CATA News
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President's Message

Mark E. Barbour

Dear Fellow Members;

As I write this we are in the midst of the holiday season, which is a time of thanks and reflection.

So let me start by giving thanks to Alison Ramsey, who is stepping down as co-editor of our newsletter, to Abby Botnick, who is stepping up to fill her spot, and to Andrew Thompson, who is staying on for another round. Your efforts are great and your rewards are small, so thank you for doing a thankless task.

Next, let's reflect a little bit about where we have been, and where we can go. Most of you would probably say this last year was one where you worked twice as hard for half the result compared to the past, and you might be right. Subrogation, tort deform, poisoned jurors, crazy schedules, everything is a fight, and all of it seems to conspire against us. How did it get like this? I'm not sure there is space enough to recount the ways.

Is the future more of the same, or worse? Let's make it something better. The year 2008 is an election year. Let's be involved, and give ourselves a voice in as many of these races as possible, by our actions and words, and through our clients. We have done this in past, and we were mostly right, although we did not always win. Let's keep doing it.

We have started to adopt new strategies and tactics across the board to deal with our challenges in our individual cases, which is something we, as a group, are very good at doing, and I remain cautiously optimistic largely due to my faith in you, fellow CATA members.

These new strategies and tactics are the topics of our monthly CLE lunches, our annual Bernard Friedman Institute and our list serve conversations, and represent where we are going. Changes in the way we conduct voir dire, how we tell our

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story, and how we argue our cases are all part of the most recent and future events and articles presented by CATA. We have brought nationally known speakers here to talk about trial practice, and plan on bringing David Ball, Ph.D., to town in April as part of our annual BFI seminar to talk about damages in this day and age of tort deform. Let's take these ideas and use them.

Continue posting those pleadings, briefs and decisions on the list serve. We give ourselves a big advantage by sharing information with each other. If you have a topic or issue of concern, help us and yourself by writing an article for this very newsletter. Share what you know because we all gain when there is a good result. Let's give ourselves the best chance possible.

And let's keep advancing our cause, and fighting our fight. Many before us did so, and we should do the same thing. We owe it to them, to our clients, and to ourselves.

Thank you for your support of CATA, and here is to a healthy, happy and prosperous New Year.
Mark Barbour

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Law Updates

by Andrew Thompson

Alternative Dispute Resolution – Consideration of Briefs Is Sufficient To Satisfy Hearing Requirement Of R.C. §2311.03, But Parties Must Be Given Opportunity To Present Supplemental Information Before Trial Court Rules Whether Arbitration Clause Was Unconscionable

Barnes v. Andover Village Retirement Community, Inc., *11th Dist. App. No. 2006-A-0039, 2007-Ohio-4112, 2007 WL 2296459.*

In March 2002, Gary Barnes, under power of attorney, sought to admit his quadriplegic son, Robert, to Andover Village nursing home. Gary, who had a high-school education, was provided numerous papers to review and sign during the admissions process, one of which was a lengthy agreement containing an arbitration provision. He was not given time to review the agreement or consult with counsel, nor were the provisions in the agreement explained to him by Andover's staff. Gary was told that execution of the agreement was a prerequisite to Robert's admission. Robert suffered injuries that resulted in his death while admitted to Andover. The administrator of his estate ("Barnes") brought a personal injury and wrongful death action against Andover and other defendants (hereinafter "Andover"). In its answer, Andover pled lack of subject matter jurisdiction as an affirmative defense due to the arbitration provision in the agreement signed during the admission process.

Following a hearing, the trial court entered judgment that defendants failed to follow the procedures required by R.C. §2711.03 in raising the arbitration issue. Defendants appealed the judgment entry. Plaintiff moved to dismiss the appeal on the grounds that it was not timely filed and that a final appealable order had not been entered. Defendants sought an order from the trial court pursuant to R.C. §2711.03 requiring arbitration to proceed and a request pursuant to R.C. §2711.02 to stay trial until arbitration was completed. Plaintiff argued that the arbitration provision was unconscionable. After reviewing briefs filed by both parties, the trial court found the arbitration provision unconscionable and therefore unenforceable, overruled defendants' order to proceed with arbitration, and ordered that the matter proceed on the court's docket.

On appeal, Andover argued that the trial court violated R.C. §2711.03(A) and (B) when it failed to require Barnes to submit his brief first so Andover could respond. The court of appeals noted that R.C. §2711.03(A) requires the trial court to hear the parties when one party is aggrieved by the other party's failure to perform under a written arbitration agreement. If, upon satisfaction that neither the making of the agreement nor the failure to comply with the agreement is at issue, the trial court must issue an order directing the parties to arbitration. While the trial court did not hold an oral hearing, the appeals court held that it was clear that the parties agreed the trial court would consider the parties' briefs. Thus, the trial court properly held a "hearing" as contemplated by R.C. §2311.03(A).

The court also rejected Andover's argument that the trial court's briefing schedule did not provide it with the opportunity to respond to Barnes' position that the arbitration clause was unconscionable. Andover never objected to the trial court's briefing schedule, and was on notice of Barnes' claims during the briefing period. Therefore, Andover was barred from raising that issue on appeal. However, the court of appeals held that Andover should be allowed to present information at a continued hearing. The case was therefore reversed and remanded to the trial court to either direct the parties to proceed to arbitration pursuant to R.C. §2311.03(A), or, if the trial court finds the arbitration provision or Barnes' performance at issue, proceed summarily to trial on either or both of those issues.

Alternative Dispute Resolution – Decedent Could Not Bind His Beneficiaries To Arbitration Agreement With His Employer And Require Arbitration Of Wrongful Death Claim

***Peters v. Columbus Steel Castings Co.,* 115 Ohio St.3d 134, 2007-Ohio-4787.**

William Peters began working at Columbus Steel Castings Company in about July 2003. He executed an employment agreement that stated in part that "mediation, and if unsuccessful, arbitration under the Dispute Resolution Plan will be my sole and exclusive remedies for any legal claims or disputes I may have against the Company regarding my employment." The agreement further stated that it applied to "the heirs, beneficiaries, successors, and assigns" of the employee. Peters fell from a catwalk while attempting to reach a crane only eight days after he began his employment. The injuries he suffered in the fall resulted in his death.

Peters' widow filed suit against the employer alleging that the company committed an intentional tort. Her claims included a survival action and a wrongful death claim. The company sought dismissal of the case, arguing that the claims were subject to arbitration as set forth in the agreement signed by Peters. The trial court held that the survival action was subject to arbitration, however the wrongful death claim could be pursued in court. Peters' widow thereafter voluntarily dismissed the survival claim. The court of appeals upheld the trial court's decision. The Ohio Supreme Court accepted the discretionary appeal, and found that an individual cannot bind his beneficiaries in an agreement to arbitrate their wrongful death claims.

The Court's decision was based primarily on two principles of law. The Court first noted that arbitration is a procedure grounded in contract, and a party cannot be forced to arbitrate a matter that he or she has not agreed to submit to arbitration. Although courts generally favor arbitration as a method to resolve disputes, this policy does not overcome a litigant's constitutional right to bring a viable claim to court. Therefore, the Court reasoned, Peters' beneficiaries will not be bound by the arbitration agreement unless the company can prove that they specifically agreed to arbitrate their wrongful death claims.

The Court next distinguished the nature of a wrongful death claim from a survival action. In a survival claim, a decedent's estate seeks recovery for injuries suffered by decedent before his or her death. In a wrongful death action, damages are awarded for injuries suffered by the beneficiaries of decedent. Although the actions are pursued by the same party (the personal representative of the estate), Ohio courts have consistently recognized that these two claims are separate and distinct. For example, in Thompson v. Wing (1994), 70 Ohio St.3d 176, the Court allowed a wrongful death action to proceed despite the fact that the decedent had already pursued a medical malpractice action against the same defendants prior to her death. The Court held that "the injured person cannot defeat the beneficiaries' right to have a wrongful death action brought on their behalf because the action has not yet arisen during the injured person's lifetime. Injured persons may release their own claims; they cannot, however, release claims that are not yet in existence and that accrue in favor of persons other than themselves." Id. at 183.

Applying these principles to the facts of the instant case, the Court held that Peters agreed to arbitrate his claims against the company, whether brought during his life or after his death. Since the wrongful death claim is not his, but a claim for the benefit of his beneficiaries, it was not affected by the agreement. Since Peters' beneficiaries did not sign any agreement with the company, their wrongful death claims can go forward.

Civil Procedure – Assertion Of Affirmative Defense Of Insufficiency Of Service Of Process Is Not Waived By Continuing Participation In Litigation Of The Case

***Gliozzo v. University Urologists of Cleveland, et al.,* 113 Ohio St.3d 141, 2007-Ohio-3762.**

Appellee Gliozzo filed a medical malpractice claim against Appellants University Urologists and Mar-

tin Resnick, M.D. on November 14, 2003, stemming from a surgical procedure performed on Appellee in June 2002. Pursuant to R.C. §2305.113(B)(1), Appellee hand delivered a 180-day letter to Appellants before filing the complaint, thus extending the statute of limitations for his claim. The deadline to perfect service was November 14, 2004 (one year from the date the complaint was filed). Service by certified mail failed and no other attempts were made to serve Appellants. Appellants' answer to the complaint denied Appellee's allegations and raised, among other defenses, the affirmative defense of insufficiency of service of process and the statute of limitations.

