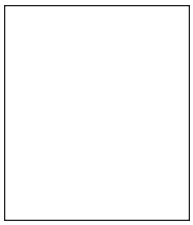
CATA has become a very powerful force, thanks to you. CATA's newsletter contains relevant articles, verdicts and recent cases. Many thanks to our Co-Editors, Romney Cullers, who has now moved on to Treasurer and to Steve Keefe, who continues the tradition. Thanks to Mary Cavanaugh for volunteering her efforts as the new Co-Editor of CATA's newsletter, along with Steve. If you practice personal injury, reading the newsletter is a must.

CATA's deposition bank is on line. What better tool than a prior deposition of that same expert. CATA has it - just access it.

Our luncheon seminars are well attended, informative and provide CLE credit. The seminars will start again in September and will be produced by Dennis Lansdowne, CATA's new Secretary. Mark your calendars for the Bernard Friedman Institute in March, produced by Michael Becker, CATA's new Vice President.

This past year, CATA has helped Youth Challenge and 911 victims; CATA is now in a position to help those on the campaign trail! CATA is one of the finest local trial groups in the state. Many thanks for your support and to our **advertisers!** Please **endorse them!**

CATA has several new Board Members who will lead this organization into the future. In the coming year, I hope to add to our already blossoming membership and recognize deserving members of our fine judiciary.



David M. Paris

The past 10 years serving CATA, first as a director and co-editor of the Newsletter and then as an officer, provided me the opportunity to work with and learn from some of the finest trial attorneys in the state, if not the entire nation. The CATA membership should be proud to know that this is one of the most talented, cooperative, technologically advanced, selfless group of all the local trial associations that I have encountered over the years. It's uniqueness is defined by "the group effort" of so many. I'm sure to omit recognition to some members and, for that, I apologize in advance.

I made only one promise at the commencement of my term - that we'd have the deposition bank scanned and ready for emailing in its entirety within months. I fell somewhat short of that goal, but not for lack of trying. Aside from the thousand or so depositions that were already in the bank, we have received deposits of more than 300 additional valuable expert depositions generously contributed by dozens of firms and individual members including, Linton & Hirshman, Spangenberg, Shibley & Liber, Lancione & Lancione, Becker & Mishkind, Donna Taylor - Kolis and Dale Economus, ... just to mention a few. We have also experienced a year of unprecedented economic growth of nearly 50%. Much of this is due to increased membership, the development of annual advertisers for the Newsletter and trimming unnecessary expenses. In short, your Board is running the organization like a successful business.

I'd like to thank the Officers who kept the organization running on a day to day basis - Treasurer Dennis Lansdowne who balanced our check book, paid our bills, collected dues, cajoled delinquent members to renew and kept track of the ever changing addresses of members; Secretary Mike Becker who not only took copious and accurate minutes of our Board Meetings, but spent countless hours orchestrating six outstanding luncheon seminars which were always well attended by our members and local judges; and Vice President Ken Knabe whose Bernard Friedman Litigation Institute seminar received a 5 star review. I'd also like to thank the Board of Directors whose continued leadership and creativity permit CATA to shine as an example to others and welcome our new directors Jack Landskroner, Laurel Mathews, Brian Eisen and Dean Nieding to continue the effort. Where would we be without the Editors of the Newsletter, Romney Cullers and Stephen Keefe, who worked tirelessly compiling data, scanning photos, summarizing unreported decisions, having articles written on current topics and laying out a first class publication that continues to keep us all abreast of recent developments affecting all of our clients? And lastly, a special thanks is owed to those authors of the Newsletter articles as well as our member seminar speakers who "volunteered" their time: William J. Novak, Steve Vanek, Brian N. Eisen, Eric Kennedy, Todd Rosenberg, Robert Housel, Dennis Mulvihill, John Burnett, Dean Neiding, Ellen Simon, Jack Landskroner and James Szaller.

Now, aren't you glad I saved all this for the Newsletter and not the Installation Dinner?

Please don't forget: Together we **can** move mountains. Alone, we're just shoveling dirt. Thanks again.

David

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The CATA Youth Challenge Regatta.

Law Update

by Stephen T. Keefe, Jr.

and Mary A. Cavanaugh

Cases of Interest Pending in the Ohio Supreme Court

***Colbert v. City of Cleveland* (2002), S. Ct. Case No. 02-0101. *See* 95 Ohio St. 3d 1421.**

Police officers, suspecting that a drug transaction had taken place, permitted a car to travel away from a suspected drug dealer so as to avoid alerting it of their presence. While en route to intercept the vehicle, the officers collided with Plaintiff's vehicle causing injuries. Neither the police cruiser's lights nor its siren were activated when the collision occurred. Plaintiff filed suit, and the city defended on the basis that it and the police officers were immune from liability under R.C. 2744.02, because they were responding to an "emergency call" as defined in R.C. 2744.01. The trial court granted summary judgment for the Defendants, and the Eighth District Court of Appeals affirmed in a 2-1 decision, holding that an "emergency call" is not limited to "inherently dangerous" situations. More specifically, the reviewing court held that an emergency call is not limited to situations involving actual danger, and that it is not necessary for officers to activate their sirens and lights to be responding to an emergency call. The Ohio Supreme Court has permitted an appeal in this case on the following proposition of law:

> Legislative intent regarding R.C. 2744.01(A) requires that the term "call to duty" should be interpreted as those only concerning an inherently dangerous situation.

***Kemper v. Michigan Millers Mut. Ins. Co.* (2002), S. Ct. Case No. 01-1709. *See* 94 Ohio St. 3d 1435 & 93 Ohio St. 3d 1483.**

Here, there was a form rejecting UM/UIM coverage, but it did not describe the coverage or list either the cost or the limits of the coverage. Thus, the form did not comply with the requirements set forth by the Ohio Supreme Court in *Linko*. The following questions of state law have been certified to the Ohio Supreme Court by the federal district court:

1. Are the requirements of *Linko v. Indemn. Ins. Co.* (2000), 90 Ohio St. 3d 445, relative to an offer of UM/UIM coverage, applicable to a policy of insurance written after enactment of H.B. 261 and before S.B. 97?

2. If the *Linko* requirements are applicable, does, under H.B. 261, a signed rejection act as an effective declination of UM/UIM coverage, where there is no other evidence, oral or documentary, of an offer of coverage?

See also Pillo v. Stricklin (2002), S. Ct. Case No. 02-0291 (stayed for the decision in *Kemper* on the issue of whether *Linko* applies to policies subject to R.C. 3937.18 as amended by H.B. 261).

***Roman v. Estate of Gobbo* (2002), S. Ct. Case No. 02-0285.**

An elderly driver with a history of heart problems suffered a heart attack while driving. As a result, he drove left of center and collided with another vehicle, causing two deaths and injuries to several other persons. The jury found the driver negligent per se in driving left of center but nevertheless concluded that his heart attack was a sudden emergency which he had no reason to foresee and which prevented him from complying with the traffic law. The Eighth District Court of Appeals affirmed the trial court's judgment in Defendant's favor. Plaintiff advances the following propositions of law in this appeal which has been accepted for review by the Ohio Supreme Court:

1. The sudden medical emergency doctrine should be abolished as a defense to negligence per se.

2. An individual who has knowledge of a serious medical condition should be held to assume the risk of injury to himself and others, while driving an automobile on a public roadway, and should thus be precluded from asserting the defense of a sudden medical emergency.

Stone v. Medaglia-Dell **(2001), 93 Ohio St. 3d 1451**

In February 1999, Plaintiff was injured in an automobile accident when Defendant lost control of her vehicle on I-271, traveled across a median strip and directly into the path of Plaintiff's vehicle. Although Plaintiff applied her brakes, she testified that she did not have time to swerve to avoid the collision with Defendant's vehicle. The case proceeded to trial, and Defendant requested instructions on comparative negligence and the duty to keep a lookout. Plaintiff's counsel objected to these instructions on the basis that there was no evidence of Plaintiff's negligence. The trial court overruled Plaintiff's objections and instructed the jury on the issue of comparative negligence and also gave an instruction that "all motorists have a duty to exercise their rights in a reasonable manner upon becoming aware of a perilous situation." The jury returned a verdict finding that Defendant was 60% negligent and that Plaintiff was 40% negligent. The Eighth District Court of Appeals affirmed, holding that, although Plaintiff had the right of way, she had a duty to exercise ordinary care after perceiving that Defendant had violated her right of way. The reviewing court also found no error in the trial court's instructions and concluded that there was evidence from which a jury could conclude that Plaintiff was comparatively negligent and that her negligence was a proximate cause of the collision. The Ohio Supreme Court permitted a discretionary appeal on Plaintiff-Appellant's Motion for Reconsideration. Plaintiff asserts the following three propositions of law:

1. A driver with the right of way has no duty to keep an "effective lookout" for those who may violate his or her right of way.

2. A "duty to look" instruction, that fails to distinguish between the party with the right of way and the one without, but instead imposes and equal "duty to look" on both parties, is erroneous as a matter of law.

3. As a matter of law, a driver who has less than one second to react to a vehicle that spins out in front of hers cannot be found to be comparatively at fault for the collision that ensues.

Arbitration - Nonsignatories to Contract Seeking to Enforce Contract Rights and Obligations of Signatories Can Be Held to Arbitration Clause in Contract

Gerig v. Kahn **(June 19, 2002), 95 Ohio St. 3d 478 (arbitration clause applied to medical malpractice claimants to determine insurance coverage dispute)**

This is identified as a case of first impression by the Ohio Supreme Court. In a medical malpractice insurance coverage dispute, the Court held that signatories to a contract could enforce an arbitration provision against a nonsignatory who sought a declaration of the signatories' rights and obligations under the contract.

In the underlying action, the Plaintiff brought a medical malpractice action against a doctor and hospital arising out of a birth-related injury. At the time the lawsuit was filed, the hospital insured the doctor against medical malpractice claims through P.I.E. Following P.I.E.'s insolvency, the Plaintiffs reviewed an affiliation agreement between the hospital and doctor, pursuant to which the hospital was required to insure the doctor through its self-insurance plan. The Plaintiffs then filed a declaratory judgment action, asking the court to declare that the affiliation agreement so required. OIGA and the doctor also filed cross and counter claims for a declaratory judgment against the hospital, asking the court to declare that the affiliation agreement required the hospital to indemnify the doctor. The hospital, relying on an arbitration clause in the agreement, moved the court to stay the proceedings in the medical malpractice action and the declaratory judgment action and also sought an order compelling arbitration of the dispute regarding whether the hospital was required to insure the doctor through the self-insurance plan. The Plaintiffs and OIGA opposed that motion, arguing that they could not be compelled to arbitrate the dispute because they were not parties to the affiliation agreement.

The trial court denied the hospital's motion to compel arbitration. The appellate court reversed and held that the doctrine of equitable estoppel prevented the Plaintiffs and OIGA from asserting that the arbitration clause

should be disregarded while simultaneously asserting that other provisions in the agreement were enforceable. The Ohio Supreme Court accepted the case on allowance of a discretionary appeal.

The primary issue before the Court was whether signatories to a contract may enforce an arbitration provision against a nonsignatory who seeks a declaration of the signatories' rights and obligations under the contract. Applying the equitable estoppel doctrine, the Court held that they may. Because the appellants derived their interest in the agreement through the doctor, they could have no greater right than the doctor to a judicial interpretation of the agreement.

Constitutional Law - Free Speech - Restrictions on Judicial Candidates

Republican Party of Minnesota v. White **(June 27, 2002), _____ U.S. _____, 122 S. Ct. 2528.**

The Minnesota Supreme Court adopted a canon of judicial conduct that prohibited a "candidate for a judicial office" from "announcing his or her views on disputed legal or political issues" (referred to as the "announce clause"). The United States Supreme Court held that the announce clause violates the 1st Amendment. (Per Justice Scalia, with three justices concurring and one concurring in the result.)

The action arose after candidates for judicial office and various political groups sued the state boards and offices responsible for establishing judicial ethics, alleging that Minnesota's canon of judicial conduct, specifically the announce clause, violated the 1st Amendment. The Court found that the announce clause prohibited speech on the basis of content and burdened speech of political candidates, a category of speech at the core of 1st Amendment freedoms. Under the strict scrutiny test, the restrictions had to be narrowly tailored to serve a compelling state interest. Debate on the qualifications of candidates is at the core of the election process and the role of elected officials makes it imperative that they be allowed to freely express themselves on matters of current public importance. Finding that the announce clause was not narrowly tailored to serve the purported state interest of impartiality of the state judiciary (or even the appearance of impartiality) at all, the Court concluded that it failed the strict scrutiny test. Accordingly, the Minnesota Supreme Court's canon prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violated the 1st Amendment and the appellate court's grant of summary judgment was therefore reversed.

Evidence - Admissibility of Photos to Establish Relation Between Vehicle Damage and Extent of Injuries; Supporting Expert Testimony Required

Hastie v. Dohar **(Feb. 28, 2002), 2002 Ohio App. LEXIS 808, Cuy. App. No. 79456, unreported.**

In order to present photographs of limited damage to a car to negate the physical injury to the plaintiff, expert testimony is needed to draw a correlation between the damage to the vehicle and the physical injury to the plaintiff. (However, a reading of this case would also indicate that the holding potentially could be used in reverse to argue that expert testimony would also be needed by a plaintiff, in order to suggest a correlation between significant vehicle damage and severity of injuries.)

In the underlying action, the trial court denied admission of photos submitted by the defense to show limited damage to the Plaintiff's vehicle. The court excluded the photos on the basis that the defense had failed to introduce expert testimony connecting the minor damage to the vehicle and the Plaintiff's purported injuries. Thus, the photographs would be unduly prejudicial. On appeal, the court noted that decisions regarding the admissibility of photographs are within the sound discretion of the trial court and upheld the trial court's determination.

Editor's Note: *See also Morales v. Petitto* (Nov. 9, 2000), 2000 Ohio App. LEXIS 5228, Cuy. App. Nos. 77326 & 77532, unreported (affirming trial court's exclusion of photographs in low impact case).

Evidence - Evid. R. 703 - Basis of Expert Testimony

Gartner, et al. v. Hemmer, M.D., et al. **(April 26, 2002), 2002 Ohio App. LEXIS 1976, Hamilton App. No. C-010216, unreported.**

In a medical malpractice action, the Hamilton County Court of Appeals held that it was prejudicial error and an abuse of discretion for the trial court to exclude the testimony of the Plaintiff's medical expert when the

record demonstrated that two medical articles the expert cited in his deposition to support his testimony were not the sole basis for his opinion; rather, his opinion was based on specialized knowledge gained through training, education and synthesis of the medical literature published over the past twenty years of practice.

In the underlying case, the Plaintiff's expert testified that he had in part based his opinions on two medical articles, but then clarified on voir dire at trial that his opinions were based on a combination of his experience, training, education, and a synthesis of the medical literature. The trial court nonetheless prohibited him from testifying on the basis that his opinion was based on the medical articles and his personal experience did not show specialized knowledge on the proximate cause issues.

The appellate court found this was an abuse of discretion, in part analyzing Evid. R. 703, which provides that an expert may not base his opinion exclusively on other experts' opinions or hearsay evidence. The court held that knowledge or data gained from other experts in the field, either communicated orally or in writing, that forms a partial basis for a testifying expert's opinion is proper because that knowledge or date has been "perceived" by the expert witness in compliance with Evid. R. 703. Otherwise, experts would be limited to hands-on experience to form the basis of their opinions, which the court noted has never been the case.

Firearm Manufacturer and Distributor Liability

Cincinnati v. Beretta, U.S.A. Corp. **(June 12, 2002), 95 Ohio St. 3d 416.**

The Ohio Supreme Court held that a city can state a cause of action against manufacturers and distributors of firearms under nuisance, negligence, and product liability theories. Therefore, the Court reversed the trial court and the Hamilton County Court of Appeals' 12(B)(6) dismissal of a complaint by the City of Cincinnati ("City").

On April 28, 1999, the City filed a Complaint against fifteen handgun manufacturers, three trade associations, and a handgun distributor, seeking to hold them liable under nuisance, negligence, and product liability theories for harm caused by the firearms they manufacture, sell, or distribute. The gist of the Complaint was that the Defendants manufactured, sold, or distributed firearms in ways that ensured their widespread accessibility to prohibited uses, such as children and criminals. In the Complaint, the City sought both injunctive relief and damages, including reimbursement for expenses such as increased police, emergency, health, and corrections costs.

Rather than file an answer, fifteen of the Defendants moved to dismiss under Civ. R. 12(B)(6). The trial court granted the motions, holding that the City's Complaint failed to state a cause of action, the claims were barred by the doctrine of remoteness, and the City could not recoup expenditures for public services. The court of appeals affirmed on similar grounds. The case was then allowed before the Ohio Supreme Court on a discretionary appeal.

In determining whether the motions were properly granted, the Court addressed the issue of whether the Complaint stated a cause of action under Ohio law. The Court held that the City's Complaint survived Defendants' 12(B)(6) motion on the public nuisance and negligence claims, as well as the common law defective design and failure to warn claims. The Court found that the alleged harms were direct injuries to the City and, therefore, not barred by remoteness, and that the continuing nature of the misconduct could justify the recoupment of governmental costs. The Defendants' claims of violations of the Commerce Clause and Due Process Clause were also rejected. In concluding, the Court noted that reversal of the lower court judgments did not mean that the City would prevail, but that it did allege facts necessary to withstand a motion to dismiss.

Inherently-Dangerous-Work Exception to General Rule of Nonliability for Independent Contractor in Negligent Security Action

Pusey v. Bator **(Feb. 27, 2002), 94 Ohio St. 3d 275.**

The Ohio Supreme Court has found that where an employer hires an independent contractor to provide armed security guards to protect property, the inherently-dangerous-work exception is triggered such that if a person is injured as a result of a guard's negligence, the employer is vicariously liable even though the tortfeasor is an employee of the independent contractor.

In this case, the Ohio Supreme Court extended the inherently-dangerous-work exception to the security context and also clarified application of the exception. The underlying action was brought by the estate of Derrell Pusey, who was shot and killed by a security guard, Eric Bator, who was employed by Youngstown Security Patrol ("YSP"), a company hired by Grief Brothers to provide armed security at its manufacturing plant. Prior to trial, YSP and Bator settled with Pusey's estate, leaving Grief Brothers as the only Defendant. On a motion for directed verdict, the trial court held that even if Derrell's death was the result of YSP's negligence, Grief Brothers was not liable because YSP was an independent contractor and, as a general rule, an employer is not liable for the negligence of its independent contractor. The trial court rejected Pusey's argument that the nature of the work contracted for qualified as an exception to this general rule. The Seventh District Court of Appeals affirmed the trial court's ruling, and the case came before the Ohio Supreme Court on a discretionary appeal.

The Court found that YSP was an independent contractor and, as such, the employer generally would not be liable for negligent acts. However, there are exceptions to this general rule, several of which stem from the nondelegable duty doctrine which fall into two categories: affirmative duties that are imposed on the employer by statute, contract, franchise, charter, or common law, and duties imposed on the employer that arise out of the work itself because its performance creates dangers to others, i.e. inherently dangerous work. The Court found that to fall within the inherently-dangerous-work exception, it is not necessary that the work be such that it cannot be done without a risk of harm to others, or even that it be such that it involves a high risk of such harm. It is sufficient if the work involves a risk, recognizable in advance, of physical harm to others, which is inherent in the work itself. The exception applies when special risks are associated with the work such that a reasonable person would recognize the necessity to take special precautions. The Court found that armed security created a peculiar risk of harm to others, such that the inherently-dangerous-work exception applied. The case was, therefore, remanded to the trial court for a jury determination of whether the death was the result of YSP's negligence.

Insurance Law - Local Cases of Interest

Axthelm v. Bruce **(March 18, 2002), Cuyahoga C.P. No. 403233, unreported.**

On March 27, 1998, while driving her own vehicle, Diane Axthelm was injured in an auto accident caused by Defendant Mary Bruce. At the time of the accident, Diane was employed by Tri-C, and Tri-C was insured by St. Paul Fire & Marine ("St. Paul") under a policy of insurance providing multiple types of coverages, including express UM/UIM coverage. Diane's husband, Carl Axthelm, was employed by Cleveland Track Material, Inc. ("Cleveland Track"), which was insured under a business auto policy, a commercial general liability policy and an excess policy issued by Travelers Indemnity of Illinois ("Travelers"). The tortfeasor's insurer, Grange, tendered its $250,000 limits, and St. Paul consented to Plaintiff executing a release in favor of the tortfeasor.

