CATA News
Cleveland Academy of Trial Attorneys
Summer 2003

Michael F. Becker
President

Dennis R. Lansdowne
Vice-President

Romney B. Cullers
Secretary

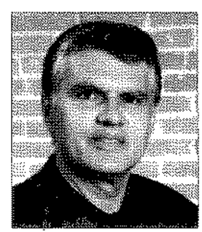
Donna Taylor-Kolis
Treasurer

Directors
Samuel V. Butcher, 2005
Mary A. Cavanaugh, 2005
Brian N. Eisen, 2005
Mark E. Barbour, 2005
Jack Landskroner, 2005
Laurel A. Matthews, 2005
Dean Nieding, 2005
Stephen T. Keefe, 2004
Stephen S. Vanek, 2004
Toby J. Hirshman, 2003
Ellen M. McCarthy, 2003
Francis E. Sweeney, Jr, 2003
John A. Lancione, 2006
W. Craig Bashein, 2006

Edited by
Stephen T. Keefe, Jr.
and
Mary A. Cavanaugh

Cleveland Academy
of Trial Attorneys
134 Middle Avenue
Elyria, Ohio 44035
440-323-7070
440-323-1879 FAX
mfbprivate@hotmail.com

President's Message



Michael F. Becker

The annual Cleveland Academy of Trial Attorneys installation dinner was held on June 6, 2003. For those of you who missed the dinner, former Supreme Court Justice Andy Douglas was honored with a "Lifetime Commitment to Justice Award." Additionally, Don Keenan of Atlanta, Georgia gave an inspiring keynote address. Much thanks to Ellen McCarthy who greatly assisted in the planning of the installation dinner.

Mike Becker gets sworn in by Retired Ohio Supreme Court Justice Andy Douglas

I am honored and privileged to serve as your President for the upcoming year. Our agenda for this year will include the continued commitment to provide the finest newsletter published by a local trial lawyer organization. Furthermore, we will attempt to make the services offered by CATA more user friendly. Of course, we will continue to bring monthly luncheon seminars and the Bernard Friedman Institute in March of 2004.

LUNCHEON SEMINAR SERIES

As Secretary of CATA, Romney Cullers is in charge of luncheon seminars this year. Our first luncheon seminar is Wednesday, September 3, 2003 at the Marriott. Glen Pritchard of the law firm of Clark, Perdue, Roberts & Scott Co., L.P.A. has once again agreed to share his wisdom on the topic of UM-UIM law. Thomas Repicky will be speaking (also at the Marriott) at the October 7, 2003 seminar on the topic of mediation. Please mark your calendars accordingly for the Fall luncheon series. You will receive invitations in the mail prior to each seminar.

NEW MEMBERS

Please welcome the following new members that have been admitted to CATA in this calendar year: John E. Ausnehmer, Erika Bailey, W. Craig Bashein, Ralph C. Buss, Stephen J. Charms, Lawrence C. Davison, Blake A. Dickson, Joan A. Ford, Mark F. Garretson, Nadine Hauptman, John P. Hildebrand, David A. Looney, William J. Lucas, Egidijus Marcinkevicius, Paul C. Perantinides, Robin Peterson, Laurence Powers, John J. Spellacy and John Scanlon.

CHOPPY WATERS AND ANOTHER STORM FRONT APPROACHING

The Senate passed Senate Bill 80 close to the form in which it was originally introduced. OATL has been very aggressive in trying to educate the public about this legislation. You can view their website at www.ThisLawHurts.com. Hopefully, the House will make major changes to S.B. 80, just as they did with S.B. 281. Beginning in September, the legislature will be back and they will begin hearings on S.B. 80 in the House. OATL needs victims and their attorneys to testify. If you know of a victim that would be in a position to testify effectively, please contact Connie Nolder at (614) 341-6800.

As you all know, S.B. 281 (med mal tort reform) became effective a few months ago. You should be aware that in response to S.B. 281, the medical negligence section of OATL has developed a battle plan to challenge its constitutionality. Specifically, Dave Kulwicki, current chair of the medical negligence section has formed a constitutional review committee. This committee will operate with the advice and consent of OATL's President, Peter Brodhead, and Executive Director, Richard Mason. The committee will serve to analyze the constitutionality of S.B. 281, and more significantly, will make strategic recommendations to OATL membership regarding when and how to challenge the constitutionality of this bill. Any questions or comments regarding OATL's constitutional review committee should be addressed to Dave Kulwicki at (216) 241-2600.

Some of you may have noticed or even experienced the fact that it is becoming more difficult to find an unbiased jury as well as obtaining a plaintiff's verdict. I suspect that much credit should go to our current President for his "sound bytes" against trial lawyers. Whatever the cause may be, we have to get smarter and wiser as we approach trial in our cases. It may be that we should begin by being more aggressive in attempting to excuse for cause prospective jurors (e.g., those that admit to believing in reasonable caps).

Once again, we find ourselves fighting to keep the doors to the courthouse open for the people of the State of Ohio. We certainly can no longer rely upon the Supreme Court as a stopgap to remedy constitutionally infirm legislation. In an effort to return our courts to the people of Ohio, there must be a multi-pronged attack. This should include preparation for the upcoming four Supreme Court seats, getting good people elected to the Ohio General Assembly and improving public opinion. Not only must we ask ourselves whether a proposed Supreme Court justice candidate is well qualified, but now we must ask ourselves is this person realistically "electable" on a state-wide basis. Locally, you should all be aware that David Pomerantz, a CATA member, is running for the 17th District in November of this year. His opponent is Jim Trakas. David needs our support, both financially and in terms of man hours for a successful election. Please contact David for any assistance you can render at (216) 696-5959.

Finally, it is critical that we continue to engage in networking. Any trial court or court of appeals ruling/opinion that would have any type of impact on the plaintiffs' bar should be brought to the attention of the Editors of this newsletter, Steve Keefe and Mary Cavanaugh, so that we may better serve our membership. Steve Keefe can be reached at STK@lintonhirshman.com, and Mary Cavanaugh can be reached at MAC@spanglaw.com. Everyone in this organization should be proactive. If there is a service or program that can be improved, please speak up. Our strength is not only in our numbers, but in our commitment to helping one another.

Keep up the fight. Best regards.

Past Presidents

Kenneth J. Knabe
David M. Paris
Frank G. Bolmeyer
Robert F. Linton, Jr.
Jean M. McQuillan
Richard C. Alkire
William Hawal
David W. Goldense
Robert E. Matyjasik
Laurie F. Starr
William M. Greene
James A. Lowe
Paul M. Kaufman
John V. Scharon, Jr.
Scott E. Stewart
Joseph L. Coticchia
Sheldon L. Braverman
William J. Novak
Peter H. Weinberger
Alfred J. Tolaro
Fred Wendel III
John V. Donnelly
Michael R. Kube
Frank K. Isaac
Seymour Gross
Lawrence E. Stewart
Milton Dunn
F. M. Apicella
Fred Weisman
Franklin A. Polk
Albert J. Morhard
George Lowy
Eugene P. Krent
Walter L. Greene
T.D. McDonald
Ralph A. Miller
Nathan D. Rollins
Harold Sieman
Michael T. Gavin
Richard M. Cerrezin
Joseph O. Coy
Robert R. Soltis
James J. Conway

Outgoing President's Message

Kenneth J. Knabe

I am amazed at how fast this year has gone! I am deeply grateful for the opportunity to serve the fine members of CATA. I thank everyone for their support, especially our great officers and board of directors. Believe me when I say, CATA is "loaded" for the future.

Reflecting back, I am most proud of our continued growth and expansion, as well as our receipt of the Outstanding Local Trial Organization from OATL. I welcome all of the many new members from the surrounding counties. I recognize many of your names and am proud that you have elected to associate yourself with our organization. I hope that we can be a great source of support for you.

However, I am deeply saddened and disappointed by the continued successful assault upon injury victims by Ohio legislators. Ohio legislators are erasing hundreds of years of Ohio tort law with the sweep of an unsympathetic and unfair vote on Bill after Bill. I am amazed that they continually vote for corporate and insurance industries and ignore Ohio citizens and injury victims. **When was the last time our Ohio legislators passed any laws that actually helped innocent victims**?

I leave office with the hope that Ohio courts will strike down the legislator's attempt to unfairly erase Ohio tort law. Our members must lead the charge in court; our members must also become involved with the political process. We must change the tide back in favor of "people." I hope each and every member of this outstanding academy continues to stand up and fight these unfair, unjust and **unconstitutional** laws.

Thank you for the opportunity to serve you!

2003 Installation Dinner

CATA Officers Donna Taylor-Kolis (Treasurer), Romney Cullers (Secretary) and Dennis Lansdowne (Vice-President) taking the oath of office.

Retired Ohio Supreme Court Justice Andy Douglas giving a few inspirational words at the Intallation Dinner.

CATA President Mike Becker presents Merit Award to the Editors of CATA's Newsletter, Mary Cavanaugh and Steve Keefe.

Contents

President's Message 1
Michael F. Becker

Outgoing President's Message 3
Kenneth J. Knabe

2003 Installation Dinner 3

Constitutional Impilcations Of S.B. 281 And Its Progeny 4
by Don Iler, Esq.

3 Do's; 3 Don'ts 13
Judge Janet Burnside

Consumer Class Actions 14
Jack Landskroner

Law Update 21
Stephen T. Keefe, Jr.
Mary A. Cavanaugh
Steve Vanek

Verdicts & Settlements 39

Brief Bank 45

Enter the digital age of courtroom visual presentations.

Litigation Support Services

- Trial/Discovery Videotaped Depositions
  - 1 or 2 Camera
  - Document Camera
- Large Screen High Resolution Playbacks
- Day-in-the-Life Documentaries
- Settlement Videos
- Site Inspections
- Property Damage and Personal Injury Photography
- 2-D and 3-D Animation
- Accident Reconstruction/Re-enactment
- CD-Rom Technology
- Text-to-Video Sync
- Document/Image Integration
- Courtroom Trial Support
- Document/Image Scanning and Enhancement
- Mock Trial Presentations
- Linear/Non-Linear Editing Suites

14245 Cedar Road
Cleveland, Ohio 44121
Contact: Barry Hersch

Phone: (216) 382-1043
Fax: (216) 382-9696
Toll Free: 1 (888) 720-7206 Pin # 2757
www.videodiscoveryinc.com

Constitutional Impilcations Of S.B. 281 And Its Progeny

by Don Iler, Esq.

Introduction

A careful review of the decision in *State ex rel. Ohio Academy of Trial Lawyers, et al. v. Sheward* (1999), 86 Ohio St.3d 451 and other Ohio Supreme Court decisions addressing prior tort reform efforts by the Ohio legislature lead to the conclusion that many sections of the newly enacted Medical Malpractice Act, S.B. 281, are unconstitutional. Indeed, in S.B. 281, the legislature has enacted provisions that have already been struck down as unconstitutional by the Ohio Supreme Court in *Sheward* and the other cases discussed in this article.

Proponents of tort reform improperly argue that the Ohio Supreme Court is pro-active and is legislating from the bench. In *Sheward*, however, the Court noted at the outset that it "has nothing to do with the policy or wisdom of a statute," which "is the exclusive concern of the legislative branch of the government." The Court went on to note that "[t]he only judicial inquiry into the constitutionality of a statute involves the question of legislative power, not legislative wisdom." *Id.* at 456. This "legislating from the bench" argument of tort reform proponents thus lacks merit, as it deliberately ignores the Supreme Court's duty to expose legislative constitutional violations. Lessons can be learned from the detailed and articulated responses to these and other inaccurate notions made by tort reform proponents by reviewing the *Sheward* decision, as well as other relevant constitutional cases discussed therein and in this article.

S.B. 281 must be confronted with vigorous constitutional challenges, many of which are addressed in this article.

Separation Of Powers

The separation of powers doctrine under the Ohio Constitution is one of the major roadblocks to tort reform. Indeed, the legislature cannot exempt its legislative tort reform enactments from judicial scrutiny and constitutional examination by the Ohio Supreme Court. In *Sheward*, the Ohio Supreme Court clearly announced that legislative enactments cannot avoid the binding effect of the Court's interpretation of the Ohio Constitution. The *Sheward* Court was quick to define the separation of powers doctrine and use its constitutional obligation to examine legislation that encroaches, denies, or acts outside the boundaries of the Ohio Constitution. Moreover, the Court ruled that the General Assembly does not have an unrestricted right to re-enact legislation that had already been deemed unconstitutional by the Ohio Supreme Court:

> We agree that "the General Assembly has the right to enact legislation even if the constitutionality of that legislation is questionable." In fact, any holding which suggests otherwise would itself violate the doctrine of separation of powers as a derogation of the veto power and an intrusion into the legislative domain. However, it does not follow that the General Assembly has the right or the power to enact legislation that purports to release itself from the binding effect of this Court's interpretation of the Ohio Constitution. While the General assembly "is free to act upon its own judgment of its constitutional powers," *Pfeifer, supra*, 88 Ohio St. at 487, 104 N.E. at 533, it "cannot annul, reverse or modify a judgment of a court already rendered, nor require the courts to treat as valid laws those which are unconstitutional. If this could be permitted the whole power of the government would at once become absorbed and taken into itself by the legislature. *Bartlett, supra*, 73 Ohio St. at 58, 75 N.E. at 941."

Sheward, at 505.

A statute that violates the doctrine of separation of powers is unconstitutional. *See State v. Hochhausler* (1996), 76 Ohio St.3d 455, 463. In *Hochhausler*, Justice Moyer explained:

> The principle of separation of powers is embedded in the constitutional framework of our state government. The Ohio Constitution applies the principle in defining the nature and scope of powers designated to the three branches of the government. *State v. Warner* (1990), 55 Ohio St.3d 31, 43-44, 546 N.E. 2d 18, 31. *See State v. Harmon* (1877), 31 Ohio St. 250, 258. It is inherent in our theory of government "that each of the three grand divisions of the government, must be protected from the encroachments of the others, so far that its integrity and independence may be preserved...." *S.*

> *Euclid v. Jemison* (1986), 28 Ohio St.3d 157, 159, 503 N.E. 2d 136, 138, quoting *Fairview v. Giffee* (1905), 73 Ohio St. 183, 187, 76 N.E. 865, 866.

As noted above, careful review of the *Sheward* case supports the conclusion that many sections of the newly enacted S.B. 281 unconstitutionally violate the separation of powers doctrine. Indeed, by enacting S.B. 281, the legislature has re-enacted many provisions that have already been struck as unconstitutional by the Ohio Supreme Court in *Sheward* and the other cases discussed below. This represents the Legislature's ongoing efforts to impermissibly avoid the binding effects of the Ohio Supreme Court's interpretation of the Ohio Constitution.

In addition, S.B. 281 includes provisions that regulate court procedure in violation of the separation of powers set forth in the Ohio Constitution. When it enacted Am. H.B. 350, the General Assembly, for the first time in this State's history, attempted to broadly take over the Supreme Court's function of prescribing rules governing the courts and rules of practice. As noted elsewhere in this article, the Ohio Constitution vests the judiciary, not the legislature, with the authority to "prescribe rules governing practice and procedure" which "shall not abridge, enlarge or modify any substantive right." Thus, a strong argument can be made in support of the unconstitutionality of S.B. 281 based on rules of practice and procedure, the civil rules and evidentiary rules which have expressly been changed, altered, or implicated by S.B. 281, as well S.B. 281's effort to usurp the power of the judicial branch mandated by the Ohio Constitution.

The power of the judiciary to determine the constitutionality and therefore the validity of acts of the other branches of government have been firmly established as an essential feature of Ohio's system of separation of powers. *See Beagle v. Walden* (1997), 78 Ohio St.3d 59 (holding that the interpretation of state and federal constitutions is a role exclusive to the judicial branch); *OATL v. Sheward, supra*; *State ex rel Johnson v. Taulbee* (1981), 66 Ohio St.2d 417; *Hale v. State* (1895), 55 Ohio St. 210. Am.H.B. 350 attempted to clothe itself with a self-cleansing constitutional interpretation of its own legislation. The independence of the judiciary was thus threatened, as that legislation attempted to violate Section 5, Article III of the Ohio Constitution and the judicial power of the courts contained in Section 1, Article IV of the Ohio Constitution.

The Ohio Constitution plainly states that "the General Assembly shall not. . . exercise any judicial power, not herein expressly conferred." Section 32, Article II, Ohio Constitution. The General Assembly is free to change a statute that has been interpreted by the courts in a fashion that the legislature deems wrong or bad public policy; however, it may not readily override a constitutional interpretation by the court. *See De Rolph v. Ohio* (1997), 70 Ohio St.3d 193. The principle that it is the duty of the Ohio Supreme Court to examine the constitutionality of all legislation has been firmly established in Ohio law. *See Beagle v. Walden* (1997), 78 Ohio St.3d 59 ("Interpretation of the state and federal constitution is a role exclusive to the judicial branch.") While this doctrine of law was hard fought among the framers of the Ohio Constitution, the separation of powers and the duties of the Supreme Court of Ohio became part of Ohio's Constitution.

The General Assembly Cannot Exercise Judicial Power By Enacting Or Altering Rules Of Practice and Procedure

Article IV, Section 1 of the Ohio Constitution vests the judicial power of the State of Ohio exclusively in the Ohio Supreme Court and other courts. The Constitution states that the Ohio Supreme Court shall have sole responsibility for the "general superintendence over all courts." Ohio Constitution Article IV, Section 5(B)(1). By contrast to that power which is vested in the courts, Article II, Section 32 of the Ohio Constitution prohibits the General Assembly from exercising "any judicial power not herein expressly conferred."

In addition, the Ohio Constitution clearly states that the "Supreme Court shall prescribe rules governing practice and procedure in all courts of the state, which rule shall not abridge, enlarge, or modify any substantive right." Further, Article IV, Section 5(B) of the Ohio Constitution states that all laws in conflict with such rules shall be of no further force and effect. Thus, the Ohio Rules of Civil Procedure, which are promulgated by the Ohio Supreme Court pursuant to Section 5(B) of Article IV of the Ohio Constitution, must control over legislative enactments that are in conflict with the procedural rules. *See Rocky v. 84 Lumber Co.* (1993), 66 Ohio St.3d 221.

The General Assembly Cannot Exercise Judicial Power By Overriding The Rules of Evidence

The Constitutional prohibition on legislative changes to practice and procedure rules apply equally to rules of evidence. Thus, the Legislature cannot override rules of evidence promulgated by the Supreme Court. The Ohio Supreme Court has already held unconstitutional any attempts to change the evidence rules promulgated by the

Supreme Court. *See In re Coy* (1993), 67 Ohio St.3d 215. An examination of S.B. 281 reveals that civil rules and rules of evidence have been changed, as S.B. 281 attempts to overrule a number of Supreme Court cases dealing with the civil rules and rules of evidence.

Previous Ohio Supreme Court Decisions Interpreting Medical Malpractice Legislation – The Real Question: Did The Legislation Under Constitutional Review "Rationally Further a Legitimate Legislative Objective?"

In preparing for the constitutional challenge to S.B. 281, it is instructive to review the test used by the Ohio Supreme Court in cases addressing the constitutionality of prior medical malpractice legislation.

Standard For Constitutional Review

There are two standards for constitutional review of legislation that are recognized by the courts:

When a fundamental right is not involved:

> Rational Basis Test: There is a basic presumption that legislation is going to be constitutional. As long as there is some rational reason on the part of the legislature for passing it, it is not arbitrary and capricious and the legislation is constitutional. Challengers of the statute must prove that it is arbitrary and unreasonable. *See Morris v. Savoy* (1991), 61 Ohio St.3d 684; *Mominee v. Scherbarth* (1986), 28 Ohio St.3d 270 (invalid on due process grounds); *Schwan v. Riverside Methodist Hosp.* (1983), 6 Ohio St.3d 300 (unconstitutional on equal protection analysis).

When a fundamental right is involved:

> Strict Scrutiny Test: This more stringent test requires that the legislature have determined, either through findings that preceded the legislation or through history, that there are compelling government justifications for legislating on the issue. It cannot be just an important thing or a desirable thing. Instead, it has to be compelling, and the legislation must accomplish that goal through the least restrictive means. In other words, it regulates no more than is required in order to accomplish that compelling interest. Proponents of statutes must prove compelling interest. See *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415.

It is best to put both of these tests into play and let the court decide which standard will apply to the legislation at issue. For example, in *Morris v. Savoy* (1991), 61 Ohio St.3d 684, the cap on medical malpractice damages in former R.C. 2307.43 was analyzed under both a due process and equal protection challenge. The Supreme Court dealt with the standard of review of R.C. 2307.43 using the rational basis test as follows:

> Our standards for review of this statute, challenged on due process and equal protection grounds, are the same as we used in *Mominee v. Scherbarth* (1986), 28 Ohio St.3d 270, 503 N.E.2d 717, and in *Schwan v. Riverside Methodist Hosp.* (1983), 6 Ohio St.3d 300, 452 N.E.2d 1337. In *Mominee*, we held that "A legislative enactment will be deemed valid on due process grounds '* * * [1] if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and [2] if it is not unreasonable or arbitrary.'" *Id.*, 28 Ohio St.3d at 274, 503 N.E.2d at 720-721, quoting *Benjamin v. Columbus* (1957), 167 Ohio St. 103, 146 N.E.2d 854, paragraph five of the syllabus. In *Schwan*, we agreed to an equal protection analysis that utilized the "rational basis" test because that case, like this one, did not involve a fundamental right or suspect class. *Id.*, 6 Ohio St.3d at 301, 452 N.E.2d at 1338. "'* * * Consequently, the statute must be upheld if there exists any conceivable set of facts under which the classification rationally furthered a legitimate legislative objective.' (Citation deleted.) *Denicola v. Providence Hospital* (1979), 57 Ohio St.2d 115, 119 [11 O.O.3d 290, 293, 387 N.E.2d 231, 234.]"

Morris, at 688-89.

Due Process

In analyzing the statute under due process requirements, the *Morris* court held that "[t]his court's function is only to determine whether the method employed bears a 'real and substantial relationship' to public health or welfare, or whether it is 'unreasonable or arbitrary.'" *Morris*, at 689. In *Morris*, the clear language of the act was aimed at malpractice insurance rates which had been rising rapidly in previous years. *Id.*, at 690. In commenting on the perceived medical malpractice crisis in 1995, the Supreme Court in *Morris*, led by Justice Craig Wright, noted that "the statutes (R.C. 2307.43, 2305.27) were part of the General Assembly's response in 1975 to a

perceived healthcare crisis prompted by escalating medical malpractice insurance premiums."