On April 4, 2005, less than two weeks before the scheduled trial date, Appellants filed a motion to dismiss based on imperfection of service of process. The trial court denied the motion as untimely because the deadline set for filing dispositive motions had passed. Appellants moved for leave to renew their motion to dismiss on the first day of trial. The trial court granted the motion to dismiss, holding that the case was not properly commenced because Appellants were never served with the complaint and did not waive insufficient service of process and the statute of limitations as affirmative defenses.

On appeal, Appellee argued that Appellants had thus far actively participated in defending the case and therefore submitted to the trial court's jurisdiction and waived insufficiency of service of process as an affirmative defense. The appeals court agreed and remanded the case.

The Ohio Supreme Court reversed the court of appeals, relying on its holding in First Bank of Marietta v. Cline (1984), 12 Ohio St.3d 317, wherein it found an insufficiency of service of process defense raised in the first responsive pleading but not raised again until after all evidence had been presented at trial was not a waiver of that defense. Thus, "a properly asserted and preserved defense may be

raised even after trial has begun." The Court also found no reason to find the trial court abused its discretion when it granted Appellants' motion to dismiss after the dispositive motion deadline had passed, as such decisions are within the discretion of the trial court.

Finally, the Court rejected Appellee's argument that allowing Appellants to submit a motion to dismiss based in insufficient service of process after the service period expired – when Appellants were also defending on the merits of the case – encourages abuse of the legal process because Appellee was not provided time to correct his error. The Court held that it is the plaintiff's obligation to perfect service. Even if a defendant knows that an action has been filed, the Civil Rules do not absolve the plaintiff of that obligation.

Civil Procedure – Judge Does Not Have Discretion To Seat Juror When A Condition Stated In R.C. §2313.42(A) Through (I) Is Found

***Hall v. Banc One Management Corp., et al.,* 114 Ohio St.3d 484, 2007-Ohio-4640.**

Appellant, Anne Hall, was terminated from her employment with Banc One, where she worked as a government and community relations representative. She brought claims for age discrimination, sex discrimination and retaliation. The trial court granted summary judgment on all causes of action except the claim premised on sex discrimination and the matter proceeded to trial. During voir dire, Hall's attorney challenged for cause a prospective juror who disclosed that at the time of trial two of his sons worked for Banc One. His daughter previously worked for Banc One but was terminated. The prospective juror classified her discharge as a "business decision" and stated that it was necessitated by "the economy that we're all living in right now." Hall's attorney challenged the juror based on R.C. §2313.42(E), which precludes jury service of a parent whose children are employed by one of the parties. The trial court denied the challenge, ruling that despite the apparent conflict the juror would be fair.

After the trial, the jury returned a verdict in favor of Banc One. The court of appeals upheld the verdict, and affirmed the trial court's decision to deny the statutory challenge to the prospective juror. The Ohio Supreme Court granted discretionary review to consider only the issue of whether the trial court has authority to exercise discretion to seat a juror who is otherwise statutorily disqualified from serving on the jury.

The statute at issue in this case is R.C. §2313.42, which states in part that the following are "good causes for challenge to any person called as a juror:

> (A) That he has been convicted of a crime which by law renders him disqualified to serve on a jury;
> (B) That he has an interest in the cause;
> (C) That he has an action pending between him and either party;
> (D) That he formerly was a juror in the same cause;
> (E) That he is the employer, the employee, or the spouse, parent, son, or daughter of the employer or employee, counselor, agent, steward, or attorney of either party;
> (F) That he is subpoenaed in good faith as a witness in the cause;
> (G) That he is akin by consanguinity or affinity within the fourth degree, to either party, or to the attorney of either party;
> (H) That he or his spouse, parent, son, or daughter is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against him;
> (I) That he, not being a regular juror of the term, has already served as a talesman in the trial of any cause, in any court of record in the county within the preceding twelve months;
> (J) That he discloses by his answers that he cannot be a fair and impartial juror or will not follow the law as given to him by the court."

The statute further provides that a challenge made based on one of the above facts "shall be considered

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as a principal challenge, and its validity tried by the court." Appellant argues that because the statute expressly classifies the above factors as "good causes for challenge," the trial court does not have discretion to seat a prospective juror once one of these facts is established. Appellee contends that the trial court may always exercise discretion in excusing a juror during voir dire.

The Court noted that two types of challenges existed at common law to potential jurors, "principal challenges" and "challenges to the favor." 2 Blackstone, Commentaries on the Laws of England, 363. A principal challenge was defined by Blackstone as one "where the cause assigned carries with it prima facie evident marks of suspicion either of malice or favor…which, if true, cannot be overruled, for jurors must be omni exceptione majores" (above all challenges). Establishment of a principal challenge results in automatic disqualification with no opportunity to rehabilitate the juror. Blackstone describes challenges to the favor as ones where the party "objects only some probable circumstances of suspicion, as acquaintance and the like." A subjective determination should still be made following a challenge to the favor to decide whether the juror can be impartial.

The distinction between the two types of challenges is described by the Court as "well entrenched in Ohio jurisprudence." In Dew v. McDivitt (1876), 31 Ohio St. 139, the Court upheld the decision of the trial court to deny challenges to several jurors who also served on the jury in a related case. The Court held that a "great latitude of discretion must be allowed to the court in the trial of a challenge for favor, as there was at common law to the triers appointed for that purpose." Id. at 142. The Court also acknowledged the two forms of challenges in Lingafelter v. Moore (1917), 95 Ohio St. 384, when it held that a challenge must be upheld if the potential juror's statements indicated "actual bias." The United States Supreme Court stated in United States v. Wood (1936), 299 U.S. 123, 135, that "[c]hallenges to the polls were either 'principal' or 'to the favor,' the former being upon grounds of absolute disqualification, the latter for actual bias."

The Court concludes that the challenges listed in R.C. 2313.42(A) through (I) are principal challenges. The legislature expressly stated that they are "good causes for challenge," and did not include language allowing for the court to exercise discretion. These ten challenges include many that were recognized as principal challenges at common law. They require only an objective determination of the facts by the court, but do not require a subjective analysis of fairness or impartiality. The Court states that the challenges listed in R.C. 2313.42(A) through (I) "establish a conclusive presumption of disqualification if found valid, in conformity with longstanding judicial precedent, and require the court to dismiss the prospective juror, not to rehabilitate or exercise discretion to seat the prospective juror upon the prospective juror's pledge of fairness despite the disqualification."

The Court noted that the challenge listed in Section (J) allows the use of discretion by the trial court. The Court's decision in Berk v. Matthews (1990), 53 Ohio St.3d 161, which specifically states in the syllabus that a court may exercise discretion when a challenge is raised under this provision, is limited only to a challenge brought under Section (J). The Court suggests that inclusion of this challenge in the list of other principal challenges in R.C. §2313.42 is a mistake by the legislature "because that challenge was not part of the common law, nor was it included in an earlier version of this statute." In dissent, Justice Lanzinger finds this statutory interpretation unwarranted, and argues that "a principal challenge for cause does not deprive a trial court of discretion to determine whether to disqualify a prospective juror, where the prospective juror expresses himself as able to render a fair and impartial verdict on the evidence and under the law."

Civil Procedure – Affidavit Of Merit Submitted By Nurse Sufficient To Withstand Challenge Under Rule 10(D)(2).

***Tranter v. Mercy Franciscan Hospital Western Hills, et al.,* 1st Dist. App. No. C-061039, 2007-Ohio-5132, 2007 WL 2812912.**

Plaintiff, Administrator of the estate of Virginia Ellis, filed a medical malpractice action against Defendant alleging that nurses at the hospital negligently caused Ms. Ellis to fall and suffer injuries that ultimately resulted in her death. Plaintiff submitted an affidavit of a nurse, Donna Adkins, in support of the complaint as required by Rule 10(D)(2) of the Ohio Rules of Civil Procedure. Adkins stated in the affidavit that she was familiar with the standard of care applicable to the nurses caring for Ellis at the time of the subject incident and that it was her "expert opinion that the standard of care was breached by Mercy Franciscan Hospital Western Hills and Jane Does 1-10 and this breach of care resulted in the injuries sustained by Virginia Ellis."

Defendant filed a motion to dismiss challenging the sufficiency of the affidavit. It argued that Adkins was not competent to testify about the standard of care or about whether any alleged negligence caused injuries to decedent. The trial court granted the motion to dismiss, holding that Adkins was not qualified to render an opinion relating to the issue of proximate cause.

Rule 10(D)(2) requires that when filing a medical malpractice claim, the complaint "shall include an affidavit of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability." The affiant must state "that the standard of care was breached by one or more of the defendants to the action and that the breach caused injury to the plaintiff." At oral argument, the Defendant conceded that Adkins could testify regarding the applicable standard of care, but challenged her ability to state that injuries were caused by any alleged breach.