In its motion for summary judgment, St. Paul argued that Plaintiff was not entitled to UIM coverage because: (1) its policy also provided the Named Insured (i.e., Tri-C) with property damage coverage, and the definition of "you" is not ambiguous given the fact that a corporation can sustain property damage, and (2) Tri-C is allegedly a political subdivision, not a corporation, such that it may only provide insurance coverage for employees who are acting within the course and scope of their employment at the time of their injuries. The Court rejected both of these arguments. Here, Plaintiff suffered "bodily injury," not property damage, and the relevant clause in St. Paul's policy also provided coverage for bodily injury which a corporation cannot sustain.

The Court rejected St. Paul's second argument on a number of grounds. First, R.C. 2744.01 defines an "employee" of a political subdivision *for purposes of immunity from tort liability* and "has nothing to do with whether an employee of a political subdivision can be covered by underinsured motorist coverage purchased by a political subdivision." The Court also held that Ohio law does not prohibit a political subdivision from purchasing UM/UIM insurance to cover its employees, even when they are outside the scope of their employment. *Accord Mizen v. Utica* (Jan. 17, 2002), Cuy. App. No. 79554, unreported; *Morganstern v. Nationwide Mut. Ins. Co.* (S.D. Ohio 2001), U.S. Dst. Ct. Case No. C-2-00-1284, unreported; *Wausau Business*

*Ins. Co. v. Chidester (*S.D. Ohio May 11, 2001), U.S. Dst. Ct. Case No. C-2-00-297, unreported.

In its separately filed motion for summary judgment, Travelers conceded that its policies contained the same ambiguity set forth in *Scott-Pontzer*. However, it argued that Plaintiff was precluded from coverage by virtue of the "other owned auto" exclusion in its policy which excludes coverage for "bodily injury sustained by...any family member while occupying...any vehicle owned by that family member...." In support of its position, Travelers relied on the HB 261 version of R.C. 3937.18, which permits this exclusion in a policy of insurance. *Cf. Martin v. Midwestern Group Ins. Co.* (1984), 70 Ohio St. 3d 478 (previously holding that other owned auto exclusion was invalid).

In rejecting Travelers' argument with respect to its business auto liability policy, the Court concluded that "amended Revised Code 3937.18 enforces the validity of the other owned auto exclusion only in the cases of vehicles furnished for the regular use of a *named insured*." Here, while Plaintiff undoubtedly qualified as an insured, she was not "the named insured" (i.e., Cleveland Track) shown in the Declarations. Moreover, because Plaintiff's vehicle was not furnished for the regular use of Cleveland Track, the other owned auto exclusion was deemed to be inapplicable. In addition, the Court held that Plaintiff's vehicle is a "covered auto" under the terms of the policy. The policy defines covered autos as only those autos "you" own. Because Plaintiff was deemed to be an insured pursuant to the definition of "you," her motor vehicle was likewise deemed to be a "covered auto" for purposes of Travelers' business auto policy. The Court went one step further and held that "even if Plaintiff's vehicle could not be considered a 'covered auto' or an 'owned auto,' Defendant Travelers still would not be entitled to exert the exclusion as underinsured motorist coverage is designed to protect persons, not vehicles." *Accord Scott-Pontzer*; *Dukeshire v. Dick* (Nov. 22, 2000), Sandusky C.P. Case No. 99CV685, unreported; *Kasson v. Goodman* (Sept. 25, 2001), Lucas C.P. Case No. CA00-1682, unreported (exclusion not applicable because plaintiff was "insured," not "named insured"); *Headley v. Grange Guardian Ins. Co.* (June 18, 2001), Mahoning C.P. Case No. 00-CV-1153, unreported (same); *Mayle v. Gimroth* (Feb. 5, 2002), Stark C.P. Case No. 2001CV00084, unreported. Finally, the Court noted that Travelers failed to provide any evidence regarding the date on which it first issued the policy, such that the Court could not determine if the two-year guarantee period set forth in *Wolfe v. Wolfe* (2000), 88 Ohio St. 3d 246 began before or after H.B.261's enactment.

The Court next determined that Plaintiff was entitled to UIM coverage under Travelers' commercial excess policy "to the extent that Plaintiff's damages implicate the excess policy." With respect to Travelers' commercial general liability policy, however, the Court determined that Plaintiff was not an insured, because the policy clearly stated that if the individual who is injured is an employee, that person must be in the course and scope of employment for Cleveland Track to qualify as an insured.

As a final note, the Court rejected Travelers' "late notice" arguments. Here, the accident occurred on March 27, 1998 and Travelers received notice in January of 2001. The Court reasoned that (1) notice may be excused where legal precedent appears to excuse a claim (*citing West Am. Ins. Co. v. Hardin* (1989), 59 Ohio App. 3d 71), (2) the failure to notify the UM/UIM carrier of a settlement with the tortfeasor does not eliminate coverage where the UM/UIM claim was not legally recognized at the time of the settlement (*citing Oakar v. Farmers Ins. of Columbus* (April 17, 1997), Cuy. App. No. 70726, unreported), and (3) even if Plaintiff failed to provide "prompt" notice, actual prejudice must be shown in order to preclude UM/UIM coverage on that basis. While prejudice may be presumed in certain cases, Plaintiff demonstrated that the insurers' subrogation rights were not compromised and that Travelers was able to fully participate in the discovery process and control the litigation.

Editor's Note: Only two of the twelve appellate districts have considered the application of *Scott-Pontzer* to insurance policies issued to political subdivisions. *See Mizen v. Utica* (Jan. 17, 2002), Cuy. App. No. 79554, unreported, and *Allen v. Johnson* (May 22, 2002), 2002 Ohio App. LEXIS 2456, Wayne App. Nos. 01CA0046 & 01CA0047, unreported. Both of those courts have held that *Scott-Pontzer* applies in this context. For a contrary result, *see Nationwide Agribusiness v. Roshong* (July 9, 2002), 2002 U.S. App. LEXIS 13962, 6th Cir. App. No. 01-4009, unreported (2-1 decision holding that school districts do not have authority to obtain UM/UIM coverage, such that *Scott-Pontzer* is not applicable).

***Carper v. Valley Forge Ins. Co.* (S.D. Ohio March 20, 2002), U.S. Dst. Ct. Case No. C-1-01-281, unreported.**

On August 7, 2000, Juanita Cox died in a motor vehicle collision in South Dakota while riding as a passenger on a motorcycle driven by her boyfriend, Daniel Plavsic. The accident was allegedly caused by the driver of another motorcycle, Jackie Ridinger, when he attempted to make an illegal left hand turn directly in front of Plavsic's motorcycle. Ridinger was cited by the South Dakota Highway Patrol and was uninsured at the time of the accident. Plavsic was insured through Allstate with UM/UIM limits of $35,000. Allstate tendered its limits.

At the time of the accident, decedent was an Ohio resident and was employed by an Ohio corporation, Ambulatory Medical Care, Inc. ("AMB"), which was insured by (1) a commercial liability policy issued by Valley Forge Insurance Company("Valley Forge") with UM/UIM limits of $1 Million, and (2) a business account package policy and umbrella policy issued by Continental Casualty Company ("Continental") with liability coverage for owned and non-owned vehicles in the amount of $1 Million and additional umbrella coverage limits of $4 Million.

Plaintiff was appointed Administratrix of decedent's estate and, on May 8, 2001, filed suit for UIM coverage under the foregoing policies. Plaintiff and Defendants filed cross-motions for summary judgment.

Valley Forge originally issued its policy on May 1, 1997. This policy defined "Who Is An Insured" in a substantially similar manner as the definition at issue in *Scott-Pontzer*. On May 1, 2000, in response to *Scott-Pontzer*, Valley Forge issued a new policy in which it modified the definition of "insured." Plaintiff argued that the terms set forth in the May 1, 1997 policy controlled, because *Wolfe v. Wolfe* (2000), 88 Ohio St. 3d 246 holds that insurance policies have a 2 year guarantee period in which they may not be modified or canceled. Thus, since Valley Forge's policy was renewed on May 1, 1999 and could not be modified again until May 1, 2001, Plaintiff argued that Valley Forge's attempted modification on May 1, 2000 was ineffective. The Court agreed with Plaintiff and held that R.C. §3937.31, as interpreted by the Ohio Supreme Court in *Wolfe*, applies to commercial automobile insurance policies issued to corporations. The Court noted that R.C. §1.59 provides that "[a]s used in any statute, unless another definition is provided in such statute...(C)'Person' includes an individual, *corporation*, business trust, estate, trust, partnership and association." Moreover, Valley Forge failed to provide the Court with any other definition of "person" which would render this statute inoperative. The Court held that its analysis was supported by other provisions of the Ohio Revised Code which specifically deal with commercial entities. For example, R.C. §3937.25 provides for cancellation of commercial property insurance, commercial fire insurance, or commercial casualty insurance "other than fidelity or surety bonds *and automobile insurance as defined in section 3937.30 of the Revised Code*." This same exception is applied consistently in sections 3937.25-2927.27 which apply to commercial entities. Furthermore, §§3937.30-3937.39 is collectively entitled "Cancellation and Non-Renewal of Automobile Insurance." If R.C. §3937.30 was not intended to include automobile liability insurance policies issued to commercial entities, there would be no reason to specifically address automobile insurance policies and exempt them from sections 3937.25 through 3937.27. Thus, the Court agreed with Plaintiff that the May 1, 1997 pre-H.B. 261 policy governed the parties' rights.

Despite the applicability of the May 1997 policy, Valley Forge argued that its 1997 policy effectively limited UM/UIM coverage to accidents involving only those persons set forth in the schedule entitled "Drive Other Car Coverage-Broadened Coverage for Named Individuals." Because this schedule identified two individuals as insureds, Valley Forge argued that, unlike the policy at issue in *Scott-Pontzer*, its policy extended coverage to some individuals and Plaintiff was therefore not an insured. The Court disagreed, noting that the policy merely *broadens* coverage for the listed individuals and that the broadened coverage endorsement merely *adds to*, but does not modify, the definition of "Who Is An Insured."

The Court next analyzed whether decedent was an insured under Continental's policy. On May 1, 2000, Continental issued its policy to decedent's employer, and the policy provided automobile liability coverage for hired and non-owned autos in the amount of $1 Million and umbrella coverage in the amount of $4 Million. UM/UIM coverage was deleted from the policy. Plaintiff argued that, pursuant to *Selander v. Erie Insurance* (1999), 85 Ohio St. 3d 541, Continental was required to

provide UM/UIM coverage in its policy. Continental countered by arguing that *Selander* was decided based on a former version of R.C. §3937.18, and that its policy was governed by amended R.C. §3937.18(L). More specifically, Continental argued that its policy failed to meet the definition of an "automobile liability or motor vehicle policy of insurance" as defined by the amended version of R.C. §3937.18(L) since no automobiles were "specifically identified" in its policy. In support of its argument, Continental relied on *Jump v. Nationwide Mut. Ins. Co.* (Nov. 2, 2001), 2001 Ohio App. LEXIS 4850, Montgomery App. No. 18880, unreported, in which the court held that R.C. §3937.18 was inapplicable to a similar insurance policy covering only hired and non-owned autos and no specifically identified autos. In rejecting Continental's arguments and instead ruling in Plaintiff's favor, the Court held and/or observed:

> Plaintiff urges this Court not to apply the *Jump* case. According to Plaintiff, the reasoning in *Jump* is flawed and conflicts with a decision from the same appellate district rendered on October 5, 2002. *Shropshire v.Progressive Insurance Co.* (Oct. 5, 2001), Montgomery App. Nos. 18803 & 18814, unreported. Plaintiff directs the Court to the admonishment by the Ohio Supreme Court that Ohio Rev. Code §3937.18 is a statute designed to protect Ohio consumers and that it must be construed liberally by Ohio courts. *Gyori v. Johnston Coca-Cola Bottling Group, Inc.* (1996), 76 Ohio St.3d 565, 567.
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> Plaintiff also directs this Court to a decision rendered by the Lake County Court of Common Pleas in *Smith v. Cincinnati Insurance Co.* (May 24, 2001), Lake App. No. 00CV000916, unreported. The Court in *Smith* was faced squarely with the issue presented in this policy. *Id.* The policy in question covered non-owned and hired vehicles. *Id.* In interpreting the meaning of the word "specifically" as used in Ohio Rev. Code §3937.18(L), the court attempted to give effect to the intent of

the legislature. The court utilized the definition of "specific" as "constituting or falling into a specifiable category." *Id*. The Court held that while the policy in question clearly did not "specify makes and models of automobiles to be insured, it [did] specify the class of motor vehicles to be insured as "non-owned" or "hired" autos. Further, said policy [did] serve as proof of financial responsibility as it...respond[ed] in damages for liability on account of accidents arising out of the ownership, maintenance, or use of "non-owned" or "hired autos." *Id*. Therefore, the Court concluded that the policy in question was an "automobile liability policy of insurance" pursuant to Ohio Rev. Code §3937.18(A). *Id*.

The Court agrees with the analysis employed in the *Smith* opinion. This question appears to be unsettled under Ohio law. Therefore, the Court's task in such a situation is to predict how the issue will ultimately be resolved. In performing this task, the Court is mindful that the Supreme Court of Ohio has gone to great lengths to ensure the broadest possible coverage against accidents caused by uninsured or underinsured motorists. *See*, *Faruque v. Provident Life & Acc. Ins. Co.* (1987), 31 Ohio St.3d 34.

* * *

The Ohio Supreme Court has continuously instructed the lower courts to interpret insurance policies broadly to effect the legislative intent of protecting persons who are injured, not vehicles. *See Scott-Pontzer* at 664, referencing *Martin v. Midwestern Group Ins. Co.* (1994), 70 Ohio St.3d 478. The Court agrees with the court in the *Smith* case, that the words "specifically identified," as used in Ohio Rev. Code §3937.18(L) are ambiguous, but appear to be used to modify operators or owners of vehicles, not to impose an affirmative requirement. Regardless of the semantics of this provision in question, however, the Court concludes that a liberal construction of the term would require that specific categories of vehicle must meet the requirements imposed. Plaintiff is quite correct in asserting that in this context, there is simply no way to further specify which vehicles are covered in the policy. There is no way for a company to know in advance every or even any particular vehicle which will be used in the course or its business or otherwise at the time the policy is drafted. Finally, given the obvious legislative intent to protect as many insureds as possible, as well as the expansive language used in Ohio Rev. Code §3937.18(A), the Court concludes that this policy meets the definition of an automobile liability or motor vehicle liability policy , as defined in Ohio Rev. Code §3937.18(L).

Thus, the Court concluded that Continental's policy qualified as a "motor vehicle liability policy of insurance" under R.C. §3937.18(L). Because Continental failed to provide UM/UIM coverage with its policy, the Court held that such coverage was imposed by law. In addition, the Court determined that Plaintiff was insured under Continental's policy because the policy contained the ambiguous word "you." Finally, the Court held that Continental's umbrella policy qualified as a motor vehicle liability policy of insurance under R.C. §3937.18(L)(2), that Plaintiffs qualified as insureds thereunder, and that any language in the umbrella policy restricting insurance coverage was intended to apply solely to the liability coverage and not to imposed by law UM/UIM coverage.

Editor's Note: For additional cases supporting the argument that *Wolfe* applies to commercial insurance policies, *see Selander v. Eire Ins. Group* (1999), 85 Ohio St.3d 541, 544; *Shropshire v. Progressive Ins. Co.* (October 5, 2001), 2001 Ohio App. Lexis 4493, Montgomery Ct. App., unreported; *Knox v. Travelers Ins. Co.* (November 21, 2001), Franklin C.P. Case No. 00CVC-12-11264, unreported; *Kasson v. Goodman* (September 25, 2001), Lucas C.P. Case No. CI 00-1682, unre-

ported; *Lescher v. Auto Owners Mutual Ins. Co.* (September 19, 2000), Erie C.P. Case No. 97CV024, unreported; *Miller v. The Hartford* (June 14, 2001), Lake C.P. Case No. 00CV001234, unreported; *Rimel v. Chubb* (October 31, 2000), Stark C.P. Case No. 1999CV02413, unreported. In addition, for another recent case holding that neither exclusions, nor conditions from the liability portion of a policy can be applied to UM/UIM coverage which is imposed as a matter of law, *see Rohr v. Cincinnati Ins. Co.* (March 28, 2002), 2002 Ohio App. LEXIS 1595, Stark App. No. 2001CA00237, unreported.

***Howard-Jahi v. Cincinnati Ins. Co.* (May 14, 2002), Cuyahoga C.P. No. 440319, unreported.**

On August 15, 1999, a minor Plaintiff was seriously injured while riding as a passenger in a 1998 Ford Explorer operated by his mother, Nicole Howard-Jahi. At the time of the accident, Plaintiff's mother was insured by Allstate with liability limits of $12,500. Plaintiff's father was employed by the AIDS Task Force of Greater Cleveland Inc., which was insured under a business auto policy issued by Cincinnati Insurance Company ("Cincinnati"). The Cincinnati policy had a policy term of February 17, 1999 to February 17, 2000 and contained UM/UIM limits of $1 Million Dollars.

Plaintiff settled with Allstate in exchange for the tortfeasor's (i.e., his mother's) state minimum policy limits, and a release was executed in favor of Nicole Howard-Jahi and Allstate without notice to or consent by Cincinnati. Cincinnati was first notified of Plaintiff's claim on March 13, 2001, and on May 29, 2001, suit was filed. In its motion for summary judgment, Cincinnati argued that Plaintiff was not entitled to UIM benefits because (1) he is not legally entitled to recover from the tortfeasor, (2) he prejudiced Cincinnati's subrogation rights, and (3) he materially breached the contract by failing to abide with the notice provisions of the policy.

After determining that Plaintiff was an insured under Cincinnati's policy on the authority of *Scott-Pontzer* and *Ezawa*, the trial court rejected Cincinnati's "legally entitled to recover" argument. Citing to *Ohayon v. Safeco Ins. Co. of Ill.* (2001), 91 Ohio St. 3d 474, the court reiterated the proposition that the phrase "legally entitled to recover" merely means that the insured must be able to prove the elements of his or her claim against the tortfeasor. Here, according to the trial court, there was no dispute genuine that Plaintiff could prove the elements of his claim against the tortfeasor. The court also rejected Defendant's related argument that it was entitled to the same defenses as the tortfeasor, including the defense of a signed release. According to the court, "the executed release is a separate contract entered into between the Plaintiff and the tortfeasor and her insurer, [and] Ohio statutory and case law has yet to extend the benefit of an executed release to a UM/UIM insurer who was not a party to the release."

The trial court also rejected Cincinnati's argument that R.C. Section 3937.18 somehow confers an automatic right of subrogation upon insurers. Instead, the court held that the insurer's right to subrogation is dependent upon the language of the policy. Here, the policy contained conflicting provisions relative to subrogation. On the one hand, Section IV of the Business Auto Coverage portion of the policy provides that:

> 5. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US
> If any person or organization to or for whom we make payment under this Coverage Form has rights to recover damages from another, those rights are transferred to us. That person or organization must do everything necessary to secure our rights and must do nothing after "accident" or "loss" to impair them.

At Section C.1 of the "Ohio Uninsured Motorist Coverage - Bodily Injury" portion of the policy, however, the policy impliedly permits an insured to settle a claim without Cincinnati's consent. This section states:

> C. Exclusions
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> This insurance does not apply to:
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> 1. Any claim settled without our consent. However, this exclusion does not apply to a settlement made with the insurer of

> a vehicle described in Paragraph F.3.b of the definition of "uninsured motor vehicle."

Paragraph F.3.b defines uninsured motor vehicle in pertinent part as "a land motor vehicle or trailer...which is an underinsured motor vehicle...." Because these provisions are ambiguous and conflicting when read in conjunction with one another, the trial court concluded that the alleged subrogation provision is unenforceable as ambiguous.

Finally, the court rejected Cincinnati's argument that Plaintiff is barred from recovery because he materially breached the insurance policy by failing to provide notice to Cincinnati of any settlement or claim. While acknowledging that the 2nd District in *Luckenbill v. Midwestern Indemn. Co.* (June 1, 2001), 2nd Dst. App. No. 01-CA-1536, unreported, held that the plaintiff therein was barred from UIM coverage for failing to comply with the notice provision found in the policy as a condition for coverage, the trial court concluded that *Luckenbill's* application to this case would be inappropriate. Here, Cincinnati's notice provision was deemed to be ambiguous and confusing for the same reason that Cincinnati's alleged subrogation provision was deemed to be ambiguous and unenforceable. The court observed that Cincinnati's notice provision is contradicted by Section C.1 of the policy (*see, supra*), such that an insured may reasonably conclude that he or she does not need to provide notice as long as they have exhausted the tortfeasor's policy limits. According to the court, "the existence of the two provisions, without specific instructions as to which one governs or trumps the other, creates a substantial ambiguity in the notice provision of the policy."