Does this sound familiar? The *Morris* court went on to explain that the Ohio Medical Malpractice Act was passed as a result of the turmoil that swept the nation in the early 1970's with the medical fraternity predicting dislocation of medical care as a result of soaring malpractice rates. As set forth in the *Morris* case, while the bill was in a Senate committee, the Ohio State Medical Association informed the legislature that "[w]ithin the next several days, the number of physicians unable to continue medical practice in Ohio because of lack of adequate malpractice coverage will reach crisis proportions." *Id.*, at 687. On July 28, 1975, the Medical Malpractice Act became law.

However, the *Morris* court could not find a connection between malpractice insurance premiums and jury awards. The court went on further to hold:

> We are unable to find, either in the amicus briefs or elsewhere, any evidence to buttress the proposition that there is a rational connection between awards over $200,000.00 and malpractice insurance rates. (emphasis added.)

The *Morris* Court cited the *Mominee* decision, in determining whether the statute was unreasonable or arbitrary, and quoted with approval to the following excerpt from the Court of Appeals for Stark County regarding R.C. 2307.43:

> ...it is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice...

Nervo v. Pritchard (June 10, 1985) Stark App. No. CA-6560, unreported, at 8; *Morris*, at 691.

In *Morris*, the Ohio Supreme Court applied the rational basis test as the standard of review, which presumes that the legislation is constitutional as long as there is some rational reason on the part of the legislature for passing it. The Court held that under the due process analysis, the limit on damages in R.C. 2307.43 was unconstitutional, because it did not bear a real and substantial relation to public health or welfare, and because it was unreasonable and arbitrary.[1] The Court stopped short of finding the statute defective on equal protection grounds.

Yet in S.B. 281, the Ohio legislature's response to suffering was to deliver more suffering to the victims and their families of medical negligence. S.B. 281 limits noneconomic damages to $250,000.00 or an amount equal to three times the plaintiff's economic loss, or a maximum of $350,000.00 for each plaintiff or a maximum of $500,000.00 for each occurrence (plaintiff and all derivative claims combined). Further, S.B. 281 limits damages of $500,000.00 for each plaintiff or $1,000,000.00 for each occurrence and one million dollars under certain circumstances of catastrophic injury. Review of the legislation, however, indicates that it is subject to significant due process challenges, as well as challenges based on equal protection.

Equal Protection

The *Morris* court held that "[e]qual protection of the laws requires the existence of reasonable grounds for making a distinction between those within and those outside a designated class." *Morris*, at 691, citing *State v. Buckley* (1968), 16 Ohio St.2d 128. The equal protection test requires the challenger to demonstrate either that there was no rational basis for the creation of the class itself or that those within the class are not being treated equally in the furtherance of a legitimate governmental interest. *Id.*, at 691.

The *Morris* Court analyzed the damage limitations under R.C. 2307.43:

> R.C. 2307.43 deals with damages in medical claims but treated members of the class of medical damage claimants in radically different fashion. First, the statute applies only to claims "not involving death." Respondent contends that this distinction is immaterial because Section 19a, Article I of the Ohio Constitution forbids a limit on damages recoverable in wrongful death actions. The fact that the Constitution prohibits treating one portion of a class in the desired fashion surely is not license to subject the balance of the class to disparate treatment. Second, and more importantly, the statute treat the most seriously injured malpractice victims differently from the rest of the class.

Morris, at 691-92.

The *Morris* Court clearly was loath to accept the contention that a cap would ease "the burden of alleged 'exorbitant' malpractice awards." The Court stopped short of finding the statute defective on equal protection grounds, however, despite noting the disparate treatment within the class, based on the "any conceivable set of facts" standard set forth in *Schwan*, discussed further below.

An Example Of Due Process And A Right To A Remedy

The Ohio Supreme Court has found that certain tort reform efforts are unconstitutional on due process grounds. Undaunted by the Ohio Constitution's requirements of due process, equal protection, and the right to a remedy, the legislature ignored these constitutional protections and in the case of *Mominee v. Scherbarth*, (1986) 28 Ohio St.3d 270, the Supreme Court met these issues head on. The *Mominee* decision involved two sections of the Ohio Constitution. Section 1, Article 1 of the Ohio Constitution, provides:

> All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

Section 16, Article 1, states in relevant part:

> All courts shall be open, and every person, for any injury done him in his lands, goods, persons or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

In *Mominee*, the Ohio Supreme Court examined the "alleged medical malpractice crisis," skyrocketing insurance costs, and cost of defensive medicine. Former Chief Justice Frank Celebrezze's concurring opinion revealed the true nature of the alleged "insurance crisis." The *Mominee* court noted that:

> Moreover, defendants have failed to proffer any evidence that R.C. 2305.11(B) as applied to minors has had any effect on insurance premiums; nor have they provided us with evidence that minors with malpractice claims even constitute a significant portion of all medical malpractice claimants. How important, therefore, can this section be to the immediate goal of reducing insurance premiums? Certainly in our view, the relationship between the statue and the goal is not substantial.

Id., at 275.

The *Mominee* Court then examined the due process issue, Section 16, Article I of the Ohio Constitution. With laser like precision, the *Mominee* Court held that then Ohio Revised Code 2505.11(B), the statute of limitation as it applied to minors, violated Article 1, Section I, and Article 1, Section 16 of the Ohio Constitution.

The Court held that a "legislative enactment will be deemed valid on due process grounds "...(1) if it bears a real and substantial relationship to the public health, safety, morals, or general welfare of the public and (2) if it is not unreasonable or arbitrary." *Id.* at 274. In *Mominee*, the Court found that there was not a substantial relationship between the statute and the stated goal of reducing insurance premiums, and that it was unreasonable and arbitrary as applied to minors because it effectively closed the courthouse doors to them. Based on this, the Court held that the statute was unconstitutional as applied to minors under the due course of law provisions of the Ohio Constitution. *Id.* at 276. The analyses in both *Morris* and *Mominee* are helpful and illustrative of the Court's analysis of the purported bases for reform efforts on insufficient or unsubstantiated claims of a connection between malpractice claims and premiums.

An Example Of An Equal Protection Violation

The standard that the Supreme Court used in *Morris v. Savoy* in reviewing the Medical Malpractice Act was a challenge on due process and equal protection grounds -- the same grounds that were used in *Schwan v. Riverside Methodist Hosp.* (1983), 6 Ohio St.3d 300 and *Mominee v. Scherbarth* (1986), 28 Ohio St.3d 270.

Schwan concerned the one year statute of limitations in medical malpractice cases that applied to minors under ten years of age. The Supreme Court declared this limitation unconstitutional and in violation of the equal protection provision, Section 2, Article I of the Ohio Constitution. The *Schwan* Court dealt with the "medical malpractice crisis" of the 1970's as follows:

> We acknowledge, however, the importance of the purpose of Am. Sub. H. B. 682 to alleviate the "medical malpractice crisis" of the mid-1970's. Section 5 of that Act requires that the Superintendent of Insurance report annually to the General Assembly the effectiveness of amendments to each of several sections of the Revised Code on reducing medical malpractice insurance premiums. R.C. 2305.11(B), however, was not of sufficient consequence to be included among those provisions for annual review. Therefore, in light of our conclusion that R.C. 2305.11(B) creates an irrational classification which does not rationally further the purpose of Am. Sub. H. B. No. 682, we hold that R.C. 2305.11(B) is unconstitutional on its face with respect to medical malpractice litigants who are minors. (Emphasis added)

Schwan, at 302-03.

The statute in *Schwan* was examined under an equal protection analysis using the "rational basis test." The Supreme Court reasoned, as it did in *Morris*, that the statute of limitations issue did not involve a fundamental right or suspect class:

> Appellant properly asserts that equal protection analysis requires that we review R.C. 2305.11(B) according to the "rational basis" test, because this case does not involve either a fundamental right or suspect class. *See, e.g. Beatty, supra*, at 491 et seq.; *Bd. of Ed. v. Walter* (1979), 58 Ohio St.2d 368, 373 [12 O.O.3d 327] et seq. Consequently, the statute must be upheld if there exists any conceivable set of facts under which the classification rationally furthered a legitimate legislative objective.

Id. at 301. The *Schwan* court did not say equal protection of the laws would be violated if there was a distinction made as to classes of people involved in the legislation. However, the Court did say there was a requirement that reasonable grounds for making a distinction between those within and without the class must be established. "Legislation must apply alike to all persons within a class, and reasonable grounds must exist for making a distinction between those within and those without a designated class." *Schwan*, at 302; *See also Porter v. Oberlin* (1965), 1 Ohio St.2d 143.

The *Schwan* Court held that the Malpractice Act's statute of limitations provision – a provision that made a distinction between medical malpractice victims who were younger than 10 years of age and those who were older but still minor – created an irrational classification which did not rationally further the purpose of the Medical Malpractice Act and was therefore unconstitutional on its face. In the concurring opinion in *Schwan*, Justice Clifford Brown pointed out that there were due process provisions of the Ohio Constitution, Section 1 and 16 of Article I, rendering the Medical Malpractice Act unconstitutional for violation of the due process clause of the Ohio Constitution. It is important to evaluate the provisions of S.B. 281 in this light and clearly expose the failure of the legislation to use reasonable grounds to draw class distinctions.

After deciding the limitations of damages in the amount of $200,000.00 set forth in the Medical Malpractice Act was unconstitutional, as it violated due process, the *Schwan* Court went on to uphold the collateral benefit portion of the Act. It is important to note that an alleged "insurance crisis" was the legislature's reason for enacting the tort reform act of 1975 and in shortening the statute of limitations as to minors. It appears that it is cyclical in this state's history that there is an "insurance crisis" in the medical field about every 20 years.

A Medical Malpractice Crisis, Again!

The Ohio Supreme Court has examined a "medical malpractice insurance crisis" on two previous occasions and found there was no reasonable justification to deny the constitutional and common law rights of those injured by medical negligence.

The 2002 "medical insurance crisis" is no different than the insurance crisis in 1975 when the Medical Malpractice Act was enacted. The Supreme Court in both *Morris* and *Mominee* examined the alleged insurance crisis and found that it could not be sustained on due process grounds where there was no sufficient evidence that the proposed legislative provisions were a factor in medical malpractice insurance rate setting.

The following is a review of other areas of constitutional challenge to reform efforts.

Periodic Payments Of Future Damages

The Ohio Supreme Court has previously ruled that statutory provisions for periodic payments of future damages are unconstitutional. *Galayda v. Lake Hospital Systems, Inc.* (1994), 71 Ohio St.3d 421. Former R.C. 2323.57 required that a trial court, upon motion, order that any future damages be paid in a series of periodic payments. The Court found that such a provision violated the Right to Jury Trial Clause of Section 5, Article 1, and the Due Process Clause, Section 16, Article 1, of the Ohio Constitution. In *Galayda*, both lower courts had found the statutory provision unconstitutional on the same grounds.

The *Galayda* Court found that the provision resulted in a successful plaintiff receiving less than the jury awarded and deprived the most seriously injured plaintiffs of the benefit of investment, by reducing the future damages to present value and not taking into account the effects of inflation, interest, or potential investment appreciation.

The statute also provided that the total lump sum and the periodic payment plan could not exceed the amount of the judgment, which also potentially violated the doctrine of separation of powers by effectively imposing a legislative remittitur. The Court found the provisions violated the jury's province to determine damages and the plaintiff's right to trial by jury. *Galayda*, at 426. The Court also upheld the lower courts' findings that the

statute violated the Due Process Clause on the basis that it was unreasonable, arbitrary, and that there was insufficient evidence to support a reasonable relationship between the legislation and the availability or affordability of malpractice insurance (the purported basis for the legislation). *Id.*

Non-Economic Damages

As discussed above, as part of the legislature's response to the perceived health care crisis in 1975, legislation was passed setting a $200,000.00 cap on noneconomic damages for medical malpractice. In *Morris v. Savoy*, the Court found that there was no evidence to support a relationship between awards over $200,000.00 and malpractice insurance rates, and that such a cap was unreasonable and arbitrary on due process grounds. *Morris*, at 689-91. On equal protection, the Court found that the Act created two classes – medical malpractice victims and all other tort victims – which required the existence of reasonable grounds for making a distinction between those within and those outside a designated class. *Morris*, at 691.

Although strongly questioning the legitimacy of this distinction, the Court, applying the "any conceivable set of facts" test set forth in *Schwan*, concluded that there could be a rational basis for the distinction made in the statute and was reluctant to find the statute unconstitutional on equal protection grounds. *Id.* However, caps were found to be unconstitutional on due process grounds.

Retroactivity

Article II, Section 28 of the Ohio Constitution provides that the General Assembly shall have no power to pass retroactive laws. *Kunkler v. Goodyear Tire and Rubber* (1988), 36 Ohio St.3d 135, 137. In *Kunkler*, the Court addressed an intentional tort claim statute which included language expressly making the statute retroactive. The Court noted longstanding Ohio law that prohibited retroactivity applying to laws affecting substantive rights but not to the procedural or remedial aspects of such laws. *Id.* "Substantive law is that which creates duties, rights, and obligations, while procedural or remedial law prescribes methods of enforcement of rights or obtaining redress." *Id.*

Collateral Benefits

The Ohio Supreme Court has found collateral benefit reforms unconstitutional. A section of the Tort Reform Act of 1987 included a provision to limit the collateral source rule, whereby the trial court would reduce a plaintiff's jury award by collateral benefits which had been or would be received, irrespective of whether the benefits were actually duplicated in the jury's verdict. In *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, the Court reviewed the constitutionality of such a provision in a case where the amount of the collateral benefits to be deducted exceeded the total amount of the plaintiff's verdict. The Court found that such a provision violated the right to trial by jury because the statute did not require that damages be allocated between economic or noneconomic damages or even past or future economic damages. The statute simply directed the trial court to deduct the amount of collateral benefits from the total jury award, whereby the court could enter judgments in disregard of the jury's verdict and thus violate the plaintiff's right to have all facts determined by the jury, including damages. *Id.* at 422.

The Court held that the collateral benefit statute encroached upon the "fundamental and inviolate right to trial by jury," and therefore was unconstitutional under Section 5, Article 1 of the Ohio Constitution. *Id.* Because the right to a jury trial is a fundamental constitutional right, it is subject to the highest level of scrutiny under the Due Process Clause. Under the strict scrutiny standard, discussed *supra*, the statute would be considered unconstitutional unless it was shown to be necessary to promote a compelling governmental interest. In the Court's view, it was not shown to be necessary, and its goal of reducing the "so-called insurance crisis" was debatable given the "paucity of credible empirical evidence that a crisis existed, or that there is a relationship between tort reform legislation and the availability and affordability of insurance." *Id.* at 423.

While the goal of reducing double recoveries was not arbitrary or unreasonable, a statute that failed to take into account whether the collateral benefits to be deducted were actually within the damages found by the jury was. The Court concluded that such a provision did not afford due process under a strict scrutiny or even a rational basis test. *Id.* at 424. The Court also found that the collateral benefits provision violated equal protection. Indeed, it treated similarly situated people differently based upon an illogical and arbitrary basis, in that if there was an insurance crisis it would affect all tort defendants and there was no basis for distinguishing between medical malpractice tort defendants and all other categories of defendants. *Id.* at 425. Finally, the statute violated the Ohio Constitution's right to a meaningful remedy and open courts. *Id.* at 426. Chief Justice Moyer dissented in the *Sorrell v. Theviner* decision.

The One Subject Rule

Article II, Section 15 (D) of the Ohio Constitution provides that "no bill shall contain more that one subject." S.B. 281 contains more than one subject and should be analyzed with the one subject rule violation in mind. The one subject rule was enacted to prevent logrolling - a practice of attaching several provisions into a single bill that were not related to the main purpose of the legislation. *See State ex rel. Dix v. Celeste* (1984), 11 Ohio St.3d 141 and *Pim v. Nicholson* (1856), 6 Ohio St. 176. Forty-one state legislatures contain the one subject provision in their constitutions. *See OATL v. Sheward*, 86 Ohio St.3d 451. In *Sheward*, amended substitute H.B. 350 enacted or repealed over one-hundred section of the Ohio Revised Code, relating to changes in the laws pertaining to tort and other civil actions. *See OATL v. Sheward*, at fn. 6.

The Legislative Service Commission in its Final Analysis of Am. Sub. H.B. 350 broke down the bill into five general sections and then into sub-sections wherein the Legislative Service Commission reported that H.B. 350 arguably included potential conflicts with the due process and equal protection provisions of Section 2 and Section 16 of Article I of the Ohio Constitution and the 14th Amendment to the United State Constitution, together with the open court provision of Section 16 of Article I of the Ohio Constitution. There should be the same type of Legislative Service Commission Report on S.B. 281, and this same review must be done.

Right To A Remedy

Article I, Section 16 of the Ohio Constitution guarantees that "[e]very person for an injury done him in his land, goods, person, or reputation, shall have remedy by due process of law, and shall have justice administered without denial or delay." Limiting damage in the pain and suffering arena is an apportionment of damages that will provide plaintiff with a less complete remedy than would otherwise be available. *See Morris v, Savoy, supra*. The Court has previously found that reform efforts can violate the constitutional right to a remedy, and such a challenge must be considered anew with S.B. 281.

Jury's Inviolate Authority To Determine The Amount Of Damages

Civ. R. 38(A) guarantees a right to jury trial, and S.B. 281 prohibits a disclosure of statutory damage caps to the jury. The Supreme Court of Ohio has held that the right to jury trial and the authority of the jury to determine the amount of damages to which a plaintiff is entitled was constitutionally established in *Galayda v. Lake Hospital Systems, Inc.* (1994), 71 Ohio St.3d 421 and *Gibbs v. Girard* (1913), 88 Ohio St. 34. The jury's right to determine damages cannot be invaded or violated by either legislative act or judicial decree.

The Ohio Rules of Civil Procedure were promulgated by the Supreme Court pursuant to Section 5(B), Article IV of the Ohio Constitution and must control over legislative action that is inconsistent with the Civil Rules. *See Rocky v. 84 Lumber Co.* (1993), 66 Ohio St.3d 221. In *Rocky*, the Court held as follows:

> The Ohio Rules of Civil Procedure, which were promulgated by the Supreme Court pursuant to Section 5(B), Article IV of the Ohio Constitution, must control over subsequently enacted inconsistent statutes purporting to govern procedural matters.

Moreover, Article IV, Section 5(A)(1) of the Ohio Constitution specifically and unambiguously states that "[t]he Supreme Court shall prescribe rules governing practice and procedure in all courts of the state, which rule shall not abridge, enlarge, or modify any substantive right," and that "[a]ll laws in conflict with such rules shall be of no further force and effect after such rules have taken effect." Those provisions are further reinforced by Article II, Section 32, which prohibits the General Assembly from exercising judicial power.

A jury trial is not a substantive right; rather, it is a constitutional right. The right of jury trial is derived from the Magna Carta and from the Northwest Ordinance of 1787. (See section 14, Article II). The fundamental principle of tort law is to make the plaintiff whole for his or her injuries. See *Fantozzi v. Sandusky Cement Products, Co.*, 64 Ohio St.3d 601. "The very essence of civil liberty certainly consists of the right of every individual to claim the protection of the laws, whenever he received an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison* (1803), 5 U.S. 1 (1 Cranch) 137, 163.

S.B. 281, like its predecessors, violates the right to a jury trial and the right to have a jury determine damages – constitutional principles which are protected by the Ohio Constitution and which have been upheld by the Ohio Supreme Court. Any challenge to S.B. 281 will certainly include an analysis regarding the violation of these constitutional rights.

Conclusion

The *Sheward* case and the other Ohio Supreme Court decisions addressing prior "tort reform" efforts provide a rich history and roadmap for constitutional challenges to Senate Bill 281. A review of those cases demonstrates that

prior "reform" efforts containing provisions nearly identical to those set forth in S.B. 281 have been held unconstitutional under the Ohio Constitution. Challenges exist on separation of powers, due process and equal protection grounds. The Supreme Court precedent in Ohio, in particular the Court's decision in *Sheward*, must be considered as we collectively move forward in examining and mounting constitutional challenges to S.B. 281.

End Note

Other State Supreme Court cases that have found caps unconstitutional include:

> *Kansas Malpractice Victims Coalition v. Bell* (1988), 243 Kan. 333, 757 P.2d 251 (violates rights to trial by jury, adequate remedy, and due course of law); *Lucas v. United States* (Tex.1988), 757 S.W.2d 687 (violates constitution's open courts guarantee); *Smith v. Dept. of Ins.* (Fla.1987), 507 So.2d 1080 (violates right of access to courts); *Carson v. Maurer* (1980), 120 N.H. 925, 424 A.2d 825 (violates equal protection guarantee); Arneson v. Olson (N.D.1978), 270 N.W.2d 125 (violates equal protection); *Jones v. State Bd. Of Medicine* (1976), 97 Idaho 859, 555 P.2d 399 (remanded to apply heightened equal protection standard); and *Wright v. Central Du Page Hosp. Assn.* (1976), 63 Ill.2d 313, 347 N.E.2d 736 (violates constitutional prohibition against special privilege).

2905 Chester Avenue
Cleveland, Ohio 44114

- Litigation Copying
- Deposition & Brief Reproduction
- High Volume B&W Document Reproduction
- Bates Numbering
- Color Laser Copies
- Binding & Finishing
- FREE Pick-up & Delivery

(216) 861-3377 • Fax: (216) 861-6108
www.copy-king.com

3 Do's; 3 Don'ts

by Judge Janet R. Burnside

Don'ts

1. Don't reject out of hand the opportunity to use jury trial innovations such as juror note-taking, questions from jurors and the like. Remember – our tradi tional trial techniques are the product of necessity, not of scientific study and verified superiority: Clarence Darrow and William Jennings Bryan didn't have xerox machines or literate jurors, so they used oratory to communicate. If they would have had power point or Elmos, they would have used them!

2. Don't go to trial without spending the preceding 14 days with your nose in the local newspapers each day and with your eyes on the local television news each evening. It will prepare you to talk to jurors and be sensitive to what concerns they may have and what information they are currently being given.

3. Don't jingle the change in your pocket or repeatedly "click your bic." It distracts jurors. It disables court reporters. It annoys judges. It betrays your calm and confident image.

Do's

1. Do involve a new attorney in your trial, even if only as an observer. You will have contributed to professionalism, helped train a new colleague and given your trial meaning in an additional dimension.

2. Do practice your opening statements and closing arguments and time each of your presentations. Tape your practice sessions and replay each one to refine and perfect your approach. Many courtrooms limit these presentations to a fixed number of minutes.

3. Do learn how the civil rules are implemented in the courthouse in which you practice. Find out how paper filings flow through the courthouse. Find out how cases are opened, closed, transferred between judges and between Courts. Know what the system's shortcomings are.