The court of appeals held that the affidavit in this case was sufficient, and that no testimony regarding causation was necessary. The court held that "[a]lthough expert testimony is generally necessary to establish the applicable standard of care in a malpractice claim, 'matters of common knowledge and experience, subjects that are within the ordinary, common and general knowledge and experience of mankind, need not be established by expert opinion testimony.'" Ramage v. Central Ohio Emergency Services, Inc. (1992), 64 Ohio St.3d 97, 103. The fact that injuries resulted from the decedent's fall was found to be a matter of common knowledge. The court concluded that "[o]nce Adkins had expressed the opinion that the nurses' negligence had caused the fall, no additional expert testimony was required to support the allegation that the fall had caused injuries to Ellis." The court also noted that the purpose of Rule 10(D)(2) is to "winnow out utterly frivolous claims…not to test the sufficiency of the plaintiff's evidence on the ultimate issue of the defendant's liability."

Employment Law – No Common-Law Public Policy Wrongful Discharge Claim for Age Discrimination; Statutory Remedies Provide Complete Relief

***Leininger v. Pioneer Nat'l Latex, et al.,* 115 Ohio St.3d 311, 2007-Ohio-4921.**

Appellant Pioneer Latex fired Appellee Leininger when she was 60 years old and assigned some of her duties to 21 year-old employee. Appellee filed a common law claim alleging wrongful discharge in violation of the public policy articulated in R.C. §4112.02(A), Ohio's age discrimination statute. Appellant filed a motion to dismiss on the grounds that Appellee's claim was barred by the statute of limitations provided in R.C. §4112.02, and that no public policy wrongful discharge claim existed because the statutory remedy provided complete relief. The Fifth District Court of Appeals reversed the trial court, holding that Ohio case law had not specifically precluded a public policy wrongful discharge claim based on age discrimination.

A plaintiff must establish four elements in a claim for wrongful discharge in violation of public policy: the existence of a clear public policy (the "clarity" element); terminating employees under

circumstances similar to the plaintiff's would jeopardize that public policy (the "jeopardy" element); the termination was motivated by conduct related to the public policy (the "causation" element), and that the employer lacked any overriding business justification for the termination (the "overriding justification" element). Painter v. Graley (1994), 70 Ohio St.3d 377.

The Ohio Supreme Court discussed Appellant's claim as to the clarity and jeopardy elements, the two elements of the Graley analysis which present questions of law. The parties did not dispute, and the Court agreed, that the clarity element is met. Ohio has a clear public policy against age discrimination codified at R.C. §4112.02(A) and §4112.14(A). However, the Court found that Appellant's claim did not meet the jeopardy element. The Court followed its decision in Wiles v. Medina Auto Parts, 96 Ohio St.3d 240, 2002-Ohio-3994, wherein it held that there was no need to recognize a common law wrongful discharge claim based on a policy that already existed in the Family Medical Leave Act. Thus, the FMLA's provision for equitable and compensatory relief, even without the possibility of punitive damages, was sufficient to effectuate the policy underlying the FMLA.

The Court similarly found that the remedies provided in Chapter 4112 were sufficient to not jeopardize the public policy against age discrimination because the remedies contained therein are essential to the statutes themselves. A plaintiff has a wide range of remedies to pursue within Chapter 4112 if an age discrimination claim exists: §4112.02(N) ("any legal or equitable relief that will effectuate the individual's rights"); §4112.05(G) (Civil Rights Commission shall issue "order requiring the respondent to cease and desist from the unlawful discriminatory practice, requiring the respondent to take any further affirmative or other action that will effectuate the purposes of [Chapter 4112], including, but not limited to, hiring, reinstatement, or upgrading of employees with or without back pay … and requiring the respondent to report to the commission the manner of compliance."; §4112.14(B) (upon finding age discrimination, court shall order "an appropriate remedy which shall include reimbursement to the applicant or employee for the costs, including reasonable attorney's fees, of the action, or to reinstate the employee in the employee's former position with compensation for lost wages and any lost fringe benefits from the date of the illegal discharge and to reimburse the employee for the costs, including reasonable attorney's fees, of the action"); and §4112.99 (violators of Chapter 4112 "subject to civil action for damages, injunctive relief, or any other appropriate relief"). Finally, the Court held, the fact that §4112.02 and §4112.05 have a six-month statute of limitations does not take away from the general remedial measures available under Chapter 4112 – and the issue of the statute of limitations is one for the legislature, not the Court.

The dissent held that the existence of statutory provisions and remedies should not preclude a common-law claim. Public policy claims within the exception to the at-will employment doctrine are supported in codified laws, but need to be tied to

them, and the role of common law claims is to "adjust the acceptable breadth of employment at will" – not "fill in gaps left by statutory remedies."

Evidence – Expert Testimony Must Establish Both General Causation And Specific Causation To Present A Prima Facie Case Involving Exposure To A Toxic Substance

***Terry, et al., v. Caputo, et al.,* 115 Ohio St.3d 351, 2007-Ohio-5023.**

Several employees of the Ottawa County Board of MRDD brought suit to recover damages for exposure to mold. The employees developed headaches and other physical ailments after being assigned to work in several suites in Port Clinton, Ohio that were found to contain five separate species of mold spores. They sued the individuals and companies that owned and were responsible for maintaining the suites. (The Ottawa County Board of MRDD was dismissed from the case after asserting immunity).

The employees submitted an expert report from Jonathan Bernstein, M.D., who reviewed the medical records of the claimants and an assessment survey of the premises prepared by Hygienetics Environmental Services, Inc. He concluded based on this information that the employees "experienced clinical symptoms consistent with building-related illness that was the result of multiple problems including water incursion leading to mold and mildew growth, poor ventilation and poor filtration." Defendants filed a motion for summary judgment and a Daubert motion to exclude Dr. Bernstein's testimony pursuant to Evidence Rule 702. The trial court granted both motions, finding in part that the expert did not base his opinion on sufficient underlying data, he did not use reliable scientific methods to reach his conclusions, he did not complete a proper differential diagnosis and relied too heavily on the temporal relationship between the symptoms and condition of the building to establish causation, and he did not cite to a review of the literature that would support his conclusions. Since Dr. Bernstein was the employees' only expert witness, the trial court granted summary judgment.

The court of appeals overruled the trial court's determination that Dr. Bernstein's opinion regarding general causation should have been excluded, but upheld the trial court's finding on specific causation because the expert did not conduct a reliable differential diagnosis. Despite the lack of an expert opinion on specific causation, the court of appeals denied the motion for summary judgment, holding that the other evidence presented, including the microbial assessment survey, and the employees' medical records and deposition testimony, created a genuine issue of material fact. The Ohio Supreme Court accepted the case to determine whether expert testimony is required to establish both general and specific causation in mold-exposure cases.

The Court initially adopted the general rule that to present a prima facie case involving an injury from exposure to a toxic substance, including mold, the plaintiff must establish both general causation, that the toxin is capable of causing the alleged injuries, and specific causation, that the toxic substance in fact caused the injuries alleged by the plaintiff. After a thorough discussion of the gatekeeping function of the trial court as imposed by Daubert v. Merrell Dow Pharmaceuticals (1993), 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469, the Court held that Dr. Bernstein's testimony was admissible as it related to general causation, however his invalid differential diagnosis rendered his opinion inadmissible as it related to specific causation. As support for its holding, the Court cited two federal cases also dealing with injuries alleged to have been caused by exposure to mold. In Roche v. Lincoln Property Co. (4th Cir. 2006), 175 Fed.Appx. 597, 2006 WL 910241, the court excluded the testimony of a medical expert based on a Daubert analysis because the expert was unable to definitively state that that the toxins at issue were the cause of the plaintiff's injury. The expert based his opinion on medical records, relevant medical literature, and the report of an industrial hygienist. Similarly, in Jazairi v. Royal Oaks Apt. Assoc., L.P. (11th Cir. 2007), 217 Fed.Appx. 895, 2007 WL 460843, an expert's opinion was held inadmissible because he relied too heavily on the temporal proximity of the exposure to mold with the onset of the plaintiff's

symptoms. The court held that the expert failed to rule in mold as the cause of the symptoms and failed to rule out smoking or other common allergens.

Although the Court upheld the lower court's holding relating to the admissibility of Dr. Bernstein's opinions, the Court overruled the decision to deny summary judgment. The Court stated that expert medical testimony is necessary to establish specific causation. In Darnell v. Eastman (1970), 23 Ohio St.2d 13, it was noted in the syllabus that "[e]xcept as to questions of cause and effect which are so apparent as to be matters of common knowledge, the issue of causal connection between an injury and a specific subsequent physical disability involves a scientific and must be established by the opinion of medical witnesses competent to express such an opinion." Since Dr. Bernstein was the employee's only expert witness, the Court determined that they could not make out a prima facie case and summary judgment should have been granted.

Insurance Law – Policy May Require That Insured Be Legally Entitled To Recover From Owner Or Operator Of Uninsured Vehicle, But Not From Uninsured Motorist Immune From Liability

***Snyder v. American Family Insurance Co.,* 114 Ohio St.3d 239, 2007-Ohio-4004.**

In November 2002, Appellant Snyder, a Columbus police officer, was pursuing a suspect on foot when she was hit by a police vehicle driven by another officer. Appellant filed a claim for uninsured motorists benefits with her carrier, Appellee American Family Insurance. Appellant's policy stated that Appellee "will pay for compensatory damages for bodily injury which an insured person is legally entitled to recover from the owner or operator of an uninsured motor vehicle." After Appellee denied her claim, Appellant sued to recover her benefits under the policy, arguing that R.C. §2927.18, amended in 2001, includes those who have sovereign immunity under Chapter 2744 (i.e., the officer driving the police vehicle and the City of Columbus) as "uninsured motorists." Further, §2927.18 did not require that Appellant be "legally entitled to recover" from a tortfeasor.