Editor's Note: *Accord Howard v. State Auto Mut. Ins. Co.* (March 14, 2000), 2000 Ohio App. LEXIS 948, Franklin App. No. 99AP-577, unreported; *But see Withelm v. Cincinnati Ins. Co.* (June 20, 2002), 2002 Ohio App. LEXIS 3083, Franklin App. No. 01AP-1286, unreported, and *Alatsis v. Nationwide Ins. Enter.* (June 11, 2002), 2002 Ohio App. LEXIS 2868, Franklin App. No. 01AP-1038, unreported (distinguishing *Howard* based on additional policy language requiring insured to do nothing after loss to prejudice insurer's rights).

***Taylor v. St. Paul Fire & Marine Insurance Company* (N.D. Ohio 2002), Case No. 1:00CV2397**

Editor's Note: This opinion, authored by Judge Ann Aldrich of the Northern District Ohio, contains a great analysis as to why claims that were settled prior to *Scott-Pontzer* are still viable despite the alleged destruction of the insurers' subrogation rights. Moreover, this opinion addresses many of the very issues that each of us are facing every day in the realm of so-called *Scott-Pontzer* litigation. It is strongly recommended that you read this opinion in its entirety.

On August 24, 1995, Tasha Taylor was a passenger in a motor vehicle traveling westbound on I-90 in Sheridan, New York, when the driver fell asleep at the wheel. Taylor suffered severe injuries, including brain injuries and coma, and died on August 10, 1998 as a result of her injuries. At the time of the accident, (1) Tasha Taylor, Edna Taylor (mother), Michael Taylor (brother) and Ernesha Walker (sister) resided together in Cleveland, Ohio, (2) Edna Taylor was an employee of University Hospitals Health System ("University Hospitals"), and (3) University Hospitals was insured by Hartford for automobile liability and by St. Paul under a general liability policy and an umbrella excess liability policy.

Prior to the *Scott-Pontzer* decision, the Estate of Tasha Taylor brought suit against the tortfeasor and settled its claims for $600,000 on November 25, 1998. On August 28, 2000, Plaintiffs filed suit in the Cuyahoga County Court of Common Pleas against St. Paul and Hartford, alleging that they were insureds under the Defendants' policies and that they were entitled to recover under those policies for the lost society, services, affection, etc. of Tasha Taylor, and because of Defendants' bad faith. Defendants removed the case to federal court on September 19, 2000.

In this opinion, the court initially addresses the issue of whether a *Scott-Pontzer* case constitutes a direct action on a policy of liability insurance under 28 U.S.C. §1332(c)(1). Noting that this issue "has created substantial uncertainty in this jurisdiction," the court nevertheless held that *Scott-Pontzer* cases do not constitute direct actions on a policy of liability insurance, such that diversity is not destroyed under section 1332(c)(1). [Note: In so holding, the court cites to a lengthy list of other courts that have disagreed with the foregoing analysis and have held that jurisdiction is lacking].

The court's opinion next addresses Plaintiffs' status as insureds under St. Paul's umbrella policy. The umbrella policy lists only University Hospitals as the named insured. Under the heading "PERSONS OR ENTITIES INSURED," however, the policy extends coverage "subject to the terms and conditions of this Policy, [to] any additional insured included in the underlying insurance listed in Schedule A but only to the extent that insurance is provided to such additional insured thereunder." One of the policies listed on Schedule A of St. Paul's umbrella policy is the automobile liability policy issued by Hartford, and Hartford's policy defines "Who Is An Insured" to include "You" and "If you are an individual, any family member." In light of the foregoing, the court concluded that Edna Taylor is an insured under St. Paul's umbrella policy. The court further held that Michael Taylor, Tasha Taylor and Ernesha Walker were all insureds on the authority of *Ezawa v. Yashida Fire & Marine Ins. Co.* (1999), 715 N.E. 2d 1142. According to the court, "[t]hat Tasha and Michael Taylor were adult children at the time of the accident is irrelevant, because the Hartford policy defines "Family member" as "a person related to you by blood, marriage or adoption who is a resident of your household...." Here, the court determined that Michael Taylor, Tasha Taylor and Ernesha Walker were all insureds under St. Paul's umbrella policy based on their status as insureds under Hartford's policy. In so holding, the court rejected St. Paul's argument that the umbrella liability policy does not incorporate any of the UIM coverage provisions in the endorsement to the Hartford policy, but rather can only be read as incorporating additional insureds under the automobile *liability* coverage portion of Hartford's policy. According to the court, "St. Paul fails to point to any language in the policy that would support such a limitation. In support of its position, St. Paul relied on that portion of the *Scott-Pontzer* opinion in which the Ohio Supreme Court held that "[a]ny language in the ...umbrella policy restricting insurance coverage was intended to apply solely to excess liability coverage and not for purposes of underinsured motorist coverage." Regarding this aspect of the *Scott-Pontzer* decision, the court concluded that:

> The Ohio Supreme Court's analysis on this issue has little bearing on the question of who is an insured under the policy at issue, and, to the extent that it is relevant to that question at all, it militates in favor of coverage. In this portion of the *Scott-Pontzer* opinion, the Ohio Supreme Court made clear that insurers who fail to offer UIM coverage as required by Ohio law should not reap the benefits provided by exclusions and limitations that were bargained for without reference to UIM coverage.
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> Extensions of coverage to Edna Taylor's family is a byproduct of the fact that, by failing to live up to its statutory obligations, St. Paul also forfeited the opportunity to draft specific language limiting the scope of such coverage.

Because St. Paul failed to make an offer of UIM coverage with its policy, which it was required by statute to do, the court held that UIM coverage was provided by operation of law. Nevertheless, St. Paul contended that the Plaintiffs besides Tasha Taylor, none of whom suffered bodily injury, were not entitled to recovery under the policy. The court disagreed, citing to *Moore v. State Auto Mut. Ins. Co.* (2000), 723 N.E. 2d 97, in which the Ohio Supreme Court held that an insurer may not, consistent with the terms of R.C. 3937.18, limit recovery under a UIM policy to damages suffered as a result of bodily injuries. While St. Paul argued that *Moore* only applies where the policy at issue is itself an automobile liability policy, and not an umbrella excess liability policy with UIM coverage as a matter of law, the court rejected this argument, noting that "[n]othing in *Moore* supports this distinction...and St. Paul can point to no other case in support of its position....Under *Moore*, however, a bodily injury limitation *is* forbidden under Ohio law." Moreover, because Tasha Taylor was insured under the umbrella policy, which provides UIM coverage by operation of law, and because she suffered bodily injury and death as a result of the accident, her estate has certainly suffered recoverable damages. In addition, the court rejected St. Paul's argument that *Moore* has been legislatively overruled by S.B. 267, which changed the language "provided to persons insured under the policy for loss due to bodily injury or death suffered by such persons" to "offered to persons insured under the policy due to bodily injury or death suffered by such insureds." The court found this amendment to be unavailing for three reasons. First, in this

case an insured (i.e., Tasha Taylor) *did* suffer bodily injury for which another insured seeks to recover, and the amendment and historical note express no intent to overrule *Moore* in this type of situation. Second, even if the amendments did overrule *Moore*, it merely *permits* an insurer to limit UIM coverage to bodily injury and does not require that UIM coverage always limited in such a manner. Finally, the amendment was effective September 21, 2000, and the policy at issue became effective on July 1, 1995. *See Ross v. Farmers Ins. Group of Cos.* (1998), 695 N.E.2d 732, 736 ("when a contract for automobile insurance in entered into or renewed, the statutory law in effect at the time of contracting or renewal defines the scope of underinsured motorist coverage").

St. Paul also argued that, even if the umbrella policy affords UIM coverage to plaintiffs, they are barred from recovery because they failed to give timely notice and prejudiced St. Paul's subrogation rights and failed to satisfy a condition precedent to coverage. Consistent with *Scott-Pontzer* and *Myers v. Safeco Ins. Co.* (Feb. 18, 2000), 5th Dst App. No. 99CA00083, unreported, the court held that "the notice and subrogation provisions of the policy constitute "language...restricting insurance coverage" as that phrase was used by the *Scott-Pontzer* court, and...these provisions were therefore only intended to apply to liability coverage, not to UIM coverage, which arises by operation of law." The court also observed that the language of the subrogation provision itself "supports the conclusion that the clause was intended only to apply in the liability context." For example, in discussing the apportionment of "any amount recovered," the policy notes that the *insured* and insurer shall be reimbursed. This language, according to the court, "clearly contemplates payment of liability insurance and makes little sense in the context of UIM coverage."

Even if the court were to conclude that the reasoning of *Scott-Pontzer* applies solely to exclusions or limitations and not to conditions precedent, the court would still hold that Plaintiffs' suit was not barred by the notice and subrogation provisions, because the policy is ambiguous as to whether those provisions were intended to be exclusions/limitations or conditions precedent. Finally, the court held that Plaintiff did not violate the terms of the policy and that St. Paul has not been prejudiced in any way by Plaintiffs' actions. The policy's notice provisions require notice to be given to the insurer "as soon as practicable" with respect to an occurrence "which appears likely to involve this policy." In 1995, and even in 1998, the accident was not an occurrence that could have appeared likely to involve the policy. *See West Am. Ins. Co. v. Harden* (1989), 59 Ohio App. 3d 71, syllabus ("...delay in giving notice of an accident is excused while legal precedent appears to foreclose any claim"). Finally, the court held that St. Paul's subrogation provision, which requires that the insured "do nothing after loss to prejudice" its rights, was not violated. The court reasoned that this language suggests that an insured must not *purposefully* do something to prejudice subrogation rights. In accordance with *Martin v. Liberty Mut. Ins. Co.* (N.D. Ohio 2001), 187 F. Supp. 2d 896, the Court concluded that Plaintiffs could not have known about their cause of action before *Scott-Pontzer* was decided, that none of the Plaintiffs violated that provision, and that St. Paul could not demonstrate any prejudice.

Insurance Law - Cases of Interest From Around the State

***Amore v. Grange Insurance Co.* (May 1, 2002), Richland C.P. Case No. 00-441-D, unreported.**

On June 6, 1998, Plaintiffs Tom and Darlene Amore were rear-ended in a motor vehicle accident caused by Defendant Elizabeth Brennan ("Brennan"). Tom Amore was driving the vehicle and Darlene Amore owned the vehicle. At the time of the accident, the Amores were insured by Grange with liability and UM/UIM limits of $100,000, while Brennan only had liability limits of $50,000. Plaintiffs sought UIM benefits under their policy with Grange and under their employers' business auto policies. At the time of the accident, Darlene Amore was employed by Thompson Corporation, which was insured by Continental Insurance Company ("Continental") with a $1,000,000 single limit business auto policy. Moreover, Tom Amore was employed by Fuji Film America, Inc., which was insured by Tokio Marine & Fire Insurance Company ("Tokio") with a $1,000,000 single limit business auto policy.

In its motions for summary judgment, Continental and Tokio argued that Plaintiffs were not entitled to underinsured motorist coverage. Plaintiffs' UM/UIM carrier, Grange, argued that Plaintiffs were entitled to coverage under the policies issues by Continental and

Tokio, and that all three insurers should be required to pay in proportion to their total policy limits.

While conceding that Thompson Corporation has UIM coverage and that the same definition of "Who Is An Insured" that was involved in *Scott-Pontzer* was at issue here, Continental argued that the Amores were not entitled to UIM coverage because (1) Connecticut law applies, thus excluding the Amores as insureds, and (2) even if Ohio law applies, the Amores failed to provide it with prompt notice of the collision. The Richland County Court of Common Pleas rejected both of Continental's arguments. Regarding Continental's choice of law argument, the Court observed that "the insurance contract itself specifies Ohio law applies." Here, Continental issued an Ohio underinsured endorsement defining underinsured motor vehicle as "a land motor vehicle...for which the sum of all liability bonds...provides at least the amounts required by *the applicable law where a covered 'auto' is principally garaged*...." The Court noted that Thompson Corporation has its autos principally garaged in Ohio, such that its Ohio underinsured endorsement specifies that Ohio law applies. The Court further held that "even if the insurance contract did not itself specify Ohio law. . .a choice of law analysis would select Ohio law as the applicable law." Applying the factors set forth at Restatement 2d of Conflicts, Section 188, as mandated by *Ohayon v. Safeco Ins. Co. of Ill.* (2001), 91 Ohio St. 3d 474, the Court relied heavily on the fact that the location of the subject matter of the contract was in Ohio.

The Court also rejected Continental's late notice argument, observing that Plaintiffs provided notice less than two years after the collision and also made Continental a party to the action when it was originally filed on June 5, 2000. Here, according to Plaintiff Darlene Amore's uncontradicted affidavit, it took her until 18 months after the collision to learn the extent of her injuries and the amount of the tortfeasor's coverage. Moreover, Continental had an opportunity to conduct a defense and investigate the claim, and the tortfeasor was not released before Continental could make claims against him.

Tokio argued that Plaintiffs were not entitled to UIM coverage due to an endorsement styled "Drive Other Cars Coverage - Broadened Coverage for Named Individuals." According to the Court, "[a]ssuming this is in fact an exclusion rather than a broadening of coverage, it doesn't apply to underinsured coverage." Here, the endorsement specifically stated that it applied to "changes in liability coverages only."

Grange, as Plaintiffs' personal UM/UIM insurer, argued that the Continental and Tokio policies provide *primary* UIM coverage to Plaintiffs. Grange based its argument on the fact that the "other insurance" policies set forth in both insurers' policies state that they provide excess coverage "with respect to vehicles *you* do not own." Grange argued that the term "you" applies to the Named Insured and its employees, whereas Continental and Tokio argued that the term "you" only applies to the Named Insured. In rejecting Grange's argument, the Court cited to *Motorists Mut. Ins. Co. v. Lumberman's Mut. Ins. Co.* (1965), 1 Ohio St. 3d 105 for the proposition that "[a]s between insurance companies the rule of thumb is that insurance on the car is primary and insurance on the driver is excess." Here, Grange's policy insured the car, and the policies issued by Continental and Tokio insured the driver, such that only Grange's coverage was deemed to be primary.

***Cornett v. State Farm Mut. Ins. Co.* (July 12, 2002), 2002 Ohio App. LEXIS 3660, Montgomery App. No. 19103, unreported.** (Fraud claim may be actionable against insurer and its agent when agent advises insureds that they may stack UM/UIM coverages despite the existence of anti-stacking language in the insurer's policies).

The Cornetts purchased four separate auto insurance policies from State Farm. One of the policies' covered a 1995 Harley-Davidson motorcycle and included UM/UIM coverage in the amount of $100,000/$300,000. The other three policies covered the Cornetts' other three vehicles and contained UM/UIM limits of $50,000/$100,000 each. On March 3, 2000, while all four policies were in effect, Plaintiff Ronald Cornett was rear-ended while stopped at a red light on his motorcycle and sustained serious injuries. Plaintiffs settled with the tortfeasor in exchange for his liability limits of $25,000 and then brought suit against State Farm and its agent, Kenneth Whitfield. In their Complaint, Plaintiffs set forth claims for relief for (1) return of insurance premiums based on failure to disclose, (2) fraud, (3) negligence, (4) unjust enrichment and (5) punitive damages. Their claims were based in large part on their allegations that Whitfield "misrepresented to them...that [they] would ultimately be able to recover under the separate insur-

ance policies because they were made to pay separate premiums on said policies."

The trial court granted summary judgment in favor of Defendants on all of Plaintiffs' claims. The Second District Court of Appeals affirmed the trial court's judgment with respect to Plaintiffs' claims for (1) return of insurance premiums based on a failure to disclose, (2) negligence, and (3) unjust enrichment. However, the reviewing court reversed the trial court's ruling with respect to Plaintiffs' claims for fraud and punitive damages.

In analyzing Plaintiffs' claims for relief, the court of appeals focused on two aspects of Plaintiffs' UM/UIM coverage, to wit: (1) the other owned vehicle exclusion in each State Farm policy, and (2) the anti-stacking provision in each State Farm policy. Here, State Farm's other owned vehicle exclusion provided that "[t]here is no [UM/UIM] coverage...for bodily injury to an insured...while occupying or through being struck by a motor vehicle owned by you, your spouse, or any relative if it is not insured for this coverage under this policy." In addition, the anti-stacking language in State Farm's policies provided that "[i]f two or more motor vehicle liability policies issued by us to you providing uninsured motor vehicle coverage apply to the same accident, the total limits of liability under all such policies shall not exceed that of the policy with the highest limit of liability." As the reviewing court observed,

> the other-owned vehicle exclusion requires the insured to have uninsured/underinsured motorist coverage for the vehicle occupied by the insured at the time of the accident and prevents the insured from recovering under the uninsured/underinsured motorist coverage pertaining to an insurance policy for some other vehicle. The anti-stacking provision prevents the insured from recovering uninsured/underinsured motorist coverage benefits under more than one policy for one accident.

In light of the foregoing, the court of appeals affirmed with respect to Plaintiffs' claims for (1) return of insurance premiums based on a failure to disclose, (2) negligence, and (3) unjust enrichment. Regarding Plaintiffs' claim for return of insurance premiums, the court concluded that "[b]ecause each policy excluded UM/UIM coverage for the other three vehicles, each policy was necessary to obtain UM/UIM coverage with respect to the particular vehicle covered by that policy." Regarding their negligence claim, Plaintiffs alleged that Whitfield had a duty of good faith and fair dealing to advise them that stacking insurance policies is not permitted under Ohio law, and that "imposing premiums for uninsured/underinsured motorists coverage Defendants had no intention of providing was a breach of said duty of good faith and fair dealing." The court rejected this argument, noting that the Cornetts did, in fact, receive separate and distinct benefits from each policy, because each policy provided UM/UIM for injuries sustained by the Cornetts while occupying the vehicle that was the subject of each particular policy. In addition, since the policies contained clear anti-stacking language, the court determined that State Farm had no duty to advise the Cornetts that these provisions are permitted by law. Regarding their unjust enrichment claim, Plaintiffs alleged that "paying separate insurance premiums for uninsured/underinsured coverage, which defendant State Farm had no intention of paying, unjustly enriched defendant State Farm." The court rejected this argument and held that because of the other-owned vehicle exclusion, the Cornetts received separate UM/UIM coverages as a result of each premium paid, such that the trial court did not err in rendering summary judgment on this claim.

Despite the foregoing, the court of appeals reversed the trial court's ruling with respect to Plaintiffs' fraud and punitive damages claims. The court observed and/or held:

> ...the Cornetts assert that Whitfield, State Farm's agent, misrepresented to them that they would "be able to recover under the separate insurance policies."...Although somewhat inartfully stated, the implication...is that Whitfield told the Cornetts that they would obtain multiple coverages, notwithstanding the existence of the anti-stacking provisions. State Farm and Whitfield have not rebutted this allegation with any averments or other evidentiary material consistent with Civ. R. 56. Because the concepts of stacking

> and anti-stacking of insurance coverages are esoteric, we conclude that a consumer might reasonably rely upon a representation, by an insurer's agent, that uninsured/underinsured motorist coverages in multiple policies of automobile insurance will be cumulative - that is, that the consumer may obtain benefits under more than one policy - even though there are anti-stacking provisions in each policy. When an insurance agent knows that the customer is relying upon his expertise, the agent may have a duty to exercise reasonable care in advising the customer. (Citations omitted).

As such, the court of appeals held that the trial court erred in granting summary judgment to State Farm on Plaintiffs' fraud claim, as well as their punitive damages claim, which the court characterized as "derivative of the fraud claim."

***Edstrom v. Universal Underwriters Ins. Co.* (June 27, 2002), 2002 Ohio App. LEXIS 3318, Franklin App. No. 01AP-1009, unreported** (holding that *Linko* survives H.B. 261)

On February 6, 2002, Plaintiff was injured as a passenger in a vehicle owned by Honda East, insured by Universal Underwriters and operated by Theodore Edstrom, an employee of Honda East. Universal's policy, which was issued on June 1, 1999, provided $500,000 in liability coverage. In connection with this policy, Honda East's President had previously selected $500,000 in UM/UIM coverage for designated individuals and $12,500 for all other persons. In the trial court, Plaintiff sought a declaration that she was entitled to $500,000 in UIM coverage, because there had not been a valid offer and rejection of such coverage. More specifically, Plaintiff claimed that since Universal's offer failed to contain premium information, it was an invalid offer under the requirements set forth by the Ohio Supreme Court in *Linko v. Indemn. Ins. Co. of N. Am.* (2000), 90 Ohio St. 3d 445. In response, Universal argued that H.B. 261's amendments to R.C. 3937.18 controlled and established a *presumption* that a valid offer of UM/UIM coverage was made. The trial court held that *Linko* did not apply since that case was dealt with a prior version of R.C. 3937.18. The court also found that Plaintiff failed to present any evidence to rebut the presumption that a legally sufficient offer was made.