Consumer Class Actions

by Jack Landskroner, Esq. and Chastity Christy

Introduction

In a society plagued by empty promises of monetary success, sustained health without any effort, and youthful appearance, consumers that can least afford to shoulder financial losses are often the victims of such predatory schemes. In the age of impulse purchasing, it has become commonplace for companies to maximize their profits with gimmicks, add-ons and upsells that nickel and dime the unsuspecting consumer at every turn. Whether the deception involves a product that promises "weight loss while you sleep," a plan for "instant financial stability," or "eternal youth and beauty," and whether the scheme is perpetrated through telemarketing, infomercials, or unauthorized charges assessed to the consumer for unwanted items through vendors such as banks, phone companies or credit card companies, consumers are defrauded on a daily basis in the State of Ohio and across the nation.

Class actions provide a remedy for consumers that may otherwise be unable to pursue a claim or enforce their legal rights because of the economic futility of bringing such an action. In these types of cases, the success of the fraud is largely based upon limited individual damages affecting a widespread consumer population. Hence, a little profit is taken from a lot of people, the majority of whom are unable to take the time and effort necessary to right the wrong for the few pennies lost on their dollar. Potential recovery on an individual claim would be limited and expensive, while a forum for collective restitution gives putative class members a method to economically assert their rights and flex their collective muscle.[1]

The threshold issue in electing to proceed with consumer class action is the ability to identify and subsequently certify the class. The failure to properly identify the class and assess whether a viable class action can be certified can result in a long, arduous and expensive venture without reward.

What is a Consumer Class Action?

A consumer class action is a suit brought by a group of individuals who have been injured, misled, defrauded, abused, or damaged by the same misconduct, practices, or procedures of another individual, group of individuals, company, or manufacturer. The suit is brought by an individual or several individuals, called the representative or lead plaintiff, on behalf of the members of the defined class. An action brought by a group as a whole, rather than a single individual for his or her individual claims, allows victims to band together when they may not have the financial resources or economic justification to independently bring their claims. Simply put, there is far greater strength and power in numbers. Moreover, a class-wide action is a more efficient use of judicial time and energy. This should be recognized by the courts and is even implicit in some Ohio consumer protection statutes which expressly authorize consumer class actions,[2] albeit, under Ohio's Consumer Safety Protection Act (CSPA), damages may be limited in specific cases in order to protect the Defendants from huge damage awards.

Viable Class Cases

A fraud perpetrated on numerous persons using similar misrepresentations may be an appropriate circumstance for a class action.[3] Frequently, multiple consumers are exposed to the same dubious practice by the same tortfeasor so that proof of the prevalence of the practice as to one consumer would provide proof for all.[4] As an example, cases alleging violations of securities fraud for publicly traded stocks or violations of antitrust law are generally considered as viable class actions.[5]

However, a catastrophic accident causing injuries to numerous persons is generally not appropriate for class action treatment because "significant questions, not only of damages but of liability and defenses to liability, might be present, affecting the individuals in different ways."[6] Although there are some instances where such actions have been pursued, courts are reluctant to apply class action procedures to mass tort claims.[7]

Class counsel must also be wary of claims that stem from rogue sales representatives or telemarketers who vary from the policies and sales scripts used in sales pitches. In such cases, individualized proof may be necessary which would not be common to the class claims, defeating class certification.

Class Certification

Once a complaint has been filed and a class action is initiated, the plaintiff(s) can file a motion for class certification pursuant to Ohio Rule of Civil Procedure 23. Seven prerequisites must be satisfied before a class can be certified. The first two requirements are not explicitly mentioned in Ohio R. Civ. P. 23, but are considered implicit in the rules. The next four requirements must all be satisfied and are explicitly mentioned in Ohio R. Civ. P. 23(A). The last prerequisite is that one of the explicit requirements in Ohio R. Civ. P. 23(B) be satisfied. The party seeking class certification has the burden of showing that class certification is appropriate by a preponderance of the evidence.[8] The following is the list of prerequisites and analyses of each by the Supreme Court of Ohio and Ohio appellate courts.

1. Identifiable and Unambiguously Defined Class

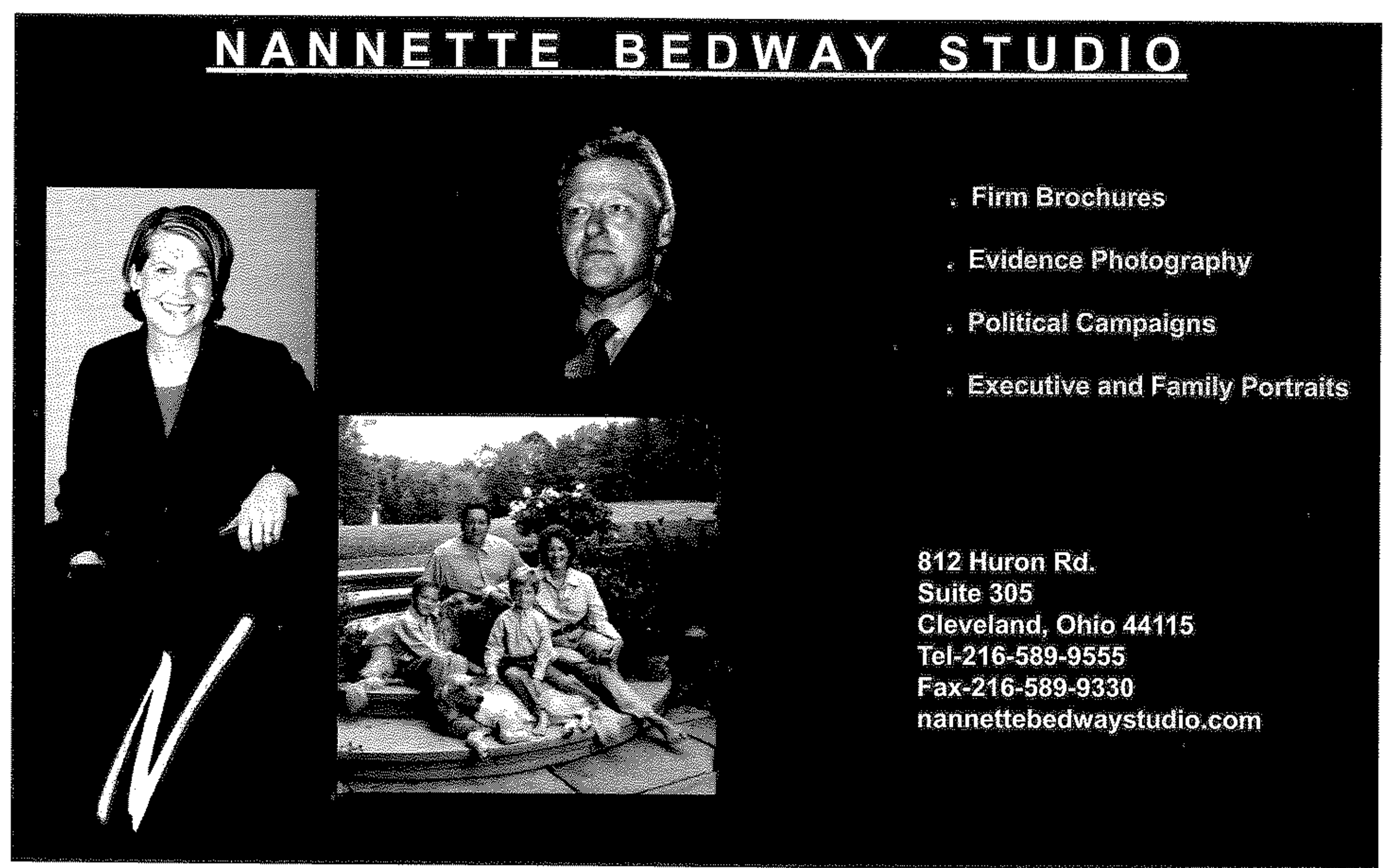
Ohio R. Civ. P. 23 implicitly requires that an identifiable class must exist before certification is permissible.[9] Furthermore, the definition of the class must be unambiguous.[10] This requirement is not deemed satisfied unless the description is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.[11] Thus, the class definition must be precise enough "to permit identification within a reasonable effort."[12] Where it is possible, the class should be defined upon the manner in which the defendant acted toward the ascertainable group of people.[13]

2. Named Representatives Must be Members of the Class

The second implicit prerequisite is that the class representatives must be members of that unambiguous and identifiable class.[14] This requires only that the representative have proper standing.[15] In order to have proper standing to sue as a class representative, the plaintiff must possess the same interest and suffer the same injury or type of injury shared by all members of the class that he or she seeks to represent.[16]

3. Numerosity

Ohio R. Civ. P. 23(A)(1) mandates that the class must be so numerous that joinder of all members is impracticable. Courts have not specified a numerical boundary for the number of members there must be in a class. However, if the class has more than forty people in it, numerosity is satisfied; if the class has less than twenty-five people in it, numerosity probably is lacking.[17] Joinder is more likely to be impracticable if the class members can be assumed to lack the ability or the motivation to institute individual actions.[18] For example, if a class member's individual



claims involve only a small amount of damages, class members would be unlikely to file separate actions.[19]

4. Commonality

Ohio R. Civ. P. 23(A)(2) states that there must be questions of law and fact common to the class. Most courts construe this prerequisite to require a showing of a "common nucleus of operative facts."[20] Thus, these common questions of law and fact must represent a significant aspect of the case and must be able to be resolved for all members of the class in a single adjudication. Yet, the Ohio Supreme Court has made clear that where common issues of law exist evidence necessary to a determination of each class member's transaction does not preclude class certification.[21] Class action treatment is appropriate where the claims arise from standardized forms or routinized procedures by the defendant.[22]

5. Typicality

Ohio R. Civ. P. 23(A)(3) requires that the claims or defenses of the representative parties be typical of the claims or defenses of the class. This requirement is met where there is no express conflict between the representative party and the class.[23] Typicality does not require exact identity of claims or identical defenses or claims.[24] A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.[25] The focus at this stage should properly remain on the essential characteristics of the defendant's conduct and the claims arising therefrom.[26] The purpose of this provision is to protect absent class members.[27]

Defenses asserted against a member of the class should not make his or her claims atypical.[28] Defenses may affect the individual's ultimate right to recover, but they do not affect the presentation of the case on the liability issues for the plaintiff class.[29] A unique defense will not destroy typicality or adequacy of representation unless it is so central to the litigation that it threatens to preoccupy the class representative to the detriment of the other class members.[30]

Moreover, in situations where a pending motion for class certification is pursued with reasonable diligence, the class action will not be mooted by a defendant's efforts to 'pick off' claims of the named plaintiffs by tendering the relief sought to that claimant in an effort by defendants to defeat the plaintiff's typical status.[31]

6. Adequacy

Ohio R. Civ. P. 23(A)(4) establishes that the representative parties must fairly and adequately protect the interests of the class. This requirement is divided into a consideration of the adequacy of the representative and the adequacy of counsel.[32] A representative is deemed adequate so long as his interest is not antagonistic to that of other class members.[33] Counsel should be competent and experienced in handling litigation of the type involved in the case before class certification is allowed.[34]

7. Ohio R. Civ. P. 23(B)

An action may be maintained as a class action if, in addition to all of the prerequisites of Ohio R. Civ. P. 23(A), one of the three requirements under Ohio R. Civ. P. 23(B) is satisfied.

- **Inconsistent or Varying Adjudications**

Ohio R. Civ. P. 23(B)(1)(a) will permit class certification if separate actions would create a risk of inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conducts for the party opposing the class.[35] This subsection of the rule does not lend itself to mass tort claims; however, it would apply to situations where a class may, for example, challenge the validity of a lease, the constitutionality of a term within a municipal bond or a voting rights statute.[36]

- **Adjudication Dispositive of Non-Parties/Impair or Impede Non-Party Interests**

Ohio R. Civ. P. 23(B)(1)(b) permits class certification if prosecution of individual actions would create a risk of adjudication which would either be dispositive of the interests of other members not parties to the suit or would substantially impair or impede their ability to protect their interests.[37] This section has been interpreted as protection for later litigants who may be deprived of recovery due to the success of earlier litigants.[38] For example, this subsection would be applicable to suits where only a limited amount of money is available and there is a risk that separate claims would deplete the fund before all deserving parities could make a claim.[39]

- **Final Injunctive or Declaratory Relief Appropriate**

Ohio R. Civ. P. 23(B)(2) will permit class certification if the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. The fact that damages are also sought in addition to injunctive relief does not defeat certification under this subsection.[40]

- **Common Questions Predominate and Class Action is a Superior Method**

Ohio R. Civ. P. 23(B)(3) is the so-called "damages" action.[41] It requires the court to make two findings: that the common questions predominate over questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.[42] The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action.[43]

For common questions of law or fact to predominate, it is not sufficient that such questions merely exist; rather, they must represent a significant aspect of the case and they must be able to be resolved for all members of the class in a single adjudication.[44] A claim will meet the predominance requirement for a class action where there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis.[45] While potential dissimilarity in remedies or damages is a factor to be considered in determining whether individual questions predominate over common questions, that alone does not prevent a court from certifying the class.[46]

Predominance is a test readily met in certain cases alleging consumer or securities fraud or violation of antitrust laws.[47] In consumer cases, this test is more readily disputed. Whether a class action is the superior method of adjudication requires a comparative evaluation of other available procedures to determine if the judicial time and energy involved would be justified.[48] Factors the court will consider are the economics of time, effort, expense and efficiency of class action treatment, the need for judicial supervision and the risk of confusion.[49]

8. Notice

Once a class is certified, notice must be provided to the absent class members. If a class is maintained under subdivision (B)(3), the court shall direct to all members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.[50] The notice shall advise each member that: (a) the court will exclude him/her from the class if he/she so requested by a specific date; (b) the judgment, whether favorable or not, will include all members who do not request exclusion; and (c) any member who does not request exclusion may, if he/she desires, enter an appearance through his/her counsel.[51]

However, a judgment rendered in a class certified under 23(B)(1) or (2), whether favorable or not, binds all members of the class who have not opted out and the judgment shall include and describe those whom the court finds to be members of the class.[52]

While it is expected that defendants will vehemently oppose class certification, it is worthwhile to note that once a class is certified by the trial court, it is often in defendant's best interest at settlement to have the class encompass the broadest interpretation of the defined class and class claims in order to gain a comprehensive *res judicata* effect to bar subsequent claims of all conceivable members of the class.

9. Trial Court's Determination and Abuse of Discretion

A determination as to class action certification is made only according to the requisites in Rule 23 and a court is not to consider the merits of the action when making its determination.[53] As a general rule, a trial court's determination as to class certification will not be disturbed absent an abuse of discretion.[54] A court abuses its discretion in denying certification of a class action: when it requires a certainty that a common issue of fact "probably exists" based on the merits of the class claim; when it finds that no other members of the alleged class filed a comparable suit or had sought to intervene; where no alternative means of redress is readily available for potential class members; and where, under the totality of the circumstances, Civ. R. 23 is narrowly construed to substantially hinder the remedial purpose of the rule.[55]

10. Class Certification as an Appealable Order

Ohio has recently changed its position on the status of a right to appeal a class certification order. Formerly, only an order denying class certification was immediately appealable. Now, pursuant to R.C. 2505.02(B)(5) "any order that determines that an action <u>may or may not be maintained as a class action</u>" is an appealable order. Federal courts have also recently amended the rules to permit an immediate appeal from an order of a district court granting or denying class action certification.[56]

Thus, in pursuing a class action, the choice of venue is a primary consideration. At the trial level, a trial judge with class action experience will understand that once certification is granted, the case is relatively simple to manage. The failure to certify a claim can result in the

risk of blocks of individual claims being filed which can clog up dockets and create a logistical nightmare for the court. Judges without class experience may be intimidated by pleadings and unfamiliar proceedings and may be reluctant to certify a class. Thus, it may be necessary to educate the inexperienced judge in order to prevail on class certification.

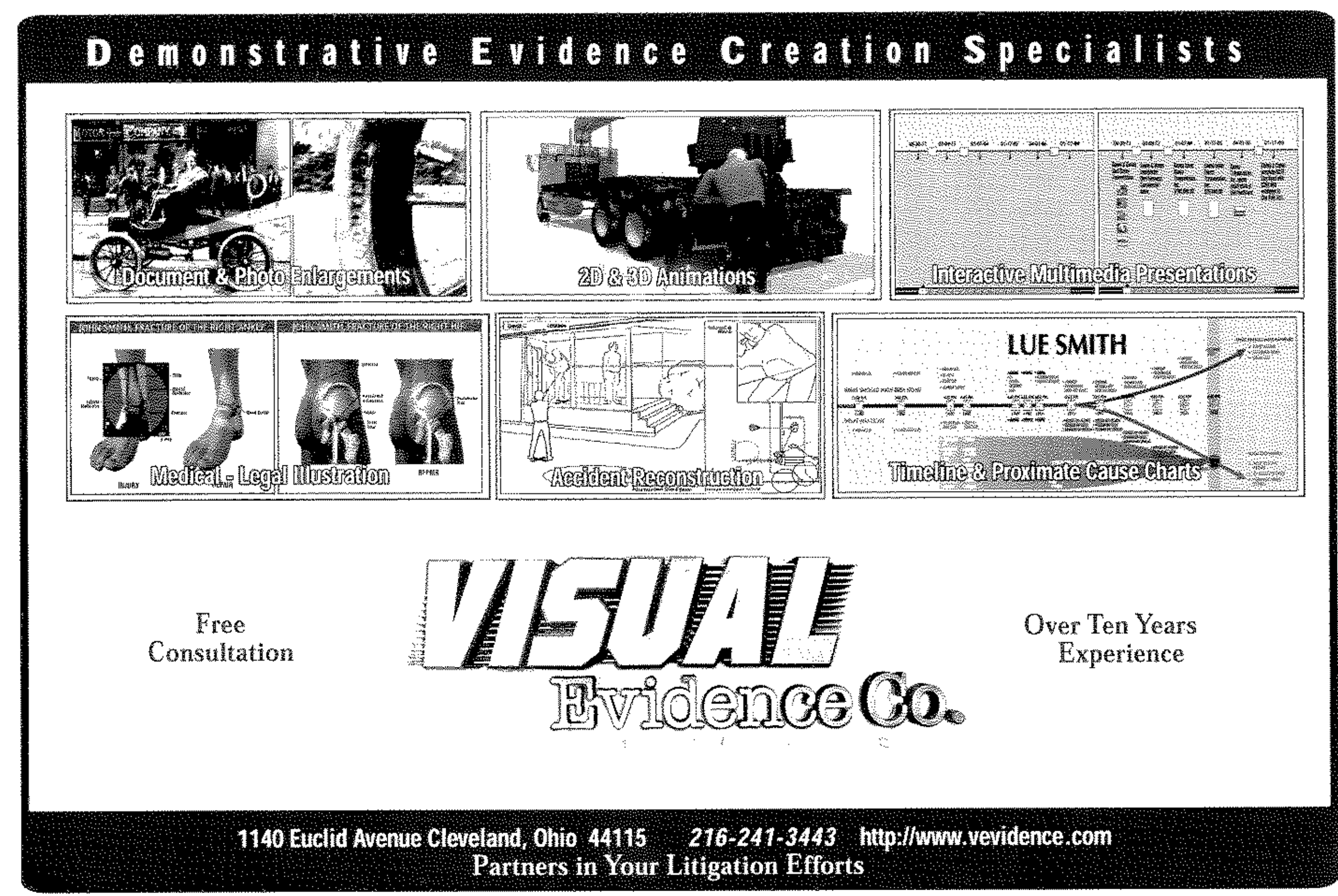
The wrong appellate district can not only result in an unfavorable opinion if the court is not receptive to class actions, but can also add months to the litigation process where opinions are not timely generated. Counsel must always keep in mind when pursuing a consumer class case that extensive delays can mean the difference between recovery from a financially solvent defendant and the insolvency of a fly-by-night entity run by high rollers who distribute and spend ill-gotten gains before class members can obtain redress and stop the monetary hemorrhage.

11. Attorneys Fees

An attorney who recovers for a common fund or confers a substantial benefit on behalf of an identifiable class is entitled to recover attorneys' fees and expenses payable from the fund relative to the benefit obtained.[57] The district court has discretion to award fees in common fund cases based on either the lodestar/multiplier method or the percentage-of-the-fund method.[58] However, the lodestar method has been criticized as "being too time-consuming of scarce judicial resources."[59] The preferred method in these cases has been to award a reasonable percentage of the fund to class counsel as attorney's fees.[60]

12. Judicial Approval of Class Action Settlements

After a class action settlement has been reached, the court is required to conduct a fairness hearing.[61] To approve a proposed class action settlement, the court must find it to be "fair, adequate, and reasonable."[62] In making this overall determination, the court should consider seven factors: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risk of establishing liability; (5) the likelihood of ultimate success on the merits balanced against the amount and form of relief offered in the settlement; (6) the judgment of experienced trial counsel; and (7) the public interest.[63] If these requirements are met, the court should approve the settlement and the claims process can commence.



Conclusion

While pursuing a consumer class action is often the most effective and efficient method to obtain redress where it otherwise would not be economically feasible for a consumer to bring an individual claim, pursing a class action requires extensive research and significant forethought before filing. The pitfalls are numerous and precaution is advised to counsel unfamiliar with the territory of class action litigation. Significant investigation, time and money must be invested in a client's claims in advance of litigation to properly assess the class viability before forging ahead on the merits. Short of this commitment to the proposed class case, the road to remuneration may be long, expensive and fruitless.

Editors' Note: On July 10, 2003, the 8th District Court of Appeals rendered its decision in *Ritt v. Billy Blanks Enterprises*, Cuy. App. No. 80983, 2003-Ohio-3645, a case addressing the propriety of a trial court's order denying class certification on the purported basis that the proposed class was not sufficiently identifiable. *Ritt* involved a telemarketing scheme by fitness expert Billy Blanks, who gained national notoriety through the sale of his Tae-Bo videotapes. Upon calling a 1-800 number, callers were required to give their personal credit card/ debit card information and were told about a free trial membership. After the caller stated his or her interest in the membership, the callers would not receive anything memorializing the free membership or anything informing them of any fees or any other details of the membership. Membership and annual renewal dues were thereafter assessed to the callers' credit cards. The purchasers sought to have a class certified consisting of all persons in the United States (of such States as may be certified by the court) who were charged unauthorized fees or charges on their credit or debit card accounts in connection with enrollment in the membership program. The trial court denied class certification on the basis that the proposed class was too ambiguous and would require individualized inquiry or each potential member regarding the issue of arbitration. On appeal, the 8th District agreed that the original class was too ambiguous to constitute an identifiable class, but it held that the trial court should have modified the class description so that all members of the class were sufficiently identifiable. Further, when the defendants filed their answer without demanding arbitration, they agreed to a waiver of arbitration. Finally, because the claims were grounded in common law fraud, there was no need to question every class member about their consent to arbitrate.

