CATA News
Cleveland Academy of Trial Attorneys
www.clevelandtrialattorneys.org
First Edition, 2008

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President's Message

Stephen T. Keefe, Jr.

Dear CATA Members:

It is a tremendous honor to serve as your President for the 2008-09 year and to have such a highly dedicated and diverse group of Officers, Directors, Members and ex-Presidents behind me and committed to CATA and its ongoing causes. Throughout my nine years with CATA, I have repeatedly been impressed with the compassion, depth and dedication of our Members – a group of people who *genuinely* care about people, who *genuinely* care about making the world a safer place, and who don't and won't give up the fight for justice even when justice becomes increasingly harder to attain for our clients.

My past nine years with CATA have also taught me that the collective wisdom and experience of our Members is our organization's greatest asset. Indeed, our ability to share information freely, to selflessly assist one another with case strategies and pitfalls, and to collectively fight corporate America and the insurance companies who are hell bent on eroding even *more* individual rights than those which have already fallen by the wayside – these are powerful and noteworthy assets. To continue to improve on these collective assets, we need even greater collective involvement and activism by our Members. I encourage all of you to provide thoughts and feedback about how CATA can improve as an organization, how we can better help you help your clients, and how we can increase both our membership and Member involvement. Please feel free to email me at STK@lintonhirshman.com with any thoughts or suggestions.

Our goals for the year include but are not limited to: updating and improving CATA's online member resources, increasing attendance at monthly CLE luncheons, continuing to provide high quality seminars that will help us all serve our clients better, increasing our membership, doing a better collective job at educating our clients to get more involved in protecting and fighting for their individual rights, and continuing with our dedication to philanthropy and volunteerism. To meet those goals, we strongly encourage you, our Members, to get more involved and to provide feedback on how we together can make CATA an even stronger organization.

ROBINSON V. BATES UPDATE

R.C. §2315.20 sets forth Ohio's new collateral source rule for claims arising on or after April 7, 2005. Despite acknowledging that in *Robinson v. Bates*, the Ohio Supreme Court held that the new rule couldn't be applied since the underlying claim arose before it's effective date. Even though R.C. §2315.20 currently applies, Defendants and insurance companies continue to ignore this new collateral source rule and wrongly claim that *Robinson* should control on the admissibility of collateral sources.

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President's Message, continued from page 1...

The overwhelming majority of Ohio trial courts have now properly ruled that R.C. §2315.20 controls over *Robinson* for claims arising on or after April 7, 2005. These decisions are based in reality. They recognize that the disclosure of write-offs or adjustments by a subrogated collateral source disclosure would necessarily reveal to the factfinder *exactly* what R.C. §2315.20 now prohibits – the *amount* ***actually*** *paid as a benefit* by a subrogated collateral source. Moreover, Ohio Courts continue to recognize the additional burdens and confusion that results when one attempts to apply *Robinson* instead of R.C. §2315.20 to claims arising after April 7, 2005. This is perhaps best summarized in the recent case of *Rivera v. Urbansky*, Lorain C.P. Case No. 08-CV-154436, where the trial court properly denied a defendant's motion to permit the introduction of collateral source write-offs:

> Additional time and resources are spent on gathering the records, trying to decipher insurance payment records, and reconciling provider bills with insurance statements. This extra paper work for the litigants, the providers, and the courts seems to create a potential for confusion in the courtroom with an inordinate amount of time spent on these issues before trial and during trial, at least in this judge's opinion. Section 2315.20 eliminates these problems in those situations where there are subrogation rights. Such is the case here. The cause of action in this case accrued on the date of the collision, January 13, 2006. Therefore, the defendant's motion is denied on that ground.

Included in this Newsletter is an article co-authored by Nick Schepis and myself analyzing *Robinson v. Bates* in the wake of R.C. §2315.20 and setting forth an up-to-date listing of recent trial court decisions applying R.C. §2315.20 to claims arising after April 7, 2005 whenever the collateral source has a right of subrogation. Nick has been kind enough to establish an archive of these decisions and a collection of underlying briefs on this issue at http://www.schepislaw.com/archive. All of our Members are encouraged to make use of the archive and submit additional decisions and briefs for our mutual benefit.