The Franklin County Court of Appeals reversed, holding that the *Linko* requirements survive H.B. 261, and that Plaintiff presented sufficient evidence to rebut the presumption set forth in H.B. 261's amendments to R.C. 3937.18. More specifically, Plaintiff demonstrated that Universal's offer did not contain premium information. Because the rebuttable presumption of a valid offer was met with countervailing evidence, the reviewing court held that the presumption "fails and serves no further evidentiary purpose." Citing to *Pillo v. Stricklin* (2001), Stark app. No. 2001CA00204, unreported, the court also held that H.B. 261 does not eliminate the requirements of a valid offer as set forth in *Linko*. Because Universal's offer was legally inadequate under *Linko*, the Court concluded that UIM coverage arises by operation of law in an amount equal to the liability coverage of $500,000.

Editor's Note: For additional cases holding that the *Linko* requirements survive H.B. 261 policies, *see also Barr v. Hernandez* (June 13, 2002), Stark C.P. Case No. 2001CV01061, unreported (applying *Linko* requirements to both an invalid rejection of UM/UIM coverage and an invalid reduction of UM/UIM coverage); *Shindollar v. Erie Ins. Co.* (June 14, 2002), 2002 Ohio App. LEXIS 2956, Auglaize App. No. 2-01-35, unreported (holding that pre-H.B. 261 version of R.C. 3937.18 applies in light of 2 year guarantee period per *Wolfe v. Wolfe* (2000), 88 Ohio St. 3d 246, but also noting that there is continued vitality to the *Linko* requirements post-H.B. 261; also holding that extrinsic evidence of father's knowledge and experience with regard to insurance was inadmissible to establish the adequacy of insurer's offer of UM/UIM coverage or that such coverage was knowingly and expressly waived); *Pillo v. Stricklin* (Dec. 31, 2001), 2001 Ohio App. LEXIS 6021, unreported; *Minor v. Nichols* (June 25, 2002), Jackson App. No. 01CA14, unreported; *Roper v. State Auto Mut. Ins. Co.* (June 28, 2002), Hamilton App. No. C-010117, unreported; *Raymond v. Sentry Ins.* (March 8, 2002), Lucas App. No. L-01-1357, unreported. *See also Rohr v. Cincinnati Ins. Co.* (March 28, 2002), 2002 Ohio App. LEXIS 1595, Stark App. No. 2001CA00237, unreported (cited to in *Barr* and applying *Linko* to an attempted *reduction* of UIM coverage in a pre-H.B. 261 case); *Backie v. Cash* (April 10, 2002), Stark C.P. No. 2000CV02366, unreported (holding that *Linko* survives H.B. 261, that *Wolfe v. Wolfe* 2 year guarantee period applies to commercial policies and that no deductible applies to UIM coverage that is imposed by law).

But see Purvis v. Cincinnati Ins. Co. (April 12, 2002), Greene App. No. 2001-CA-104, unreported (*Linko* requirements not applicable); *Martinez v. Travelers Ins. Co.* (April 24, 2002), Summit App. No. 20796, unreported (same).

***Heath v. CNA* (July 29, 2002), Summit C.P. Case No. CV01-06-2992, unreported.**

On August 26, 2002, Robert Heath was injured in an automobile collision caused by one Robert Ward. Plaintiff sued and obtained a general verdict, reduced to judgment, for $368,500.00. The tortfeasor's liability carrier paid its policy limits of $12,500, and Plaintiff's UIM carrier paid $87,500, such that there remained an unsatisfied judgment in the amount of $268,500.00.

At the time of the accident, Plaintiff was employed by Nestle Frozen Food Company ("Nestle"), which was insured under a commercial auto policy and a commercial general liability policy issued by Fidelity & Casualty Company of New York ("Fidelity"). Fidelity's policy was a "fronting policy" with a matching deductible and policy limit. In its motion for summary judgment, Plaintiff argued that he was an insured entitled to coverage under Fidelity's policy pursuant to *Scott-Pontzer*. In its cross-motion for summary judgment, Fidelity argued that (1) Nestle was self-insured in the practical sense, such that it was not required to comply with R.C. 3937.18, (2) because the policy names real persons, the ambiguity found in *Scott-Pontzer* does not exist and (3) its policy is not governed by the law of *Scott-Pontzer* based on specific policy limitations.

The trial court rejected all of the insurer's arguments and granted Plaintiff's motion for summary judgment. First, the trial court rejected Fidelity's argument that Nestle was "self-insured in the practical sense." According to the court, "[t]here is no *controlling* case law recognizing a self-insured 'in a practical sense,' [and] R.C. 3937.18 only notes exceptions to coverage for self-insurers who comply with statutory requirements and for principals with a financial responsibility bond." Thus, the court held that Nestle was not self-insured and that UM/UIM coverage was imposed by operation of law.

Although the court acknowledged that (1) Fidelity's liability policy listed real persons, (2) no covered auto was involved in the accident, and (3) Plaintiff did not provide notice until four years after the accident, the court concluded that "the law of Ohio establishes that with respect to this policy, UM/UIM coverage arises as a matter of law [such that] any language of limitation within the policy does not restrict *underinsured* motorist coverage."

***Hornyak v. CNA Commercial Insurance* (June 6, 2002) Lucas C.P. No. 01-2133, unreported.**

On November 20, 1999, David LaFountain was killed in a motor vehicle accident when his vehicle was struck head on by a vehicle being driven the wrong way on I-475. At the time of the accident, LaFountain was employed by Sylvester Material Company ("SMC"), which was insured by CNA. Hornyak was appointed Executrix of LaFountain's estate, and on March 29, 2000, she filed suit against CNA and several John Doe insurance companies. Pursuant to *Scott-Pontzer*, Plaintiff asserted claims against three policies or parts of policies issued to SMC by CNA (i.e., Business Auto policy, Commercial General Liability Part and Commercial Umbrella Coverage Part) even though LaFountain was not driving a company car or within the scope of his employment at the time of the accident. With respect to the Business Auto policy, Defendant argued that *Scott-Pontzer* was not applicable (1) because the policy listed a trust in addition to corporations as a named insured, and (2) because the policy contained a "Drive Other Car - Broadened Coverage for Named Individuals" endorsement which extended coverage to named individuals. Regarding the "trust" argument, the court concluded that a trust creates the same ambiguity as a corporation since a trust cannot occupy an automobile, suffer bodily injury or death, or operate a motor vehicle. Regarding the "broadened coverage" argument, Defendant argued that the provision of coverage to named individuals removes the ambiguity of *Scott-Pontzer* found in the word "you" in the "Who Is An Insured" provision. In support of its argument, Defendant relied on the cases of *Tilley v. American Family Ins. Co.* (2002), Williams App. No. WM-01-014, unreported and *Geren v. Westfield Ins. Co.* (2002), Lucas App. No. L-01-1398, unreported. Citing to numerous decisions to the contrary out of the Fifth District and other jurisdictions, the court likewise rejected this argument and distinguished the *Tilley* and *Geren* cases, noting that those cases involved named insureds who were specifically identified persons doing business as a *partnership*. Further, the policies at issue

in *Tilley* and *Geren* did not name any corporations as a named insured. Finally, because Defendant failed to offer UM/UIM coverage with the Business Auto policy, the court concluded that such coverage arose by operation of law.

Plaintiffs also argued that they were entitled to coverage as a matter of law under the Commercial Umbrella Plus Coverage Part of the policy. Attached to this policy was an endorsement, effective October 15, 1997, stating "EXCESS UNINSURED/UNDERINSURED MOTORISTS COVERAGE ENDORSEMENT. It is agreed that the Uninsured/Underinsured Motorists Exclusion in the policy is deleted and not replaced." Also attached to the policy was an undated Renewal Declaration stating that "HOWEVER, THERE IS NO UNINSURED/UNDERINSURED MOTORIST COVERAGE UNDER THIS POLICY. WE OFFERED THIS COVERAGE AND YOU REJECTED IT." The court noted that the first rejection occurred after H.B. 261's amendments to R.C. 3937.18, which provides that a signed rejection of UM/UIM coverage creates a presumption of a valid offer of UM/UIM coverage. Defendant contended that Plaintiff had no proof to rebut this presumption. In response, Plaintiff argued that the rejections did not contain all of the information required for a valid offer under *Linko v. Indemn. Ins. Co. of N. Am.* (2000), 90 Ohio St. 3d 445. Affirming the continued vitality of *Linko* in the context of post-H.B. 261 policies, the Court applied the *Linko* requirements and concluded that the presumption was rebutted based on the failure of Defendant's offer to comply with *Linko*. Here, there was no separate written offer in evidence. Moreover, the Court observed, in accordance with *Linko*, that extrinsic evidence regarding the offer is not admissible. Having determined that Plaintiff's employer did not validly reject UM/UIM coverage under *Linko* or R.C. 3937.18(C), the court held that UM/UIM coverage arose by operation of law. The court also concluded that LaFountain was an insured under the Commercial Umbrella policy. The Umbrella policy defines "Who is an Insured" as follows:

> 1. If you are designated in the Declarations as:
>
> * * *
>
> c. An organization other than a partnership or joint venture, you are an insured. Your executive officers and directors are insureds, but only with respect to their duties as your officers or directors.
>
> 2. Each of the following is also an insured:
>
> a. Your employees, other than your executive officers and directors, but only for acts within the scope of their employment by you.

The court agreed with Plaintiff that paragraph 1 contains the same ambiguous "you are an insured" addressed by the Supreme Court in *Scott-Pontzer*, such that "you" includes employees of the corporation. Defendant argued that even if LaFountain is considered an insured, he is excluded under section 2.a because he was not acting within the scope of his employment at the time of the accident. The court rejected this argument, concluding that the scope of employment exclusion is unenforceable when UIM coverage is imposed by operation of law. Citing to *Scott-Pontzer*, the court observed that "*any language* in the policy restricting insurance coverage was intended to apply only to liability coverage."

Finally, Plaintiff argued that UM/UIM coverage was available under the Commercial General Liability part of the policy. Although this part of the policy contained an exclusion stating that the insurance did not apply to "aircraft, auto or watercraft," the policy expressly states that the exclusion does not apply to "parking an auto on or on the ways next to premises you own or rent..." The court rejected Plaintiff's argument that coverage was available under this policy. The court concluded that this part of the policy did not qualify as a motor vehicle liability policy of insurance under the H.B. 261 version of R.C. 3937.18(L). *Compare Ramey v. Powers* (June 17, 2002), Scioto C.P. Case No. 01-CIC-091, unreported, summarized *infra* (commercial general liability policy that provides coverage for "parking an auto" and for certain "mobile equipment" is an automobile policy for purposes of R.C. 3937.18).

***Marshall v. ACE USA* (May 20, 2002), 2002 Ohio App. LEXIS 2429, Warren App. No. CA2001-09-083, unreported.**

On August 5, 1999, Bobby Marshall was killed when the motorcycle he was operating collided with a van driven by one Janet Kortum. Kortum had liability limits of $100,000. At the time of his death, Marshall was an employee of the Ingersoll-Rand Company ("Ingersoll"), which had an automobile liability insurance policy with ACE USA. This policy, which contained $1 Million Dollars in express UM/UIM coverage, purported to be a "matching deductible" or "fronting policy." In other words, the policy contained liability limits of $1 Million and a matching deductible of $1 Million. Moreover, the policy's terms required Ingersoll to promptly reimburse ACE for any sums paid on its behalf. Under its agreement with Ingersoll, ACE provided various services to Ingersoll, including the defense and adjustment of claims made against it, and the use of its licenses as an insurer.

Marshall's estate brought a declaratory judgment action against ACE, seeking a declaration that ACE was obligated to provide UIM coverage up to the $1 Million policy limits. Ingersoll was thereafter added as a Defendant. In Defendants' motion for summary judgment, they argued that Ingersoll's matching deductible or fronting policy with ACE was a form of self insurance, such that they were not required to comply with R.C. 3937.18. The trial court denied Defendants' motion for summary judgment and granted Plaintiffs' cross-motion for summary judgment, holding that Plaintiffs were entitled to UIM coverage up to the $1 Million limits set forth in the policy.

The Twelfth District Court of Appeals affirmed. In doing so, the reviewing court distinguished *Grange Mut. Case. Co. v. Refiners Transport & Terminal Corp.* (1986), 21 Ohio St. 3d 47 and *Lafferty v. Reliance Ins. Co.* (S.D. Ohio 2000), 109 F. Supp. 2d 837. In *Lafferty*, the employer *had rejected UM/UIM coverage,* and the plaintiff therein was attempting to have such coverage imposed by operation of law on the grounds that the insurer failed to comply with R.C. 3937.18. Here, by contrast, Ingersoll's policy with ACE *provided express UIM coverage.* According to the reviewing court:

> the fact that Ingersoll's policy with ACE did not have to comply with former R.C. 3937.18(A), since Ingersoll is, in effect, a self-insurer, is immaterial. While the Ohio Supreme Court's decision in *Scott-Pontzer* works a hardship on companies like Ingersoll, that is a risk they assumed by using a matching deductible or fronting policy to comply with this state's financial responsibility requirements.

***Mayle v. Gimroth* (Feb 5, 2002), Stark C.P. Case No. 2001CV00084, unreported.**

On November 19, 2000, Jesse Mayle was killed in an auto accident in an auto she owned and while not in the course and scope of her employment. At the time of the accident, she was an employee of Marquis Healthcare, Inc, which was listed as the sole Named Insured under a commercial auto liability policy issued by Citizens Insurance Company of Ohio ("Citizens"). The policy, which was issued after H.B. 261, provided $1 Million dollars in liability coverage. Citizens failed to offer UM/UIM coverage with the policy. In its motion for summary judgment, Citizen's argued that the H.B. 261 version of R.C. 3937.18 does not impose UM/UIM coverage by operation of law on the policy, because the policy does not satisfy the R.C. 3937.18(L)(1) definition of an "automobile liability or motor vehicle liability policy of insurance." The H.B. 261 version of R.C. 3937.18(L) defines "automobile liability or motor vehicle liability policy of insurance" as follows:

> Any policy of insurance that serves as proof of financial responsibility, as proof of financial responsibility is defined by division (K) of section 4509.01 of the Revised Code, for owners or operators of the motor vehicles specifically identified in the policy of insurance.

Here, Citizens argued that the policy did not satisfy the foregoing definition, because it did not "specifically identify" any motor vehicles. In this regard, Citizens relied on the Second District's holding in *Jump v. Nationwide Mut. Ins. Co.* (Nov. 2, 2001), 2001 Ohio App. LEXIS 4850, Montgomery App. No. 18880, unreported, in which the Second District held that a post-H.B. 261 policy that offers coverage for "hired" and "non-owned" vehicles does not satisfy the definition of an automobile liability or motor vehicle liability policy of insurance.

In this case, the policy likewise provided coverage for "hired" and "nonowned" autos, yet the trial court refused to follow the Second District's holding in *Jump* and instead opted to follow the Tenth District's more recent opinion in *Davis v. State Farm Fire & Cas. Co.* (Dec. 18, 2001), Franklin App. No. 00AP-1458. In *Davis*, the Tenth District held that providing coverage for "hired" and "nonowned" autos meets the requirement of specifically identifying motor vehicles owned or operated by or rented or loaned to the insured. The Tenth District further opined that "we do not believe, by using the word 'specified,' that the legislature intended to require makes, models and serial numbers." In accordance with *Davis*, the trial court likewise held that it would "not construe the legislature's intent as requiring the impossible task of listing the make, model, and serial number of all insured employees' autos. . .the language stated above is sufficient to specifically identify the autos covered under the policy." Thus, the trial court held that R.C. 3937.18 imposes UIM coverage on the policy by operation of law. The trial court further concluded that decedent was operating a covered auto at the time of the accident and is insured under Citizen's policy in accordance with *Scott-Pontzer*.

Editor's Note: For additional cases following *Davis* and *Mayle*, *see Perkins v. Hill* (May 14, 2002), Lucas C.P. Case No. CI01-1425, unreported.

***Moening v. Western Reserve Mut. Cas. Co.* (May 24, 2002), Stark C.P. Case No. 2001CV01274.**

In October 2000, Plaintiff sustained serious injuries as a passenger on a motorcycle whose operator negligently caused a crash. The tortfeasor had $25,000 liability limits, such that he was an underinsured motorist. At the time of the crash, Plaintiff was an employee of a limited liability company called Momus Real Estate Holdings ("Momus"). Momus had a commercial policy of insurance in effect at the time of the accident with Western Reserve Insurance Company which listed Momus, Multiphase Development Company and Richard and Victoria Bauer as the Named Insureds. The Business Auto portion of the policy provided $500,000 limits for damages arising out of the ownership, maintenance or use of "hired" or "nonowned" autos. The policy did not contain UM/UIM coverage by its terms and there was not a valid offer and rejection of such coverage.

While concluding that the Commercial General Liability portion of the policy did not qualify as an "automobile liability or motor vehicle liability policy of insurance" under the requirements of R.C. 3937.18(L), the Court concluded that the Business Auto portion of the policy qualified as such a policy under R.C. 3937.18(L). First, the policy expressly provides proof that it responds in damages for liability arising out of the ownership, maintenance or use of a motor vehicle. In addition, following the rationale of *Smith v. Cincinnati Ins. Co.* (May 24, 2001), Lake C.P. Case No. 00CV000916, unreported and *Davis v. State Farm Fire & Cas. Co.* (Dec. 18, 2001), Franklin App. No. 00AP-1458, the Court concluded that the Policy's description of "hired" and "non-owned" vehicles meets the statutory requirement of "specifically identified" autos. In other words, the Court rejected the notion that autos would have to be specifically listed in the policy by make, model and serial number.

The policy defined Who Is An Insured to include "you for any covered 'auto.'" Following *Burkhart v. CNA* (Feb. 25, 2002), Stark App. No. 2001CV00265, the Court also concluded that the listing of individual named insureds (i.e., Richard & Victoria Bauer) did not resolve the ambiguity of the word "you" set forth in the policy. Defendant argued that Plaintiff was not insured because she was not in a covered auto at the time of the accident. The Court rejected this argument, holding that any language restricting the definition of insured to "any covered autos" does not apply to UIM coverage arising by operation of law. *Accord Hopkins v. Dyer* (5th Dst. 2002), Tusc. App.Nos. 2001AP080087 & 2001AP080088; *Butcher v. Lewis* (5th Dst. 2002), Stark App. No. 2001CA00219.

***Ramey v. Powers* (June 17, 2002), Scioto C.P. Case No. 01-CIC-091, unreported** (commercial general liability policy that provides coverage for "parking an auto" and for certain "mobile equipment" is an automobile policy for purposes of R.C. 3937.18).

On October 9, 1999, Plaintiff Patricia Ramey was seriously injured in an auto accident while a passenger in an auto owned and operated by her husband. On that date, Mr. Ramey's vehicle was rear-ended by a vehicle owned and operated by Joey Powers. At the time of the accident, Plaintiff was an employee of Jody's Family Restaurant, which was insured under a commercial general liability policy issued by Grange Mutual Casualty Com-

pany ("Grange"). The policy had been issued to Delores Brafford dba Jody's Family Restaurant with policy limits of $300,000 per occurrence. While the policy excluded coverage for bodily injury arising out of the use of an auto, an exception was set forth in the policy for "parking an auto on or on the ways next to, premises you own or rent, provided the 'auto' is not owned by or rented or loaned to you or the insured" and for "mobile equipment" such as farm machinery designed for use principally off public roads.

Relying on *Davidson v. Motorists Mut. Ins. Co.* (2001), 91 Ohio St. 3d 262 and *Lee-Lipestreu v. Chubb* (N.D. Ohio June 21, 2001), Case No. 1:00CV3238, Defendant argued that the foregoing policy exceptions did not convert the commercial general liability policy into a motor vehicle liability policy. The trial court rejected Defendant's arguments, holding that the "parking an auto" exception and "mobile equipment" provision qualify the commercial general liability policy as an automobile policy for purposes of R.C. 3937.18. In so holding, the court relied on *Phillips v. Acceptance Indemnity Ins. Co.* (N.D. Ohio November 6, 2001), Case No. 5:01CV0495 and *Burkhart v. CNA*.

Stacy v. Wausau Business Ins. Co. (June 22, 2002), 5th Dst. App. No. 2000AP010004, unreported (holding, in a case decided after *Davidson v. Motorists Mut. Ins. Co.* (2001), 91 Ohio St.3d 262, that a commercial general liability policy qualifies as a motor vehicle liability policy of insurance when coverage is specifically provided for on premises or between premises use of golf carts or tractors).