The trial court found for Appellant, holding that the officer and the City were "uninsured motorists" under §3937.18(B)(5) because they were immune under Chapter 2744 and that Appellant should not have been denied uninsured motorist coverage. The appeals court reversed, holding that under §3937.18, as amended in 2001, insurers were not precluded from limiting uninsured motorist coverage unless the insured was legally entitled to recover from the tortfeasor. Therefore, because Appellant could not recover from Appellees due to their sovereign immunity, she was not "legally entitled to recover" under her policy.

The Ohio Supreme Court reviewed the 2001 amendments to R.C. §3937.18. The new law permitted insurers to limit the circumstances in which uninsured motorist coverage applies, even if the circumstances are not limited by statute. The amendments also added that an owner or operator of a motor vehicle (the tortfeasor) is considered an "uninsured motorist" if that person is immune under Chapter 2744, and that an insured must prove all elements of his claim necessary to recover from the owner or operator of an uninsured vehicle. The amendments further eliminated the provision that an insured must be "legally entitled to recover" from a tortfeasor, as well as the provision that coverage is not precluded when a tortfeasor is immune under Chapter 2744.

Importantly, the Court noted, absent statutory or common-law prohibition, the 2001 amendments to R.C. §3937.18 do not preclude an insurer from requiring certain conditions or limiting the circumstances under which an insured may recover – the parties may freely agree to the terms of the insurance contract. While immune political subdivisions are included in the definition of "uninsured motorist" in the statute, an insurer may restrict such entities in its policy as those from which an insured is "legally entitled to recover." Further, following its decision in State Farm Mut. Auto Ins. Co. v. Webb (1990), 54 Ohio St.3d 61, the phrase "legally

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entitled to recover" is unambiguous and therefore enforceable as to Appellant's policy. In Webb, the Court held that the fellow-servant immunity doctrine overcame an insured's right to recover against the tortfeasor where the policy covered damages caused by uninsured motorists from which the insured was "legally entitled to collect." Thus, the terms of Appellee's policy were valid within the requirements of §3937.18 as amended.

The dissent found that the majority's opinion reflected an overbroad reading of the amended statute, resulting in insurers being able to simply "contract around" the statutory definition of "uninsured motorist" despite the rule that policy terms may not contradict statutory requirements.

Medical Malpractice – When Loss of Qualification is Due to Delays Attributable to Opposing Party, Testimony of Medical Expert Witness Who No Longer Devotes At Least Half of Professional Time to Active Clinical Practice is Permitted

***Celmer v. Rodgers et al.,* 114 Ohio St.3d 221, 2007-Ohio-3697.**

On April 28, 2000, Appellants filed a medical malpractice claim against Appellees, Drs. George, Walker, Shin, Goettsch, and Rodgers, Radiology Associates Inc., Warren Radiologists, Inc., and St. Joseph Health Center for failure to detect a malignant tumor in Appellant Carol Celmer's breast following mammograms in 1997 and 1998. Trial was set for March 11, 2002, but due to Appellees' four various requests for continuances, trial did not actually commence until May 18, 2004.

When the trial finally began, Appellees' counsel was permitted to voir dire Dr. Jay Thompson, Appellants' expert witness who had actually diagnosed the lump in Appellant's breast as cancerous in 1999. Dr. Thompson testified that he was licensed to practice medicine in Ohio, that between 1997 and 2003 he devoted at least one-half of his professional time to the active clinical practice of radiology, and that he had just accepted a new position with a radiology practice group in Ohio, where he would be trained to interpret computer radiology reports. Dr. Thompson also testified, however, that as of November 2003, he had resided in Florida and had not been engaged in medical practice. Appellees' counsel sought to exclude Dr. Thompon's testimony on the grounds that, at that precise time, he did not devote one-half of his professional time to the active clinical practice of medicine and therefore was not qualified under Evid.R. 601(D) to testify as to the standard of care. The trial court overruled the motion, noting that this issue would not have arisen but for Appellees' repeated requests for continuances, and, moreover, Appellees did not object to Dr. Thompson's qualifications for the period relevant to his testimony (1997 though 1999) in 2002 when the trial was initially scheduled.

Drs. Walker and Shin and Radiology Associates appealed, but the appellate court held that the trial court was within its discretion to overrule their motion because Evid.R. 601(D) permits the trial court flexibility in determining whether an expert witness is qualified under the rule.

On appeal to the Ohio Supreme Court, Appellees urged the Court to adopt a narrow interpretation of Evid.R. 601(D). Specifically, they argued that a witness cannot testify as an expert on a physician's liability unless, at the time of testimony, the witness devotes at least one-half of his professional time to active clinical practice of medicine. Appellants, on the other hand, sought a liberal application of the Rule, suggesting that unjust results would otherwise be common.

The Court reiterated that the purpose of Evid.R. 601(D) is to discourage testimony regarding the proper standard of care by a "professional witness", as the court held in Wise v. Doctors Hospital (10th Dist. 1982), 7 Ohio App.3d 331, 334. Further, it is within a trial court's discretion to determine a medical expert witness' competency to testify as to the standard of care, but the opposing party may freely attack the credibility of that witness. Dr. Thompson plainly satisfied the requirements of the Rule at the time the trial was scheduled to begin.

The fact that he was not active for a period of time did not render him a "professional witness," thus violating the spirit of the Rule. Finally, the Court held that the circumstances of this case presented a valid exception to the Rule. Absent a clear showing that the trial court's decision was unreasonable, arbitrary, or unconscionable, the trial court acted within its discretion to allow Dr. Thompson's testimony, and the appeals court properly upheld that decision.

The dissenting opinions stated that although Dr. Thompson was qualified to testify at the time the trial was initially scheduled to occur, the trial court was required to interpret Evid.R. 601(D) narrowly and find Dr. Thompson not qualified when the case finally went to trial. Further, it is the job of the legislature, not the courts, to address whether the rule, as technically written and applied, is overly restrictive.

Medical Malpractice – Written Statement Prepared By Nurse Was Not Covered By Statutory Privilege For Incident Reports Under R.C. 2305.253, But Was Protected From Discovery Based On Attorney-Client Privilege

***Flynn v. University Hospital, Inc., et al.*, 1st Dist App. No. C-060815, 2007-Ohio-4468, 2007 WL 2458119.**

Sean and Jennifer Flynn sued University Hospital and other defendants for medical malpractice after Sean was severely burned during a shoulder surgery. A dispute arose during discovery over a written statement completed by a nurse who was present during the surgery. The hospital refused to produce the report to the Flynns, arguing the document was privileged. The Flynns filed a motion to compel production of the statement. The hospital filed a motion for a protective order. The trial court granted the Flynns' motion, ordering the hospital to produce "all written statements provided by employees and/or agents and/or any other materials resulting from the incident with the Plaintiffs." The hospital appealed.

The hospital first argues that the statement of the nurse is privileged based on Revised Code §2305.253, which provides that "an incident or risk management report and the contents of an incident or risk management report are not subject to discovery in, and are not admissible in evidence in the trial of, a tort action." An "incident or risk management report" is defined by the statute as "a report of an incident involving injury or potential injury to a patient as a result of patient care provided by health care providers, including both individuals who provide health care and entities that provide health care, that is prepared by or for the use of a peer review committee of a health care entity and is within the scope of the functions of that committee." In support of its argument, the hospital introduced the deposition of the nurse, who testified that he prepared the statement as a matter of protocol and submitted it to his supervisor. He further stated in an affidavit that "the incident report was prepared for transmittal to the attorneys in the Office of Risk Management…for purposes of quality assurance and legal counsel."

In evaluating the hospital's claim, the court first noted that simply labeling a document an "incident report" does not bring it within the statutory definition cited above. The hospital did not present any evidence that the statement prepared by the nurse was used by or prepared for a peer-review committee. Therefore, the privilege afforded by R.C. 2305.253 did not apply. For the same reason, the court also rejected the hospital's arguments that the statement was privileged under R.C. §2305.24, R.C. §2305.251, and R.C. §2305.252, which provide confidentiality for documents submitted to a quality-assurance, utilization committees, or peer review committees. There was no evidence that the nurse's statement was submitted to such a committee. Also, since the hospital failed to cite these statutes at the trial court, the argument was deemed waived.

Finally, the court considered whether the statement was protected by the attorney-client privilege. A party asserting the privilege must show (1) that an attorney-client relationship existed, and (2) that

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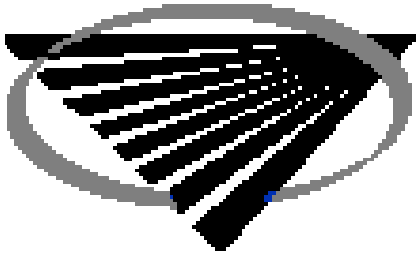

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confidential communications took place within the context of that relationship. The privilege extends to communications made in anticipation of litigation by employees to an employer's attorney. In Tyes v. St. Luke's Hospital (8th Dist.), 1993 WL 497026, it was held that the attorney client privilege covers incident reports prepared for the risk-management department of a hospital.