LUNCHEON CLE SEMINAR SERIES

Attendance has gradually dropped at our monthly CLE luncheon seminars over the past few years. One goal for the upcoming year is to increase seminar attendance by Members, Judges and Staff Attorneys. Our first luncheon seminar was held on Wednesday, October 29, 2008 with Rich Haber presenting on punitive damages and the $46 million verdict he and Shannon Polk obtained this past July – the largest verdict in Ohio's history. It was very refreshing to see such a high turnout for Rich's compelling presentation, and we look forward to increasing that attendance even more as the year goes on. Our next CATA Luncheon Seminar will be held on **Thursday, December 4, 2008** with Chuck Kampinski as our featured speaker. This is a seminar you will not want to miss. **Please save the date now and plan on attending.**

We encourage all Members to send suggestions on speakers you'd like to see, topics of interest you'd like to see presented, format changes you believe would increase attendance and improve the overall value of the programs offered, and other ideas on how we can provide better member services to meet your needs. Brian Eisen will be scheduling the monthly luncheon seminar series for the 2008-09 year. Please forward any suggestions for proposed speakers and topics of interest to Brian at beisen@malpracticeohio.com.

CATA'S WEBSITE & EXPERT DEPOSITION DATABANK

In an effort to update CATA's online Expert Deposition and Brief databank, Members are encouraged to send all available expert depositions, expert reports and noteworthy briefs to Rose Graf at Nurenberg Paris for uploading to CATA's online database. This is accessible to all members at www.clevelandtrialattorneys.org. On behalf of CATA, I'd like to thank Rose, Frank Strack and everyone else at Nurenberg Paris for maintaining our online resources. They have all been invaluable resources to CATA for many years now.

In order to better serve our Members, please join in this drive to update our collective resources. This is something that will greatly benefit us all, and with minimal individual effort. Depositions in e-trans format can be sent via email to Rose at rgraf@nphm.com. You may also scan any depositions/reports/briefs on your end in .pdf format and then email to Rose at the same email address. Alternatively, items can be sent to the following address on a disc or in hard copy for scanning and/or uploading:

Ms. Rose Graf
Nurenberg, Paris, Heller & McCarthy Co., LPA
1370 Ontario Street, Suite 100
Cleveland, Ohio 44113-1708

Remember, the strength of our collective resources depends on the involvement and participation of our Members.

CATA'S EMAIL LISTSERV

I have received numerous calls over the past few years from Members wanting to know how to post email messages on the CATA Listserv for distribution to our membership. To accomplish this, send your email query to the following email address: members@clevelandtrialattorneys.org. This will automatically distribute your email message to all CATA Members who have registered with an email address.

In a related vein, Members who have changed offices or email addresses are encouraged to provide updated contact information (mailing and email addresses) to Frank Strack at FStrack@nphm.com and CATA's Treasurer, John Liber, at liberlaw@aol.com. This will ensure that you continue to receive the CATA Newsletter and Listserv emails in a timely manner.

CATA's 2nd ANNUAL SKI-LE IN SNOWBIRD, UTAH

Thanks to the ongoing efforts and commitment of David Paris, CATA is sponsoring its 2nd Annual SKI-LE Seminar at The Cliff Lodge in Snowbird, Utah from Wednesday, January 28, 2009 through Friday, January 30, 2009. (www.snowbird.com). A block of rooms have been reserved. To make reservations, call the reservation line at 1-800-453-3000 and mention that you are with the CATA Seminar party. Phoebe Hawkins is our lodging coordinator and can be reached at 1-801-947-8230 or phawkins@snowbird.com.

A summary of CLE presenters and topics for the SKI-LE Seminar will follow. For those who did not attend last year, SKI-LE was a great success. The presentations were excellent, and the skiing was out of this world. I hope to see more of you in Utah this January.

YOUTH CHALLENGE UPDATE

Another goal for the year is to both continue and increase CATA's dedication to philanthropy and volunteerism. For many years now, CATA has been a strong sponsor of Youth Challenge. As many of you are aware, Youth Challenge is a non-profit corporation that provides nearly 180 activities year-round to special needs children, such as those with muscular dystrophy, cerebral palsy, spina bifida and a variety of other disabilities. Youth Challenge currently services more than 300 families in Cuyahoga and surrounding counties. It also trains more than 400 teens from the Greater Cleveland area annually to provide services to its participants.