On April 2, 1997, Plaintiff was injured as a passenger in a motor vehicle accident caused by one George Briggs. Briggs was insured by Westfield with liability limits of $100,000 which were thereafter exhausted by way of settlement with Plaintiff. At the time of the accident, Plaintiff was acting within the course and scope of his employment with Tuscarawas County Educational Service Center ("TCESC"). TCESC was insured by Wausau Business Insurance Company ("Wausau") with liability limits of $2 Million per occurrence. Plaintiff filed suit against various insurers, including Wausau, and the trial court thereafter granted Wausau's motion for summary judgment on the basis that its policy was not an automobile liability policy of insurance under R.C. 3937.18. On appeal, Plaintiff-appellant argued that the trial court erred in holding that Wausau's commercial general liability policy did not provide "motor vehicle liability" coverage. The Fifth District Court of Appeals agreed and reversed. In support of its decision, the reviewing court relied on the proposition set forth in *Selander v. Erie Ins. Group* (1999), 85 Ohio St. 3d 541 that when the specific language in a policy provides for "motor vehicle liability" coverage, even in a narrowly restricted instance, the provisions of R.C. 3937.18 apply. The appellate court also noted that, since the policy was issued prior to H.B. 261's 1997 amendment to R.C. 3937.18, there was no controlling definition of what a "motor vehicle liability" policy is. While Wausau's policy provided specific exclusions for "any liability arising from the ownership, operation, maintenance or use of any owned or non-owned automobile," the policy lists a number of exceptions to that exclusion. The reviewing court noted that the policy specifically does provide coverage for "[o]n premises or between premises use of golf carts or tractors." The court went on to hold that, under R.C. 4511.01(B), tractors are motor vehicles, and that pursuant to 1990 Ohio Atty. Gen. Op. No. 90-043, golf carts are also "motor vehicles." These facts, coupled with the "on premises and between premises" language of the policy, led the 5th District to conclude that Wausau's policy is a "motor vehicle liability policy," such that UM/UIM coverage should have been offered. Since it was not, coverage was deemed to arise by operation of law.

Intentional Torts & Common Law Retaliatory Discharge

McKinley v. Standby Screw Machine Products Co. **(June 20, 2002), 2002 Ohio App. LEXIS 3124, Cuy. App. No. 80146, unreported.**

This action arose after an employee who filed a complaint with OSHA following an injury at work was subsequently terminated for alleged poor work performance. On the first day of his job, the plaintiff was told by his new supervisor that his predecessor had been electrocuted while working on electrical circuits. Plaintiff told the supervisor that the company was in violation of federal law which required a lockout/tagout system to protect employees from similar injuries. Some time later, the employee sustained injures from a similar electrical shock. When he returned to work, he again complained about the lack of a lockout/tagout procedure and also made a complaint to OSHA. Several months later he was terminated. Documents created after the termina-

tion alleged poor work performance. The plaintiff then filed a complaint against the employer, alleging claims of intentional employment tort and retaliatory discharge.

The trial court granted summary judgment to the employer, finding that the employee was unable to meet all of the requirements for a common law intentional employment tort and that a claim for retaliatory discharge under Ohio's Whistleblower Statute could not be asserted because the employee failed to comply with OSHA regulations.

Three issues were addressed on appeal. First, the court found that the employee could establish the second prong of the *Fyffe v. Jeno, Inc.* intentional tort test. The appellate court found that where an employer has failed to install a safety device that might have prevented an injury, courts may consider that fact in determining a motion for summary judgment. The court found then that the evidence was in conflict concerning whether the employer's refusal to implement the lockout/tagout procedure made the harm that the employee suffered a substantial certainty.

The appellate court, on the second issue, upheld the trial court's refusal to consider a statement made by an unnamed OSHA inspector which supported that the firing was related to the OSHA complaint, because unsigned and unsworn statements are not materials authorized by Civ. R. 56(C) for consideration on summary judgment.

Finally, the court, following *Pytlinski v. Brocar Products, Inc.* (2002), 94 Ohio St. 3d 77, held that retaliation against employees who file complaints with their employer regarding workplace safety contravenes public policy of Ohio irrespective of whether the complaints are filed with OSHA. Having determined that the employee had a cause of action for retaliatory discharge, the court then went on to find that there were triable issues of fact as to whether the employer's proffered reasons for the discharge were pretextual. Accordingly, the trial court judgment was reversed and the case was remanded for further proceedings.

Intentional Torts - Surviving Directed Verdict on 3rd Element of Intentional Tort Test

***Gibson v. Drainage Products, Inc.* (May 8, 2002), 95 Ohio St. 3d 171.**

The third element of the *Fyffe v. Jeno's, Inc.* intentional tort test can be established upon evidence that raises an inference that the employer, through actions or policies, required an employee to engage in the dangerous task.

This action arose out of a workplace accident whereby the plaintiff's decedent was sprayed in the face and neck with hot molten plastic when a pipe exploded during repairs to correct a leak. The plaintiff's decedent, who worked in another area of the plant, was in the area of the explosion as a result of a workplace policy that employees were to offer assistance to other employees once his/her assigned duties were completed. At trial, the court granted a motion for directed verdict on the basis that the plaintiff failed to establish, as required by the second element of the *Fyffe* test, that prior to the accident the appellee-employer knew of the existence of a dangerous process, procedure, equipment, or condition within its facility that was substantially certain to cause harm to the decedent or any other employee. The court of appeals affirmed on different grounds, focusing on the third element of the *Fyffe* test, which requires that the employee demonstrate that the employer, under such circumstances, and with such knowledge, acted to require the employee to continue to perform the dangerous task. The case was allowed on a discretionary appeal.

The Ohio Supreme Court held that for purposes of surviving a motion for directed verdict, it is not necessary for an employee to show that the employer expressly ordered the employee to engage in a dangerous task to establish the third element of the *Fyffe* intentional tort test. Instead, the third element of *Fyffe* can be satisfied by presenting evidence that raises an inference that the employer, through its actions and policies, required the employee to engage in that dangerous task. Regarding the degree of intent, the Court noted that *Fyffe* requires only that the employer possess knowledge of a dangerous condition within its business and knowledge that, if the employer exposes an employee to such dangerous condition, harm to the employee is substantially certain to occur. The employer can be liable for the consequences of its acts even though it never intended the

specific result. Accordingly, the Court held that the plaintiff-appellant had submitted sufficient evidence in regard to the third element of *Fyffe* to overcome a directed verdict because a jury could conclude that the decedent was in the area of the accident to offer assistance as expected pursuant to the terms of the employer's own policy.

Medical Malpractice - Limited Discoverability of Hospital Incident Reports

***Johnson v. University Hospitals* (March 28, 2002), 2002 Ohio App. LEXIS 1428, Cuy. App. No. 80117, unreported.**

This decision provides limited discovery of hospital incident reports where the incident is not properly described in the relevant patient's medical record pursuant to an in camera comparison of the incident reports and the medical record to determine if the incident itself is properly explained in the medical record.

This case arose as an appeal from an order of the Cuyahoga County Court of Common Pleas denying the hospital's motion for protective order regarding certain incident reports and ordering the hospital to produce the reports. The appellate court first found that the order denying the protective order was a final appealable order under R.C. 2505.02, as it granted a provisional remedy, disclosure would have conclusively determined the action with regard to the materials, and the hospital would have been denied a meaningful remedy by way of appeal after a final judgment once forced to disclose the reports.

The appellate court then went on to consider the discoverability of the incident reports. The court found that although the reports contained information from quality assurance committees that was subject to privilege under R.C. 2305.24, 2305.25, and 2305.251, pursuant to 2305.251, information otherwise available from original sources was not unavailable for discovery merely because it was presented in a quality assurance committee. The hospital had a duty under its policy manual to describe the incident in the relevant patient's medical record. Thus, the trial court should have determined whether the incident was properly described in the medical record; if it was not, then only that part of the incident report which described the events, not the entire report, was subject to disclosure.

Medical Malpractice - Primary Assumption of Risk in Narcotics Addiction Action

***Conrad-Hutsell v. Colturi, M.D.* (May 24, 2002), 2002 Ohio App. LEXIS 2740, Lucas App. No. L-01-1227, unreported.**

In the underlying action, a plaintiff patient alleged that her doctor negligently prescribed dangerous and addictive narcotic drugs and failed to recognize her addiction to them. The trial court entered judgment, granting a directed verdict on the basis of primary assumption of risk. The appellate court found that the plaintiff's classic drug addicted behavior did not automatically relieve the doctor from his duty to monitor her for signs of abuse or relieve him from liability for continuing to prescribe narcotics, nor could it be found as a matter of law that the patient voluntarily acquiesced to the risks involved with taking excessive medication insofar as addiction was a compulsive behavior.

In reviewing the trial court decision, the appellate court found that the doctor had certain common law and statutory duties he was required to follow when utilizing controlled substances and that the plaintiff-appellant established a prima facie case of medical malpractice. At issue was whether the case was barred by the doctrine of primary assumption of risk. According to the appellate court, to make such a finding, the trial court would have had to find that there was no risk created by the doctor's actions and that the risk of becoming addicted when taking narcotics was so inherent it could not be eliminated. The appellate court found that as there was evidence the doctor breached his statutory duties regarding utilization of controlled substances, reasonable minds could conclude differently regarding whether the doctor's actions created a risk of addiction. As addiction was a compulsive behavior, it could not be found that the plaintiff-appellant had voluntarily acquiesced to the risk involved with taking excessive medication. Accordingly, the trial court erred in granting a directed verdict on primary assumption of risk.

As a secondary finding, the appellate court also found that the trial court erred in prohibiting the plaintiff's expert from testifying regarding whether the doctor deviated from standards of care for all physicians when utilizing narcotics as these topics did not require a specialized expertise in gastroenterology, the defendant-doctor's area of practice, but rather were standards that applied to all physicians.

Medical Malpractice - Statute of Limitations - Termination of Physician-Patient Relationship

***Ram v. The Cleveland Clinic Foundation* (July 18, 2002), 2002 Ohio App. LEXIS 3714, Cuy. App. No. 80447, unreported.**

This is an appeal from the trial court's order granting summary judgment in favor of the Cleveland Clinic on the basis that Plaintiff failed to commence her action within the statute of limitations set forth in R.C. §2305.11.

In 1986, Plaintiff Barbara Ram felt a lump in her right breast and began treatment at the Cleveland Clinic Foundation ("CCF"). Two physician-employees treated Plaintiff at that time – a general surgeon and a gynecologist. The CCF surgeon performed a biopsy on Plaintiff's breast in March 1986, and the pathology report indicated that Plaintiff had a ductal carcinoma in situ. The evidence presented in the trial court established that the CCF surgeon did not remove the entire cancer in 1986. Plaintiff testified that she was told that the cyst was benign and that she only had a precancerous condition. The CCF surgeon informed Plaintiff that her condition could be treated by observation. Plaintiff also consulted with a CCF gynecologist who advised Plaintiff that the lump was only a cyst and not to worry. As such, Plaintiff was unaware that she had cancer in 1986.

In 1994, Plaintiff returned to CCF and received hormone replacement therapy. In 1997, Plaintiff once again discovered a lump in her right breast. She returned to CCF for treatment and was told that she had cancer. In February or March of 1998, a CCF radiation oncologist informed Plaintiff that she had cancer in 1998. Plaintiff testified that this was the first time that she was advised of having cancer. On March 9, 1999, an attorney sent a 180 day letter to CCF "in connection with a failure to diagnose cancer in 1986, which failure was not discovered by Ms. Ram until 1998." In January 2000, Plaintiff was diagnosed with metastasis in a supra-clavicular lymph node. She again returned to CCF for treatment and received radiation therapy from a CCF radiation oncologist until March or April of 2002. During the pendency of this appeal, Plaintiff died.

Plaintiff filed suit against CCF in December 2000 for the negligence of its physicians, nurses and other medical care providers in their care and treatment of Plaintiff's "intraductal breast carcinoma at a time when Plaintiff's condition was one hundred percent treatable and curable." In the Complaint, Plaintiffs alleged that Ms. Ram developed metastatic adenocarcinoma of the breast in February 2000 as a direct and proximate result of CCF's negligence. CCF moved for summary judgment on the basis that the statute of limitations had expired prior to the commencement of the action. More specifically, CCF argued that the relationship between Plaintiff and itself for her condition of cancer terminated at the time that the physicians who treated Plaintiff in 1986 left the employ of CCF. The trial court agreed and granted CCF's motion. The public policy behind tolling the statute of limitations for filing a medical malpractice action until the relationship terminates is to allow the alleged tortfeasor to attempt to alleviate the effect of its negligence. *Frysinger v. Leech* (1987), 32 Ohio St. 3d 38; *Ishler v. Miller* (1978), 56 Ohio St. 2d 447, 449. The trial court concluded that the departure of the actual CCF physicians that had treated plaintiff in 1986 operated to terminate Plaintiff's relationship with CCF since these particular physicians could no longer remedy their alleged negligence. The Eighth District Court of Appeals reversed, holding that:

> In this case, plaintiff's relationship, in terms of treatment for her diagnosed breast cancer and the metastasis thereof, was *with CCF* and was not a separable relationship from the individual medical practitioner employees of CCF that treated her condition over the years. Accordingly, plaintiff's repeated return visits to CCF, such as in 1997 and 2000, concerning treatment for her reoccurrence and progression of cancer, both continued the relationship between plaintiff and CCF and afforded CCF (the alleged tortfeasor) the opportunity to mitigate the effects of its alleged negligence. CCF had the opportunity to cure the alleged mistakes of its former employees and/or provide full treatment to plaintiff throughout the years, albeit through different physician employees. Whether this was accomplished is a question of fact to be determined by a jury. Even construing the evidence in a light most favorable to

> CCF, reasonable minds could only reach the conclusion that plaintiff continued to receive treatment for her cancerous condition at CCF at times beginning in 1986 until April 2000. To suggest that plaintiff's radiation therapy at CCF in 2000 was for the treatment of some condition other than the cancer is illogical. Therefore, plaintiffs commenced this action in December 2000 and within the applicable statute of limitations under the termination rule.

Political Subdivision Immunity - Recreational User Statute

***Ryll, et al. v. Columbus Fireworks Display Co., Inc.* (June 19, 2002), 95 Ohio St. 3d 467.**

On this discretionary appeal, the Ohio Supreme Court clarified Ohio's recreational user statute, indicating that the statute does not state that a recreational user is owed no duty, and where the cause of the injury is from separate negligence rather than a failure to keep the "premises" safe, immunity does not apply. The Court also held that sponsoring a fireworks display is not a governmental function entitling a city to immunity.

This appeal arose out of a wrongful death action stemming from a fireworks accident at a public park. The court of appeals reversed the trial court and held that the city and township were immune from liability. The Ohio Supreme Court accepted the case on a discretionary appeal.

The intermediate appellate court held that the city was immune based on Ohio's recreational user statute, specifically R.C. 1533.181(A)(1). The Ohio Supreme Court held that the statute did not state that a recreational user was owed no duty, but instead immunizes an owner, lessee, or occupant of premises only from a duty to keep the premises safe for entry or use. In this case, the cause of the injury was from shrapnel from fireworks rather than anything to do with the premises. As the cause of the injury had nothing to do with the "premises," the city was not immune.

The Court then applied the three-tier analysis of R.C. 2744 to determine if the city was immune as a political subdivision. Since sponsoring a fireworks display was not a governmental function, it was a proprietary function and the city was not entitled to immunity pursuant to R.C. 2744.01(C). As sponsoring a fireworks display was a proprietary function, the R.C. 2744.02(B)(2) exception to the general rule of immunity applied and the city could be held liable. The Court then concluded that no defenses set forth in R.C. 2744.03 applied; therefore, the city was not entitled to summary judgment on sovereign immunity. Noting that R.C. 2744.02(B)(2) did not apply unless the city acted negligently, the Court then found that there were factual issues as to the city's negligence.

With respect to the township, the court of appeals had held that their inspection of the fireworks display was a governmental function. The Ohio Supreme Court agreed with this characterization. However, an issue of fact existed as to whether the township failed to keep public grounds free from nuisance under R.C. 2744.02(B)(3), such that summary judgment was improper. Finding that the trial court did not abuse its discretion when it denied the motions for summary judgment, the Court reversed the judgment of the court of appeals and remanded the case back to the trial court.

Premises Liability - Clarification to Attendant Circumstances Exception to "Two Inch" Rule

***Goldshot v. Romano's Macaroni Grill* (May 3, 2002), 2002 Ohio App. LEXIS 2138, Montgomery App. No. 19023, unreported.**

This case further clarifies the evidence which can be used to establish attendant circumstances to overcome the "two inch" rule in defective sidewalk cases.

Where the difference in height between two sidewalk portions in a slip and fall claim is less than two inches, the non-moving party must show attendant circumstances to overcome the presumption that a less than two inch defect is insubstantial as a matter of law. Some courts have refused to consider prior notice of accidents at the location of the defect to be an attendant circumstance. In an earlier decision, this court also found that insufficient lighting was not enough to rise to the level of attendant circumstances.

In this case, however, the Montgomery County Court of Appeals reversed a summary judgment on the "two

inch" rule, finding that sufficient attendant circumstances existed. The court noted that while lighting alone was insufficient, other attendant circumstances taken together with the absence of lighting can lead to the conclusion attendant circumstances exist. Poor illumination coupled with the color of the sidewalk prevented the plaintiff from seeing the defect. Further, the defendant's own employees stated that other accidents had occurred at the same spot. These circumstances, taken together with the absence of adequate lighting, create a genuine issue of material fact whether the attendant circumstances enhanced the risk of injury to the point that injury was a reasonably foreseeable consequence of the defect.

Railroad Liability - Inadequate Warning Devices

***Bonacorsi v. Wheeling & Lake Erie Ry. Co.* (2002), 95 Ohio St. 3d 314.**

In July 1996, Plaintiff sustained serious injuries when the motorcycle he was riding collided with the engine of Defendant's freight train at a railroad crossing on Howe Road in Brimfield Township, Ohio. At the time of the accident, signs and pavement markings were posted along Howe Road warning westbound motorists like Plaintiff of the crossing. Just before the crossing was a red triangular "yield" sign and a white, X-shaped sign with the words "RAILROAD CROSSING" written in black ("crossbuck sign"). These signs and pavement markings were merely "passive warning devices" because they indicate the presence of a crossing but do not change in any manner when a train is crossing. As he was approaching the crossing, Plaintiff was unaware that a train was also approaching, because there were no active warning devices at the crossing and because foliage near the railroad right-of-way blocked his view. Plaintiff filed a claim against the railroad alleging that the accident was caused by the railroad's negligence in failing to install active warning devices, failing to eliminate view obstructions caused by the foliage, failing to operate the train in a lawful and safe manner, and by failing to properly sound the train's horn and bell.

Defendant moved for partial summary judgment, arguing that Plaintiff's inadequate warning device claim was preempted by federal law. Defendant contended that federal funds had been used to pay for the crossbuck sign on Howe Road and that warning devices installed using federal funds are adequate as a matter of law. As proof that federal funds were used, Defendant submitted an affidavit from one of its employees, Bruce Brown, stating that prior to the accident the crossbuck was installed using federal funds as part of Ohio's Buckeye Crossbuck Program. Attached to Brown's affidavit was a pamphlet describing an experimental program designed to determine the effectiveness of a newly designed crossbuck system and an agreement between ODOT and Defendant wherein Defendant agreed to replace existing crossbuck signs at all of its passive crossings by the end of 1993 as part of the Buckeye Crossbuck Program. ODOT agreed to supply the new crossbuck and to reimburse Defendant for its installation costs from federal funds. In opposing Defendant's first motion for summary judgment, Plaintiff attacked the sufficiency of Brown's affidavit, arguing that it was not based on his personal knowledge that federal funds were spent on the installation of the crossbuck at Howe Road. Plaintiff also argued that Defendant was also required to show that the Federal Highway Administration had approved the installation. The trial court agreed with Plaintiff and denied Defendant's dispositive motion. With leave of court, Defendant filed a second motion for summary judgment on Plaintiff's inadequate warning device claim. Attached to this motion was an affidavit executed by Ohio Rail Development Commission employee, Susan Kirkland. In her affidavit, Kirkland stated that the crossbuck installed at all passive crossing in Ohio were installed with federal funds as part of the Buckeye Crossbuck Program. In response to Defendant's second motion, Plaintiff once again argued that Kirkland, like Brown, did not have personal knowledge regarding federal funding of the Howe Road crossbuck sign. Plaintiff cited to portions of Kirkland's deposition testimony in which she testified that her knowledge of federal funding came from other people. In addition to Kirkland's lack of personal knowledge as required by Civ. R. 56(E), Plaintiff once again asserted that proof of federal funding alone is insufficient to preempt a state law claim of inadequate warning devices. The trial court once again agreed with Plaintiff and overruled Defendant's motion. Defendant then moved for summary judgment on this issue a third time, and the Court once again denied the motion.

The case proceeded to trial and the jury found for Plaintiff but also determined that both parties' negligence equally contributed to causing the accident. The jury's verdict of $1,664,200 was therefore reduced to account

for Plaintiff's contributory negligence, and the trial court entered judgment in Plaintiff's favor in the amount of $832,100. In response to a written interrogatory that asked "If you find that [Defendant] was negligent, in what respect(s) do you so find?" the jury responded "Two prior accidents; railroad did not initiate change in signals and signs. Proving ordinary care. Plaintiff unable to see the train."