The court concluded that the attorney client privilege encompassed the statement by the nurse in this case, and reversed the decision of the trial court compelling its production. In addition to the affidavit of the nurse, which stated that the report was prepared for the risk management department, the hospital offered the affidavit of David F. Schwallie, the director of risk management, who stated that the report was "prepared for the specific purposes of notifying the Risk Management department, as well as legal counsel for University Hospital, of possible claims, for quality assurance purposes and to inform outside legal counsel." The report was not a part of Flynn's medical records and was not made available to any other person outside the attorney-client relationship. This evidence was sufficient to satisfy the two-part test and the report was deemed privileged.

Medical Malpractice – Physician's Negligence Can Be Established For Purposes of Negligent Credentialing Claim Against Hospital Without Physician as Named Party in the Action

***Schelling v. Humphrey, et al.,* 6th Dist. App. No. WN-07-001, 2007-Ohio-5469, 2007 WL 2965773.**

This case arises out of Appellant Schelling's initial complaint, filed February 10, 2005, against Defendant Dr. Humphrey and Appellee Community Hospitals of Williams County. The complaint alleged Dr. Humphrey's negligence in performing two foot surgeries on Appellant at Appellee Hospital in early 2003. In May 2004, however, Dr. Humphrey had pled guilty to seven offenses stemming from theft after confessing to stealing hospital and construction equipment. The State suspended Dr. Humphrey's medical license in August 2004. In April 2005, Appellant filed an amended complaint against Appellee for negligent credentialing. In August 2005, Dr. Humphrey successfully moved to bifurcate the negligent credentialing claim and the negligence claim against the hospital. He thereafter filed bankruptcy. The trial court issued a stay on Appellant's case. Appellant moved to dismiss her negligence claim against Dr. Humphrey after reaching an agreement with his bankruptcy trustee. The trial court dismissed that claim without prejudice, leaving Appellee hospital as the only defendant.

Appellee filed a 12(B)(6) motion to dismiss, asserting that the negligent credentialing claim could not stand after Dr. Humphrey's dismissal from the case. The trial court granted the motion, holding that since Dr. Humphrey had been voluntarily dismissed without a finding of negligence, the negligent credentialing claim against Appellee could not proceed.

The court of appeals disagreed, following the decisions of the Fourth District Court of Appeals in Dicks v. U.S. Health Corp. (1996), 4th Dist. No. 95-CA-2350, and the Ohio Supreme Court in Browning v. Burt (1993), 66 Ohio St.3d 544. In Browning, a negligent credentialing claim was upheld where only one of two allegedly negligent doctors was a party. Dicks, relying on Browning, held that in a negligent credentialing case against a hospital, the appellant may prove a doctor's negligence without the doctor being present in the action. Appellee argued that in Dicks, the physician actually admitted he was negligent, which could lead to a negligent credentialing claim against a hospital. In this case, Appellee argued, Dr. Humphrey was dismissed from the case without any finding of negligence. However, the appeals court countered that the Dicks court never actually found the doctor negligent, so its holding was not distinguishable from this case. A physician's negligent act is factually and legally distinct from the hospital's acts in issuing credentials to the physician and these are two separate causes of action. The trial court's decision was therefore reversed.

Medical Malpractice – Proffered Medical Expert Testimony Admissible To Show Causation And Deviation From Standard Of Care

***Smith, et al. v. ProMedica Health System, Inc., et al.*, 6th Dist. App. No. L-06-1333, 2007-Ohio-4189, 2007 WL 2332070.**

Appellants, Mr. and Mrs. Smith, filed a medical malpractice claim alleging Appellees (including the treating internist and surgeon) failed to properly treat Mr. Smith's post-surgery cough or administer a cough suppressant following surgery. Smith developed separation and dehiscence of his surgical incision after he was discharged from the hospital.

At trial, the trial court granted a motion in limine filed by Appellees to exclude the testimony of Appellants' proffered medical expert, Dr. Stephen R. Payne, on the grounds that he was not qualified to testify as to proximate cause or the applicable standard of care regarding post-surgical care in a hospital setting. Appellants filed a "motion for reconsideration", which the court granted in part, allowing Dr. Payne to testify only as to cough medication. The court upheld its decision that Dr. Payne was not qualified to testify to the standard of care for a general surgeon, attending physician, consulting physician, or registered nurse in a hospital setting. Appellees then filed a motion for summary judgment on the grounds that Appellants failed to provide sufficient evidence of proximate cause and failed to provide expert testimony on the requisite standard of care. The trial court granted Appellees' motion and also found that Appellants failed to establish a prima facie case of negligence.

Appellants alleged two assignments of error: 1) it was reversible error for the trial court to grant Appellees' motion in limine excluding Dr. Payne's testimony on the issue of liability; and 2) the trial court erred to Appellants' prejudice when it granted summary judgment on the issue of liability for Appellees.

The court of appeals upheld both assignments of error. The court reiterated that for his or her testimony to be admissible, a medical expert witness must demonstrate a familiarity with the standard of care applicable to a defendant sufficient to provide an expert opinion as to the defendant's deviation from those standards. If the fields of a defendant physician and a medical expert witness overlap, the test is whether the witness demonstrates sufficient knowledge of the standards of the defendant's school and specialty sufficient to provide an expert opinion as to the defendant's deviation from those standards. At trial, Dr. Payne testified that he was a board-certified internist and had been an attending physician for 20 years. He had treated post-operative abdominal surgery patients and had basic surgical training in medical school. He was also familiar with the standard of care for nurses regarding basic pharmacology and administration of drugs. The appeals court held that Dr. Payne's training, experience and expertise qualified him as a medical expert witness whose expertise overlapped with the internist and surgeon who treated Smith. Therefore, Dr. Payne was qualified to testify as to the cause of Smith's injuries, the standard of care required by the physicians and nurses who treated Smith post-operation, and the propriety of the cough treatment.

The court next had to determine whether summary judgment was properly granted by the trial court – that is, whether Dr. Payne's proffered testimony established evidence of breach of the applicable standard of care and proximate cause that would create a genuine issue of material fact. Dr. Payne testified that based on his experience treating post-operative wound care, physical force such as uncontrolled coughing was a common factor in dehiscence. He further testified that it was a breach of the standard of care to not administer proper treatment and cough medication after Smith's cough developed, especially since medical records revealed dehiscence and coughing before Smith was discharged from the hospital. The appeals court therefore held that Appellants presented sufficient evidence of the standard of care and proximate cause, and accordingly, the trial court erred in granting summary judgment. The case was reversed and remanded.

Motor Vehicle Accident – Plaintiffs Entitled To Recover "Residual Diminution In Value" Of Vehicle In Addition To Cost Of Repairs

***Rakich, et al., v. Anthem Blue Cross & Blue Shield, et al.,* 10th Dist App. No. 06AP-1067, 172 Ohio App.3d 523, 2007-Ohio-3739.**

The issue presented in this case was whether a plaintiff may recover damages for the diminished market value of her repaired vehicle in addition to the actual cost of repairs. Plaintiffs filed claims arising out of a motor vehicle accident in Franklin County Court of Common Pleas. After a judgment was granted on the issue of liability, the trial court entertained cross motions for partial summary judgment filed by the parties on the above-stated issue. The trial court ruled in favor of the defendants, holding that Ohio law allows only two exclusive and alternative methods to calculate property damages, the cost of repairs to the vehicle or the diminution of market value. Since plaintiffs already recovered the cost of repairs, the court concluded that they could not present further evidence of the decrease in the vehicle's market value.

On appeal, the Tenth District Court of Appeals considered previous Ohio case law outlining the general rules for calculating property damages in motor vehicle cases. In Falter v. City of Toledo (1959), 169 Ohio St. 238, the Ohio Supreme Court held that "the owner of a damaged motor vehicle may recover the difference between its market value immediately before and immediately after the collision." Although it was stated that this is the preferred method of establishing property damage, the plaintiff in Falter was permitted to recover the cost of repairs to the vehicle, as this was found to be a method of calculating the depreciation to the vehicle resulting from the accident. The Court noted that the repair cost could not exceed the difference in market value before and after the collision. This limitation prevents the plaintiff from benefiting from his or her loss. Subsequent decisions have held that when proving damage to a vehicle using the cost of repairs, the plaintiff must also present evidence of the market value of the vehicle before and after the accident so the court can determine that the amount of the repairs does not exceed the actual reduction in market value.

The trial court in the instant case held that the diminution in market value caused by a collision and the cost of repairs are separate, exclusive, and alternative methods to determine property damage. Allowing recovery of both amounts would result in a windfall to the plaintiff because the two measures of damages overlap. The court of appeals, although agreeing that this is a correct statement of the law in Ohio, determined that plaintiffs were not in fact seeking such a double recovery. Instead, plaintiffs argued that they had a right to recoup the difference between the market value of the vehicle immediately before the accident and the market value of the vehicle immediately after its repair, not after the collision. The court called this item of damage the "residual diminution in value," which is distinct from the gross diminution in value considered by the trial court. There is no overlap in damages between the cost of repair and the residual diminution in value because the court only compares the value of the vehicle after the repairs are completed, not immediately after the accident.