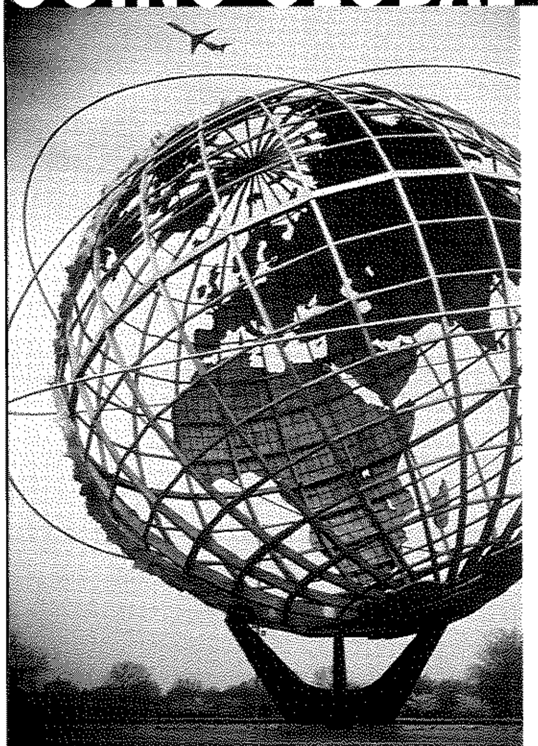
ENDNOTES

[1]. *Washington v. Spitzer Management*, 2003 Ohio 1735, 51, 2003 Ohio App. LEXIS 1640, 25-16 (8th App., Cuyahoga)
[2]. *See* R.C. 1345.09(B).
[3]. *Hamilton v. Ohio Savings Bank* (1998), 82 Ohio St. 3d 67, 83, 694 N.E.2d 442, 456; *Cope v. Metropolitan Live Insurance Co.*(1998), 82 Ohio St. 3d 426, 430, 696 N.E.2d 1001, 1004; *Ritt v. Billy Blanks Enterprises*, Cuy. App. No. 80983, 2003-Ohio-3645.
[4]. *In re Consolidated Mortgage Satisfaction Cases*, 97 Ohio St. 3d 465, 470, 780 N.E.2d 556, 561.
[5]. *Baughman v. State Farm* (2000), 88 Ohio St. 3d 480, 489, 727 N.E.2d 1265, 1274.
[6]. *Marks v. C.P. Chemical Co.* (1987), 31 Ohio St. 3d 200, 204, 509 N.E.2d 1254, (referencing the Advisory Committee Notes to the comparable Fed. R. Civ. P. 23(b)(3) provision).
[7]. *Id.*
[8]. *Warner v. Waste Management, Inc.* (1988), 36 Ohio St. 3d 91, 94, 521 N.E.2d 1091, 1094.
[9]. *Id.* at 96,1096.
[10]. *Id.*
[11]. *Hamilton, supra*, at 71-72, 448.
[12]. *Warner, supra*, at 96, 1096.
[13]. *Hamilton, supra*, at 73, 449.
[14]. *Warner, supra*, at 96, 1096.
[15]. *Hamilton, supra*, at 74, 450.
[16]. *Id.*
[17]. *Warner, supra*, at 97, 1097.
[18]. *Hamilton, supra*, at 75, 451.
[19]. *Id.*
[20]. *Marks, supra*, at 202, 1253.
[21]. *Washington, supra*, at 47 (citing *Cope v. Metropolitan Live Insurance Co.* (1998), 82 Ohio St. 3d 426, 696 N.E.2d 1001).
[22]. *Hamilton, supra*, at 84, 456.
[23]. *Marks, supra*, at 202, 1253.
[24]. *Baughman, supra*, at 485, 1270.
[25]. *Id.* at 485, 1271.
[26]. *Id.* at 487, 1272.
[27]. *Marks, supra*, at 202, 1253.
[28]. *Baughman, supra*, at 486, 1271.
[29]. *Id.*
[30]. *Id.* at 487, 1272.
[31]. *Woods v. Oak Hill Cmty. Med. Ctr.*(1999), 134 Ohio App. 3d 261, 272, 730 N.E.2d 1037, 1045; *see also Deposit Guar. Nat'l Bank v. Roper*, (1980), 445 U.S. 326, 339, 100 S. Ct. 1166, 1174 (Supreme Court of the United States upholds class certification and reasons that, "requiring multiple plaintiffs to bring separate action, which could be 'picked off' by a defendant's tender of judgment

before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class action...").

[32].*Marks, supra*, at 203, 1253.
[33].*Id.*
[34].*Warner, supra*, at 98, 1097-1098.
[35].*Id.* at 95, 1095.
[36].*Id.*
[37].*Marks, supra*, at 203, 1253.
[38].*Id.*
[39].*Warner, supra*, at 95, 1095.
[40]40.*Hamilton, supra,* at 87.
[41].*Id.* at 95-96, 1095.
[42].*Id.* at 96, 1096.
[43].*Vinci v. American Can Company* (1984), 9 Ohio St. 3d 98, 101, 459 N.E.2d 507, 510.
[44].*Schmidt v. Avco Corp.* (1984), 15 Ohio St. 3d 310, 313, 473 N.E.2d 822.
[45].*Cope, supra,* at 429, 1004.
[46].*Ojalvo v. Board of Trustees of Ohio State University* (1984), 12 Ohio St. 3d 230, 232, 466 N.E.2d 875, 876.
[47].*Baughman, supra*, at 489, 1274.
[48].*Schmidt, supra,* at 313, 825.
[49].*Id* at 316, 826.
[50].Ohio R. Civ. P. 23(C)(2).
[51].*Id.*
[52].Ohio R. Civ. P. 23(C)(3); See also *Gilmore v. General Motors Corp.*, 1974 Ohio App. LEXIS 2966, 7; *In re Kroger Co. Shareholders Litigation* (1990), 70 Ohio App. 3d 52, 60, 590 N.E. 2d 391, 396.
[53].*Ojalvo, supra*, at 233, citing *Eisen v. Carlisle & Jacquelin* (1974), 417 U.S. 156, 177.
[54].*Ojalvo, supra*, at 231, 876.
[55].*Id.* at 236, 880.
[56].*See* USCS Fed. Rules Civ. Proc. R. 23.
[57].*Boeing Co. v. Van Gemert* (1980), 444 U.S. 472, 478-79, 100 S. Ct. 745.
[58].*Rawlings v. Prudential-Bache Properties*, 9 F.3d 513, 517 (6th Cir. 1993).
[59].*Id.* at 516.
[60].*See In re Telectronics Pacing Sys.*, 186 F.R.D. 459, 483 (S.D. Ohio 1999).
[61].*See* Manual for Complex Litigation, § 30.212.
[62].*Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983).
[63].*In re Telectronics Pacing Sys.*, 186 F.R.D. at 476.

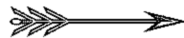
GOING GLOBAL AND STAYING IN CONTROL



We offer worldwide scheduling capabilities, a "valet" approach to service developed to provide clients with qualified professional reporters, facility arrangements, service of process and other services wherever, and whenever, they're needed. Benefits of our central scheduling services include:

- One phone call to Rennillo Reporting Services; no need to research and follow up with unfamiliar reporters in other locations. Your deposition is scheduled for you and confirmed in writing.
- Centralized production and distribution; your transcript is centrally produced and archived by our office so that you always get the same assurance of quality and familiar format.
- Consistency of quality reporters; our strong national relationships and reputation and our affiliation with LegaLink SM, the largest international court reporting company, ensures our access to qualified professional reporters.
- Convenient access to archives; all transcripts are formatted and produced in our offices and archived before distribution to clients. No need to search for the delivery or location of transcripts.
- Fair and familiar invoicing; we generate all invoices, extend reduced rates when available and stand behind you as a client wherever your discovery needs take you.

We offer a worldwide reach, a superior depth of experience and breadth of resources by providing you with access to experienced litigation support specialists and services whenever and wherever you need them.



RENNILLO REPORTING SERVICES
A LEGALINK AFFILIATE COMPANY

Cleveland 216.523.1313 • Akron 330.374.1313 • Nationwide 888.391.DEPO
www.rennillo.com

COURT REPORTING • VIDEO CONFERENCING • LEGAL VIDEOGRAPHY • SERVICE OF PROCESS • LITIGATION SUPPORT

Law Update

by Stephen T. Keefe, Jr.

Mary A. Cavanaugh

Steve Vanek

Cases of Interest Pending in the Ohio Supreme Court

***Katz v. Ohio Ins. Guar. Assn.*, 98 Ohio St. 3d 1536, 2003-Ohio-1946.**

The Ohio Supreme Court has accepted a discretionary appeal in this matter. In the underlying case, reported at 150 Ohio App.3d 262, 2002-Ohio-6357, the administratrix of decedent's estate filed wrongful death and survivorship actions against two doctors based on the failure to diagnose and treat cancer. During the relevant time period, one of the doctor's was insured by primary and excess policies through PIE. The primary policy provided coverage of $200,000 for "each claim," with an aggregate limit of $600,000. An excess policy provided coverage if a claim exceeded $200,000 up to an aggregate limit of $1 million. Those policies were entered into on July 1, 1994. The insurer became insolvent, and the determination of whether the doctor had a single "covered claim" or multiple "covered claims" within the meaning of the policies fell upon the OIGA. The OIGA determined that it was statutorily limited to pay a single claim at a maximum payment of $300,000. The trial court held that the claims of the four beneficiaries each constituted covered claims. The appellate court held that the OIGA could not thwart the remedial purpose of the wrongful death statute by finding *Savoie v. Grange Mut. Ins. Co.* (1993), 67 Ohio St.3d 500 inapplicable. According to the 6th District, the language of *Savoie* was broad enough to encompass all forms of insurance. The limits of liability clause in the primary policy was deemed invalid and unenforceable. It was the intent of the General Assembly to impose the $300,000 statutory limit on *each claim* made by a person entitled to damages in a wrongful death action. Indeed, the statute references "claims," not "occurrences" when setting forth the statutory limit. Thus, there were a total of four covered claims against the primary policy, each with a maximum coverage amount of $200,000 and an aggregate limit of $600,000. In addition, each of the four claims were covered under the excess policy.

Editors' Note: The Ohio Supreme Court has also accepted a discretionary appeal in *Witt v. Ohio Ins. Guar. Assn.*, 99 Ohio St.3d 1408, 2003-Ohio-2454. That cause is held for the Court's decision in *Katz*. The underlying decision in *Witt* is reported at Cuy. App. No. 80509, 2003-Ohio-278.

***Modzelewski v. Yellow Freight Systems, Inc.*, 2003-Ohio-3717, 2003 Ohio LEXIS 1837.**

The Ohio Supreme Court has accepted a discretionary appeal in this case on the issue of the constitutionality of the former version of Ohio's Workers' Compensation statute, R.C. 4123.93. R.C. 4123.93 is the predecessor to R.C. 4123.931, which the Ohio Supreme Court found to be unconstitutional in *Holeton v. Crouse Cartage Co.* (2001), 92 Ohio St.3d 115. In the underlying case of *Modzelewski*, reported at 151 Ohio App.3d 666, 2003-Ohio-827, the trial court and the 9th District Court of Appeals struck down former R.C. 4123.93 as unconstitutional. Citing with approval to the Eighth District Court of Appeals' holding in *Giles v. Schindler Elevator Corp.* (2001), 146 Ohio App. 3d 388 and also discussing the 6th District Court of Appeals' decision on *Yoh v. Schlachter*, 2002-Ohio-3431, the 9th District Court of Appeals held that R.C. 4123.93 impermissibly distinguishes between claimants who try their torts claims versus those who settle them. More specifically, according to the 9th District, the former statute unfairly deterred claimants from pursuing settlement over litigation, because the entire amount of any settlement was unconditionally subject to subrogation, whereas a litigant could obtain a special verdict to protect the amount of the award from subrogation.

***Taylor v. Kemper*, 99 Ohio St.3d 1406, 2003-Ohio-2454, 2003 Ohio LEXIS 1394.**

Determining the Eighth District's opinion in *Taylor* to be in conflict with the cases of *Hutchinson v. State Auto.*

Mut. Ins. Co. (1987), Ross. App. No. 1304, 1987 Ohio App. LEXIS 8263 and *Hatcher v. Grange* (Dec.14, 1993), Franklin App. No. 93AP-882, the Court determined that a conflict exists on the following issue:

> In a claim arising from an accident in 1989, in which an uninsured motorist was not sued within the statute of limitations for personal injury, is an insured's "legal right to recover" subject to common-law defenses, such as the statute of limitations, when the accident is governed by the pre-1994 version of R.C. 3937.18(A)(1), which had not yet defined "legally entitled to recover" as proving the elements of a claim:

In the underlying case of *Taylor v. Kemper Ins. Co.*, Cuy. App. No. 81360, 2003-Ohio-177, the Eighth District Court of Appeals held that appellant Taylor was not "legally entitled to recover" from the tortfeasor, because Taylor failed to sue the tortfeasor within the applicable two year statute of limitations for personal injury actions. Taylor's policy stated that the insurance company would pay all sums the insured is "legally entitled to recover" as damages from the driver of an uninsured motor vehicle. Finding Taylor to be no longer legally entitled to recover from the tortfeasor, the 8th District held that Taylor was likewise no longer entitled to seek UM coverage, as he had failed to satisfy a condition precedent in the policy. The 8th District based its decision in part on the fact that the insurer would not be able to pursue its subrogation rights against the tortfeasor due to the expiration of the two year statute of limitations for personal injury actions.

__Editors' Note__: The Ohio Supreme Court has also accepted a discretionary appeal in *Pilo v. Liberty Mut. Fire Ins. Co.*, 99 Ohio St.3d, 2003-Ohio-2902 on the "legally entitled to recover" issue, and has noted that the cause will be held for its decision in *Taylor v. Kemper*. Further, the Court has allowed a discretionary appeal in *Dimalanta v. Travelers Ins. Co.*, 790 N.E. 2d 1217, 2003 Ohio LEXIS 1704 on the "legally entitled to recover" issue, and that case is set for argument the same day as *Taylor v. Kemper*. *Pilo*, like *Taylor*, involves a pre-S.B. 20 policy, whereas *Dimalanta* involves a post-S.B. 20 policy.

Attorney Client Privilege - Exception in *Boone* and *Moskovitz* Clarified

***Garcia v. O' Rourke, M.D.* (May 23, 2003), Gallia App. No. 02CA16, 2003-Ohio-2780.**

The attorney-client privilege exception set forth in *Boone v. Vanliner Ins. Co.* (2001), 91 Ohio St.3d 209, and *Moskovitz v. Mt. Sinai* (1994), 69 Ohio St.3d 638, applies only in the context of proving the allegation of "bad faith."

In this case, a medical malpractice claim was settled on behalf of plaintiffs. Subsequently, a guardian brought a second action for damages for loss of parental consortium, derivatively based on the medical malpractice. The defendant doctors subpoenaed the attorney-client file from the original action on the theory that the file might contain information on whether the children benefitted from the earlier settlement. When the trial court held a hearing, both sides agreed that the documents were privileged. The doctors argued that a waiver had occurred and that the *Boone* and *Moskovitz* exception applied. The trial court ordered the Plaintiffs' attorney to produce the documents, stating that fundamental fairness and fair play dictated their disclosure, yet acknowledging that there was no allegation of bad faith.

An exception to the attorney client privilege set forth in R.C. 2317.02, which creates the attorney–client privilege, exists where there is an allegation of bad faith against an insurer denying coverage per *Boone*, or an allegation of a lack of good faith effort to settle in a proceeding seeking prejudgment interest per *Moskovitz*.

The appellate court here found that it was an abuse of discretion to order the production of attorney-client privilege documents in the absence of an allegation of bad faith.

Civil Procedure - Defendant Acting As Own Medical Expert Must Comply With Report And Discovery Rules For Experts

***Vaught v. Cleveland Clinic Foundation, et al.*, 98 Ohio St.3d 485, 2003-Ohio-2181, 2003 Ohio LEXIS 1170.**

This case deals with former Loc. R. 21.1 of the Court of Common Pleas of Cuyahoga County, which set forth the requirements for identification and submission of written expert reports. Note, however, that Loc. R. 21.1 was amended after the appellate decision in this case to apply only to non-party witnesses.

In the underlying case, the patient filed a motion in limine to prevent a defendant doctor from testifying as his own expert witness. The defendant had failed to identify an expert in response to discovery requests and had failed to

submit any expert report in accordance with the trial court's report deadline. The Clinic requested an extension of the expert report deadline but then failed to submit a report. One week before trial, defendant filed a brief listing the defendant doctor as an expert witness. The trial court granted a motion excluding the treating physician-defendant from providing expert testimony because he had not complied with Loc. R. 21.1.

On appeal, the appellants argued that the trial court abused its discretion. The court of appeals disagreed and affirmed, reasoning that a party who seeks to testify as an expert witness must be identified prior to trial and comply with all provisions of Loc. R. 21.1. The Supreme Court framed the issue as whether the trial court abused its discretion in not allowing the doctor to testify as an expert witness in his own behalf, after failing to file a written report and failing to supplement answers to interrogatories asking for identification of expert witnesses. The Court found that it did not.

Relax.

We know our business

Small business *personal service* with large firm *technology*

audiOdepo Transcripts
RealLegal Binder
RealLegal Publisher
(transcript and exhibit management solutions)
FREE DEMONSTRATIONS UPON REQUEST

Laura Ware

Realtime
E-Transcript
Complete Video Services Provided by Video Discovery, Inc.
Subpoenas/Notices

Ware Reporting Service
216.533.7606

Each court reporter has 15 plus years of experience and specializes in medical/technical depositions, resulting in an excellent product, making your job a little less stressful.

The Court reasoned that the doctor's belief that he should testify as an expert was premised only on his participation as a party to the action. "To allow such would permit a party who acts as his or her own expert to utilize a different set of rules than those which are in place, leading to an unfair advantage for one party at the expense of the opponent." Justine Lundberg Stratton dissented, arguing that it was an abuse of discretion to use the remedy of exclusion of the expert testimony.

Contract Law - Third Party Advances In Lawsuit Void As Champerty And Maintenance

***Rancman v. Interim Settlement Funding Corp. et al.*, 99 Ohio St.3d 121, 2003-Ohio-2721, 2003 Ohio LEXIS 1504.**

A contract for a nonrecourse advance of funds secured solely by an interest in a pending lawsuit constitutes champerty and maintenance and is void under Ohio law, except as permitted by legislative enactment or the Code of Professional Responsibility.

The plaintiff was injured in a motor vehicle accident and pursued a claim against her insurance company for uninsured motorist benefits. While the lawsuit was pending, the plaintiff contacted Interim Settlement Funding Corp., seeking an advance of funds secured by her pending legal claim. The defendant forwarded $6,000 in exchange for the first $16,800 she would recover if the case was resolved within 12 months, $22,000 if resolved within 18 months, or $27,600 if resolved within 24 months. The plaintiff then settled her case for $100,000 within 12 months of entering the agreement with Interim but refused payment on the contract, instead tendering the return of the money advanced to her at eight percent interest per annum. She then filed suit against Interim, seeking rescission of the contract and a declaratory judgment that the practices were unfair, deceptive and unconscionable sales practices.

On review, the Ohio Supreme Court found that such advances constitute maintenance, assistance to a litigant in pursing or defending a lawsuit provided by someone who does not have a bona fide interest in the case, and champerty, a form of maintenance in which a nonparty undertakes to further another's interest in a suit in exchange for a part of any favorable result of the litigation. Speculating in lawsuits is prohibited by Ohio law. Therefore, the Court affirmed the lower courts in finding that the contract was void and unenforceable.

Insurance Law - Ohio Supreme Court Cases

***Penn Traffic Co. v. AIU Ins. Co. et al.*, 99 Ohio St.3d 227, 2003-Ohio-3373** (CGL policy containing an exclusion for bodily injury to an employee arising out of the course and scope of employment does not provide coverage for an employer's liability for substantial certainty intentional torts).

On April 12, 1995, appellant Virginia Ramsey was injured when she fell off a loading dock while working for Penn Traffic. Ramsey and her husband filed intentional tort claims against Penn Central, alleging that Penn Traffic's failure to place a guardrail on the dock made Ramsey's injuries substantially certain to occur. In September 1997, a jury returned a verdict in favor of the Ramseys for more than $2.7 million in compensatory damages.

When Penn Traffic's insurance carriers declined to indemnify it and pay the judgment, Penn Traffic filed an action for declaratory judgment. Penn Traffic settled the Ramseys' claims and assigned to them certain rights of recovery against its insurers, such that the Ramseys were made parties to this action.

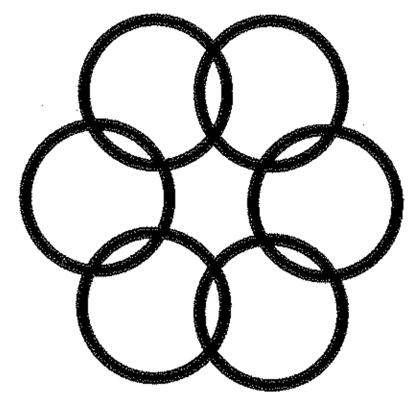
On the issue of insurance coverage, the trial court granted summary judgment to Cincinnati Insurance Company ("CIC") and Federal Insurance Company ("Federal"), holding that coverage was not available under their policies. The court of appeals affirmed summary judgment in favor of CIC, but it reversed the trial court's judgment as to Federal, concluding that genuine issues of material fact remained as to coverage under Federal's umbrella policy.

Determining that a conflict existed, the Ohio Supreme Court ordered the parties to brief the following issue: "whether a commercial general liability insurance policy which contains an exclusion for 'bodily injury to an employee' which arises out of or in the course of employment covers an employer's liability for substantially certain torts."

The Ohio Supreme Court affirmed the court of appeals' holding that the CIC policy does not provide coverage for substantially certain intentional torts, and it also agreed that genuine issues of material fact existed as to whether coverage exists under Federal's umbrella policy. Regarding the CIC policy, that policy was issued to Penn Traffic for the period of March 1, 1992 to March 1, 1995 and it contained an Ohio Stop-Gap Employer's Liability Coverage form. Effective March 1, 1994, and pursuant to a General Change Endorsement, CIC deleted Penn Traffic's stopgap coverage and added an "Ohio Liability Coverage Enhancement" modifying the insurance provided under the CGL policy. More specifically, it excluded coverage for "'bodily injury' expected or intended from the standpoint of the insured," and the exclusion specified that it applies to "any liability for acts committed by or at the direction of an insured in which the act is substantially certain to cause 'bodily injury.'" The exclusion also tracked the legal definition of substantially certain torts adopted from the Restatement and *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115.