Upon a de novo review of Defendant's motion for partial summary judgment, the court of appeals found that Kirkland's affidavit established that federal funds had been used to pay for the installation of the Howe Road crossbuck. Moreover, the reviewing court held that proof of federal funding was alone sufficient to trigger preemption of Plaintiff's inadequate warning claim based on the United States Supreme Court's decision in *Norfolk S. Ry. Co. v. Shanklin* (2000), 529 U.S. 344. Thus, the appellate court reversed the trial court's denial of Defendant's motion for summary judgment on this claim. Finally, the court determined that the jury's response to the interrogatory clearly indicated that its verdict was based solely on Plaintiff's inadequate warning device claim.

The Ohio Supreme Court permitted a discretionary appeal in this matter and reversed the judgment of the court of appeals in a 4-3 decision. Plaintiff argued that (1) the court of appeals erred in finding that Kirkland's affidavit proved that federal funds paid for the installation of the Howe Road crossbuck, because she lacked personal knowledge of the statements made in her affidavit, and (2) the court of appeals erred in applying the holding in *Shanklin* to this case, because *Shanklin* only applies when federal funds are applied toward railroad crossing *improvement* programs and not when applied toward *experimental* programs such as the program under which the Howe Road crossbuck was installed. The Court reversed the judgment of the court of appeals based on Plaintiff's first argument and declined to address Plaintiff's assertion that *Shanklin* does not apply. The Court initially noted that "proof of federal funding is crucial to [Defendant's] preemption argument because the federal regulation that covers the subject of warning-device adequacy applies only to warning devices installed with federal funds." After reviewing Kirkland's deposition testimony, in which she testified that ODOT was responsible for handling federal funds, that she did not work for ODOT and that her knowledge that federal funds were used came from other people, the Court concluded that she lacked the personal knowledge required by Civ. R. 56(E) to support the statements in her affidavit regarding federal funding. Because federal funding is required to trigger preemption, the Court held that Defendant's motion for summary judgment should not have been granted.

Settlements - Interest on Confidential Settlements Under R.C. 1343.03

Hartmann v. Duffey **(June 12, 2002), 95 Ohio St. 3d 456.**

Pursuant to R.C. 1343.03(A), a plaintiff who enters into a confidential settlement agreement that has not been reduced to judgment is entitled to interest on that settlement, which becomes due and payable on the date of settlement.

In the underlying medical malpractice action, the parties entered into a confidential settlement on the date of trial and the case was dismissed without a formal journal entry. Seventeen days later, the plaintiff filed a motion to enforce interest on the settlement amount pursuant to R.C. 1343.03(A) and (B). The trial court denied the motion on the ground that the settlement had not been journalized, and the appellate court affirmed on similar grounds. The case came before the Ohio Supreme Court on allowance of a discretionary appeal.

In this case, the appellant argued that pursuant to R.C. 1343.03(A), a plaintiff is automatically entitled to interest on a confidential settlement agreement which becomes due and payable on the settlement date. Appellee argued that R.C. 1343.03(A) was inapplicable and instead that 1343.03(B) applied, whereby the appellant was precluded from obtaining interest since no "judgment, decree or order" was rendered (the triggering language for interest under 1343.03(B)). The Court rejected the appellee's interpretation of the statute, holding that a settlement that has not been reduced to judgment is clearly within the purview of 1343.03(A), whereas 1343.03(B) is a narrower provision applying only when a settlement has been reduced to judgment or there has been a decree or order.

Settlements - Interpretation of Settlement Agreement Absent Joint and Several Liability Language

Kostelnik v. Helper **(July 3, 2002), 96 Ohio St. 3d 1.**

This appeal from the Eighth District Court of Appeals arose out of the settlement of a medical malpractice action against Hillcrest Hospital and a P.I.E. insured physician prior to the P.I.E. liquidation. Prior to trial, plaintiff-appellant ("plaintiff") settled the action against the doctor for $1.1 million and against the hospital for $100,000. Following the P.I.E. stay, plaintiff moved to reduce the settlement to judgment against both the hospital and the doctor jointly and severally in the amount of $1.2 million. The trial court denied the plaintiff's motion as well as the defendant hospital's motion to enforce the judgment and instead set the case for trial. The appellate court affirmed the trial court's judgment, finding that the parties never agreed to joint and several liability and there was no meeting of the minds as to the terms of the settlement. The Ohio Supreme Court took the case on allowance of a discretionary appeal.

The issue before the Court was whether an enforceable settlement agreement existed between the parties and, if so, what its terms were. The Court concluded that there was a valid agreement whereby the plaintiff agreed to settle with the hospital for $100,000 and with the doctor for $1.1 million. In concluding that there was no joint and several liability, the Court found that if the plaintiff wanted the settlement to impose joint and several liability, that terminology should have been placed on the record or memorialized in some writing at the time the case was settled.

Verdicts & Settlements

(For members and educational purposes only)

Jane Roe v. ABC Corporation, et al.
Type of Case: Medical Negligence
Settlement: $2,000,000 (ABC Corporation contributed $1,900,000; XYZ Hospital contributed $100,000)
Plaintiff's Counsel: Charles Kampinski, Laurel A. Matthews, M.D., J.D.
Defendant's Counsel: Withheld
Court: Withheld
Date: Not Listed
Insurance Company: Withheld
Damages: Mastectomy of left breast, prophylactic removal of uterus and ovaries.

Summary: This was a negligence action brought by Jane Roe, a 48 year-old Ashkenazi Jewish woman with a remote history of right breast cancer that was successfully treated with mastectomy and chemotherapy. She is considered cured. At the urging of her oncologist at XYZ Hospital, Jane underwent genetic testing. Despite the fact that there were obvious problems with the laboratory controls used in Jane's genetic testing, it was erroneously interpreted as positive by employees of ABC Corporation. The test was not repeated. Believing that she carried the BRCA1 mutation, Jane had her remaining breast, uterus and ovaries prophylactically removed. When Jane's parents were tested to determine which lineage carried the genetic mutation, they both tested negative. Jane's testing was then repeated at an outside laboratory and it was determined that she did not have the mutation.

Plaintiff's Experts: Larry Brody, Ph.D. (Developed Genetic Test Used); Wayne Grody, M.D., Ph.D. (Medical Genetics); Melvin Dinner, M.D. (Plastic Surgeon); John F. Burke, Ph.D. (Economist)
Defendant's Experts: Gerald Feldman, M.D.

Estate of John Doe v. Jane Roe
Type of Case: Automobile Accident
Settlement: $3,500,000
Plaintiff's Counsel: Charles Kampinski, Laurel A. Matthews, M.D., J.D.
Defendant's Counsel: Withheld
Court: Withheld
Date: Not Listed
Insurance Company: Withheld
Damages: Death

Summary: Negligence action by the estate of a 59 year-old man who died as a consequence of injuries sustained in a car

accident caused by a 17 year-old driver who ran a stop sign at the intersection. Defendant's vehicle collided with the side of another vehicle in which decedent was a passenger. Decedent sustained multiple long bone fractures and an aortic rupture. He had no vital signs and was pronounced dead upon arrival at the hospital. Decedent was retired but would have done consulting work in the future. He is survived by his wife and four adult children.

Plaintiff's Experts: None (Settled without experts)
*Defendant*s Experts*: None (Settled without experts)

Mary Lou Zimmerman, etc. v. The Cleveland Clinic Foundation
Type of Case: Medical Malpractice
Verdict: $7,500,000
Plaintiff's Counsel: Robert F. Linton, Jr., Mark W. Ruf, Stephen T. Keefe, Jr.
Defendant's Counsel: James Malone, Alan Parker
Court: Cuyahoga County Court of Common Pleas
Date: June, 2002
Insurance Company: N/A
Damages: $5,310,778.18

Summary: Plaintiff underwent brain surgery at The Cleveland Clinic Foundation for obsessive-compulsive disorder. The Clinic performed an experimental procedure on the Plaintiff without consent. Plaintiff had a post-operative brain infection with an intestinal organism. Plaintiff suffered brain damage and is unable to care for herself.

Plaintiff's Experts: Dr. Charles Rawlings, III (Neurosurgeon), Dr. Clark Kerr (Infectious Disease), Dr. John Burke, Jr. (Economist), Tracy Wingate, O.T.R., C.C.P. (Life Care Planner)
Defendant's Experts: Dr. Michael Jenike (Psychiatry), Dr. Rees Cosgrove (Neurosurgeon), Dr. Mark Poznansky (Infectious Disease)

Dan Doe v. XYZ Corp. and XYZ Parent Corp.
Type of Case: Intentional Tort and Frequenter Action
Settlement: $295,000 ($250,000 from parent's commercial general liability carrier; and $45,000 from subsidiary)
Plaintiff's Counsel: Rubin Guttman
Defendant's Counsel: Withheld
Court: Medina County Court of Common Pleas
Date: January, 2002
Insurance Company: Withheld
Damages: Degloving and loss of four fingers

Summary: Negligence action brought by Dan Doe, a 40 year-old man who was employed on a steel pickle line as an exit panel operator. Plaintiff chose to clean the bridle role while the steel was running, the most hazardous of three alternative means available to him, and his hand was pulled into an inrunning nip point, causing degloving and loss of four fingers. Over 30 depositions disclosed that 10 employees had used the same dangerous procedures over the years, but none had been hurt. Employees felt that management had to know of the procedure but couldn't cite to any specific incident. Case was complicated by, amongst other things, adverse Medina County case law holding that the lack o prior injury and availability of safer alternative means to do the task are fatal to intentional tort action.

Plaintiff's Experts: Gerald Rennell, Technical Safety Associates; Bram R. Kaufman (Plastic & Reconstructive Surgery)
Defendant's Experts: Frank Schwalje, P.E., Affiliated Engineering Laboratories, Inc.; Richard P. Oestreich, Ph.D., C.R.C.

Anonymous, admin. v. Minor Driver and XYZ Insurance Company
Type of Case: Wrongful Death
Settlement: $625,000
Plaintiff's Counsel: Rubin Guttman
Defendant's Counsel: Paul D. Eklund
Court: U.S. District Court (N.D. of Ohio)
Date: January, 2002
Insurance Company: Withheld
Damages: Wrongful death

Summary: Plaintiff's decedent, a 16 year-old, was a passenger in a vehicle being recklessly driven by another juvenile, which crashed and turned over at a high rate of speed, causing several deaths. Both the passenger and the driver tested positive for cannabis and alcohol. A total of $25,000 of primary coverage existed. Plaintiff proceeded against the insurer of decedent's mother's employer claiming that language in the policy rendered her a named insured and that that in turn meant that, given the ambiguities found in the policy and the Supreme Court's decisions in *Scott-Pontzer* and *Selander*, she could recover under the

uninsured motorist provisions of the policy. Case was removed from the Common Pleas Court to Federal Court where it settled for a $600,000 cash settlement.

Plaintiff's Experts: Cuyahoga County Coroner
Defendant's Experts: None

John Doe v. XYZ Insurance Company
Type of Case: Automobile accident and Scott Pontzer Claim
Settlement: $575,000
Plaintiff's Counsel: Rubin Guttman
Defendant's Counsel: Dale Markworth
Court: Cuyahoga County Common Pleas Court
Date: December, 2001
Insurance Company: Withheld
Damages: Medicals/lost wages/impaired earning capacity

Summary: Defendant uninsured motorist, who was three days out of prison, launched his vehicle so that it was airborne and actually landed on the Plaintiff*s automobile causing a serious closed head injury. While visible injuries were minimal, intensive neuropsychological evaluation lead to diagnosis of closed head injury and cognitive deficit disorder. Plaintiff had only a $25,000 policy and coverage was pursued on a *Scott-Pontzer* basis through Plaintiff*s employer. Plaintiff remains employable, but her earning capacity is somewhat lower than before the accident due to cognitive difficulty. Claimed wage loss of $35,655.00 and medicals of $24,177.00.

Plaintiff's Experts: Denise C. Woods, Ph.D. (Neuropsychology); Rod W. Durgin, Ph.D., Vocational Assessments
Defendant's Experts: None

Anonymous 37-Year-Old Woman v. Anonymous Boat Owners
Type of Case: Personal Injury
Judgment: $1,750,000
Plaintiff's Counsel: J. Michael Monteleone
Defendant's Counsel: Withheld
Court: U.S. District Court, Virgin Islands
Date: March, 2002
Insurance Company: Withheld
Damages: Loss of left leg, below the knee

Summary: Plaintiff, while on a group dive, had trouble breathing, surfaced, and was hit by a boat, resulting in the loss of her left leg below the knee.

Plaintiff's Experts: N/A (Settled before expert deadline)
Defendant's Experts: N/A (Settled before expert deadline)

John Doe, a minor vs. Big City School District
Type of Case: Premises Liability
Judgment: $135,000
Plaintiff's Counsel: Michael B. Pasternak
Defendant's Counsel: Graves and Horton
Court: Cuyahoga County Court of Common Pleas
Date: April, 2002
Insurance Company: Self-Insured
Damages: Tibial fracture

Summary: Plaintiff was in gym class when an unsecured door at the entrance to the girls' locker room fell on his leg, causing the fracture.

Plaintiff's Experts: Alan Gurd, M.D. (originally listed as Defendant's expert; provided testimony favorable to Plaintiff)
Defendant's Experts: Alan Gurd, M.D.

Jane Doe vs. John Doe, M.D.
Type of Case: Medical Malpractice
Judgment: $150,000
Plaintiff's Counsel: Michael B. Pasternak
Defendant's Counsel: Withheld
Court: Cuyahoga County Court of Common Pleas
Date: April, 2002
Insurance Company: Withheld
Damages: Failure to Properly Repair Fracture

Summary: John Doe, M.D. failed to properly reduce and surgically repair Jane Doe's (77 years-old) Lis Franc (foot fracture). She was left with more pain and less function than if the procedure were properly performed.

Plaintiff's Experts: James Sferra, M.D.; James Zinser, M.D.; George Cyphers
Defendant's Experts: Bob Zass, M.D.; Thomas Lee, M.D.

Tricia Wynn, et al. v. Barry C. Lamkin, M.D., et al
Type of Case: Medical Malpractice
Settlement: $82,500
Plaintiff's Counsel: Scott Kalish
Defendant's Counsel: David Kraus
Court: Summit County Court of Common Pleas, Judge Cosgrove
Date: May, 2002
Insurance Company: Withheld
Damages: Three cracked teeth and TMJ Injury (no surgery required)

Summary: Plaintiff, age 28, was being examined by Defendant physician for the removal of two (2) moles on her lower back and two warts on her left foot. Plaintiff was positioned at the end of the examination table in a sitting position by Defendant. Defendant,

after administering injections of lidocaine, proceeded to freeze the two warts on the bottom of Plaintiff's left foot. Plaintiff then complained to Defendant that she was very dizzy (a known adverse reaction for lidocaine). Defendant, instead of instructing Plaintiff to lay down on the examination table, instructed Plaintiff to lean forward as he administered another injection of lidocaine into her back. Thereafter, Plaintiff fainted and fell off the examination table sustaining dental injuries and a TMJ injury.

Plaintiff's Experts: Scott Cohen, D.D.S., M.D.; Michael Mancuso, M.D.; Mark E. Neff, D.D.S.
Defendant's Experts: Robert T. Brodell, M.D.

Scott Pealer, et al. v. Eric W. Hoskins, et al
Type of Case: Wrongful death; automobile accident/Moore-Sexton claims for relatives
Settlement: $540,000
Plaintiff's Counsel: Scott Kalish
Defendant's Counsel: Jay S. Hanson, Barbara J. Moser, Paul D. Eklund, Richard Garner
Court: Cuyahoga County Common Pleas Court, Judge Bridgett M. McCafferty
Date: April, 2002
Insurance Company: Progressive Casualty Insurance Company; Farmers Insurance of Columbus, Inc.; State Farm Insurance Company; Westfield Insurance Company
Damages: Death

Summary: Decedent, age 40, was operating his motorcycle in Ashtabula when he was struck from behind Defendant Hoskins*s vehicle, resulting in death. Neither the motorcycle nor the automobile were insured. *Moore-Sexton* claims were brought on behalf of the father, mother, brother, sister, and the children of Decedent.

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

Rose Serrano v. City of Cleveland, et al
Type of Case: Negligence - Automobile accident
Verdict: $21,975.20
Plaintiff's Counsel: Scott Kalish
Defendant's Counsel: William Scully, Catherine Ma
Court: Cuyahoga County Court of Common Pleas, Judge William Aurelius
Date: August, 2001
Insurance Company: Allstate Insurance Company & City of Cleveland (self-insured)
Damages: Soft tissue injuries to the neck and low back

Summary: Plaintiff, age 30, was a passenger in two-door Honda Accord being driven by Defendant when a city of Cleveland street cleaner, collided into the vehicle. Plaintiff sustained soft tissue injuries to the neck and low back. Plaintiff went to physical therapy for a month and a half. Plaintiff brought a claim against Defendant City of Cleveland and the driver of the vehicle she was in. Jury found the driver of the vehicle 45% negligent and the City of Cleveland 55% negligent.

Plaintiff's Experts: Richard Sabransky, M.D.
Defendant's Experts: None

Alagic v. Stadler
Type of Case: Automobile collision
Verdict: $25,000
Plaintiff's Counsel: Dale Economus
Defendant's Counsel: Richard J. Hartman
Court: Cuyahoga County Court of Common Pleas, Judge Richard Markus
Date: March, 2002
Insurance Company: Allstate Insurance Company
Damages: Lumbar sprain/strain

Summary: Rear end collision with minor property damage. Past medical specials of $4,200.00 and wage loss of $185.00.

Plaintiff's Experts: Dr. John J. Kavlich, III
Defendant's Experts: None

John Doe v. XYZ Physician
Type of Case: Medical Malpractice
Settlement: $800,000
Plaintiff's Counsel: Michael F. Becker
Defendant's Counsel: Withheld
Court: Lorain County Court of Common Pleas
Date: February, 2002
Insurance Company: Withheld
Damages: Wrongful death

Summary: Plaintiff's decedent, age 58, was from Taiwan and had Hepatitis B diagnosed in early 1990 . Because of Plaintiff's nationality and diagnosis of Hepatitis B, the Plaintiff's decedent should have been subjected to semi-annual screening for liver cancer, which would have included alpha feta protein testing and liver ultrasound. The primary care physician/internist failed to do the same. In late 1997, Plaintiff's decedent was diagnosed with advanced liver cancer, and he was not amenable to any type of therapy including transplant. Plaintiff's theory of liability was had there been appropriate serial screening for liver cancer, the same would have been diagnosed at an early stage when the liver cancer would have been confined to one section of the liver and the Plaintiff's decedent would have been likely amenable to a liver transplant. Liver transplants have the

greatest success in treating liver cancer. Plaintiff's expert opined that the decedent likely would have been amenable to a liver transplant and the same likely would have been successful and he would be living today.

Plaintiff's Experts: Kenneth Rothstein, M.D., Hepatologist
Defendant's Experts: Nathan Levitan, M.D., Oncologist

Jane Doe v. ABC Physician and ABC Hospital
Type of Case: Medical Malpractice
Settlement: $4,000,000
Plaintiff's Counsel: Michael F. Becker
Defendant's Counsel: Withheld
Court: Lucas County Court of Common Pleas
Date: April, 2002
Insurance Company: Withheld
Damages: Brain damaged baby

Summary: Obstetrical malpractice action based on a delay in diagnosis of uterine rupture in a VBAC (vaginal birth after cesarean) patient. The Plaintiffs allege that there were signs and symptoms of uterine rupture in this patient that were ignored resulting in delay in an emergency caesarean section. The attending physician, who was at home during all relevant times, contributed $500,000 and the hospital contributed $3.5 million.

Plaintiff's Experts: Donald Cameron, M.D.; John P. Elliott, M.D.; Barry Pressman, M.D.; Raymond Redline, M.D.
Defendant's Experts: Martin Gimovsky, M.D.; Peter Kollros, M.D.; Robert Schumacher, M.D.; David A. Schwartz, M.D.; Robert Hayashi, M.D.; Linda DiPasquale, R.N.

Ruth Myers v. Faissal Zahrawi, M.D., et al
Type of Case: Medical Malpractice
Settlement: $650,000 ($350,000 compensatory; $300,000 punitive)
Plaintiff's Counsel: Howard D. Mishkind, Kathryn A. Vadas
Defendant's Counsel: David Krause, William Meadows
Court: Lake County Common Pleas court; Judge Mitrovich
Date: June, 2002
Insurance Company: Kentucky Mutual
Damages: Distal ulnar instability and ulnar translocation of thewrist.