The court of appeals noted that its research did not reveal any Ohio case law that addressed whether the residual diminution in value is an appropriate element of damage. Such a claim is supported by the Restatement of the Law 2d, Torts, 543, Section 928, which states that in this situation one is entitled to compensation for the reasonable cost of repair or restoration, "with due allowance for any difference between the original value and the value after repairs." The court also cited Am. Serv. Ctr. Assoc. v. Helton, (D.C. App. 2005), 867 A.2d 235, 242-243, in which it was noted that to achieve the goal of making the injured party whole, for some property, a recovery for residual diminution in value in addition to the cost of repairs is necessary. The court stated that "when a plaintiff can prove that the value of an injured chattel after repair is less than the chattel's worth before the injury, recovery may be had for both the reasonable cost of repair and the residual diminution in value after repair, provided that the award does not exceed the gross diminution in value." Id. at 243. Other jurisdictions that have considered this question have overwhelmingly permitted recovery of damages for a residual diminution in value.

The court of appeals found the reasoning in Helton persuasive, and overturned the decision of the trial court. The court concluded that "when a plaintiff proves that the value of his automobile after repair is less than the pre-injury value of the automobile, the plaintiff may recover the residual diminution in value in addition to the cost of repair, provided that the plaintiff may not recover damages in excess of the difference between the market value of the automobile immediately before and immediately after the injury."

Workers' Compensation – Ohio Supreme Court Grants Motion For Reconsideration And Holds That Claimant Entitled To TTD Compensation Because His Discharge Was Causally Related To Incident Causing His Injuries

***State ex rel. Gross v. Industrial Commission of Ohio, et al.,* 115 Ohio St.3d 249, 2007-Ohio-4916.**

On November 26, 2003, David M. Gross injured himself and two others in the course of his employment for KFC when he opened the lid on a pressurized deep fryer filled with boiling water. KFC investigated the incident and determined that Gross violated workplace safety rules and several warnings. Gross was discharged on February 13, 2004. The Industrial Commission terminated his TTD benefits because it classified his discharge as a voluntary abandonment of employment. The court of appeals granted a writ of mandamus and ordered the Commission to reinstate his benefits. The Ohio Supreme Court, in State ex rel. Gross v. Indus. Comm., 112 Ohio St.3d 65, 2006-Ohio-6500 ("Gross I"), overturned the court of appeals and held that Gross was not entitled to TTD benefits following his discharge. Gross filed a motion for reconsideration, and following additional oral argument the Supreme Court granted his motion.

The Court noted that generally, an employee is entitled to receive TTD benefits when he is injured in the course of his employment during the period of his disability while the injury heals. The benefits cease when the employee returns to work, is capable of returning to work, or has reached maximum medical improvement. See R.C. §4123.56. Courts have also terminated TTD benefits when an employee voluntarily abandons his or her job. The voluntary abandonment doctrine was first stated in State ex rel. Jones & Laughlin Steel Corp. v. Indus. Comm. (10th Dist. 1985), 29 Ohio App.3d 145, when the court held that a claimant was not entitled to continued TTD benefits after a voluntary retirement. The court reasoned that since claimant had no intention of returning to work, his disability would no longer be the cause of his loss of

earnings. The court stated, "where the employee has taken action that would preclude his returning to his former position of employment, even if he were able to do so, he is not entitled to continued temporary total disability benefits since it is his own action, rather than the industrial injury, which prevents his returning to such former position of employment." Id. at 147.

The voluntary abandonment doctrine was later applied to a claimant who was imprisoned while receiving TTD benefits. In State ex rel. Ashcraft v. Indus. Comm. (1987), 34 Ohio St.3d 42, the Court applied the reasoning of Jones and held that while incarcerated, the claimant's loss of earnings was no longer "on account of the injury," as contemplated by R.C. §4123.54. The doctrine was later clarified in Rockwell Internatl. v. Indus. Comm. (1988), 40 Ohio St.3d 44, wherein it was held that if the abandonment of employment was related to the underlying injury, it was not voluntary and therefore did not act as a bar to TTD benefits. The Court held that "a proper analysis must look beyond the mere volitional nature of a claimant's departure. The analysis must also consider the reason underlying the claimant's decision to retire…[W]here a claimant's retirement is causally related to his injury, the retirement is no 'voluntary' so as to preclude eligibility for temporary total disability compensation." Id. at 46.

Application of the doctrine to a termination from employment was discussed in State ex rel. Louisiana-Pacific Corp. v. Indus. Comm. (1995), 72 Ohio St.3d 401. In that case, the claimant was medically released to return to work, but failed to show for three days. His employer discharged him for violating absenteeism rules included in the company handbook. In consideration of whether he could receive further TTD benefits, the Court suggested that a discharge from employment is often a result of behavior that the claimant willingly undertook,

and as such could be considered a voluntary act. The Court established a three part test for determining whether violation of a work rule resulting in discharge should be considered voluntary. The termination must be generated by the claimant's violation of a written work rule that (1) clearly defined the prohibited conduct, (2) had been previously identified by the employer as an offense that could result in termination, and (3) was known or should have been known to the claimant. The claimant's conduct in Louisiana satisfied the test and the claimant was denied further benefits.

In State ex rel. McCoy v. Dedicated Transport, Inc., 97 Ohio St.3d 25, 2002-Ohio-5305, the Court examined the history of the voluntary abandonment rule as a bar to TTD benefits and the reasoning underlying it. The Court stated that to be eligible for TTD compensation, "the claimant must show not only that he or she lacks the medical capability of returning to the former position of employment but that a cause-and-effect relationship exists between the industrial injury and an actual loss of earnings. In other words, it must appear that, but for the industrial injury, the claimant would be gainfully employed." Id. at ¶ 35. The Court went on to say that merely determining whether the departure from employment was voluntary is not enough. "Instead, voluntary departure from the former position can preclude eligibility for TTD compensation only so long as it operates to sever the causal connection between the claimant's industrial injury and the claimant's actual wage loss." Id. at ¶ 38.

In Gross I, the Court overruled a finding of the court of appeals that the claimant's discharge was an involuntary departure. The court of appeals focused its finding on the fact that the termination letter connected the employer's decision to the incident that caused Gross to be injured. Since the termination was causally related to the injury, the court of appeals concluded it was involuntary. The Court overturned that ruling, holding that the claimant's willful violation of work rules met the test as stated in Louisiana and was a voluntary abandonment that severed his right to continued TTD benefits. Gross argued on reconsideration that this decision was an unwarranted expansion of the voluntary abandonment doctrine and inserted an element of fault into the workers' compensation system. The Court granted the motion for reconsideration to address the "confusion and misunderstanding that Gross I has generated."

The Court first stated that "Gross I was not intended to expand the voluntary-abandonment doctrine." The doctrine was never previously applied to conduct occurring before or contemporaneous with an injury, but was always applied to post-injury conduct. The Court made clear that Gross I was not intended to carve out such an exception, and suggested that if any such change is made it is the role of the legislature to do so. Next, the Court expressly rejected any interpretation of Gross I that injects fault into the workers' compensation system. References in that opinion to the claimant's deliberate, willful, or wanton behavior was meant to describe the conduct justifying his termination, but was not intended to set a new standard for determining voluntary abandonment or eligibility for TTD benefits.

Upon reconsideration, the Court abandoned its prior ruling in Gross I and upheld the decision of the court of appeals that the claimant's separation from his employment was involuntary. The Court based its decision on the principle that if an employee's departure from the job is causally related to the injury, it is not voluntary and should not preclude the employee's eligibility for TTD benefits.

Verdicts & Settlements

(For members and educational purposes only)

Dimitri Martynyuk v. Peter Deak, et al.
Type of Case: Motor Vehicle Accident
Verdict: $12,150.00 ($9,350.00 + $2,800.00 property damage)
Plaintiff's Counsel: Scott Kalish, Esq. of Scott Kalis Co., LLC
Defendant's Counsel: Sean Kenneally, Esq.
Court: Cuyahoga Court of Common Pleas/ Judge Kathleen Ann Sutula
Date: June 27, 2007
Insurance Company: State Farm
Damages: Soft tissue injury to shoulder of 23 year old single male (occupation: valet parker)

Summary: On June 10, 2006, Plaintiff joy riding in the Old Warehouse District in Cleveland, Ohio on a 2001 Suzuki SV6506 ("crotch rocket") when Defendant attempted to turn left into a parking lot on West 9th and struck Plaintiff, who was traveling in the same direction and attempting to pass Defendant. Plaintiff sustained a soft tissue injury to the shoulder, incurring medical specials in the amount of $5,396.00. Plaintiff's last settlement demand before Trial was $11,000.00. Defendant's offer before Trial was $0. Case was tried on negligence only. At Trial, Plaintiff argued that Defendant was probably trying to make a u-turn, while Defendant argued that he was merely attempting a left hand turn when Plaintiff recklessly attempted to pass him. Jury determined Plaintiff was 15% negligent, while Defendant was 85% negligent.