Penn Traffic argued that (1) it had no knowledge of and did not consent to the deletion of the stopgap form and the issuance of the liability enhancement endorsement, (2) that any change by CIC in 1994 was an improper unilateral modification, and (3) that the renewal of the CGL policy in March 1995 did not become effective until countersigned by Penn Traffic's agent on April 14, 1995, two days after Mrs. Ramsey was injured. Thus, Penn Traffic argued that the stopgap form remained in effect when Mrs. Ramsey was injured and provided coverage as a matter of law.

The Court rejected Penn Traffic's arguments, holding that the Liability Coverage Enhancement Endorsement was countersigned on Penn Traffic's behalf by its designated agent, just as the original 1992 policy had been. The Court also concluded that the plain language of the endorsement excludes coverage for both direct-intent and substantial-certainty employer intentional torts. The Court went one step further and held that coverage would still be precluded even if the liability enhancement endorsement was not in effect at the time of Mrs. Ramsey's injury. Here, the CGL policy excluded coverage for bodily injury arising out of the course of employment. The Court started its analysis by essentially disavowing its holding in *Blankenship* that employer intentional tort's occur outside the employment relationship. The Court noted that in *Jones v. VIP Dev. Co.* (1984), 15 Ohio St.3d 90, it had clarified that an injured worker may both recover under workers' compensation and pursue an action against his or her employer for intentional tort. According to the Court, "[t]herefore, an injury that is the product of an employer's intentional tort is also one that 'arises out of and in the course of' employment." The Court further observed that "the injury itself must arise out of or in the course of employment; otherwise, there can be no employer intentional tort." The Court then held that '[f]or purposes of employer's insurance coverage, language in a CGL policy that excludes injuries that "arise



RINGLER ASSOCIATES

Michael W. Goodman, JD, CSSC
MGoodman@RinglerAssociates.com

Thomas W. Stockett, CSSC
TStockett@RinglerAssociates.com

John D. Heavenrich, JD, MBA, CSSC
JHeavenrich@RinglerAssociates.com

Jerry Vavruska
JVavruska@RinglerAssociates.com

STRUCTURED SETTLEMENT EXPERTS

55 Public Square, Suite 1850
Cleveland, OH 44113
(216) 241-9722
fax (216) 241-9733
(800) 585-0434
www.RinglerAssociates.com

out of or in the course of employment" merely means that the injury is causally related to one's employment." Because Mrs. Ramsey's injuries happened when she was working, the Court deemed that they were expressly excluded under the CIC policy.

Regarding Federal's umbrella policy, however, the Court agreed with the appellate court that genuine issues of material fact existed as to whether coverage was available. Under Coverage Part A, "Excess Follow Form Liability Over Claims Made or Occurrence Coverage," the policy provides that:

> We will pay, on behalf of an insured, damages in excess of the total Limits of Liability of Underlying Insurance...The terms and conditions of the Scheduled Underlying insurance are with respect to Coverage A made a part of this policy except for....a. any definition, term or condition therein relating to: any duty to investigate and defend, the Limits of Liability, premium, cancellation, other insurance, our right to recover payment, Extended Reporting periods, or b. ...
>
> With respect to all Scheduled Underlying Policies, the injury or damage must be caused by an occurrence....

The Federal policy defined "occurrence" as "with respect to bodily injury or property damage liability, an *event*, including continuous and repeated exposure to substantially the same general harmful conditions neither expected nor intended from the standpoint of the insured." The appellate court focused on the plain language of the policy and concluded that Mrs. Ramsey's fall was clearly an "event" as that term is used in the policy's definition of occurrence, "*unless* it was caused by 'continuous and repeated exposure to substantially the same general harmful conditions' which were 'expected or intended' by Penn Traffic." Because that was not apparent from the record, the appellate court determined that there remained a genuine issue of material fact as to whether Mrs. Ramsey's injuries were caused by continuous and repeated exposure to substantially the same general harmful conditions neither expected nor intended from the standpoint of the insured." The Ohio Supreme Court agreed with this analysis.

Justice Pfeifer, concurring in part and dissenting in part, stated that the issue of whether the stopgap policy provides coverage was not decided by the trial court. He would remand to the trial court on the issues of whether the stopgap policy was in effect at the time of injury.

Insurance Law - Duty To Defend Property Damage Claim For Alleged Failure To Disclose

***Cincinnati Ins. Co. v. Anders, et al.; GuideOne Mutual Ins. Co. v. Reno, et al.*, 99 Ohio St.3d 156, 2003-Ohio-3048, 2003 Ohio LEXIS 1668.**

These cases illustrate the importance of the allegations in a claim for injuries arising from property damage under a homeowners' policy.

In this consolidated appeal of certified conflicts among appellate decisions, the Court held that "[i]nsurance policies insuring against liability for property damage arising from accidents do not provide coverage to homeowners who are sued for their negligent failure to disclose to purchasers damage to the property that occurred during the seller's occupancy." *Id.*, at syllabus.

The two appeals involved claims against property sellers for failure to disclose structural defects in floor joists and failure to disclose structural damage caused by termite infestation. In both actions, the insurer filed a complaint for declaratory judgment that it was not required under a homeowners' policy to defend against the claims. The issue certified in both cases was whether insurance policies covering injuries arising out of property damage provide coverage to homeowners for claims arising out of an alleged negligent failure to disclose to purchasers damage occurring to the property during the sellers' occupancy. The Court answered this question in the negative.

Both insurance policies provided coverage for actions against an insured arising from an "occurrence." In *Motorists Mut. Ins. Co. v. Trainor* (1973), 33 Ohio St.2d 41, 62, the Court held that the scope of the allegations in the complaint against the insured determined whether an insurance company had a duty to defend. However, in *Preferred Risk Ins. Co. v. Gill* (1987), 30 Ohio St.3d 108, the court distinguished *Willoughby Hills*, finding that where the conduct giving rise to the underlying suit is so clearly outside coverage, there is no duty to defend.

In both cases, the Court found that the alleged nondisclosure was not the cause of the property damage or an "occurrence" – the faulty installation of insulation on the joists and the infestation were the occurrences. In both cases, the Court found that the conduct alleged was

indisputably outside the scope of coverage and there was no duty to defend.

Insurance Law - Local Cases of Interest

***Michael Gilchrist v. Arthur M. Gonsor*, Cuy. App. No. 80944, 2003-Ohio-2297, 2203 Ohio App. LEXIS 2106.**

On August 19, 2000, Michael Gilchrist was employed as a foreman at a construction site on I-90 when he was struck by a vehicle operated by Arthur Gonsor and was seriously injured. He sued Gonsor and later amended his Complaint to include a claim for underinsured motorist coverage under a policy issued to his employer, United Rentals, by USF&G.

The trial court granted partial summary judgment to Gilchrist, finding that he was entitled to uninsured motorist coverage under the USF&G policy issued to his employer. USF&G argued that the policy issued to United Rentals had matching liability and deductible amounts which rendered United effectively self-insured and exempt from the provisions of R.C. 3937.18.

The Eighth District had previously considered this issue in *Straubhaar v. Cigna Property & Casualty Company*, Cuy. App. No. 81115, 2002-Ohio-4791; however, in Gilchrist, Judge Ann Kilbane was critical of that opinion:

> The dissent also claims that we should follow, without question, the decision in *Straubhaar v. Cigna Property & Casualty Co.* In fact, the judge asserts that we should "summarily reverse" the judgment here on the basis of that unexplained decision decided on the accelerated docket. Because the *Straubhaar* decision fails to explain its rationale, however, it has no persuasive authority.
>
> Moreover, the dissent's assertion that his three-paragraph opinion in *Straubhaar* did not require explanation because it was heard on this court's accelerated docket defeats, rather than supports, his claim that the case should now be regarded as persuasive. Cases on the accelerated docket may be ruled upon with abbreviated opinions, but one engages in such abbreviation only at the cost of persuasive value. The law should always respect sound reasoning over naked appeals to authority.

Judge Kilbane went on to distinguish the holding in *Lafferty v. Reliance Ins. Co.*, (S.D. Ohio 2000), 109 F. Supp. 2d 837, from the instant case and further found that the USF&G policy clearly indicated that United Rentals intended to use the USF&G policy as proof of financial responsibility under R.C. 4509.01(L) and R.C. 3937.18.

Judge Kilbane also noted that the use of USF&G's licenses as an insurer was not a mere formality. Here, because the insured "chose to provide proof of financial responsibility by entering into a relationship designed to meet technical statutory requirements, that relationship must also comply with those mandates." The Court noted that "[e]ither United's policy is automobile liability insurance fulfilling all technical requirements or it consists of blank pieces of paper."

In sum, the Court held that:

> The circumstances show that, unlike a surety bond, the USF&G policy benefitted United as well as the public, and the *Grange* rationale requires that the policy be subject to R.C. 3937.18. United benefitted because USF&G bore a risk of loss if it was insolvent or refused to pay, took ultimate responsibility for the defense and payment of claims, and relieved United of the need to comply with bonding, deposit, or other statutory requirements for proving financial responsibility. United paid its premium not only for administrative services, as the dissent claims, but to maintain financial responsibility while avoiding the necessity of tying up capital in surety bonds.
>
> Instead of taking its duties of satisfying financial responsibility statutes upon itself, United paid its insurer to do so, and relied upon the insurer to provide it with an adequate "motor vehicle liability policy." Once this occurred the relationship was no different than that between any insurer and insured, and USF&G had a duty to inform its customer of the availability of UMI coverage and offer that coverage as part of the policy.

As a result of this decision, the Eighth District appears to have reversed its position (with articulated reasoning) regarding the defense of "practical self insurance" where the deductible matches the policy's liability limits.

Editors' Note: However, in another recent decision, *Landers v. Lucent Technologies, Inc.*, Cuy. App. Nos. 81506 & 81531, Judge Michael Corrigan, the author of *Straubhaar*, once again determined that an employer was self-insured in the practical sense when the insurance policy at issue had matching limits and deductibles. Thus, the 8th District continues to go both ways on the "self-insured in the practical sense" issue.

***John Kalista v. Pacific Employers Insurance Company, et al.*, Cuy. App. No. 82286, 2003-Ohio-3031, 2003 Ohio App. LEXIS 2716.**

On July 26, 1998, John Kalista was sitting on his motorcycle on the berm of State Route 2 in Erie County, Ohio when he was struck by vehicle operated by David Baron. Baron lost control of his vehicle causing the collision. Kalista was seriously injured in the crash.

Baron was insured by Allstate with a liability limit of $100,000, which Kalista accepted in exchange for a release. Kalista was employed by Praxair, Inc. which was insured under a business auto policy issued by Pacific Employers. The policy had a liability limit of $2 million. Ohio UM/UIM coverage was allegedly rejected under the Pacific policy; however, the offer/rejection form did not contain premium information for UM/UIM coverage.

HOFFMASTER
COURT REPORTERS, INC.

Full range of litigation support including:

- Condensed transcripts
- Word indexing
- ASCII format
- Video
- Subpoenas
- State-wide referrals

For a complete list of services call:

Phone 216.621.2550
Fax 216.621.3377

The trial court granted Pacific's motion for summary judgment, finding that UM/UIM coverage had been properly offered and rejected. On appeal, Pacific argued that because the policy was controlled by the post H.B. 261 version of R.C. 3937.18, the signed rejection created a presumption of a valid offer of UM/UIM coverage. Pacific pointed to the Supreme Court's answers to the questions certified to it by the federal district court in *Kemper v. Michigan Millers Mutual Insurance Co.*, 98 Ohio St.3d 162, 2002-Ohio-7101, and argued that *Kemper*, read along with the applicable version of R.C. 3937.18, allowed for oral or documentary evidence to support an offer of UM/UIM coverage.

The Eighth District rejected Pacific's argument, observing as follows:

> [T]he "selection form" names the insured, Praxair, Inc., along with a signature line for rejecting coverage or accepting reduced limits. The "selection form" was signed by Edward DeLoughy, Praxair's authorized representative, rejecting UM/UIM coverage. The selection form provides UM/UIM limits equal to liability limits. However, the premium for UM/UIM coverage or for reduced limits was not stated on the selection form, nor anywhere else in the policy, failing the second prong of *Linko*.
>
> This court finds this policy to be ambiguous. The appellee fails to comply with the valid offering requirements set forth in *Linko*. We note the trial court ruled on the instant matter before the Supreme Court released its decision in *Kemper*. Finding additional guidance from the Supreme Court, we must reverse.
>
> This court holds that Pacific's "selection form" does not meet the requirements for a proper offer set forth by the Supreme Court in *Linko*; therefore, UM/UIM coverage arises by operation of law. This Court also finds that *Kalista* is an insured for the purposes of *Scott-Pontzer*.

The Eighth District determined in *Kalista* that extrinsic evidence was not permitted under *Linko*, and that the

Kemper decision did not alter the Supreme Court's decision in *Linko* with regard to the valid offering requirements.

***Lee-Lipestreu v. The Hartford*, Cuy. App. No. 81515, 2003-Ohio-1955, 2003 Ohio App. LEXIS 1882.**

Edith Lee-Lipestreu sustained injuries in an automobile accident on December 20, 1997. Lipestreu sued the tortfeasor and her own UM/UIM carrier, Nationwide, under her personal UM/UIM policy containing $250,000 in limits. In January 2000, Lipestreu settled with the tortfeasor for his $25,000 limits and with Nationwide for her personal UM/UIM limits. On August 28, 2000, Lipestreu notified her employer, National City Bank ("NCB"), of her accident via letter and asserted a claim under NCB's policies. As set forth in the Editors' Note below, Lipestreu's action against Chubb and Federal Insurance Companies was removed to federal court and decided adversely to her. In this state case, Lipestreu filed suit against the Hartford, which had also insured NCB during the relevant time frame.

Here, the trial court held that Lipestreu was not entitled to UM/UIM coverage under the Hartford policy, because she breached the notice and subrogation provisions of the policy. Citing to its decision in *Oakar v. Farmers Ins. of Columbus* (April 17, 1997), Cuy. App. No. 70726, the 8th District noted that in general, it is unreasonable for an insurer to require an insured to protect subrogation rights of reimbursement that do not exist at the time of settlement with the tortfeasor. However, in this case, Lipestreu settled with the tortfeasor in 2000 – *after* the Ohio Supreme Court's decision in *Scott-Pontzer*. Despite the foregoing, the 8th District reversed the trial court's ruling and remanded for a determination in accordance with *Ferrando v. Auto-Owners Mut. Ins. Co.*, 98 Ohio St.3d 186, 2002-Ohio-7217 as to whether Lipestreu's breach of the subrogation and consent to settle provisions prejudiced Hartford.

__Editors' Note__: In the companion case of *Lee-Lipestreu v. Chubb* (6th Cir. 2003), 329 F.2d 898, the 6th Circuit affirmed the trial court's ruling that the CGL policy at issue was not an automobile liability policy of insurance within the meaning of former R.C. 3937.18(A), such that it did not contain UM/UIM coverage. The reviewing court also determined that the "parking attendant" provision in the policy did not create automobile liability coverage.

__Editors' Note__: For additional recent 8th District cases in which the Court has reversed and remanded on the basis of *Ferrando, see Ungur v. Buckeye Union Ins. Co.*, Cuy. App. No. 81208, 2003-Ohio-2044 (reversing and remanding based on *Ferrando* and rejecting the defense argument that the "Broadened Coverage for Named Individuals" endorsement removes the ambiguities present in *Scott-Pontzer*).

***Edward Ratkosky v. Scottsdate Surplus Lines Insurance Company*, Cuy. App. No. 81519, 2003-Ohio-2868, 2003 Ohio App. LEXIS 2603.**

On June 9, 2000, Edward Ratkosky ("Edward") was a passenger in a motor vehicle driven by his brother, Jeffrey Ratkosky ("Jeffrey"). Jeffrey negligently ran off the road and caused injury to Edward. Edward sued Jeffrey, Scottsdale Surplus Lines Insurance Company ("Scottsdale") and Allstate Insurance Company seeking recovery for his injuries. Scottsdate insured Edward's employer, Fallen Tree, Inc. Allstate insured Michael Cropper, Edward and Jeffrey's father, with whom the two brothers resided.

Allstate moved for summary judgment, arguing that because the Ratkoskys were insured under the Allstate policy it was not an uninsured motor vehicle under the policy language and R.C. 3937.18(K). Edward argued that the Allstate policy eliminated liability coverage by way of a family member exclusion, thus rendering Jeffrey an uninsured motorist. Edward also argued that R.C. 3937.18 was ambiguous and should be resolved in favor of providing UM coverage. The trial court granted Allstate's motion declaring that Edward was not entitled to UM coverage.

On appeal, Judge Timothy McMonagle, writing for the Eighth District, reversed. The Court noted that the Allstate policy's liability provision contained an intra-family exclusion which precluded liability coverage for "bodily injury to any person related to an insured person by blood, marriage or adoption and residing in that person's household." The validity of this exclusion was not challenged by Edward.

However, Edward argued that because of the intra-family exclusion, Jeffrey became an uninsured motorist. The Allstate policy defined an "uninsured auto" as "a motor vehicle for which the insurer denies coverage." Allstate argued, however, that it was only obligated to provide UM coverage for "damages which an insured person...is legally entitled to recover from the owner or operator of an uninsured auto...." Both the policy and R.C. 3937.18(K)(2) defined an "uninsured auto" as not including "[a] motor vehicle that has applicable liability

coverage in the policy under which the uninsured...motorist coverages are provided" or "[a] motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a named insured." Allstate argued that because the vehicle Jeffrey was operating was insured under the Allstate policy and owned by the named insured or furnished for the regular use of Jeffrey, a resident relative, there was no uninsured auto which entitled Edward to UM coverage.

The policy was controlled by the H.B. 261 version of R.C. 3937.18, which has an effective date of September 3, 1997.

Edward argued that R.C. 3937.18(J)(1) and 3937.18(K)(2) are irreconcilable, thus rendering R.C. 3937.18(K)(2) unenforceable. Section (J)(1) permits insurers to preclude coverage for bodily injury suffered by an insured "while the insured is operating or occupying a motor vehicle owned by, furnished to, or available for the regular use of a named insured," if the motor vehicle is not specifically identified in the policy under which a claim is made. This is known as the "other owned auto exclusion." Edward argued that (J)(1) appears to provide UM coverage when the vehicle is specifically listed in the policy, as was the case here, while the "household exclusion" in section (K)(2) eliminates any such coverage even if that vehicle is so listed.

The Eighth District discussed competing views on these two sections of R.C. 2927.18 from the Fourth Appellate District in *Morris v. United Ohio Ins. Co.*, Fourth Dist. No. 02CA2653, 2003-Ohio-1708, in which the court determined that section (K)(2) was unenforceable, and *Kyle v. The Buckeye Union Ins. Co.*, Sixth Dist. No. L-02-1166, 2003-Ohio-488, wherein the court found no inherent conflict.

The Eighth District generally agreed with the *Morris* court and disagreed with the court in *Kyle*, stating:

> In this case, we agreed that subdivision (J)(1) is intended to limit rather than provide coverage for vehicles listed in the policy. Nonetheless, we are troubled by the fact that subdivision (J)(1) implies that coverage is available if the vehicle is listed in the policy while subdivision (K)(2) makes it clear that, even if listed, coverage can never be available. This doublespeak militates against a finding that these statutory provisions are unambiguous and, therefore, reconcilable.

The court looked to the intent of the legislature and found it notable that on September 21, 2000, the legislature amended R.C. 3937.18 via S.B. 267 and removed the exclusion of a motor vehicle owned by, furnished to, or available for the regular use of a named insured, spouse or resident relative of a named insured in (K)(2) from the definition of an uninsured or underinsured motor vehicle. The court stated that "[w]hatever the case may be, subdivision (K)(2) is no longer part of the statute leading us to believe that the legislature never intended it to be so."

The Court held that Allstate could not avoid providing UM coverage in the policy and sustained appellant's assignment of error and reversed the trial court's order granting summary judgment to Allstate.

***Michael Ryan v. Larry Dolin, et al.*, Cuy. App. No. 81689, 2003-Ohio-2738, 2003 Ohio App. LEXIS 2487.**

Appellant Michael Ryan ("Ryan") was injured when he was struck by a vehicle operated by Lloyd Sahley. Ryan was directing traffic for his employer, The Front Row Theatre, Inc., when he was injured. Ryan settled with Sahley's carrier, Allstate, for the liability limits of $100,000.

Front Row was insured by Lumbermans Insurance and also by American Insurance. Lumbermans issued a commercial automobile policy and American a commercial general liability policy.

Ryan sued Larry Dolin, d.b.a. The Front Row Theatre, Inc. seeking underinsured motorist coverage. Dolin was later dismissed from the action.

The trial court held that the Lumberman's policy was not ambiguous and *Scott-Pontzer* did not apply because of the presence of a Drive Other Car endorsement which identified six named individuals as insureds. The trial court denied coverage under the American policy finding that it was not an automobile liability policy of insurance.

On appeal, the Eighth District, in an opinion written by Judge Frank Celebrezze, Jr., held that the Drive Other Car endorsement did not eliminate the application of *Scott-Pontzer* and did not cure the ambiguity presented by the use of the word "you." The Court held that Ryan was an insured under the Lumberman's policy.

With regard to the American commercial general liability policy, the court held that the exceptions to the automobile exclusion did not amount to express coverage and were therefore incidental. The trial court's decision with regard to American's CGL policy was thus affirmed.

Insurance Law - Cases of Interest From Around the State

***Amore, et al. v. Grange Insurance Company, et al.*, Fifth Dist. No. 02CA76, 2003-Ohio-3202, 2003 Ohio App. LEXIS 2858; and *Amore et. al. v. Grange Insurance Company and Continental Insurance Company*, Fifth Dist. No. 02CA70, 2003-Ohio-3207, 2003 Ohio App. LEXIS 2847.**

On June 6, 1998, Darlene Amore was a passenger in her own van which was being driven by her husband, Thomas Amore. The van was rearended by Elizabeth Brennan, causing Mrs. Amore to sustain injuries.

Mrs. Amore was employed by The Thompson Corporation which was insured by Continental. Mr. Amore was employed by FujiFilm America, Inc. which was insured by Tokio Marine and Fire Insurance Company, Ltd. The Amores were personally insured by Grange Mutual Casualty Company. Grange filed cross-claims for pro-rate contribution from the other two carriers.