Youth Challenge recently moved into its new building at 800 Sharon Drive in Westlake, Ohio 44145. Its need for ongoing support is greater than ever. When Member Dues notices are mailed out within the next month, you will notice that we will include space to include a *voluntary* donation to Youth challenge if you are able to do so.

CLEVELAND METROPOLITAN BAR ASSOCIATION'S 3R's PROGRAM

This will be my third year participating in the Cleveland Metropolitan Bar Associations "3R's Program," and I would strongly encourage more CATA Members to volunteer for this unique and rewarding opportunity. The 3R's program is a collaboration between the Cleveland Municipal School District and the Cleveland Metropolitan Bar Association and involves more than 700 lawyers, judges and law students tutoring tenth graders on the U.S. Constitution and its Amendments to prepare them for the Ohio Graduation Test given each March.

With Cleveland schools recently returning to "Academic Watch" with the equivalent of a "D" grade, the students desperately need our help. The time commitment for this highly rewarding program is minimal. Participants are assigned to groups (5-6 lawyers, judges and law students) and meet at an assigned school *once a month for about an hour* to tutor a class. 1st and 4th Amendment rights are covered, as is Due Process and Equal Protection.

The following are the dates for the 3R's Program for the 2008/2009 school year: October 24, 2008, November 14, 2008, December 12, 2008, Jan. 16, 2009, February 20, 2009, April 3, 2009 and May 8, 2009. Although the first class has already been held, it may still be possible to sign up.

Additional information about the 3R's Program, including a registration form, is available at www.clemetrobar.org. Alternatively, you may contact Mary Groth at the Cleveland Metropolitan Bar Association at mgroth@

clemetrobar.org or at (216) 696-3525, ext. 5004.

CLOSING THOUGHTS

It was an exciting election year at both the state and national level, with each party claiming "change" as its mantra. For our sake, and the sake of our clients, let's hope that *meaningful* change will now come about with new leadership in the White House and Legislature -- change that restores justice as opposed to putting it further out of reach for our clients. Now more than ever, we need to carry on the fight to restore justice in Ohio and nationally so that "justice" does not become a thing of the past.

As a final note, I'd like to reiterate a few quotes that I read at the June 2008 CATA Inauguration Dinner and which I find both inspirational and particularly appropriate for the political climate we find ourselves in.

Activist Susan Griffin: "There is always time to make right what is wrong."

Marian Wright Edelman (President and Founder of Children's Defense Fund): "Don't feel entitled to anything you didn't sweat and struggle for."

Thomas Jefferson: "It is reasonable that every one who asks for justice should do justice."

Sir Francis Bacon: "If we do not maintain justice, justice will not maintain us."

Thank you in advance for your ongoing support for the year.

Stephen T. Keefe, Jr.
Linton & Hirshman
700 West St. Clair Ave., Suite 300
Cleveland, Ohio 44113
(216) 771-5800
(216) 771-5803 (fax)
STK@lintonhirshman.com

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~ SAVE THE DATE ~

CATA'S 2nd Annual "SKI" L.E.

DATE: Wednesday, Jan. 28, 2008 - Friday, Jan. 30, 2008 (6:30 - 8:30 A.M.)

LOCATION: The Cliff Lodge, Snowbird, Utah (www.snowbird.com)

COST: $150.00

TOPICS/SPEAKERS: To Be Announced.
Written materials will be supplied.

CATA will be seeking approval by the Ohio Supreme Court Commission on Continuing Legal Education for 6 CLE credit hours.

Robinson in the Wake of R.C. §2315.20

For claims arising after R.C. §2315.20's effective date (April 7, 2005), evidence of collateral source write-offs are not admissible or discoverable when the collateral source has a right of subrogation

By
Nicholas Schepis, Esq.,
Stephen T. Keefe, Jr. Esq.
and Stephen R. Gibson

Ohio Revised Code §2315.20, referred to by the Ohio Supreme Court in *Robinson v. Bates* as the "new" collateral source rule, became law April 7, 2005. The *Robinson* Court acknowledged the legislative intent of R.C. §2315.20 — to set forth Ohio's current "statement of the law on the collateral-source rule." *Robinson v. Bates* (2006), 112 Ohio St.3d 17, at fn. 1. But the Court held that R.C. §2315.20 couldn't be applied since the underlying claim accrued before the new rule's effective date. (Carolyn Robinson's claim accrued on April 21, 2001). The Court therefore applied, and then modified, the *common law* collateral source rule of *Pryor v. Webber* (1970), 23 Ohio St. 2d 104. While declining to adopt a categorical rule, the Court held that both Ms. Robinson's original medical bill and the amount her insurer accepted as full payment were admissible to prove the reasonableness of the medical charges in her case.