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

John Doe (a minor) v. ABC Hospital (Confidential)
Type of Case: Medical Malpractice
Settlement: $4,250,000.00
Plaintiff's Counsel: Michael F. Becker, Esq. and David A. Kulwicki, Esq. of Becker & Mishkind Co., L.P.A.
Defendant's Counsel: Withheld
Court: Cuyahoga County Court of Common Pleas
Date: May, 2007
Insurance Company: Withheld
Damages: CP/MR/DD

Summary: Resident physician augmented labor without confirming PPROM, premature labor, or dates. Gestational age was 8 weeks earlier than previously determined.

Plaintiff's Experts: Martin Ginovsky, M.D. (OB-Gyn); Michael Sherman, M.D. (Neonatology); Mitchell Cairo, M.D. (Pediatric Hematology); Patrick Barnes, M.D. (Neuroradiology); Harley Rotbart, M.D. (Pediatric Infectious Disease); Robert Brendon, M.D. (Placental Pathology); Joseph Carfi, M.D. (Physiatry/Life Care Planner); James Zinser, Ph.D. (Economist).
Defendant's Experts: Murphy Goodwin, M.D. (OB-Gyn); Richard Martin, M.D. (Neonatology); Marilyn Siegal, M.D. (Neuroradiology); Ethan Leonard, M.D. (Pediatric Infectious Disease); Harvey Cantor, M.D. (Neurology).

Catherine Schneider v. Rene Eady (Hushea), et al.
Type of Case: Motor Vehicle Accident
Verdict: $185,000.00
Plaintiff's Counsel: Christopher M. DeVito, Esq. and Brian J. Seitz, Esq.
Defendant's Counsel: James E. Burns, Esq.
Court: Lorain County Court of Common Pleas/Judge Mark A. Betleski/Case No. 06 CV 145627
Date: September 14, 2007
Insurance Company: Allstate
Damages: Aggravation of pre-existing arthritis in left knee (with prior history of arthroscopic knee surgery in 1997), permanent nerve damage in left knee, and contusion to chest and breast from steering wheel. $11,000.00 in ER bills, with another $10,000.00 in follow-up medical treatments. Jury deliberated only two hours.

Summary: In 2003, Plaintiff (a 63 year old woman) ran into a pick-up truck that failed to yield at a stop sign.

Plaintiff's Experts: Manuel Martinez, M.D.
Defendant's Experts: None

NOTE: Motion for Pre-Judgment Interest, Motion to Tax Costs, and Motion for Attorney Fees pursuant to Civ.R. 37(B) remain pending.

Jane Doe v. XYZ Trucking Co.
Type of Case: Motor Vehicle Collision
Settlement: $435,000.00
Plaintiff's Counsel: Rubin Guttman, Esq.
Defendant's Counsel: N/A
Court: N/A
Date: August, 2007
Insurance Company: Cincinnati Insurance Company
Damages: Medicals: $69,626.36

Summary: Defendant's truck T-boned Plaintiff's vehicle. Injuries include 6 rib fractures, sternal fracture, bilateral clavicular fracture with restricted shoulder range of motion, nasal fracture, right forehead contusion with closed head injury, L1 burst fracture with retropulsion and spinal stenosis, bilateral non-displaced C2 foreman fracture. Plaintiff's injuries were extensive, and she had to wear a plastic shell for 6 months.

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

Case Caption Withheld
Type of Case: Commercial/Check Fraud
Settlement: $52,500.00
Plaintiff's Counsel: Christopher Vlasich, Esq.
Defendant's Counsel: Daryl Gormley, Esq.; James Carpenter, Esq.
Court: Cuyahoga Court of Common Pleas
Date: November, 2007
Insurance Company: None
Damages: Economic loss

Summary: Defendant Banks allowed Plaintiff's employee to open accounts throughout the State of Ohio in Plaintiff's name. Employee then deposited checks issued to Plaintiff into these accounts maintained with Defendant Banks. Defendant Banks converted monies owed to Plaintiff by negotiating checks issued in Plaintiff's name but deposited into Employee's account.

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

Case Caption Withheld
Type of Case: Personal Injury/Workplace Injury
Settlement: $1,050,000.00
Plaintiff's Counsel: Joel Levin, Esq. & Christopher Vlasich, Esq.
Defendant's Counsel: Matthew Mendoza, Esq., Steve Proe, Esq., William Kovach, Esq., John Rasmussen, Esq., John C. Cubar, Esq.
Court: Cuyahoga County Court of Common Pleas
Date: February, 2007
Insurance Company: Indiana Insurance; St. Paul/Travelers; State Auto; others
Damages: Brain damage, burns to the left side of the body, broken left arm, scarring throughout left arm and leg

Summary: Plaintiff/Carpenter injured on job while building second story of shopping center. Defendants neglected to de-energize the electrical line located mere feet from where Carpenter was working. Carpenter slipped on wet board while working near edge of building and came into contact with the live wire. Fellow carpenters were required to break Carpenter's arm to remove him from the line. He spent more than a month in intensive care burn unit at Metro.

Plaintiff's Experts: Richard Kraly, Kraly Consulting; John P. Conomy, M.D., J.D.; Frank Burg, Occupational Safety Expert
Defendant's Experts: Ron Kluchin, architect

Case Caption Withheld
Type of Case: Commercial Loss
Settlement: $525,000.00
Plaintiff's Counsel: Joel Levin, Esq. and Aparesh Paul, Esq.
Defendant's Counsel: Scott D. Eickelberger, Esq. and David J. Tarbert, Esq.
Court: U.S. District Court, Northern District
Date: August, 2007
Insurance Company: None
Damages: Financial Loss

Summary: Plaintiffs owned half of car dealership. Owner of other half of dealership sold cars, at a loss, to Defendant car dealership to the detriment of Plaintiffs. Defendant gave "kick back" to the other owner in exchange for discounted vehicles.

Plaintiff's Experts: Stephen Nelder, CBIZ; Lawrence Saulino
Defendant's Experts: None

Case Caption Withheld
Type of Case: Commercial Loss
Settlement: $1,187,500.00
Plaintiff's Counsel: Joel Levin, Esq. and Aparesh Paul, Esq.
Defendant's Counsel: Keith A. Savidge, Esq.; Christine M. Janice, Esq.
Court: U.S. District Court, Northern District
Date: October, 2007
Insurance Company: None
Damages: Financial Loss

Summary: Defendant/owner of LLC squeezed out Plaintiff/managing member and shareholder, taking control of the LLC and discharging Plaintiff from role as President of LLC.

Plaintiff's Experts: Mike Zeleznik, CBIZ
Defendant's Experts: Tim McManamon

LISTING OF EXPERTS - CATA DEPOSITION BANK
(by specialty)

Anesthesiology
Nancy Appelblatt, MD
David C.Brandon, MD
Briccio Celerio, MD
Timothy C. Lyons, MD /Cardiothoracic
Amir Dawoud, MD
John B. Downs, MD
Charles J. Hearn, MD
Leonard Lind, MD
Alan Lisbon, MD /Cardiac
Michael S. Loboda, MD
Mary McHugh, MD /Resident
Stephen W. Minore, MD
Howard Nearman, MD
David S. Rapkin, MD
John Schweiger, MD /Critical Care
Michael Smith, MD
Kenneth E. Smithson, MD
Jeffrey S. Vender, MD
Jean-Pierre Jarned, MD

Cardiology
Krzyslof Balaban, MD
Mandeep Bhargava, MD/Card. Elec. Physio.
Mark T. Botham, MD
Robert E. Botti, MD
Delos Cosgrove, MD
Reginald P. Dickerson, MD
Barry Allan Effron, MD
Barry George, MD
Wayne Gross, MD
Patricia Gum, MD /Interventional Cardio.
Steven C. Hirsch, MD
Todd L. Johnson, MD
Alan Kamen, MD
Alfred Kitchen, MD
Allan Klein, MD
Alan Kravitz, MD
John MacGregor, MD /Interventional
Raymond Magorien, MD
Steven Meister, MD
Michael Oddi, MD /Cardiothoracic Med
Geoffrey Rosenthal, MD
Patricia Rubin, MD
George Q. Seese, MD
Bruce S. Stambler, MD
Sabino Velloze, MD
Thomas Vrobel, MD /Intern/Pulm
Richard Watts, MD
Bruce L. Wilkoff, MD/Electro Physiology
Steven Yakubov, MD
Kenneth G. Zahka, MD /Pediatrics
Christine M. Zirafi, MD
Benjamin Felia Zolta, MD

Cytopathology
William Tench, MD /Chief, Cytopathology

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

ER Medicine/Physicians
Mikhail Abourjeily, MD
Thomas J. Abramo, MD
David Abramson, MD
Joseph Cooper, MD
Rita K. Cydulka, MD
Phyllis T. Doerger, MD
David Effron, MD
Mark Eisenberg, MD
Charles Emerman, MD
Cory Franklin, MD
Richard Frires, MD /Family Medicine
Gayle Galen, MD
Howard Gershman, MD
Thomas Graber, MD
Hannah Grausz, MD
Ginger A. Hamrick, MD
Mark Hatcher, MD
Dominic Haynesworth, MD
Bruce Janiak, MD
Allen James Jones, MD
Nour Juralti, MD /Intern
Gerald Geromin, MD
Allen Jones, MD
Samuel Kiehl, MD
Frederick Luchette, MD
Jeffrey Pennington, MD
Pradyumna Padival, MD
Norman Schneiderman, MD
Albert Weihl, MD
Robert C. Woskobnick, MD