The trial court held that there was underinsured coverage under all three policies, but that the Grange policy was primary and the other two policies were excess. The trial court assessed prejudgment interest but differentiated between the commencement date of the interest between Grange, the carrier it found primary, and Continental and Tokio, the carriers it determined were excess. The Amores and Grange appealed. Grange argued that Continental and Tokio were not excess carriers and that the trial court erred in assessing interest at 10% per annum from September 9, 2002 until paid.

In a related proceeding, at 2003 Ohio 3208; 2003 Ohio App. LEXIS 2857, the Fifth District held that the Amores were precluded from coverage under the Tokio policy due to an exclusion which eliminated coverage:

> Section B of the endorsement as cited by Tokio addresses broadened liability coverage, not "Who Is An Insured." Section C of the endorsement adds the following to "Who Is An Insured" under uninsured/underinsured motorists coverage... Any individual named in the Schedule and his or her 'family members' are 'insured' while 'occupying' or while a pedestrian when being struck by any 'auto' you don't own except...Any 'auto' owned by that individual or by any 'family member.' According to this definition, underinsured motorists coverage is broadened to include the Amores except for when occupying any vehicle they own. It is undisputed that the van in which Darlene Amore was riding as a passenger at the time of her injury was owned by her.
>
> Pursuant to Section C of the endorsement, we find appellees are not entitled to coverage under Tokio's business auto underinsured motorists coverage. *See, Miller v. Grange Mutual Casualty Company*, Stark App. No. 2002CA00058, 2002 Ohio 5763.

In another cross-appeal, 2003 Ohio App. LEXIS 2847, the court reversed the trial court finding that Continental was a primary insurer because the vehicle Darlene Amore was occupying was her own vehicle. The policy provided that any coverage for a vehicle "you" do not own, was excess, conversely, coverage for a vehicle "you" own would be primary.

With regard to prejudgment interest, the court had to decide the appropriate date for the commencement of interest, i.e., the date coverage was demanded or denied, the date of the accident, the date of any potential arbitration had Grange not denied benefits, or some other date.

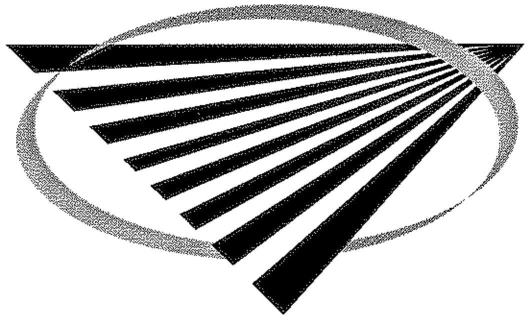
The trial court had ordered interest against Continental from the date that Grange (the Amore's personal UM carrier) had paid its policy limits. With regard to Grange, the date interest commenced was the date on which Grange received plaintiff's letter advising that the tortfeasor's insurer had offered its policy limits and asking for its consent to settle. The Fifth District held that because the issue of primary vs. excess coverage was unsettled in the district when the lawsuit was filed, the trial court's decision to use the date of payment of Grange's policy limits was not an abuse of discretion. The assignment of error was granted as to the primary insurance issue, and was denied as to prejudgment interest.

***Beever v. Cincinnati Life Ins. Co.*, Franklin App. Nos. 02AP-543 & 02AP-544, 2003-Ohio-2942, 2003 Ohio App. LEXIS 2663.**

On March 13, 2000, Plaintiff filed a Complaint against Cincinnati Life Insurance Company ("Cincinnati") alleging bad faith for the insurer's failure to pay $100,000 in life insurance proceeds pursuant to a term life policy following the death of her spouse. The policy was issued and effective on December 19, 1995, and decedent

DELTA GROUP

SETTLEMENT SERVICES



Case analysis and innovative funding solutions

*Structured Settlements

*Creative Attorney Fee Structures

*Case Valuation Service

*Court Ordered Structured Settlements

*Special Needs Trusts

*Settlement Preservation Trusts

Your clients are depending on you.
You can depend on us.

Serving Greater Cleveland for over 30 years!

Rick W. Miller

Structured Settlement Consultant

Phone: 440-543-3799

Fax: 440-543-3729

Toll Free: 866-865-8799

passed on January 9, 1996. In March of 2000, Defendant paid Plaintiff the $100,000 on the contract claim, along with statutory interest. Plaintiff's Amended Complaint alleged that Defendant's failure to pay the life insurance proceeds for a period of more than four years was done maliciously, intentionally and in bad faith.

Here, decedent was insured under a "field issued term policy" which did not require him to undergo a physical examination. Instead, the agent performed field underwriting based upon the answers given by decedent on his application form. In that form, decedent marked "no" next to the question "have you ever been treated for or had any known indication of...alcoholism." Decedent died in 1996 as a result of pneumonia, acute respiratory distress syndrome and chronic liver disease. Various hospital notes contained references to alcohol use, including notations of "significant alcohol use history" and that decedent suffered multiple medical problems, "most stemming from alcoholism." Based *solely* on the review of those medical records, Defendant's manager of life and health claims made the decision to rescind the claim. Defendant's manager made this decision based on the fact that decedent became disabled 12 days after the application was taken, the fact that he had a significant history of alcohol abuse, the fact that he had end stage cirrhosis of the liver, the fact that he had severe depression and the fact that he had a colonoscopy. In short, the claims manager felt that decedent knew he was an alcoholic at the time of the application.

The trial court granted the insurer's motion for summary judgment, finding that it was reasonably justified in denying the claim. The 10th District reversed. The deposition testimony of decedent's wife and various friends and acquaintances supported the conclusion that decedent was a social drinker, not an alcoholic. Plaintiff also submitted deposition testimony of two insurance experts and an addiction psychiatrist, Dr. Pepper. Dr. Pepper opined that decedent was not an alcoholic, noting that his review of the medical records revealed no evidence that decedent had ever been treated for alcohol dependency and that there was no indication that excessive alcohol consumption caused the liver disease. He viewed decedent as a "classic social drinker" who somehow died of acute liver failure. Defendant's own expert acknowledged that various factors associated with alcoholism (i.e., drunk driving convictions, domestic violence, concern of friends) were not present, and that there was a reasonable likelihood that decedent had a genetic susceptibility to liver disease.

In reversing the trial court's determination, the 10th district held that there were genuine issues of material fact as to whether the insurer conducted a thorough investigation of Plaintiff's claims and whether Defendant had a reasonable justification for delaying payment. Defendant never consulted with decedent's family and friends regarding evidence of known indications of alcoholism. Indeed, the insurer admitted in discovery that it never spoke with any of decedent's medical providers, never asked medical experts for opinions, never interviewed decedent's surviving spouse about her husband's use of alcohol, and never interviewed any of decedent's acquaintances.

Despite finding that there were genuine issues of material fact on the bad faith claim, the 10th District rejected Plaintiff's "lost investment claim" relative to the manner in which she would have invested the insurance proceeds had they been timely paid. In essence, Plaintiff argued that she should not be limited to the statutory interest under R.C. 3915.02 because she would have invested that money in specific securities. The court found that claim to be too speculative and relied on law to the effect that compensatory damages must be shown with certainty.

The 10th District also affirmed the trial court's refusal to apply R.C. 3911.06, which provides that "no answer to any interrogatory made by an applicant...shall bar the right to recover...unless it is clearly proved that such answer is willfully false, that it was fraudulently made, that it is material, and that it induced the company to issue the policy, that but for such answer the policy would not have been issued, and that the agent or company had no knowledge of the falsity or fraud of such answer." Here, according to the court, Ohio courts have generally held that the tort of bad faith is "independent of the contract of insurance." Thus the court declined to decide, in a case where the insurance proceeds have been paid, that plaintiff's bad faith claim is an action to "recover upon the policy." Thus, the trial court did not err in failing to consider the applicability of R.C. 3911.06.

***Roberta Haney, et al. v. Motorist Mutual Insurance Co., et al.*, Fifth Dist. No. 2002AP110093, 2003-Ohio-3412, 2003 Ohio App. LEXIS 3100.**

On April 14, 1985, Roberta Haney was injured when tortfeasor Sara Groh turned left in front of Haney's motorcycle, causing a collision in which Haney sustained injuries. Haney settled her claim with Groh's carrier, Great American Insurance Company, for $117,000 on January 12, 1987.

Terry Haney, Roberta's husband was insured by Motorists. Motorists was not notified of the claim until July 13, 2001. Roberta was insured by Globe. The Globe policy did not contain UM/UIM coverage; however, it had never been offered or rejected. Globe was notified of the claim in June or July, 2001. The trial court granted summary judgment in favor of Motorists and Globe Insurance.

On appeal, numerous issues were raised. With regard to the Globe policy which covered Roberta, the court held that *Savoie* applied so that even though the Globe policy only contained $50,000 in underinsured motorist coverage, the $117,000 obtained from Great American was set off against Haney's damages not her UIM policy limits. The appellate court also held that Globe had waived the defense of the statute of limitations as it had failed to plead it affirmatively. Finally, with regard to a claim of destruction of subrogation rights, the appellate court held that because Globe failed to offer UM/UIM coverage, and it arose by operation of law, there was no subrogation provision that applied to UM/UIM coverage and any provisions restricting coverage applied solely to the liability provisions.

With regard to Motorists, the appellate court held that the Haneys were "legally entitled to recover" damages from the tortfeasor, and that, as that phrase had been defined in case law (prior to its being defined in the statute as a result of S.B. 20), the insured need only prove "those elements of his or her claim." With regard to the statute of limitations, the court noted that the appropriate statute was fifteen years, and that accrual of the claim occurred upon exhaustion of the tortfeasor's liability coverage. On the issue of notice and subrogation, the court remanded the case to the trial court for the application of the Supreme Court's holding in *Ferrando* to the facts of the case.

***Nicholas Hubbell v. Federal Insurance Company, et al.*, Franklin App. No. 02AP-995, 2003 Ohio App. LEXIS 2783.**

On September 11, 1996, Appellant Nicholas Hubbell was injured while trying to help his friend, Chris Ross, free an automobile from a pothole. Hubbell was a passenger in the vehicle when Ross struck the pothole. The case went to trial and upon the jury's declaration that Hubbell was only 20% negligent, Nationwide Mutual Insurance Company, the UM/UIM carrier that insured plaintiff, paid its remaining policy limits of $87,500 according to a pre-trial stipulation. Hubbell had collected $12,500 from Ross' liability carrier. Hubbell signed a release in favor of Nationwide with regard to the $87,500.

After the Supreme Court's decision in *Scott-Pontzer*, Hubbell sued Nationwide Property & Casualty Insurance Company, the carrier for North Central Insulation, Hubbell's stepfather's employer and Federal Insurance Company, the insurer for Ariel Corporation, his father's employer.

The trial court granted summary judgment in favor of the insurers, to Nationwide finding that the release and trust agreement signed in favor of Nationwide barred and was *res judicata* to Hubbell's claims against Nationwide Mutual, and in favor of Federal finding a breach of notice and subrogation clauses.

CORSILLO & GRANDILLO COURT REPORTERS

REGISTERED PROFESSIONAL REPORTERS
700 CITY CLUB BUILDING CLEVELAND, OHIO 44114
TELEPHONE: 216-523-1700. Fax: 216-523-1997
CorGran@aol.com grand2@earthlink.net

- Computer-Aided Transcription featuring Key-Word
- Indexing, litigation Support
- Floppy Disk Storage, Min-U-Script, E-Transcript,
- ASCII, Discovery ZX
- Telecommunications, Video Conferencing.
- Real-time translation available
- Daily and expedited transcription available
- Notices, subpoenas and summons served
- Videotape depositions on request
- Deposition suite available at no charge

Notaries Public, State of Ohio

SPECIALISTS IN MEDICAL MALPRACTICE, AVIATION, ASBESTOS LITIGATION AND BANKRUPTCY.

SERVING ALL OF NORTHEAST OHIO

Members: National and Ohio Court Reporters Association and Cuyahoga Community College Board Court Reporting Program.

Holders of NCRA Certificates of Proficiency, Merit and Realtime Reporting.

On appeal, the Tenth District held that there was no Civ. R. 56 evidence before the trial court to support its finding that Nationwide and Nationwide Mutual were in fact the same insurance company or entity or that there was privity between the two insurers. As such, the appellate court held that there was a material question of fact which should have precluded the entry of summary judgment.
With regard to Federal, the appellate court noted that the trial court proceedings and the appellate briefs had taken place prior to the Supreme Court's decision in *Ferrando*. The court therefore remanded the issues of notice and subrogation to the trial court with instructions to adhere to the requirements set forth in *Ferrando*. The appellate court also disagreed with the trial court's finding that Hubbell never notified Federal of his claim. The court noted that notice occurred when the declaratory judgment was filed, and even though this occurred several years after the lawsuit against Ross, it was not clear that the prompt notice provision was breached.

***Mark Strayer, et al. v. Lincoln General Insurance Co.*, Allen App. No. 1-02-100, 2003-Ohio-3429, 2003 Ohio App. LEXIS 2097.**

On September 2, 1999, Mark Strayer was injured in a an automobile collision, caused by Matthew Williams. Strayer settled with Williams' carrier and presented a claim to Lincoln General Insurance Company, the carrier for his employer, A.L. Smith Trucking, Inc. A.L. Smith had allegedly rejected UM/UIM limits matching the liability limits of $1,000,000 in the policy and had selected a lower UM/UIM limit of $25,000. The issue before the court was the sufficiency of the rejection. The corporation's secretary, David Fullenkamp, had signed a rejection form; however, this form did not contain any premium information. The revisions to R.C. §3937.18 as a result of H.B. 261 applied to the policy.

Lincoln General asserted that the rejection signed by Fullenkamp was sufficient to establish a valid offer and rejection of UM/UIM coverage. The trial court disagreed and held that UM/UIM coverage arose by operation of law to match the liability limits of $1,000,000.

It appeared that although the decision in *Kemper* had been announced, Lincoln General chose to perfect and appeal in the hope that a motion for reconsideration filed in *Kemper* might provide a more favorable outcome. The appellate court noted that the motion for reconsideration in *Kemper* was denied, and because *Kemper* established that the *Linko* requirements applied to policies written after the 1997 amendments, the lack of any evidence showing that a valid offer was rendered in this case required affirmance of the trial court's decision.

***Lee W. Stubbins v. Nationwide Agribusiness Insurance Co.*, Sixth Dist. App. No. F-02-031, 2003-Ohio-3456, 2003 Ohio App. LEXIS 3140.**

Lee Stubbins, an employee of the Toledo Public School District, was injured while driving his 1996 Chevy pickup truck to school to pick up students for a field trip to Cedar Point. Stubbins and his wife sued Nationwide Agribusiness claiming coverage under the authority of *Scott-Pontzer*. The Nationwide policy had liability limits of $2,000,000 and purportedly carried UM/UIM coverage in the amount of $1,000,000. Stubbins argued that he was entitled to coverage, and that the Nationwide rejection was invalid since it lacked premium information.

On the issue of the authority of school districts to purchase UM/UIM coverage for employees outside the scope of their employment, the Sixth District held that *Scott-Pontzer* applied to the plaintiff's claim and to the Nationwide policy. The court noted that six appellate districts have found that the *Scott-Pontzer* rationale applies to a school board's policy including the Tenth (*Roberts & Griffith*), the Fifth (*Westfield v. Wausau*), the Fourth (*Carle*), the Twelfth (*Congrove*), the Eighth (*Mizen*) and the Ninth (*Allen*). Although the Sixth District had previously held otherwise in *Nationwide Agribusiness v. Roshong*, 47 Fed. Appx. 273 (2002), here the Sixth District determined that school districts could purchase UM/UIM coverage:

> R.C. 3313.201 requires school districts to purchase liability insurance for officers, employees and pupils who operate vehicles owned or operated by the school district. Similarly, R.C. 3327.09 mandates that boards of education shall procure liability insurance for employees who operate a school bus, motor van or other vehicle used in the transportation of school children. Both statutes indicate that a board of education may also purchase uninsured coverage, and nothing in either statute actually limits the purchase of coverage to employees who act in the course or scope of their employment. By implication, a board of education, therefore, may purchase UM/UIM coverage that will cover its employees even if they are not acting within the course and scope of employment.

In addition to the school district argument, Nationwide argued that Stubbins was not occupying a covered auto, and was not entitled to coverage. The Nationwide policy, provided UM/UIM coverage for Symbol 2 vehicles defined as "owned autos only." Owned autos were defined as any autos that "you" own. Since "you" necessarily includes employees, "you" included Stubbins, and since he was driving his own personal vehicle, his truck was a "covered auto."

With regard to the rejection, the court held that because the offer/rejection form did not contain the premium amounts for UM/UIM coverage, it did not qualify as a valid rejection under the holding in *Linko*. The court also noted that there was no extrinsic evidence which showed that the board of education was aware of the premium amounts for UM/UIM coverage, meaning that the rejection did not comply with *Linko* and was unenforceable.

Intentional Torts

Caldwell v. Petersburg Stone Co. Mahoning App. No. 02 CA 8, 2003-Ohio-3275, 2003 Ohio App. LEXIS 2935.

While attempting to remove undetonated explosives from a quarry, plaintiff was struck by a boulder when it unexpectedly dislodged from the quarry wall. Plaintiff sustained a serious crush injury to his right leg requiring amputation. Four months before the incident, the owners of the quarry at the time, Petersburg Stone Co., employed Senex Explosives to blast the site so Petersburg could meet customer demand for limestone. Plaintiff was one of several licensed blasters on Senex's payroll, and he had helped to prepare and configure the explosives that misfired.

The blast plan did not work out as planned due to a misfire, and witnesses characterized the blast site as an extraordinarily dangerous mess and the worst misfire ever experienced by Senex. Plaintiff advised Senex's President about the misfire and was instructed not to report the incident to the Ohio State Explosive Inspectors or any other administrative body. Although there was a dispute as to what caused the misfire, it was undisputed that it was Senex's responsibility to clean it up. Senex waited several months before beginning the task. Senex shot water in the blast holes to force some of the explosives to the surface, but the only way Senex could be sure that all of the explosives were collected was to have an employee scan the debris as it was dug and painstakingly remove the explosive material one piece at a time. This task fell upon Plaintiff, who reluctantly began this duty on January 14, 1998. Plaintiff was required to do this despite informing the company that he did not feel it was safe to do so. Senex admitted that Plaintiff registered such complaints but maintained that Plaintiff was never specially told to be in the pit as the explosives were removed and that all he was ever told to do was to prevent explosives from going into the crusher. Plaintiff maintained that there was no other way to see the explosives unless he was in the pit within 10 feet of the front end loader as it worked.

Plaintiff was injured on January 16, 1998. For the previous two days, Senex sent other employees to work with Plaintiff. However, Plaintiff was working alone at the time of his injury. As Plaintiff was hauling materials from the muck pit, a large boulder which was loosened from the previous blast or by the front end loader rolled onto and trapped his leg.

Plaintiff filed suit for against the owners of the quarry for negligence and strict liability, an employer intentional tort against Senex, and product liability claims against Senex and the manufacturer of the blasting caps and detonators. The trial court granted all of the Defendants' Motions for Summary Judgment. Regarding Senex, the court held that Plaintiff failed to demonstrate a specific dangerous condition of the employer's making or within its knowledge. The court also observed that "when one undertakes to be the one in charge of a scene of known danger and injury flows from just those known dangers, it is not to be presumed that an intentional tort by the employer was the cause." Regarding the product liability claim, the trial court noted that Plaintiff established by affidavit that alternate designs were available to Defendants, but the court held that it was speculation whether another design could have prevented Plaintiff's injuries.

The 7th District Court of Appeals reversed on the intentional tort claim, holding that genuine issues of material fact existed on the *Fyffe* elements for proving an intentional tort. Regarding the first element (i.e., employer knowledge of a dangerous condition), the court started its analysis by noting that work that is considered inherently dangerous must be distinguished from an otherwise dangerous condition which arises within that work. The court also noted that an employer will only be held liable when a danger above and beyond the ordinary for employment is present. Here, despite the inherently dangerous nature of working with explosives, Plaintiff was injured not by an explosion but by dangers presented by the site itself. Reasonable minds could determine that the site of the misfire and the clean up plan formulated presented a dangerous condition in the context of an employer intentional tort above and beyond the hazards inherent in the worker's job. The reviewing court also deemed that there was sufficient evidence on the remaining two *Fyffe* elements, such that summary judgment was improper on this claim.

Regarding the product liability claims, however, the 7th District affirmed. Here, Plaintiff failed to provide evidence to create a factual dispute as to whether any product was defective under any of the available product liability theories. Mere failure to explode is not enough, particularly where no expert in the field opines that a non-defective explosive will always explode and no one has ruled out human error or any other possible cause of the misfire. In addition, proximate cause could not be established. Plaintiff was injured four months after the misfire during the cleanup of rubble piles. The court deemed the injuries to have occurred from a chain of events that were separate and independent from the actual use of the blasting caps.

Political Subdivision Tort Liability - "Emergency Call" Expanded

***Colbert v. City of Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319** (As defined in R.C. 2744.01(A), "emergency call" involves a situation to which a response by a peace officer is required by the officer's professional obligation).

In this case, the Ohio Supreme Court was called upon to interpret the term "emergency call" as used in R.C. 2744.02(B)(1)(a), which provides a defense to political subdivision liability when a peace officer is responding to an emergency call and he/she does not operate his/her vehicle in a willful or wanton manner. The Court held that an "emergency call" requires a "call to duty" only, not the existence of an inherently dangerous situation.

While on patrol on an early December morning, two Cleveland police officers observed two white males in a car make an apparent exchange of money with another male on foot in a high-drug, high-crime area in Cleveland. The officers believed that they had witnessed a drug deal and started out in their cruiser intending to pursue the suspect's car. They did not activate their emergency lights or sirens. Upon entering the intersection of 114th and Harvard, the cruiser was broadsided by a car driven by James Colbert. Colbert sustained injuries and filed suit against the city alleging that the officers were negligent in their operation of the cruiser, such that liability would attach under the exception to political subdivision immunity set forth at R.C. 2744.02(B)(1). The trial court granted summary judgment to the city, holding that it was immune from liability because the officers were responding to an "emergency call." The appellate court affirmed, holding that "emergency call" is broadly defined as a "call to duty" under R.C. 2744.01(A), and noting that the officers' response to a suspected drug deal they had observed was a "call to duty," such that the City was immune under R.C. 2744.02(B)(1)(a).