Summary: Plaintiff, age 46, went to Defendant orthopedic surgeon expecting to have a synovectomy performed on her right hand and wrist to correct cosmetic deformities secondary to her rheumatoid arthritis. Defendant performed a Darrach procedure (resection of the distal ulnar head) without her consent or knowledge. Defendant alleged that Plaintiff was advised of the procedure as well as the risks and complications prior to the procedure. Plaintiff argued that she would never have consented to the surgery which was to correct cosmetic deformities had she been advised that the procedure would involve removal of bone from her wrist. Plaintiff has limited use of her right wrist secondary to Defendant's surgery.

Plaintiff's Experts: Arnold-Peter C. Weiss, M.D. (Providence, RI)
Defendant's Experts: Duret Smith, M.D.

Jane Doe v. Laboratory
Type of Case: Medical Malpractice
Settlement: $2,750,000
Plaintiff's Counsel: David M. Paris
Defendant's Counsel: Withheld
Court: Cuyahoga County, Judge Nancy Fuerst
Date: March, 2002
Insurance Company: Withheld
Damages: Hysterectomy, pelvic exenteration

Summary: Plaintiff's 7/95 Pap was screened as ASCUS and AGCUS but downgraded to ASCUS only by the pathologist. The repeat Pap in 12/95 was incorrectly interpreted as mild dysplasia when, in fact, it also showed adenocarcinoma in situ. The vaginal biopsy in 2/96 was incorrectly interpreted as vaginal adenosis when, in fact, it demonstrated adenocarcinoma in situ. The ultimate diagnosis of invasive adenocarcinoma was delayed until 12/97. Defendant's pathological expert opined that the slides were not misread. Further, Defendant*s GYN-oncologist opined that Plaintiff had a 90% chance of survival cancer-free.

Plaintiff's Experts: Kenneth McCarty, M.D.; Howard Homesley, M.D.; Edward Bell, Ph.D.
Defendant's Experts: Gregory Feczko, D.O., Lawrence Copeland, M.D.

Jane Doe, a Minor v. John Doe Hospital
Type of Case: Medical Malpractice
Settlement: $4,000,000
Plaintiff's Counsel: William S. Jacobson, David M. Paris, Harlan Gordon
Defendant's Counsel: Withheld
Court: Summit County Common Pleas
Date: March, 2002
Insurance Company: Withheld
Damages: Mental retardation, cerebral palsy

Summary: Plaintiff's mother presented to the Defendant hospital at 36 weeks gestation with vaginal bleeding. The fetal heart monitor showed bradycardia, then stabilized. She was then observed for 2 hours and then a C-section was performed. Plaintiff alleged the earlier failure to mobilize delayed the C-Section.

Plaintiff's Experts: Stuart Edelberg, M.D. (Obstetrics); Steve Bates (Pediatric Neurologist); Carol Miller (Neonatology); Barry Pressman (Pediatric Neuroradiology); Robert Betts (Child Psychology); Carolyn Wilhelm (Life Care); John F. Burke, Jr., Ph.D. (Economist)
Defendant's Experts: Jeff Phalen (Obstetrics); Steven Devoe (Obstetrics); Robert Kiwi (Perinatologist); Robert Meadow (Neonatologist); Jane Mattson (Life Care Planning)

Jane Doe v. ABC Company
Type of Case: Employer Intentional Tort
Settlement: $1,200,000
Plaintiff's Counsel: David M. Paris, Ellen M. McCarthy
Defendant's Counsel: Withheld
Court: Cuyahoga County, Judge Burt Griffin
Date: February, 2002
Insurance Company: Withheld
Damages: Traumatic amputation of left hand.
Summary: Plaintiff was inspecting the die in a steam-powered press. He turned the throttle control switch to "off" and propped the ram with a wooden strut. He began working on the pinch point when the throttle control lever slipped from pressure "off" to pressure low due to a worn spring. The ram crushed the wood strut, which did not meet specifications, and crushed Plaintiff's hand. Plaintiff has returned to work with the same company in a promoted position.

Plaintiff's Experts: Simon Tamny, P.E.
Defendant's Experts: Not Identified (Settled before Court required identification)

Gorokovsky v. Ohio State Univ. Med. Center
Type of Case: Medical Malpractice
Settlement: $1,650,000
Plaintiff's Counsel: William S. Jacobson
Defendant's Counsel: Timothy Tullis, Anthony White
Court: Court of Claims of Ohio, Judge Shoemaker
Date: April, 2002
Insurance Company: State of Ohio (Self-Insured)
Damages: Brain damage, cerebral palsy.

Summary: The unnecessary insertion of an intracervical catheter caused a uterine rupture and a delay in rescue. The Defendant argued that the uterine rupture was caused by a uterine anomaly and not the catheter and that rescue was timely. The case was tried in December, 2001 on negligence only and settled before a decision was issued.

Plaintiff's Experts: Barry Schifrin (Perinatologist)
Defendant's Experts: Marshall Carpenter (Perinatologist)

Estate of John and June Roe v. Boeing & ABC Airline
Type of Case: Airplane crash
Settlement: $2,200,000
Plaintiff's Counsel: Jamie R. Lebovitz
Defendant's Counsel: Withheld
Court: U.S District Court, E.D. of Pennsylvania
Date: May, 2001
Insurance Company: Withheld
Damages: Wrongful death

Summary: On September 2, 1998, an MD-11 aircraft crashed in the Atlantic Ocean with over 200 passengers on board due to an on-board electrical fire and catastrophic system failures.

Plaintiff's Experts: Dr. Edward Block (Electrical and Wiring Engineer); Dr. Peter Formuzis (Economist)
Defendant's Experts: None identified

Estate of John Doe v. Boeing & ABC Airline
Type of Case: Airplane Crash
Settlement: $2,050,000
Plaintiff's Counsel: Jamie R. Lebovitz
Defendant's Counsel: Withheld
Court: U.S District Court, E.D. of Pennsylvania
Date: May, 2001
Insurance Company: Withheld
Damages: Wrongful death

Summary: On September 2, 1998, an MD-11 aircraft crashed in the Atlantic Ocean with over 200 passengers on board due to an on-board electrical fire and catastrophic system failures.

Plaintiff's Experts: Dr. Edward Block (Electrical and Wiring Engineer); Dr. Peter Formuzis (Economist)
Defendant's Experts: None identified

Estate of John Smith v. Boeing & ABC Airline
Type of Case: Airplane Crash
Settlement: $2,000,000
Plaintiff's Counsel: Jamie R. Lebovitz
Defendant's Counsel: Withheld
Court: U.S District Court, E.D. of Pennsylvania
Date: May, 2001
Insurance Company: Withheld
Damages: Wrongful death

Summary: On September 2, 1998, an MD-11 aircraft crashed in the Atlantic Ocean with over 200 passengers on board due to an on-board electrical fire and catastrophic system failures.

Plaintiff's Experts: Dr. Edward Block (Electrical and Wiring Engineer); Dr. Peter Formuzis (Economist)
Defendant's Experts: None identified

Jane Doe, Adm. v. Jane Foe, M.D.
Type of Case: Medical Malpractice/Wrongful Death
Settlement: $350,000
Plaintiff's Counsel: William S. Jacobson, Donald Reimer
Defendant's Counsel: Withheld
Court: Withheld
Date: April, 2002
Insurance Company: Withheld
Damages: Wrongful death of 5 week-old child

Summary: Plaintiff brought her 5 week-old daughter to the emergency room with a history of loss of appetite and constant spitting up. Defendant diagnosed reflux which did not account of the loss of appetite. The child was discharged and died three days later from gastroenteritis.

Plaintiff's Experts: Carol Miller, M.D. (Pediatrician); Joseph L. Felo, M.D. (Pathologist)
Defendant's Experts: B. Beckwith, M.D. (Pediatric Pathology); Steven Krus, M.D. (Pediatric G.I); Gary Fleischer, M.D. (Pediatric Emergency Medicine)

Jane Doe, Adm. v. John Doe Hospital
Type of Case: Medical Malpractice
Settlement: $750,000
Plaintiff's Counsel: William S. Jacobson, Christopher R. Pettit, Leonard Davis, Gerald Steinberg
Defendant's Counsel: Withheld
Court: Cuyahoga County Court of Common Pleas; Judge Lawther
Date: May, 2002
Insurance Company: Hospital was self-insured
Damages: Death

Summary: Decedent, age 57, was 400 lbs. and smoked. He went into respiratory distress and was taken to defendant hospital by EMS. It was 43 minutes from the time he entered the hospital until surgery was called for emergency airway placement. Oral intubation attempts had failed. Anoxic brain damage resulted in death two months later.

Plaintiff's Experts: David Effron (Emergency Medicine); Martin Dauber (Anesthesiologist)
Defendant's Experts: John Tafuri (Emergency Medicine); John Bastulli (Anesthesiology); Robert Rogoff (Anesthesiology); Joel Bartfeld (Emergency Medicine)

John Doe, Admin. v. ABC Hospital
Type of Case: Medical Malpractice
Settlement: $1,500,000
Plaintiff's Counsel: Leon M. Plevin, Ellen M. McCarthy, Merel Grey Nissenberg
Defendant's Counsel: Withheld
Court: Cuyahoga County Court of Common Pleas, Judge William Coyne
Date: July, 2002
Insurance Company: Withheld
Damages: Death

Summary: Defendant misread Plaintiff's frozen section resulting death due to ovarian cancer. Defendant lost the original slide applicable to the Plaintiff's earlier frozen section.

Plaintiff's Experts: John Burke, Ph.D., William Tench, M.D. (Pathologist/Cytopathologist); Regis Weiss, M.D. (Gynecologist)
Defendant's Experts: Maurie Mark, M.D. (Oncologist); Howard G. Huntz, M.D. (Gynecologist); Stanley J. Robboy, M.D. (Pathologist)

Veronica Goller v. Richard Simpson
Type of Case: Automobile Accident
Verdict: $30,000
Plaintiff's Counsel: Andrew Young
Defendant's Counsel: Brian T. Winchester
Court: Cuyahoga County Court of Common Pleas, Judge J. Ralph McAllister
Date: July, 2002
Insurance Company: Allstate Insurance
Damages: Acute sprains of other shoulders; inflammation of the thoracic segment of the back and inflammation of the neck muscles.

Summary: Rear-end accident with three months of active physical therapy treatment and a negative MRI scan.

Plaintiff's Experts: Albert A. Musca, M.D.
Defendant's Experts: None

Leonard Keller, etc., et al. v. The City of Independence, et al.
Type of Case: Premises Liability
Verdict: $294,000
Plaintiff's Counsel: Leon Plevin; Andrew Young
Defendant's Counsel: Timothy Roth
Court: Cuyahoga County Court of Common Pleas, Judge Burt Griffin
Date: August, 2002
Insurance Company: CNA Insurance
Damages: Non-displaced fractures to right zygomatic arch and right temporal bone and a non-fatal acute myocardial infarction.

Summary: Plaintiff was an 81 year-old woman with serious disabilities prior to her November 18, 1999 accident. This case was an admitted liability case with five months pain and suffering, as she died from unrelated causes. The jury awarded the Estate of Lottie Keller $204,000.00 and Leonard

Keller $90,000.00 on his consortium claim for a total award of $294,000.00. Medical specials were $74,681.00.

Plaintiff's Experts: Alan Tambe, M.D. (Now retired)
Defendant's Experts: None

Estate of Jane Doe v. ABC Hospital
Type of Case: Wrongful Death
Settlement: $700,000
Plaintiff's Counsel: David M. Paris, Christopher Pettit
Defendant's Counsel: Withheld
Court: Cuyahoga County Court of Common Pleas, Judge Nancy M. Russo
Date: July, 2002
Insurance Company: Withheld
Damages: Death

Summary: Plaintiff, age 68, was admitted to hospital by her attending physician through the emergency room with acute gallstone pancreatitis. Despite her deteriorating condition over the next 13 hours, the attending and consultant failed to check on her, and the nurses failed to notify anyone of significant changes in her condition. By the time she was seen and emergency ERCP performed, she was near septic shock and unsalvageable. Defendants claimed that earlier intervention would not have altered the outcome.

Plaintiff's Experts: Neil Crane, M.D.; Mark Birns, M.D.; Vickie Turner, R.N.
Defendant's Experts: Emil Dickstein, M.D.; Donald Junglas, M.D.; Mary Jane Smith; R.N.; John Bond, M.D.

John Doe v. ABC Hospital
Type of Case: Employer Intentional Tort
Settlement: $4,100,000
Plaintiff's Counsel: David M. Paris, Ellen M. McCarthy
Defendant's Counsel: Withheld
Court: Cuyahoga County Court of Common Pleas, Judge Peggy Foley Jones
Date: June, 2002
Insurance Company: Withheld
Damages: C6 Quadriplegia

Summary: Plaintiff, age 44, was climbing the braces of a scaffold erected by his employer without built on ladders. To access the work platform, Plaintiff had to temporarily step onto an unguarded walkway with an uneven walking surface. In doing so, he lost his balance falling 25 feet to the ground. Defendants contended that Plaintiff was not required to climb the scaffolding and/or not required to get off on the unguarded walkway and that injury while accessing the work platform was unforeseeable let alone a substantial certainty.

Plaintiff's Experts: Alan Cohen, P.E.; Tony Rago; Karen Knight, M.D.; John Conomy, M.D.; Rod Durgin, Ph.D.; John F. Burke, Jr., Ph.D.; Cynthia Wilhelm
Defendant's Experts: Mike Devivo, M.D.; William Bunner, P.E; David Glable, P.E.; Sharon Reavis, R.N., M.S.

Estate of John Doe v. John Doe Trucking Company
Type of Case: Automobile Accident
Settlement: $668,000
Plaintiff's Counsel: Richard L. Demsey
Defendant's Counsel: John Gannon
Court: Cuyahoga County Court of Common Pleas, Judge Robert T. Glickman
Date: June, 2002
Insurance Company: Cincinnati Insurance Company
Damages: Death

Summary: Decedent, age 30, was walking his bicycle on city sidewalk when struck by semi pulling into a commercial facility.

Plaintiff's Experts: Joseph A. Felo, M.D.; Cuyahoga County Coroner's Office
Defendant's Experts: None

Janet Yarbrough, et al v. Max Quinton, et al
Type of Case: Automobile Accident
Settlement: $500,000
Plaintiff's Counsel: Leon M. Plevin; Jonathan Mester
Defendant's Counsel: Gerald Jeppe; Harry Sigmier
Court: Cuyahoga County Court of Common Pleas, Judge Janet Burnside
Date: June, 2002
Insurance Company: State Farm/Century Insurance
Damages: Herniated lumbar disks; urinary dysfunction; cervicogenic headaches and dizziness

Summary: Two motor vehicle accidents - no issue regarding liability. Plaintiff's claimed injuries were indivisible among the accidents.

Plaintiff's Experts: John Oas, M.D.; Robert Corn, M.D.; Harold Mars, M.D.; Julian Gordon, M.D.
Defendant's Experts: Fred Levine, M.D.; Dennis Brooks, M.D.

Jane Doe v. John Doe Hospital
Type of Case: Medical Malpractice
Settlement: $400,000
Plaintiff's Counsel: Thomas Mester; Jonathan Mester
Defendant's Counsel: Withheld
Court: Cuyahoga County Court of Common Pleas
Date: April, 2002

Insurance Company: Withheld
Damages: ERB's Palsy

Summary: Shoulder dystocia encountered in delivery. Plaintiff alleged excess lateral traction, fundal pressure, and failure to provide informed consent option for c-section following UBAC.

Plaintiff's Experts: Melvin Ravitz, M.D.; Daniel Adler, M.D.; Robert Ancell (Vocational); John Burke, Ph.D.
Defendant's Experts: Lindsey Allen, M.D.; Maureen Nelson, M.D.

Estate of Jane Doe v. ABC Hospital
Type of Case: Medical Malpractice
Settlement: $675,000
Plaintiff's Counsel: George E. Loucas, Francis E. Sweeney, Jr.
Defendant's Counsel: Beverly Harris
Court: N/A (Settled prior to suit)
Date: April, 2002
Insurance Company: Withheld
Damages: Wrongful death

Summary: Failure to diagnose breast cancer, resulting in death.

Plaintiff's Experts: Dr. Robert J. Steele (Oncology); Dr. Walter F. Coulson (Pathology); Dr. Hadley Morgenstern-Clarren (Internal Medicine)
Defendant's Experts: Dr. Arnold Baskies (Surgery); Dr. John S. Spratt (Surgical Oncology); Dr. Lazlo Makk (Pathology)

Earl Simmons v. ABC Trucking
Type of Case: Automobile Accident
Settlement: $340,000
Plaintiff's Counsel: Daniel A. Romaine
Defendant's Counsel: Withheld
Court: N/A (Settled prior to suit)
Date: December, 2001
Insurance Company: Westfield Insurance
Damages: Left wrist fractures and right leg fractures requiring surgery

Summary: Defendant failed to yield right of way and pulled in front of Plaintiff, who was operating a motorcycle. Plaintiff was thrown from vehicle and sustained left wrist fractures and right leg fractures, requiring fixation surgery. Plaintiff made an excellent recovery despite severity of injuries.

Plaintiff's Experts: Harry Hoyen, M.D.; John Davis, M.D.
Defendant's Experts: None

Patterson v. Ralph Colla, M.D.
Type of Case: Medical Malpractice
Verdict: $900,000
Plaintiff's Counsel: Peter H. Weinberger, Rhonda Baker Debevec
Defendant's Counsel: Mark Frasure
Court: Mahoning County Court of Common Pleas, Judge Lisotto
Date: June, 2002
Insurance Company: ProNational Insurance Company
Damages: Delayed diagnosis of peritonitis, sepsis, adult respiratory distress syndrome, stroke, damaged ureter, incisional hernia, colostomy

Summary: Plaintiff, age 44, went to Defendant gynecological surgeon with complaints of pelvic pain caused by a benign growth on her ovary. Despite having a documented history of extensive pelvic adhesions, the Defendant recommended laparascopic removal. During the surgery, the Defendant perforated Plaintiff's bowel and closed her without diagnosing the injury. The following day, Plaintiff returned to Defendant*s office with complaints of severe abdominal pain, distention and nausea. Defendant filed to order any diagnostic testing to rule out bowel perforation for over three days. On the fourth day, another physician saw her and immediately diagnosed her with peritonitis. An emergency colon resection with colostomy was performed. Because of the delayed diagnosis, however, the Plaintiff suffered from adult respiratory distress syndrome, stroke and sepsis. After an extensive hospitalization the Plaintiff went through a slow rehabilitation process that included three additional surgeries to reverse the colostomy, unblock her ureter and repair an incisional hernia.

Plaintiff's Experts: Michael S. Baggish, M.D. (Gynecological Surgeon)
Defendant's Experts: John Karlen, M.D. (Gynecological Surgeon); Laszlo Makk, M.D. (Pathologist)

Anthony J. Williams v. Chas. Levy Circulating Co.
Type of Case: Employer Intentional Tort/Premises Liability
Settlement: $500,000
Plaintiff's Counsel: Peter H. Weinberger, Jennifer L. Whitney
Defendant's Counsel: Paul J. Schumacher, Thomas F. Naughton
Court: Cuyahoga County Common Pleas, Judge Ronald Suster
Date: February, 2002
Insurance Company: Atlantic Mutual
Damages: Severe injury to Plaintiff's dominant hand, including the partial amputation of two fingers, requiring multiple past and future surgeries.

Summary: Plaintiff, a loaned servant working as a baler operator at Defendant's Solon, Ohio recycling and distribution center, instituted an employer intentional tort action against Defendant for the severe and permanent injury he sustained to his dominant hand, including the partial amputation of two fingers, when Defendant required him to place his hand in and around the unguarded baler, while it was in operation, to

change wire spools and clear wire jams.

Plaintiff's Experts: Eugene Bahniuk, Ph.D.; Rodney A. Green,M.D.
Defendant's Experts: None

John Doe v. Jane Doe, M.D.
Type of Case: Medical Malpractice
Settlement: $1,000,000 (limits of insurance)
Plaintiff's Counsel: Peter J. Brodhead, Jennifer L. Whitney
Defendant's Counsel: Withheld
Court: Cuyahoga County Common Pleas, Judge Sutula
Date: February, 2002
Insurance Company: Not Listed
Damages: Death

Summary: Plaintiff's decedent, a 54 year-old woman, underwent laparoscopic gall bladder removal by the Defendant. During the laparoscopic procedure, the Defendant misidentified and injured the common bile duct. This injury went unrecognized by the Defendant for several days. Defendant then subjected decedent to a lengthy exploratory laparatomy which failed to appropriately address the patient*s immediate medical problem. Decedent died eight days later from ARDS and abdominal sepsis.

Plaintiff's Experts: Keith Lillemoe, M.D.
Defendant's Experts: Thomas Gouge, M.D.