ENT
Alicia Barbary, MD /ENT Surgery
Steven Houser, MD
Yunn W.Park, MD
Seth J. Silberman, MD
Barry Wenig, MD

Epileptology
Stephen Collins, MD
Barbara Swartz, MD

Family Medicine
Arthur M. Amdur, MD
Robert T. Blankfield, MD
Douglas L. Burchett, MD

David M. Cola, MD
Mary Corrigan, MD
Julia Ann Heng, MD
Theodor F. Herwig, MD
John E. Hollin, MD
Joseph J. Kessler, Jr., MD
Jeffrey R. Kontak, MD
Kelly Oh, MD
Dean P. Rich, MD
Elisabeth Righter, MD
Michael Rowane, MD
John E. Sutherland, MD

Gastroenterology

Aaron Brzezinski, MD
Subhash Mahajan, MD
Eric J. De Maria, MD /Gastric Surgeon
Todd D. Eisner, MD
R. Kirk Elliott, MD
Kevin Olden, MD
Anthony B. Post, MD

General Internal Medicine

Thomas Abraham, MD /Pulmonology
Bruce L. Auerbach, MD
Sharon Lynn Balanson, MD
Stephen Baum, MD
Mark Bibler, MD
Frederick Bishko, MD /Rheumatology
Barry M. Brenner, MD
Garardo Cisneros, MD
Alan J. Cropp, MD /Pulmonology
Carl A. Cully, MD
Douglas Einstadter, MD
Kirk R. Elliott, MD
Douglas N. Flagg, MD
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Stacy Hollaway, MD
Amir Jaffe, MD
Douglas Junglas, MD
Suzanne Kimball, MD
Keith Kruithoff, MD
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Lorenzo Lalli, MD
Hilliard A. Lazarus, MD
Peter Y. Lee, MD
Kenneth L. Lehrman, MD /Cardiology
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John Maxfield, MD /Emergency Medicine
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James K. Salem, MD
Alok Saxena, MD
Jeffrey Selwyn, MD
Vijaykumar Shah, MD
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Kenneth W. Vaughn, MD
Patrick Whelan, MD /Pulmonology
Leonard S. Williams, MD
Michael Yaffe, MD
David Yana, MD

General Surgery

Manuel C. Abellera, MD
Samual Adornato, MD
Henry Bohlman, MD /Spinal
Dean W. Borth, MD
Mark J. Botham, MD
Raphael S. Chung, MD
Stanley Dobrowski, MD
David Fallang, MD
William F. Fallon, Jr., MD
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Moises Jacobs, MD
Frederick Luchette, MD /Trauma
Donald Malone, MD /Psycosurgery
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Doug Reintgen, MD/Oncologist
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Elizabeth E. O'Toole, MD
Neal Wayne Persky, MD

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Vinodkumar Sutaria, MD
Alan Lichtin, MD
Ronald A. Sacher, MD /Pathology
Roy Silverstein, MD

Infectious Disease

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Robin Avery, MD
Michael Bergman, MD
Robert Flora, MD
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Steven M. Gordon, MD
Clark Kerr, MD
David Longworth, MD
Lawrence Martinelli, MD
Martin Raff, MD

Susan Rehm, MD
Raoul Wientzen, MD

Neonatology

Richard E. McClead, MD

Neurology

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Bruce Cohen, MD /Pediatrics
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David Kline, MD
Fraser Landreneau, MD
Frederick Lax, MD
Matt Likavec, MD
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William McCormick, MD
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Jim Mushkat /Psychotherapist

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Geoffrey Graeber, MD
Dennis Hernandez, MD /Cardiothoracic
Gregory F. Muehlbach, MD
Mehmet C. Oz, MD /Cardiothoracic
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Craig Saunders, MD
Nicholas Smedira, MD
V.C. Smith, MD /Cardiac Surgeon

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Frederick Levine, MD

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Vincent J. Bertin, MD
Richard Paul Cambria, MD

General/Misc.

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Mack A. Anderson /Counselor
Lisa Ann Atkinson, MD /Staff Physician
Stanley P. Ballou, MD /Unknown
Elizabeth Barker /CT Technologist
Sandy Brightwell, Registered Technologist
Amardeep S. Chauhan/Osteopath- Physical Medicine & Rehab
Tracey Cherry /Residential Case Worker
Charles E. DuVall /Chiropractor
Ahmed Elghazawi /Independent Med Exam
Nancy Holmes /Cert. Physicians Assistant
Claudia Howatt, Medical Assistant
Albert I. King /Bio-Mech Engineering
Paul M. Matus /Coroner
Donald Mayes /Dental Consultant
George W. Nadolski, Cert. Surgical Assist.
Ronald Nichols /Microbiologist
Norman B. Ratliff, MD /Staff Physician
Jesse Smith, Postal Worker
Gary A. Tarola /Chiropractor
Caroline Wolfe /M.EdLCP (Rehab Counselor)
Karen Wolffe /Professional Counselor
Gary M. Yarkony /Physical Medicine; Rehab
Arthur B. Zinn, MD /Medical Geneticist

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Debbie Bazzo, RN /Obstetrics
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Yelena Beregovskaya, RN /Nurse Midwife
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Denise Brown, RN
Linda Bullock, RN
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Danielle Coates, RN
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Lois Cricks, RN
Linda DiPasquale, RN /Perinatal CNS
Kim Evans, RN
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William Flood, RN
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Josephine Gaglione, LPN

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Michelle Grimm, RN
Phyllis Hayes, RN
Deborah Heusser, RN
Laura Hoover, RN
Denise Hrobat, RN
Lori A. Huber, RN
Mary Hulvalchick, RN /Obstetrics
Dawn Hutchins, RN
Mary Janesch, RN
Donna Joseph, RN
Geraldine Kern, RN
Jodi Lasher, RN
Linda Law, RN
Judith Wright Lott, RN /Neonatal N.P.
Mary Lucy, RN
Patricia J. Lupe, RN /Nurse Midwife
Debra MacDowell, RN
Migdalia Mason, RN
Susan Massoorli, RN
Darlene McCullough, RN
Rosiland McKeon, RN
Kathleen McKillip, RN
Kristina Milavec, RN
Tracy Miller, LPN
Cassandra Minocchi, RN
Robbin Moore, RN
Susan Morgan, RN /Midwife
Jay Morrow, RN
Madeleine Murphy, CNP
Lekita Nance, LPN
Karen Nye, CRNA
Delicia Ostrowski, RN
Jeanne O'Toole, RN
Francoise Payen-Healy, BSN/Cardiovascular
Janet Pier, RN
Lisa A. Piscola, RN
Kelly M. Price, RN
Patricia Russo, RN
Elizabeth Ruzga, RN /Nurse Midwife
All Saylor, RN
Laura Schneider, RN
Debra Seaborn, RN
Melissa Slivka, RN
Penny Sonters, RN
Mary Jane Martin Smith, RN /Teacher
Suzanne Smith, RN /Midwife
Diane Soukup, RN /Geriatrics
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Helenmarie Waters, RN /Obstetrics
Marsha Weigel, RN
Jacqueline Whittington, RN
Angelique Young, RN
Colleen Zelonis, LPN
Joanne Zelton, RN, Legal Nurse Consultant
Catherine Zilka, RN

Administration/Professional

Susan Allen /Architect
Frederick Anderson /Business Mgr, Dr. Cola
Bernard Agin /Attorney
Edward B. Bell /Economist
James W. Burke, Attorney
LuAnn K. Busch /Nursing Home Administrator
Richard Hayes /Safety Expert-OSHA Inspector
Thomas Hilbert /Consultant
Gary Himmel, Esq. /Attorney
Albert I. King /Biomechanical Engineer
Susan Kirkland /Mgr, Safety Programs-
Ohio Rail Commission
Terri Lefever, Claims Adjuster
Toni Madden, Medical Secretary
Clark Millikan /Dir.of Academic Affairs
Donald Plunkett /Architect
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
Kelly Trease /Office Manager, Dr. Cola

CATA VERDICTS AND SETTLEMENTS

Case Caption ____________________

Type of Case ____________________

Verdict ____________________ **Settlement** ____________________

Counsel for Plaintiff(s): ____________________

Address: ____________________

Telephone ____________________

Counsel for Defendant(s): ____________________

Court/Judge/Case No. ____________________

Date of Settlement/Verdict ____________________

Insurance Company ____________________

Damages ____________________

Brief Summary of the Case ____________________

____

____

____

____

Experts for Plaintiff(s) ____________________

____

____

Experts for Defendant(s) ____________________

____

____

RETURN FORM TO: Andrew Thompson, Esq.
Stege & Michelson Co., LPA
29225 Chagrin Blvd., Suite 250
Cleveland, Ohio 44122
216.292.3400 FAX: 216.292.3411

The Cleveland Academy of Trial Attorneys
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2. **THE ACADEMY NEWSLETTER:**
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Cleveland Academy of Trial Attorneys
75 Public Square, Suite 1010
Cleveland, Ohio 44113
216-771-8188
216-696-2610 FAX

Application for Membership

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

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