Discussing and applying the three-tiered analysis for determining whether political subdivision liability attaches, as set forth in *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, the Ohio Supreme Court affirmed the lower courts' judgments. Under the second tier of analysis, a court is required to determine whether any of the five exceptions to political subdivision immunity set forth at 2744.02(B) apply to expose the political subdivision to liability. Under R.C. 2744.02(B)(1), political subdivisions are generally liable for death or injury caused by the negligent operation of a motor vehicle by one of its employees. However, R.C. 2744.02(B)(1)(a) provides a defense to political subdivision tort liability when a police officer operates a motor vehicle in response to an "emergency call" and when the operation of that vehicle does not amount to willful or wanton conduct. Here, there was no evidence of willful or wanton misconduct. The Court thus focused its attention on the interpretation of "emergency call," which is defined at R.C. 2744.01(A) as:

> a call to duty, *including, but not limited to*, communications from citizens, police dispatches, and personal observations by peace officers of *inherently dangerous situations* that demand an immediate response on the part of a peace officer. (Emphasis added).

The Court rejected Colbert's argument that the General Assembly intended that only those calls to duty that concern "inherently dangerous situations" qualify as emergency calls. The Court looked to the language of the statute and determined that the definition of "emergency call" is defined as "a call to duty" regardless of whether it involves an inherently dangerous situation Based on the language used, the Court ruled that the phrase "inherently dangerous situation" places no limitation on the term "call to duty," but is instead merely an example of a call to duty that affords immunity. The Court refused to add limiting language into the statute, and instead held that "an 'emergency call' as defined in R.C. 2744.01(A) involves a situation to which a response by a peace officer is required by the peace officer's obligation." Here, according to the Court, the officers were obligated to respond, and were thus on an emergency call, because they witnessed a suspected drug transaction take place in a high-crime, high-drug area in the early morning hours.

Prejudgment Interest

***Watson v Grant Medical Center* (March 3, 2003), 123 Ohio Misc. 2d 40, 789 N.E.2d 1175.**

This case provides a helpful overview of the current

standards for analyzing and awarding prejudgment interest.

In *Watson*, the plaintiff brought a medical malpractice claim arising out of a permanent injury of almost complete blindness. In response to a series of demands going as low as $350,000, the adjuster made a final offer of $125,000 and never increased his own discretionary authority to make a higher offer or consulted with his supervisor for additional authority. The jury returned a verdict of $8.6 million, reduced by a percentage of comparative negligence to $5.85 million.

The Court applied the modern standard set forth in *Kalain v. Smith* (1986), 25 Ohio St.3d 157 and reexamined in *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638 (a party has not failed to make a good faith effort to settle under R.C. 1343.03(C) if he has (1) fully cooperated in discovery, (2) rationally evaluated his risks and liability, (3) not attempted to unnecessarily delay the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party).

The Court held a formal hearing as required by R.C. 1343.03(C) and, applying this standard, held that the adjuster failed to rationally evaluate the risks and potential liability and failed to act in good faith by making a final offer of $125,000. The motion was granted and the plaintiff was awarded prejudgment interest.

Premises Liability - Open And Obvious Doctrine Remains Viable in Ohio

***Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 2003 Ohio LEXIS 1485.**

The Ohio Supreme Court held in *Armstrong* that the open and obvious doctrine remains viable in Ohio. Where a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises.

The injured plaintiff in this case entered a Best Buy store and tripped over the bracket of a shopping cart guardrail. The plaintiff alleged that the store negligently maintained a dangerous condition in the store, and that it knew or should have known that the condition was dangerous. Both the trial court and appellate court concluded that the danger was open and obvious. The Supreme Court reviewed the case because a conflict existed among the appellate courts regarding whether the open and obvious doctrine had been abrogated. The Ninth District certified its decision as being in conflict with *Schindler v. Gale's Superior Supermarket, Inc.* (2001), 142 Ohio App. 3d 146, which held that *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (1998), 81 Ohio St. 3d 677, abrogated the open and obvious doctrine. In *Schindler*, the court sought to analyze the open and obvious nature of a condition in terms of causation and comparative negligence rather than in terms of whether a duty was owed at the outset.

The certified question was: "Whether *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.* (1998), 81 Ohio St. 3d 677, abrogated the open and obvious doctrine as a complete bar to recovery and instead, required that comparative negligence be applied to determine liability?" The Court held that it did not.

The Court found that the open and obvious doctrine is not concerned with causation, but whether a landowner owes a duty to persons injured on the property. Where there is no duty, there is no liability to be compared. The open and obvious doctrine related to the threshold issue of duty. Therefore, where a danger is open and obvious, a landlord owes no duty of care.

Products Liability - Analysis Of Manufacturer's Duty To Warn

***Falkner v. Para-Chem* (June 18, 2003), Summit App. No. 21288, 2003-Ohio-3155.**

This case provides a good analysis of evidence establishing a manufacturer's duty to warn and proximate causation, specifically where the product in issue contained a written warning that was allegedly inadequate but which the plaintiffs acknowledged they did not read.

The plaintiff carpet-installers sustained severe burns when highly flammable carpet glue ignited and exploded in an indoor basement carpet installation. The product contained inconsistent and ambiguous warning language, then referred to a side panel which contained a warning that the product was for outdoor use only.

After concluding that there was sufficient evidence to find that the manufacturer breached its duty to provide adequate warning, the appellate court followed the two-fold approach to analyzing proximate causation: first, to determine if the lack of adequate warning contributed to the injured party being exposed to the product, and second, to determine if the exposure constituted a proximate cause of the injury. The appellant-manufacturer argued that any presumption that a failure to warn was the proximate cause of the injuries was

rebutted by evidence that the appellee-plaintiffs did not read the warnings on the label. The appellate court found that neither the one plaintiff's reliance on the other to inspect the label, as the designated applicator of the adhesive glue, nor the failure by the applicator to read what was described as the inconspicuous warning rebutted the presumption.

As a result, the appellate court upheld the trial court verdict in favor of both plaintiffs.

Statute of Limitations - Tolling Provision of R.C. 2305.16 Not Suspended Upon Appointment Of Guardian

Weaver v. Edwin Shaw Hospital **(May 1, 2003), Tuscarawas App. No. 2001 AP 07 0070, 2003-Ohio-2488.**

The tolling of statutes of limitations due to minority or unsound mind under R.C. 2305.16 is not suspended upon the appointment of guardians for the estate and person.

The minor plaintiff in this case was severely injured in a bicycle/automobile collision, and his parents were appointed as his legal guardians due to his incompetency. While a patient in the hospital after the collision, the parents claimed he was improperly restrained in a wheelchair, which resulted in a fall and further injuries. The parents, as guardians, brought an action against the hospital for these injuries. The action was brought after the one year medical malpractice statute of limitations period.

The hospital argued that upon the parents' appointment as guardians, the tolling under R.C. 2305.16 was suspended and, therefore, the claim was time barred. The trial court agreed and granted summary judgment. On appeal, the appellate court found that there was nothing in the language of R.C. 2305.16 to indicate an intent by the legislature to suspend the tolling of the statute upon appointment of guardians. Therefore, there was no time-bar applicable to the action.

The appellate court adopted what it considered the better view that an individual's cause of action is personal to the injured party and the limitations period would not run until the injured party had the mental capacity to understand and appreciate the nature of the injuries and the possible cause thereof.

Verdicts & Settlements

(For members and educational purposes only)

Laurice Rizk, et al v. Rais A. Beg, M.D., et al

Type of Case: Medical Malpractice

Judgment: $9,531,630 (excluding consortium claims settled and dismissed prior to verdict).

Plaintiff's Counsel: Charles Kampinski, Esq; Laurel A. Matthews, Esq., Nadine Hauptman, Esq.

Defendant's Counsel: William A Meadows, Esq.; Joseph A. Farchione, Jr., Esq.; Donald H. Switzer, Esq.; Murray K. Lenson, Esq.

Court: Cuyahoga County Court of Common Pleas, Judge John Angelotta

Date: April, 2002

Insurance Company:

Damages: Serious and permanent disability (bedridden, lost both legs; requires around the clock nursing care; requires ventilator support at night; lifelong feeding through veins; current infections, fistulous tracts, deafness; skin problems; limited voice).

Summary: 71-year-old Plaintiff presented to Defendants on May 1, 200 for elective mitral valve repair and coronary artery bypass surgery. Defendants negligently used the wrong size and type ring for the mitral valve repair and failed to administer sufficient protection to the heart in the course of cardiopulmonary bypass. As a consequence, she went into severe heart failure and could not be weaned from the ventilator after surgery. An additional group of Defendants, who are pulmonologists, were consulted several days after surgery for the management of Plaintiff's ventilatory problems and, together with respiratory therapists and nurses employed by Southwest Hospital, were thereafter responsible for Plaintiff's pulmonary care. A tracheostomy was performed on the 15th day postoperatively. After this was done, these Defendants negligently positioned Plaintiff in a forward leaning, upright posture which caused the trachea to stretch. Because of this, Plaintiff developed a progressively worsening air leak around the tracheostomy tube. Rather than correcting Plaintiff's positioning and making other necessary changes to the tracheostomy tube and connecting apparatus, several of the Defendants used massively high pressured in the tracheostomy cuff while there was a nasogastric tube in place, which injured the tracheal wall and caused necrosis. This resulted in a tracheo-esophageal fistula which Defendants negligently failed to diagnose. Because of the TE fistula, Plaintiff repeatedly aspirated tube feedings into her lungs which caused recurrent lung infections. Despite knowing that Plaintiff was aspirating, Defendants continued to administer tube feedings into her stomach instead of feeding her by an alternate method. As a result, Plaintiff suffered severe and recurrent pneumonias and repeated blood infections. She also developed an infection in the breast bone, as well as an infection around the heart. At the

family's insistence, Plaintiff was finally transferred to another hospital. As a result of Defendants' negligence, Plaintiff is essentially bedridden and has lost both of her legs. She requires around the clock nursing care, as well as ventilator support at night. Plaintiff requires lifelong feeding through her veins and can never eat again. Plaintiff was unable to speak for 18 months because of the TE fistula and now only has a limited voice.

Plaintiff's Experts: Noel Fishman, M.D. (Cardiovascular and Thoracic Surgeon); John Luce, M.D. (Pulmonary, Critical Care Medicine); Marianne Boeing (Life Care Planner), John F. Burke, Ph.D. (Economist).
Defendant's Experts: John Heffner, M.D. (Pulmonary Critical Care Medicine); Andrew Weschler, M.D. (Cardiovascular Surgeon); Dennis Fitzpatrick M.D. (Anesthesia, Critical Care); David Benhoff, M.D. (Ear Nose and Throat); Charles Bush, M.D. (Cardiovascular Surgery); Cory Franklin, M.D. (Intensive Care Medicine); Mark Horattas, M.D. (General Surgery); Lawrence Martin, M.D. (Pulmonary, Critical Care Medicine); Donald Wayne, M.D. (Cardiology); Robert Zinzer, Ph.D. (Economist).

Mother of Doe v. Father of Doe
Type of Case: Personal Injury
Settlement: $1,650,000 (present value); $11,266241 (lifetime payout)
Plaintiff's Counsel: Rubin Guttman, Esq.;
Ann Marie Stockmaster, Esq.
Defendant's Counsel: Patrick Foy, Esq.
Court: Cuyahoga County Common Pleas
Date: March, 2003
Insurance Company: CNA Insurance
Damages: Trauma to head requiring numerous reconstructive surgeries; Facial scarring and mild brain injury. $313,493.26 in medicals, with $50,000 in anticipated future medical. Future lost wages of $300,000.

Summary: 12-year-old Plaintiff was passenger in a vehicle being driven by her father when he lost control of the vehicle. The car struck a pole causing Plaintiff to be hurled out of her seat and into the front of the vehicle, causing severe trauma to her head, right eye and brain. Those injuries required numerous facial and cranial reconstructive surgeries. Plaintiff sustained some permanent scarring and mild cognitive dysfunction. Liability was never seriously in issue, but the case was complicated by the fact that the action was against the girl's father, and because the divorced parents had a tension filled relationship. Proof of cognitive dysfunction was made difficult, because the child had a troubled emotional past and school performance one year after the accident was actually better than it had been before when the parents were going through a highly contentious divorce. The factor that most impacted the outcome was the nature and extent of the injuries, together with a 20 page detailed color brochure depicting each step of the surgeries performed upon the minor plaintiff, which graphically illustrated the nature and extent of the physical injuries.

Plaintiff's Experts: Forrest J. Ellis, M.D. (Ophthalmology); Bahman Guyuron, M.D. (Reconstructive); Rod Durgin, Ph.D. (Vocational Assessment); H. Gerry Taylor, Ph.D. (Pediatric Neuropsychology); Jeffrey A. Goldstein, M.D. (Facial Reconstruction); Shenandoah Robinson, M.D. (Neurosurgery).

Defendant's Experts: None

Jane Doe v. Anonymous Doctors
Type of Case: Wrongful Death
Settlement: $450,000 (after mediation)
Plaintiff's Counsel: Rubin Guttman, Esq.;
Ann Marie Stockmaster, Esq.
Defendant's Counsel: Richard J. Rymond, Esq.;
Kenneth Abbarno, Esq.
Court: Cuyahoga County Court of Common Pleas
Date: May, 2003
Insurance Company: Clarendon Nation; United National
Damages: Death

Summary: Plaintiff's decedent was a 48-year-old female with a medical history of reflex sympathetic dystrophy in her right shoulder, causing pain and chronic depression. She also had diagnoses of narcotic pain medication abuse (in remission), alcoholism (in remission) and prior criminal convictions and career loss due to addictive behaviors. She was survived by three adult daughter. Anonymous family care physician prescribed

Advocate Films has been producing the finest **Day-In-The-Life, Tribute, Settlement, and Still Photography Presentations** since 1978.

We understand the challenges facing trial attorneys and the sensitive needs of their clients.

Call us for a free consultation.

Mark L. Hoffman, President, J.D., Ph.D.
Member: CATA, OATL, ATLA

ADVOCATE FILMS INC.

Ohio Savings Building
20133 Farnsleigh Rd.
Shaker Heights, OH 44122
216-991-6200

high doses of Ultram as well as Lorcet, Elavil and Zoloft for her symptoms. Upon subsequent referral to anonymous psychiatrist, Jane Doe was advised to increase her dosage of the antidepressant, Elavil, and to add a third antidepressant, Wellbutrin, to her medication regimen. Each of these medications carried risks for seizures and/.or cardiac arrhythmia, and each interacted with others in the mix to lower the seizure threshold and to elevate the risk of arrhythmia. Within five days of adding Wellbutrin and increasing Elavil, Plaintiff's decedent collapsed in front of her children. She suffered respiratory and cardiac arrest and was unable to be resuscitated. Per the coroner's autopsy, Jane Doe had undiagnosed mild hypertrophic cardiomyopathy and her blood serum levels of the pain killer, Ultram, were 10 times the expected concentration. These factors raised issues regarding both proximate and intervening cause, particularly given the decedent's history of narcotics abuse. The Coroner determined the cause of death to be acute intoxication due to combination of drugs prescribed by the family care physician and the psychiatrist. On the eve of trial, the case was continued and the parties agreed to referral to mediation, which lasted two days.

Plaintiff's Experts: Steven A. Rudolph, M.D. (Family Practice Expert); Charles B. Nemeroff, M.D., Ph.D. (Psychiatric/ Pharmacology Expert)
Defendant's Experts: Stephen G. Noffsinger, M.D. (Psychiatric Expert); John A. Samsa, D.O. (Cardiology Expert); Michael E. Yaffe, M.D. (Primary Care Expert); Samuel K. Rosenberg, M.D. (Pain Management Expert); Mark J. Ratain, M.D. (Pharmacology Expert); Barry J. Maron, M.D. (Cardiology Expert)

Richard Goldsmith, et al v. Nationwide

Type of Case: Wrongful Death
Settlement: $1 million
Plaintiff's Counsel: Rubin Guttman, Esq.;
Ann Marie Stockmaster, Esq.
Defendant's Counsel: Adam H. Gimbel, Esq.;
Joseph R. Tira Esq.
Court: Cuyahoga County Common Pleas Court;
Case No. CV 02 483566
Date: June, 2003
Insurance Company: Nationwide, Progressive,
Cincinnati Equitable
Damages: Death

Summary: Plaintiff's decedent was an 18-year-old high school student who was a passenger in a vehicle being driven by a friend when a drunk driver, a multiple DUI offender who had only been recently released from jail, went left of center and crashed into their vehicle. Plaintiff's decedent suffered traumatic brain injury as well as multiple fractures. She was unconscious at the scene and never regained consciousness. She was lifeflighted and lingered in a completely sedated state for five days before dying. She was survived by her divorced parents and two older brothers. The tortfeasor had $12,500 in coverage with Cincinnati Equitable. Decedent's friend's vehicle had $100,000 in coverage with Progressive, and the balance of the $900,000 was recovered from her father's policies with Nationwide. Specials were $73,367.83 which included funeral bills of just under $11,000. Decedent was a vibrant and artistic young woman. Settlement efforts were aided by a color brochure containing professional photos of decedent and reproducing materials showcasing decedent's school activities, writings, poetry and photo portfolio.

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

Jane Doe v. Dr. Roe

Type of Case: Medical Malpractice
Settlement: $7.7 Million
Plaintiff's Counsel: William S. Jacobson, Esq.
Defendant's Counsel: Withheld
Court: Cuyahoga County Common Pleas, Judge Nancy Fuerst
Date: March, 2002
Insurance Company: Withheld
Damages: Cerebral Palsy and Mental Retardation

Summary: Plaintiff was undergoing a cervical ripening on an antenatal floor. Plaintiff alleged that the failure to transfer her to Labor & Delivery in a prompt fashion in spite of regular fetal heart rate decelerations resulted in a 20 minute or more delay in Caesarean section. Defendants argued that the case involved an amniotic fluid embolus which was unforeseeable and carries with it a high mortality and morbidity rate for both mother and child.

Plaintiff's Experts: John Elliot, M.D. (Perinatologist, Phoenix); Laura Mahlmeister, Ph.D. (Obstetrical Nurse, San Francisco); Stephen Bates, M.D. (Pediatric Neurologist, Little Rock); Steven Ringer, M.D. (Neonatologist, Boston); Barry Pressman, M.D. (Pediatric Neuroradiologist, Los Angeles); Cynthia Wilhelm, Ph.D. (Life Care Planner, North Carolina); Robert Bendon, M.D. (Placental Pathologist, Louisville); Peter Formuzis, Ph.D. (Economist, Los Angeles).

Defendant's Experts: Steven Clark, M.D. (Perinatologist, Salt Lake City); Curtis Cetrulo, M.D. (Perinatologist, Boston); Michael Johnston, M.D. (Pediatric Neurologist, Baltimore); James Greenberg, M.D. (Neonatologist, Cincinnati); James Krause, M.D. (Placental Pathologist, St. Louis); Steven Day, Ph.D. (Life Expectancy, San Francisco); Beth Greenbaum, Ph.D. (Life Care Planner, Baltimore); Christopher Phlaum, Ph.D. (Economist, St. Louis).

Jane Doe v. Dr. Roe

Type of Case: *Scott-Pontzer* Claim
Settlement: $1.1 Million
Plaintiff's Counsel: William S. Jacobson, Esq.;
Kathleen J. St. John, Esq.
Defendant's Counsel: Withheld
Court: Cuyahoga County Common Pleas

Date: April, 2003
Insurance Company: Withheld
Damages: Death of 35-year-old married couple with children

Summary: The *Scott-Pontzer* claim involved three separate policies, two for $1 million dollars and one for $500,000. Each of the policies contained an anti-stacking provision and, in addition, the policies contained the "broaden coverage" endorsement. The case was mediated, and the parties agreed that the damages exceeded the available coverage. The defense argued that the maximum amount of coverage available was $1 million dollars pursuant to the anti-stacking clauses. Plaintiffs argued that those clauses were, essentially, "inter-family," and thus, were invalid pursuit to *Savoie*. The defense also argued the typical arguments made in *Scott-Pontzer* claims.

Plaintiff's Experts: John Burke, Ph.D. (Economist)
Defendant's Experts: None

James Doe v. John Doe Employer
Type of Case: Products Liability; Employer Intentional Tort
Settlement: $1,800,000
Plaintiff's Counsel: David M. Paris, Esq.;
Steven L. Crossmock, Esq.
Defendant's Counsel: Withheld
Court: Withheld
Date: May, 2003
Insurance Company: Withheld
Damages: Above knee amputation; laceration right forearm

Summary: Employer purchased a press/conveyor system for fabrication of its product line; manufacturer installed without interlocking gates/guards or light curtains around the entire press line and attempted to contractually delegate that responsibility to the employer, who also attempted to operate with a 3 man crew. The machine was designed to be operated by a 4 man crew. Plaintiff thus had to act as both an operator and quality control inspector. Due to poor lighting and poor maintenance, the 40-year-old Plaintiff was frequently required to leave the operator's station and position himself close to the points of operation on the conveyor in order to perform the quality control function. In that particular location, oil chronically leaked from a hydraulic pump on the conveyor. While on his way to perform a closer inspection of a product being moved on the conveyor, Plaintiff slipped on oil and fell onto conveyor system. He was pushed into a nip point, shearing off his left leg at the knee and lacerating his right forearm. Four years later, another employee lost an arm on a different unguarded press/conveyor system. Plaintiff's safety expert and mechanical engineer opined that the press/conveyor system was defective because it was placed into the stream of commerce without the appropriate guarding, which otherwise would have prevented this tragedy. They also opined that the employer had actual knowledge of a dangerous condition and required plaintiff to be exposed to that condition under circumstances in which injury was substantially certain to occur. Defendants claimed that Plaintiff misused the product and violated company policy by climbing up on the conveyor while it was in operation. Co-workers testified that Plaintiff was safety conscious and had never been seen climbing on the conveyor while it was in operation.

Plaintiff's Experts: Simon Tamny, Ph.D., Donald Kadunc, Ph.D.; Gerald Rennell; Robert Ancell; John F. Burke, Ph.D.; Dr. Robert Hartwig; Dr. Van Boggus
Defendant's Experts: William Dickerson, P.E.; Richard Hayes, Ph.D.; Robert Wright, Ph.D.; Sean Doyle, P.E.; Stephen Renas, Ph.D.; Thomas Lieser, M.D., Lawrence Kale, M.D.

John Doe v. James Doe
Type of Case: Wrongful Death
Settlement: $1 million
Plaintiff's Counsel: Leon M. Plevin, Esq.
Defendant's Counsel: Withheld
Court: Summit County Court of Common Pleas, Judge Cosgrove
Date: May, 2003
Insurance Company: Withheld
Damages: Wrongful death

Summary: Plaintiff's 61-year-old decedent was a passenger in a vehicle on I-76, which was rear-ended by Defendant truck driver at a high rate of speed. Plaintiff's decedent was killed instantly and survived by a wife and two adult children.