John Doe v. Jane Doe, M.D., et al.
Type of Case: Medical Malpractice/Wrongful Death
Settlement: $4,750,000
Plaintiff's Counsel: Peter H. Weinberger; William Hawal
Defendant's Counsel: Withheld
Court: Withheld
Date: June 2001
Insurance Company: Withheld
Damages: Death

Summary: Plaintiff's wife was a 31 year-old mother of a 3 year-old daughter. She was pregnant, and in the first weeks of her pregnancy, she developed the severe form of morning sickness known as hyperemesis gravidarum. Her obstetrician maintained that she could be treated with central line hyperalimentation without hospitalization on an outpatient basis at home with home health care. Decedent continued to lose weight and continued her nausea and vomiting through 17 weeks of her pregnancy, when her fetus died. (No wrongful death claim for fetus could be asserted due to lack of viability.) One week later, decedent died after presenting to the ER in metabolic acidosis. She initially arrested while in a CT scanner which was being done to rule out pulmonary embolus. Cause of death, according to the coroner, was anaphylactoid reaction to contrast dye. Plaintiff's theory was that the Defendant's malpractice in failing to hospitalize decedent during the pregnancy caused her to become malnourished and deficient in thiamine, thereby causing cardiac failure and death. The case was defended on the basis that the patient died unexpectedly from an allergic reaction to contrast material used during the CT scan.

Plaintiff's Experts: T. Murphy Goodwin, M.D. (obstetrician/gynecologist); Robert Hoffman, M.D. (pathologist); Jessie Hall, M.D. (critical care specialist).
Defendant's Experts: None listed.

Andrea Kmetz, etc. v. MedCentral Health Systems
Type of Case: Medical Malpractice
Judgment: $500,000
Plaintiff's Counsel: Jack Landskroner
Defendant's Counsel: Kenneth Beddow
Court: Richland County, Judge James DeWeese
Date: February, 2002
Insurance Company: Self-Insured
Damages: Difficulty breathing and swallowing, subsequent respiratory arrest, cardiopulmonary arrest, brain damage.

Summary: In March 1998, Jay Kmetz, deceased, underwent a cervical diskectomy at Mansfield Hospital in the MedCentral Health System. Twelve hours after surgery, Mr. Kmetz complained of increasing pain and difficulty breathing, despite no visible objective signs of respiratory distress. At 2:35 a.m., Mr. Kmetz experienced a respiratory arrest and subsequently died. The family declined an autopsy.

Plaintiff's Experts: Latane Parker, M.D.; M.J. Smith, RN
Defendant's Experts: John Termini, M.D.; Albert Timperman, M.D.

Christopher Luoma v. Hartford Insurance Co.
Type of Case: Rear-End Collision/UIM
Verdict: $895,400
Plaintiff's Counsel: Mitchell A. Weisman
Defendant's Counsel: Steve Kelly
Court: Cuyahoga County, Judge Kenneth Callahan
Date: February, 2002
Insurance Company: Hartford
Damages: $62,000 medical; $1,456 lost wages

Summary: This case was a rear-end collision where Plaintiff suffered a herniated disc at L-5/S-1. The Defendant is the underinsured motorist carrier. Plaintiff had surgery and contended chronic low back pain. The Defendant alleged pre-

existing conditions and excellent recovery from surgery. Plaintiff was 23 years-old on the day of the collision and he worked at a casting plant inspecting products.

Plaintiff's Experts: Jack Anstandig, M.D.
Defendant's Experts: Dr. Mann

John Doe v. ABC Corporation, et al.
Type of Case: Employer Intentional Tort
Settlement: $700,000
*Plaintiff*s Counsel:* Henry W. Chamberlain; Benjamin H. Anderson
Defendant's Counsel: Withheld
Court: Cuyahoga County Court of Common Pleas, Judge K. Callahan
Date: July 2000
Insurance Company: Withheld
Damages: $200,000 in medical expenses

Summary: In the course of his employment, Plaintiff was operating a vertical boring mill in close proximity to rotating vertical drive shafts. His pony tail became ensnared in the rotating shafts and he sustained a scalping. He was life-flighted to MetroHealth Medical Center where he underwent multiple skin grafts. Over the course of his treatment, he had in excess of fifteen surgeries in an effort to reattach his scalp. Nonetheless, he sustained severe disfigurement to his head and permanent scarring.

Plaintiff's Experts: Richard Harkness (mechanical engineer); Gerald Rennell (industrial engineer)
Defendant's Experts: None listed

Estate of Eugenie Look
Type of Case: Auto
Settlement: $1,000,000
Plaintiff's Counsel: Philip Kushner
Defendant's Counsel: N/A (Settled with claims adjuster)
Court: Cuyahoga County
Date: December, 2001
Insurance Company: (Coregi's)
Damages: Death

Summary: Decedent, a pedestrian, was struck by a school bus and died about 6 hours later. She was survived by her 75 year-old husband and 2 adult children.

Plaintiff's Experts: John Burke; Jim Crawford (Action Reconstructionist)
Defendant's Experts: None

John Stiles v. Darrell Kopec, et al.
Type of Case: Disputed Liability Motor Vehicle Accident
Settlement: $131,500
Plaintiff's Counsel: Andrew Goldwasser, Phillip Ciano
Defendant's Counsel: Walter Krohngold, Lou Moliterno
Court: Cuyahoga County, Judge Burt Griffin
Date: February, 2002
Insurance Company: Allstate and State Farm
Damages: Multiple rib fractures, bruises and abrasions, and multiple soft tissue injures resulting in hospitalization.

Summary: An intersection collision.

Plaintiff's Experts: James Tasse, M.D.
Defendant's Experts: Richard Stanford II (Reconstructionist)

Richard Capretta v. Avery Dennison, et al.
Type of Case: Loading Dock Negligence/Disputed Liability
Settlement: $125,000
Plaintiff's Counsel: Andrew Goldwasser, Phillip Ciano
Defendant's Counsel: John Rasmussen (Avery Dennison), Tim Roth (Graff Trucking)
Court: Lake County, Judge Mitrovich
Date: March, 2002
Insurance Company: Liberty Mutual and Crum & Forster
Damages: Questionable herniated disc at L5-S1.

Summary: Plaintiff was a temporary employee assigned to work at Avery Dennison. While in the process of unloading a tractor-trailer, the truck driver pulled forward causing Plaintiff and the tow motor to crash to the ground. Defendants maintained that Plaintiff was comparatively at fault for failing to properly engage a dock lock mechanism which would have prevented the truck from prematurely pulling forward.

Plaintiff's Experts: Faissal Zahrawi, M.D.
Defendant's Experts: Stanley Dobrowski, M.D.

Robert Mueller v. Jason German, et al.
Type of Case: Personal Injury
Settlement: $62,500
Plaintiff's Counsel: Andrew S. Goldwasser, Phillip A. Ciano
Defendant's Counsel: Robert Koeth
Court: Cuyahoga County, Judge Calabrese
Date: March, 2002
Insurance Company: State Farm
Damages: Fractured ankle

Summary: Plaintiff and Defendant were at a party and both heavily intoxicated. As Plaintiff was attempting to leave the party, Defendant jumped on Plaintiff's back causing Plaintiff's leg to collapse and breaking Plaintiff's ankle.

Plaintiff's Experts: Michael Moore, M.D.
Defendant's Experts: None

Jane Doe, Admin. v. ABC Hospital
Type of Case: Medical Malpractice/Wrongful death
Settlement: $750,000
Plaintiff's Counsel: David I. Pomerantz
Defendant's Counsel: Jeffrey Van Wagner
Court: Cuyahoga County Court of Common Pleas
Date: October, 2001
Insurance Company: Self-Insured
Damages: Death/Medical Bills/Funeral Expenses

Summary: Cord compression developed during labor. After approximately two hours, fetus experienced bradycardia. Two attempts at vacuum extraction failed, and baby was delivered by emergency c-section. Baby was severely brain damaged and died at three months of age. Plaintiff alleged that Defendant failed to properly address cord compression, and further delayed delivery by attempting vacuum delivery. As a result, Plaintiff claimed, baby experienced perinatal asphyxia, causing brain damage and death.

Plaintiff's Experts: Dr. Michael Cardwell (OB/GYN); Dr. Michael Noetzel (pediatric neurologist); Dr. Frank Miller (deputy coroner)
Defendant's Experts: Dr. Frank Boehm (OB/GYN); Dr. Ronald Thomas (OB/GYN); Dr. David Rothner (Pediatric Neurologist)

Christina Chavayda, et al. v. James Handy, et al.
Type of Case: Motor Vehicle Accident
Settlement: $500,000
Plaintiff's Counsel: David I. Pomerantz
Defendant's Counsel: Michael Fitzpatrick
Court: Cuyahoga County Common Pleas,
Judge Timothy McCormick
Date: April, 2002
Insurance Company: Cincinnati Insurance Company
Damages: Fractured hip, fractured 4th metacarpal, severe lip laceration, dental injuries.

Summary: Defendant came into Plaintiff's lane, struck her and pushed her into a telephone pole. Plaintiff, age 25, suffered multiple injuries. Her husband suffered post-traumatic stress disorder.

Plaintiff's Experts: Roger Wilber, M.D.; Daniel Leizman, M.D.; Bill Costaras, D.D.S.; Stephen Bernard, M.D. (Plastic Surgery); Paul Becker, Ph.D. (Psychiatrist)
Defendant's Experts: Timothy Nice, M.D. (Orthopedist); Chester Bizga, D.D.S. (Dentist)

LISTING OF NEW PHYSICIANS/EXPERTS

Period Ending 7/19/02

NAME	SPECIALTY
Mikhail Abourjeily, M.D.	*E.R. Physician*
Thomas Abraham, M.D.	*Int. Med./Pulmonologist*
David Abramson, M.D.	*Emergency Medicine*
Walter Afield, M.D.	*Unknown*
Bernard Agin	*Attorney*
John J. Alexander, M.D.	*Vascular Surgeon*
Lisa Ann Atkinson, M.D.	*Staff Physician*
Keith Armitage, M.D.	*Infectious Disease*
Bruce L. Auerbach, M.D.	*Internal Medicine*
Stanley P. Ballou, M.D.	*Unknown*
William Barker, M.D.	*Orthopedic Surgeon*
Mitchell Barney, D.D.S.	*Dentist*
Stephen Baum, M.D.	*Internal Medicine*
W.E. Bazell, M.D.	*Urology*
Debbie Bazzo, R.N.	*Obstetrical R.N.*
Bennett Blumenkopf, M.D.	*Neurologist*
William Bohl, M.D.	*Orthopedic Surgeon*
Robert E. Botti, M.D.	*Cardiology*
Malcolm Brahms, M.D.	*Orthopedic Surgeon*
Dennis Brooks, M.D.	*Orthopedic Surgeon*
Leo J. Brooks, M.D.	*Sleep Disorders*
William Bruner, M.D.	*OB/GYN*
Aaron Brzezinski, M.D.	*Gastroenterology*
David Burkons, M.D.	*OB/GYN*
Elias Chalub, M.D.	*Ped. Neurologist*
Stephen Collins, M.D.	*Epileptologist*
Joseph Cooper, M.D.	*E.R. Physician*
Robert Corn, M.D.	*Orthopedic Surgeon*
Mary Corrigan, M.D.	*Family Practice*
Carl A. Cully, M.D.	*Internal Medicine*
Rita K. Cydulka, M.D.	*E.R. Physician*
Amir Dawoud, M.D.	*Anesthesiologist*
Robert K. DeVies, Ph.D.	*Psychologist*
Stephen DeVoe, M.D.	*OB/GYN*
Stephen DeVoe, M.D.	*OB/GYN*
Kurt Dinchuman, M.D.	*Urologist*
John Distefano, D.D.S.	*Dentist*
Method Duchon, M.D.	*OB/GYN*
Stuart Edelberg, M.D.	*OB/GYN*
Barry Allan Effron, M.D.	*Cardiologist*
David Effron, M.D.	*E.R. Physician*
Douglas Einstadter, M.D.	*Internal Medicine*
Henry Eisenberg, M.D.	*Proctologist*
Todd D. Eisner, M.D.	*Gastroenterology*
John Elliott, M.D.	*OB/GYN*
Herbert Engelhard, M.D.	*Neurologist*
Robert Erickson, M.D.	*Orthopedic Surgeon*
Laurie L. Fajardo, M.D.	*Radiologist*
Steven Feinsilver, M.D.	*Sleep Disorders*

NAME	SPECIALTY
Bruce Flamm, M.D.	*OB/GYN*
Robert Flora, M.D.	*Infectious Disease*
Ellen Flowers	*Occupational Therapist*
Richard Friedman, M.D.	*Orthopedic Surgeon*
Richard Frires, M.D.	*Emerg. Med/Fam M.D.*
Robert Fumich, M.D.	*Orthopedic Surgeon*
Debra A. Gargiulo	*R.N.*
Barry George, M.D.	*Cardiologist*
Howard Gershman, M.D.	*E.R. Physician*
Martin Gimovsky, M.D.	*OB/GYN*
Ronald Gold, M.D.	*Pediatrician*
Daniel Goldberg, M.D.	*Surgeon*
Timothy Gordon, M.D.	*Orthopedic Surgeon*
Pankaj Rai Goyal, M.D.	*Oral Surgeon*
Thomas Graber	*Emergency Medicine*
Michael Gyves, M.D.	*OB/GYN*
William Hahn, M.D.	*OB/GYN*
Hunter Hammill, M.D.	*OB/GYN*
Ivan Hand, M.D.	*Pediatrician*
Nawar Hatoum, M.D.	*OB/GYN*
Phyllis Hayes	*R.N.*
Thomas Hilbert	*Consultant*
Gregory Hill, M.D.	*Orthopedic Surgeon*
Gary Himmel, Esq.	*Attorney*
Mary Hlavin, M.D.	*Neurologist*
Thomas Hobbins, M.D.	*Sleep Dis./Pulmonologist*
Steven Houser, M.D.	*ENT*
Tung-Chang Hsieh, M.D.	*OB/GYN*
Mary Hulvalchick, R.N.	*Obstetrical R.N.*
Moises Jacobs, M.D.	*General Surgeon*
Joseph Jamhour, M.D.	*Pediatrician*
Bruce Janiak, M.D.	*Emergency Medicine*
Mark Janis, Ph.D.	*Psychologist*
Allen Jones, M.D.	*Emergency Medicine*
Donna Joseph	*R.N.*
Douglas Junglas, M.D.	*Internal Medicine*
Samuel Kiehl, M.D.	*Emergency Medicine*
Suzanne Kimball, M.D.	*General Internist*
Alfred Kitchen, M.D.	*Cardiology*
David Kline, M.D.	*Neurosurgeon*
Ralph Kovach, M.D.	*Orthopedic Surgeon*
Keith Kruithoff, M.D.	*Internal Medicine*
Lorenzo Lalli, M.D.	*Internal Medicine*
Dennis Landis, M.D.	*Neurologist*
Mark Landon, M.D.	*OB/GYN*
Frederick Lax, M.D.	*Neurosurgeon*
Alan Lerner, M.D.	*Neurologist*
Frederick Levine, M.D.	*Urologist*
Matt Likavec, M.D.	*Neurosurgeon*

NAME	SPECIALTY
David Longworth, M.D.	*Infectious Disease*
Phillip Marciano, M.D.	*Maxillofacial Surgeon*
Sheldon Margulies, M.D.	*Neurologist*
Jeffrey Marks, M.D.	*General Surgeon*
Kenneth McCarty, M.D.	*Pathologist*
Elizabeth Dorr McKinley, M.D.	*Internal Medicine*
Steven Meister, M.D.	*Cardiologist*
Martha Miller, M.D.	*Pediatrician/Neonatal*
Clark Millikan	*Dir.of Academic Affairs*
Jay Morrow	*R.N.*
Howard Muntz, M.D.	*GYN Oncologist*
Dilip Narichania, M.D.	*General Surgeon*
James Nocon, M.D.	*OB/GYN*
Philip Nowicki, M.D.	*Pediatrician*
John O'Grady, M.D.	*OB/GYN*
Richard O'Shaughnessy, M.D.	*OB/GYN*
Elizabeth E. O'Toole, M.D.	*Geriatric*
John G. Oats, M.D.	*Otoneurologist*
Raphael Pelayo, M.D.	*Otolaryngologist*
Jeffrey Pennington, M.D.	*Emergency Medicine*
Neal Wayne Persky, M.D.	*Geriatric/Intern. Medicine*
David C. Preston, M.D.	*Neurologist*
Thomas R. Price, M.D.	*Neurologist/Psychiatrist*
Michael Radetsky, M.D.	*Pediatrician*
Martin Raff, M.D.	*Infectious Disease*
Lorus Rakita, M.D.	*Internal Medicine*
David S. Rapkin, M.D.	*Anesthesiologist*
Thomas W. Rice, M.D.	*Thoracic Surgeon*
Elisabeth Righter, M.D.	*Family Medicine*
Stanley Robboy, M.D.	*OB/GYN*
Michael Rowane, M.D.	*Family Medicine*
Ghassan Safadi, M.D.	*Pediatrician/Allergist*
Sue Sanford	*Dir./Obstetrical Services*
Craig Saunders, M.D.	*Thoracic Surgeon*
Craig Saunders, M.D.	*Thoracic Surgeon*
William Schirmer, M.D.	*General Surgeon*
Debra Seaborn	*R.N.*
Jeffrey Selwyn, M.D.	*Internal Medicine*
Don Shumaker, D.D.S.	*Dentist*
David Silvaaggio	*Dept. Admin. - Fam. Pract.*
Diane Soukup	*Geriatric Nursing*
Kelly Sted	*Manager of Enrollment*
Shirley Stokley	*R.N.*
Vinodkumar Sutaria, M.D.	*Hematologist*
Elizabeth Svec	*R.N.*
Barbara Swartz, M.D.	*Epileptologist*
William Tench, M.D.	*Chief of Cytopathology*
Laurel Thill	*R.N.*
Anthony Tizzano, M.D.	*OB/GYN*

NAME	SPECIALTY
Tarvez Tucker, M.D.	*Neurologist*
Thomas Vrobel, M.D.	*Intern/Pulm/Cardio Med.*
Helenmarie Waters, R.N.	*Obstetrical R.N.*
Mark D. Wells, M.D.	*Plastic Surgeon*
Glen Whitten, M.D.	*Orthopedic Surgeon*
Raoul Wientzen, M.D.	*Ped. Infectious Disease*
Steven Yakubov, M.D.	*Cardiologist*
Robert Zaas, M.D.	*Orthopedic Surgeon*
Joanne Zelton	*Staff Nurse*
Arthur B. Zinn, M.D.	*Medical Geneticist*
Christine M. Zirafi, M.D.	*Cardiologist*

CATA VERDICTS AND SETTLEMENTS

Case Caption:_____

Type of Case:_____

Verdict: **Settlement:**_____

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

Counsel for Defendant(s):_____

Court/Judge/Case No:_____

Date of Settlement/Verdict:_____

Insurance Company:_____

Damages:_____

Brief Summary of the Case:_____

_____

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Experts for Plaintiff(s):_____

_____

_____

Experts for Defendant(s):_____

_____

_____

RETURN FORM TO: Stephen T. Keefe, Jr.
Linton & Hirshman
700 W. St. Clair Avenue, Suite 300
Cleveland, Ohio 44113

The Cleveland Academy of Trial Attorneys
"Access to Excellence"

The Cleveland Academy of Trial Attorneys is one of Ohio's premier trial lawyers organizations. The Academy is dedicated to excellence in education and access to information that will assist members who represent plaintiffs in the areas of personal injury, medical malpractice and product liability law. Benefits of academy membership include **access to:**

1. **THE EXPERT REPORT, DEPOSITION BANK AND THE BRIEF BANK:**
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2. **THE ACADEMY NEWSLETTER:**
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3. **LUNCHEON SEMINARS:**
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THE CLEVELAND ACADEMY OF TRIAL ATTORNEYS
14222 Madison Avenue
Lakewood, Ohio 44107

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, and submit the requested information in support of my application. I understand that my application must be seconded by a member of the Academy and approved by the President. If elected a member of 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:_____

CATA Sponsors Youth Challenge Run

by Kenneth J. Knabe

On Saturday, September 21st, CATA sponsored a race for Youth Challenge. Youth Challenge provides adapted sports activities for the handicapped and disabled youths. The kids who participated really enjoyed the opportunity. Romney Cullers sits on its board of directors.

Several CATA members participated in the 10k run at Lakewood Park. Dennis Lansdowne placed first among CATA members with an effective running style that resembled a steady Chevy pick-up truck. Jack Landskroner appeared to stumble at the beginning of the race, but quickly rebounded to finish second. Despite my superior running gear, I finished last and could not overtake Jack. Christopher Mellino was also spotted crossing the finish line.


Black
Burnside
160
CATA
Black
Burnside


470
Black
Burnside