By its express terms, *Robinson* is limited to tort claims accruing before April 7, 2005. For tort claims arising after that date, R.C. §2315.20 applies and now prohibits a defendant from introducing evidence of any amount payable as a benefit by a collateral source *whenever that source has a right of subrogation.*[1] The new rule applies to Medicare, Medicaid, and insurers with contractual subrogation rights. It also prohibits the disclosure of write-offs and adjustments by such sources. Indeed, their disclosure would *simultaneously* reveal to the jury *exactly* what R.C. §2315.20 prohibits – the amount *actually* paid as a benefit by a subrogated collateral source.

Nearly all Ohio trial courts to decide the issue have now ruled that R.C. §2315.20 controls over *Robinson* for claims arising after April 7, 2005 and prohibits the disclosure of write-offs by a *subrogated* collateral source. (See Section V, below). These decisions uphold the spirit and intent of R.C. §2315.20 – a rule that prohibits evidence disclosing *"any amount,"* let alone the exact amount, "payable as a benefit" by a subrogated collateral source. These decisions are also based in reality. They recognize that if write-offs are disclosed, any juror can simply subtract the write-off from the amount of the original medical bill to learn the exact amount payable as a benefit to the plaintiff from a subrogated collateral source. And that is clearly now prohibited under R.C. §2315.20

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I. Ohio's longstanding common law Collateral Source Rule

The collateral source rule has been a fundamental rule of Ohio law for nearly four decades. It was established in *Pryor vs. Webber* (1970), 23 Ohio St.2d 104 as what can fairly be viewed as a judicially created rule of evidence. Under this well-recognized common law rule, evidence of compensation from collateral sources is not admissible to lessen the damages for which the tortfeasor is liable. *Pryor*, at syllabus 2. The rule is based on fairness principles and prevents at-fault Defendant from receiving an unfair advantage or benefit from third party payments to an injured plaintiff. *Id.*, at 108. Notably, the common law collateral source rule of *Pryor*, in contrast to the new collateral source rule of R.C. §2315.20, did not condition the exclusion of such evidence on whether or not the collateral source had a subrogation right.

II. The lower courts' decisions in Robinson v. Bates

The underlying cause of action at issue in *Robinson v. Bates* accrued on April 21, 2001. On that date, Carolyn Robinson fell in her driveway due to her landlord's alleged negligence and broke her foot. Although her medical bills totaled $1,919.00, the parties *stipulated* that Robinson's insurer only paid $1,353.43 to settle the bills. The trial court then limited Robinson's proof solely to the stipulated amount her insurer paid. It refused to admit the amount of her original medical bills.

The 1st District Court of Appeals reversed on this issue. It found error in the trial court's refusal to admit the amount of the original medical bills. See *Robinson v. Bates*, 160 Ohio App.3d 668, 2005-Ohio-1879, at ¶85. The court began its analysis by noting that no Ohio court had yet addressed whether plaintiffs were entitled to recover the full amount of medical bills or only the amount paid by insurance. Following the majority rule from other jurisdictions, and recognizing the public policy purposes of Pryor's common law collateral source rule, the 1st District held that "Robinson is entitled to seek recovery of the entire amount of her undiscounted medical bills, not just the amount paid by her insurer." *Id*. at ¶85.

In rendering its decision, the 1st District observed that Ohio, unlike other states, had no statute limiting the collateral source rule. *Robinson,* 160 Ohio App.3d at ¶70. This is technically wrong. Although inapplicable to Carolyn Robinson's case, the Ohio Legislature had enacted a new collateral source statute defining the contours of Ohio's collateral source rule just a few weeks before the 1st District decided *Robinson. Robinson* was decided by that court on *April 22, 2005*. Yet just two weeks earlier, on *April 7, 2005*, R.C. §2315.20 went into effect.