Plaintiff's Experts: Henry Lipian
Defendant's Experts: None

John Doe v. ABC Corp.
Type of Case: ERISA - Denial of Long Term Disability Benefits
Settlement: $115,000
Plaintiff's Counsel: Andrew S. Goldwasser, Esq.
Defendant's Counsel: Withheld
Court: U.S. District Court, N.D. of Ohio, Judge Gaughan
Date: April, 2003
Insurance Company: CNA
Damages: $45,000 in back benefits; $1,800/month for future benefits for the next 9 years

Summary: Plaintiff's long term disability benefits were terminated by CNA. A lump sum settlement was negotiated in lieu of reinstatement.

Plaintiff's Experts: Bhupinder Sawhny, M.D.
Defendant's Experts: Joseph Zayat, M.D.

Carolyn Morrissey v. Kohler Co.
Type of Case: ERISA - Denial of Long Term Disability Benefits
Settlement: $40,000 plus full reinstatement of benefits
Plaintiff's Counsel: Andrew S. Goldwasser, Esq.
Defendant's Counsel: JoAnn McDaniel, Esq.
Court: N/A
Date: March, 2003
Insurance Company: Self-insured

Damages: $40,000 in back benefits and $1,000/month in future benefits for the next ten years

Summary: Plaintiff's long term disability benefits were terminated by Kohler Co. The back benefits have been paid in full, and the future benefits have been reinstated.

Plaintiff's Experts: Donna Sexton, M.D.
Defendant's Experts: None

Raterman v. State Farm Ins. Co.
Type of Case: Automobile Accident
Settlement: $105,477.42
Plaintiff's Counsel: Scott Kalish, Esq.
Defendant's Counsel: Withheld
Court: Withheld
Date: June, 2003
Insurance Company: State Farm Ins. Co.
Damages: Soft tissue injuries to neck and low back, 4-1/2 inch cut to forehead with resultant scarring

Summary: 34-year-old Plaintiff was a backseat passenger in a rental car being driven in Las Vegas, NV when an uninsured motor vehicle struck the vehicle while attempting to make a left hand turn. Plaintiff's medical bills totaled $2,875.00, and Plaintiff's plastic surgeon opined that she would likely benefit from future surgery to reduce the visibility of the scar.
Plaintiff's Experts: Dr. Bryan Michelow
Defendant's Experts: None

David Wolff v. Jacob Cunningham, et al
Type of Case: Personal Injury
Verdict: $28,500
Plaintiff's Counsel: Scott Kalish, Esq.
Defendant's Counsel: Scott Derkin, Esq.
Court: Cuyahoga County Court of Common Pleas, Judge Carolyn B. Friedland, Case No. 450164, Judge Ralph McAllister
Date: July, 2003
Insurance Company: Allstate Insurance
Damages: Soft tissue neck and back injuries.

Summary: 38-year-old Plaintiff was rear ended while stopped in traffic, with minimal damage to his vehicle. There was minor damage to the front bumper of Defendant's vehicle. Plaintiff had $3,000 in medical bills and $1,800 in lost wages; Jury returned verdict in excess of amount requested by Plaintiff's counsel in closing argument.

Plaintiff's Experts: Robert D. Zaas, M.D.
Defendant's Experts: None

Doe v. Publicly Traded Employer
Type of Case: Whistleblower/employment
Settlement: $1.3 million
Plaintiff's Counsel: Cathleen M. Bolek, Esq.
Defendant's Counsel: Withheld
Court: N/A
Date: May, 2003
Insurance Company: None
Damages: Loss of employment

Summary: Doe reported to employer that co-workers were engaged in conduct Doe believed to be illegal. Employer took no action. Doe continued to report conduct to upper management. Doe was told to stop investigating and reporting conduct or employment would be terminated. Doe alleged the reprimand violated the Ohio Whistleblower statute and Sarbanes-Oxley Act of 2003. Doe resigned

Plaintiff's Experts: N/A
Defendant's Experts: N/A

Marion Condello v. David M. Raiffe, D.D.S.
Type of Case: Dental Malpractice
Verdict: $67,500
Plaintiff's Counsel: Gerald R. Walton, Esq.
Defendant's Counsel: Beth Nagel, Esq.
Court: Cuyahoga County Court of Common Pleas, Judge Judith Kilbane-Koch
Date: May, 2003
Insurance Company: Withheld
Damages: Neurotmesis of left inferior alveolar nerve; permanent paresthesia and intermittent dysthesia to left lower lip.

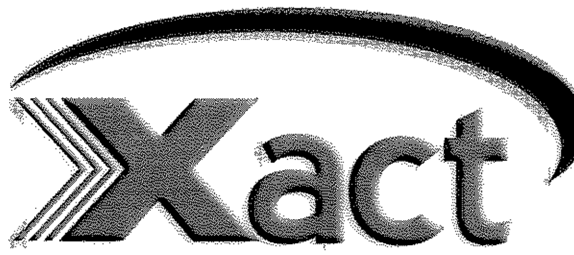
Summary: Defendant dentist overinstrumented and/or overfilled a root canal, and in doing so, invaded the interior alveolar canal. This caused neurotmesis to the inferior alveolar nerve and resulted in permanent paresthesia and intermittent dysthesia in Plaintiff's lower lip.

Plaintiff's Experts: Michael W. Dagostino, D.D.S.
Defendant's Experts: Kenneth D. Jones, Jr., D.D.S.; Edward R. Faulkner, D.D.S.

Matthews v. Mercy Hospital, et al.
Type of Case: Product Liability
Verdict: $152,500 plus a finding that Defendant acted with flagrant disregard, entitling Plaintiff to punitive damages. Case settled after verdict prior to motions for prejudgment interest and hearing on punitive damage claim.
Plaintiff's Counsel: Alec Berezin, Esq.
Defendant's Counsel: Not listed.
Court: Seneca County Common Pleas, Judge Michael Kelbley
Date: February, 2003
Insurance Company: Not listed
Damages: Brachial plexus injury; $5,000 in medicals; 8 months of disability with a $14,000 property damage and $23,000 wage loss as a result of Plaintiff not being able to continue working as a self-employed truck driver for 8 months.

Plaintiff's Experts: Barry Simmons, M.D. (Cambridge, Mass).
Defendant's Experts: John Robinson, M.D. (However, expert was excluded because defense did not comply with local rule in naming experts)

Xactly what you've been looking for!

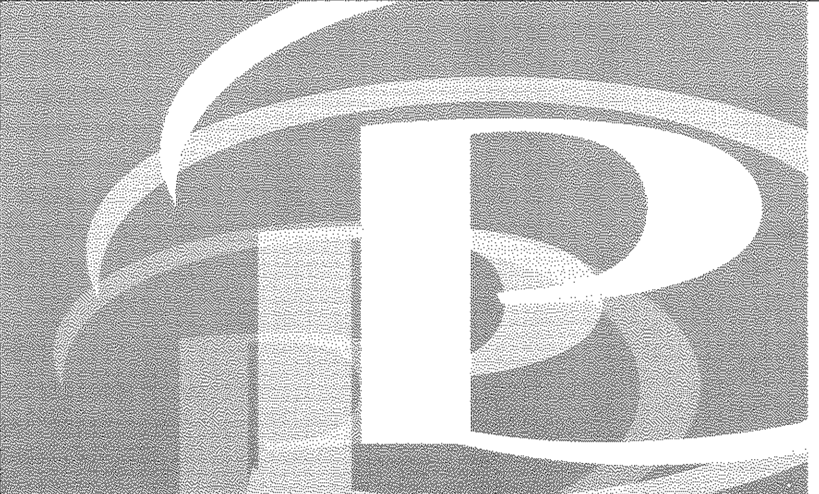


- Free pick-up & delivery!
- Never a rush charge!
- 24-hour express service!
- All services completed in-house!

Intelligent Document Solutions & Duplicating Services

Serving these areas: Akron • Cleveland • Denver • Detroit • Indianapolis • Kansas City Minneapolis • New York • Overland Park • Philadelphia • Phoenix Scottsdale • St. Paul • Toledo • Troy

For more information, please call. . .
(216) 781-1999 Cleveland, Akron
or check our website: www.xactids.com



Professionalism
Accuracy
Reliability
Integrity
Service
Experience

1111 Chester Avenue • Cleveland, OH 44114
216-241-5950 phone • 216-241-5952 fax

LISTING OF EXPERTS - CATA DEPOSITION BANK
(by specialty)

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

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

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

Dentistry/Oral Surgery
Mitchell Barney, D.D.S.
John Distefano, D.D.S.
Don Shumaker, D.D.S.
Pankaj Rai Goyal, M.D. */Oral Surgery*

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

ENT
Steven Houser, M.D.
Seth J. Silberman, M.D.

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

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

Gastroenterology
Aaron Brzezinski, M.D.
Todd D. Eisner, M.D.
Kevin Olden, M.D.

General Internal Medicine
Thomas Abraham, M.D. */Pulmonology*
Bruce L. Auerbach, M.D.
Stephen Baum, M.D.
Frederick Bishko, M.D. */Rheumatology*
Alan J. Cropp, M.D. */Pulmonology*
Carl A. Cully, M.D.
Douglas Einstadter, M.D.
Kirk R. Elliott, M.D.
Stacy Hollaway, M.D.
Douglas Junglas, M.D.
Suzanne Kimball, M.D.
Keith Kruithoff, M.D.
Calvin M. Kunin, M.D. */Microbiology*
Lorenzo Lalli, M.D.
Peter Y. Lee, M.D.
Kenneth L. Lehrman, M.D. */Cardiology*
John Maxfield, M.D. */Emergency Medicine*
Elizabeth Dorr McKinley, M.D.
Darshan Mistry, M.D.
Hadley Morgenstern-Clarren, M.D.
Lorus Rakita, M.D.
Raymond W. Rozman, M.D.
Juan A. Ruiz, M.D.
Jeffrey Selwyn, M.D.
Vijaykumar Shah, M.D.
David Yana, M.D.

General Surgery

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

Geriatrics

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

Hematology

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

Infectious Disease

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

Neonatology

Richard E. McClead, M.D.

Neurology

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

Neurosurgery

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

OB/Gyn

Paul Bartulica, M.D.
William Bruner, M.D.
David Burkons, M.D.
Stephen DeVoe, M.D.
Method Duchon, M.D.
Stuart Edelberg, M.D.
John Elliott, M.D.
Bruce Flamm, M.D.
Martin Gimovsky, M.D.
Michael Gyves, M.D.
William Hahn, M.D.
Hunter Hammill, M.D.
Nawar Hatoum, M.D.
Tung-Chang Hsieh, M.D.
Mark Landon, M.D.
Andrew M. London, M.D.
James Nocon, M.D.
John O'Grady, M.D.
John R. O'Neal, M.D.
Richard O'Shaughnessy, M.D.
Stanley Robboy, M.D.
Anthony Tizzano, M.D.

Occupational Therapy

Ellen Flowers

Oncology

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

Ophthalmology

Thomas R. Hedges, M.D.
Gregory Kosmorsky, M.D.
Andreas Marcotty, M.D.
Peter J. Savino, M.D.

Orthopaedic Surgery

William Barker, M.D.
William Bohl, M.D.
Malcolm Brahms, M.D.
Dennis Brooks, M.D.
Robert Corn, M.D.
Robert Erickson, M.D.
Richard Friedman, M.D.
Robert Fumich, M.D.

Timothy Gordon, M.D.
Gregory Hill, M.D.
Ralph Kovach, M.D.
Jeffrey J. Roberts, M.D.
Duret Smith, M.D.
Glen Whitten, M.D.
Robert Zaas, M.D.
Faissal Zahrawi, M.D.

Otolaryngology
Raphael Pelayo, M.D.
Joel D'Hue, M.D.

Otoneurology
John G. Oats, M.D.

Pathology
Robert D. Hoffman, M.D.
Sharon Hook, M.D.
Kenneth McCarty, M.D.
Richard Lash, M.D. */Surgical*
Diane Mucitelli, M.D.
Norman B. Ratliff, M.D.
Jacob Zatuchni, M.D.

Pediatrics
Ronald Gold, M.D.
Ivan Hand, M.D.
Mary C. Goessler, M.D.
Joseph Jamhour, M.D.
Martha Miller, M.D. */Neonatal*
Philip Nowicki, M.D.
Ellis J. Neufeld, M.D. */Hematology*
Philip Nowicki, M.D.
Fred Pearlman
Michael Radetsky, M.D.
Ghassan Safadi, M.D. */Allergist*
Mark Scher, M.D. */Neurology*
Lee M. Weinstein, M.D.
Keith Owen Yeates, M.D. */Neuropsychology*

Plastic Surgery
Mark D. Wells, M.D.
Phillip Marciano, M.D. */Maxillofacial*

Podiatry
Anthony A. Matalvange, M.D.

Proctology
Henry Eisenberg, M.D.

Psychiatry
Richard Lightbody, M.D.
David Shaffer, M.D. */Pediatrics*
Martin Silverman, M.D.
Cheryl D. Wills, M.D.

Psychology
Robert K. DeVies, Ph.D.
Mark Janis, Ph.D.

Pulmonology
Robert DeMarco. M.D.

Radiology
Laurie L. Fajardo, M.D.
William Murphy, M.D.
David Spriggs, M.D.

Sleep Disorders
Leo J. Brooks, M.D.
Steven Feinsilver, M.D.
Thomas Hobbins, M.D. */Pulmonology*

Social Work
Barry Mickey */Professor/Teacher*
Diane Mirabito

Thoracic Surgery
Delos M. Cosgrove, M.D. */Cardiothoracic*
Dennis Hernandez, M.D. */Cardiothoracic*
Gregory F. Muehlbach, M.D.
Mehmet C. Oz, M.D. */Cardiothoracic*
Thomas W. Rice, M.D.
Craig Saunders, M.D.
V.C. Smith, M.D. */Cardiac Surgeon*

Urology
W.E. Bazell, M.D.
Kurt Dinchuman, M.D.
Frederick Levine, M.D.

Vascular Surgery
John J. Alexander, M.D.

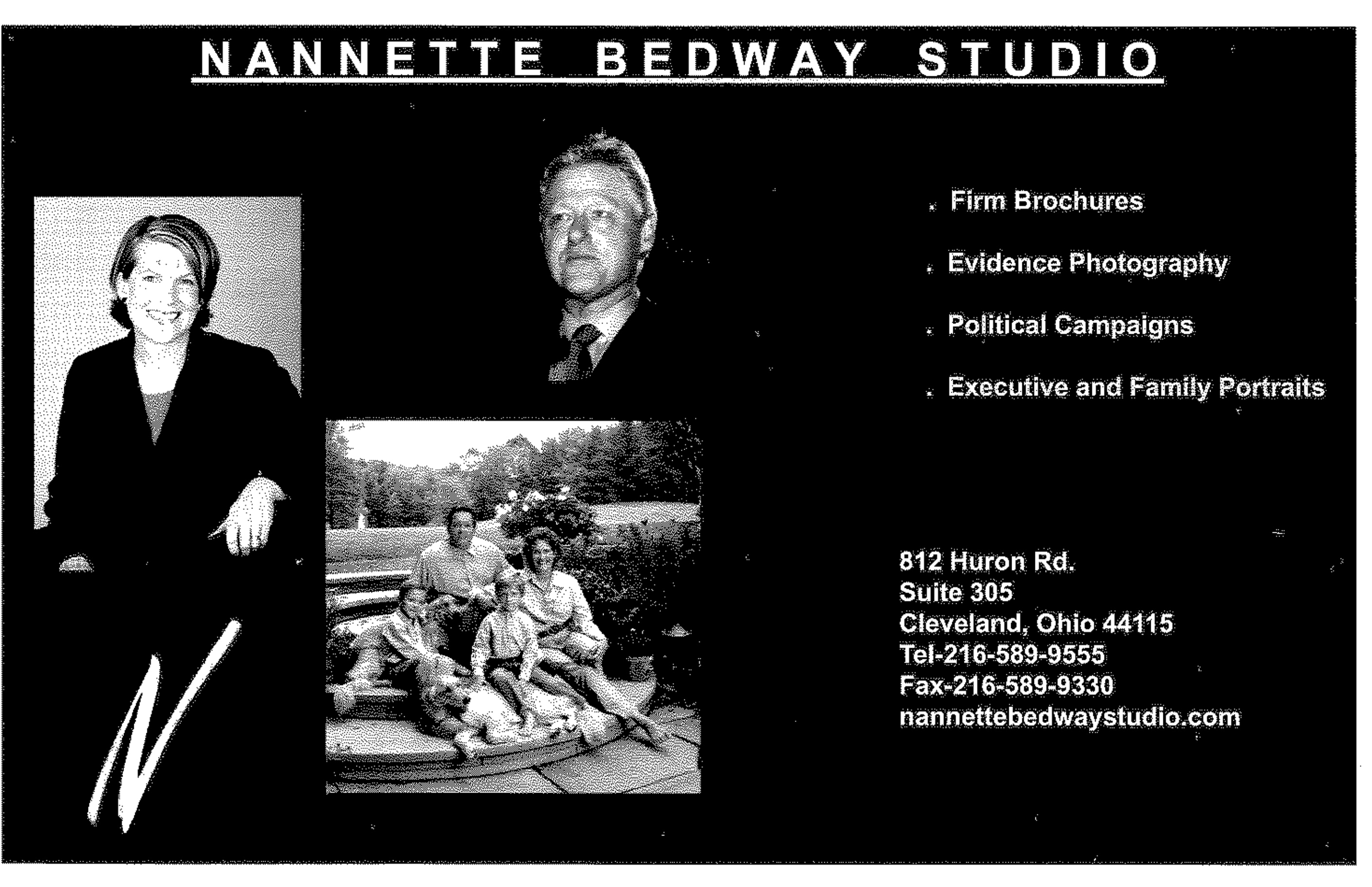
General/Misc.
Walter Afield, M.D. */Unknown*
Mack A. Anderson */Counselor*
Lisa Ann Atkinson, M.D. */Staff Physician*
Stanley P. Ballou, M.D. */Unknown*
Ahmed Elghazawi */Independent Med Exam*
Nancy Holmes */Certified Physicians Assistant*
Karen Wolffe */Professional Counselor*
Arthur B. Zinn, M.D. */Medical Geneticist*

Nursing
Jennifer Ahl, R.N.
Debbie Bazzo, R.N. */Obstetrics*
Mary Ann Belanger, R.N.
Brenda Braddock, R.N.
Danielle Coates, R.N.
Linda DiPasquale, R.N. */Perinatal CNS*

Debra A. Gargiulo, R.N.
Phyllis Hayes, R.N.
Laura Hoover, R.N.
Denise Hrobat, R.N.
Mary Hulvalchick, R.N. /*Obstetrics*
Donna Joseph, R.N.
Geraldine Kern, R.N.
Judith Wright Lott, R.N. /*Neonatal N.P.*
Jay Morrow, R.N.
Lekita Nance, LPN
Delicia Ostrowski, R.N.
Janet Pier, R.N.
Debra Seaborn, R.N.
Melissa Slivka, R.N.
Penny Sonters, R.N.
Mary Jane Martin Smith, R.N. /*Teacher*
Diane Soukup, R.N. /*Geriatrics*
Shirley Stokley, R.N.
Elizabeth Svec, R.N.
Jennifer Syrowski, R.N.
Laurel Thill, R.N.
Helenmarie Waters, R.N. /*Obstetrics*
Angelique Young, R.N.
Catherine Zalka, R.N.
Joanne Zelton, R.N.

Administration

Bernard Agin /*Attorney*
Thomas Hilbert /*Consultant*
Gary Himmel, Esq. /*Attorney*
Clark Millikan /*Dir. of Academic Affairs*
Sue Sanford /*Dir. Obstetrical Services*
Richard W. Schule /*Mgr, Surg. Process Dept.*
David Silvaaggio /*Dept. Admin. - Fam. Pract.*
Stephen L. Spearing /*Admin. Dir. Radiology*
Kelly Sted /*Manager of Enrollment*



CATA VERDICTS AND SETTLEMENTS

Case Caption: ____

Type of Case: ____

Verdict: ______________________ **Settlement:** ______________________

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

Counsel for Defendant(s): ______________________________________

Court/Judge/Case No: ______________________________________

Date of Settlement/Verdict: ______________________________________

Insurance Company: ______________________________________

Damages: ____

Brief Summary of the Case: ______________________________________

____

____

____

____

Experts for Plaintiff(s): ______________________________________

____

____

Experts for Defendant(s): ______________________________________

____

____

RETURN FORM TO:

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

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:____________

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:**
   a huge collection of reports and depositions of experts routinely used by the defense bar, and detailed briefs concerning key issues encountered in the personal injury practice.

2. **THE ACADEMY NEWSLETTER:**
   published four times a year, contains summaries of significant cases in Cuyahoga County and throughout the state, recent verdicts and settlements, a listing of experts in CATA's deposition bank and guest articles.

3. **LUNCHEON SEMINARS:**
   C.L.E. accredited luncheon seminars, about six per year, includes presentations by experienced lawyers, judges and expert witnesses on trial strategy and current litigation topics. These lunches also provide networking access with other lawyers, experts and judges.

4. **THE BERNARD FRIEDMAN LITIGATION SEMINAR:**
   this annual all day C.L.E. seminar has featured lecture styled presentations and mock trial demonstrations with a focus group jury. Guest speakers usually include a judge from the Ohio Supreme Court.

5. **ACADEMY SPONSORED SOCIAL AND CHARITABLE EVENTS:**
   these include the annual installation dinner and the golf outing, among other events These events are routinely attended by members of the academy and judges from Cuyahoga County Common Pleas Court, the Eighth District Court of Appeals, U.S. District Court and the Ohio Supreme Court.

THE CLEVELAND ACADEMY OF TRIAL ATTORNEYS
134 Middle Avenue
Elyria Ohio, 44035

Barberic & Associates, Inc.
Court Reporters

- Specialization in the transcription of medical and technical testimony.

- Barberic & Associates has been and is an integral part of the legal system. Our staff, with over 75 years of total experience, will give you dependability, accuracy and competitive rates.

- State-of-the-art technology to provide your firm with transcripts, ASCII disks, Min-U-Scripts and Video service.

- When you find yourself to be in need of court reporting services, please feel free to call us and get the BEST for LESS!

Barberic & Associates, Inc.
216.221.1970
Fax 216.221.9171
1.888.595.1970
e-mail:barberic@core.com