III. April 7, 2005 – The effective date of R.C. §2315.20

Titled "Introduction of Evidence of Collateral Benefits in Tort Actions," R.C. §2315.20 modified the common law collateral source rule set forth in *Pryor.* In addressing the contours of the new rule, R.C. §2315.20 states that collateral source evidence is to be excluded whenever the collateral source has a right of subrogation. The new rule, which applies today, states:

> *In any tort action, the defendant may introduce evidence of* ***any amount payable*** *as a benefit* to the plaintiff as a result of the damages that result from an injury, death, or loss to person or property that is the subject of the claim upon which the action is based, *except if the source of collateral benefits has a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation, or a statutory right of subrogation* or if the source pays the plaintiff a benefit that is in the form of a life insurance payment or a disability payment. [Emphasis added].

As most Ohio trial courts have now properly held, for claims arising after April 7, 2005, R.C. §2315.20 now prohibits the disclosure of write-offs by a subrogated collateral source too. Indeed, their disclosure would simultaneously disclose not only "*any* amount payable as a benefit," but the *exact* amount paid as a benefit by a subrogated collateral source. That is precisely what R.C. §2315.20 forbids.

IV. March 29, 2006 – The Ohio Supreme Court decides Robinson and holds that R.C. §2315.20 doesn't apply to the case before it since the underlying claim accrued before the new rule's effective date.

Robinson was appealed to the Ohio Supreme Court. *Robinson v. Bates,* 112 Ohio St.3d 17, 2006-Ohio-6362. The Court issued its ruling on March 29, 2006 – about a year after R.C. §2315.20's enactment and almost five years after the underlying cause of action accrued. The Court conceded that R.C. §2315.20's purpose is to set forth Ohio's "statement of the law on the collateral-source rule" that applies today. *Id.*, at fn.1. But it held that the new rule couldn't be applied since Carolyn Robinson's claim accrued before the new rule's effective date:

> We note that, effective April 7, 2005, the General Assembly passed R.C. §2315.20, a statute titled "Introduction of Collateral Benefits in Tort Actions". The purpose of this statute was to set forth Ohio's statement of law on the collateral-source rule. *The new collateral benefits statute does not apply in this case, however, because it became effective after the cause of action accrued and after the complaint was filed.* [Emphasis added]. *Id.*

The Court agreed with the 1st District that Ohio had no applicable statute addressing the scope of the collateral source rule. So it instead construed and then modified the *common law* collateral source rule of *Pryor v. Webber. Robinson,* 112 Ohio St.3d at ¶¶10-11 and fn. 1. Applying that rule, the Court held that both Ms. Robinson's original medical bill *and the amount accepted as full payment* were admissible to prove the reasonableness of her medical charges. *Id.*, at ¶17 and syllabus ¶1. The Court reasoned that any difference between those two amounts is not a "benefit" under the rule. Id., at ¶18. Yet even then, it declined to adopt a "categorical rule" for claims not governed by the new statute. Id., at ¶17.[2]

By allowing evidence of the *amount accepted as full payment* by a collateral source, the *Robinson* Court was clearly permitting the introduction of "evidence of any amount payable as a benefit to the plaintiff" by a collateral source. And yet, R.C. §2315.20 *now renders inadmissible* "evidence of any amount payable as a benefit to the plaintiff" *whenever the collateral source has a right of subrogation.* The rules set forth in *Robinson* and §2315.20 are therefore in direct conflict and cannot be reconciled.

V. For claims arising after April 7, 2005, the vast majority of trial courts to consider this issue have ruled that R.C. §2315.20 controls

over Robinson and that evidence of collateral source write-offs are not admissible when that source has a right of subrogation

Had the *Robinson* Court decided the case under R.C. §2315.20, it could not have reached the same result without violating the very purpose of the statute – to exclude "*any amount* payable as benefit" to a plaintiff from a *subrogated* collateral source. See R.C. §2315.20. The vast majority of trial courts to address the collateral source write-off issue for claims arising after April 7, 2005 have ruled that R.C. §2315.20 controls over *Robinson*. They have also properly held that R.C. §2315.20 prohibits the disclosure of write-offs by a subrogated collateral source since, as a practical matter, their disclosure would simultaneously disclose exactly what is now prohibited under controlling Ohio law — "any amount payable as a benefit" by a subrogated collateral source.

Moreover, since evidence of "*any amount* payable as a benefit" by a subrogated collateral source is *inadmissible* under §2315.20, several courts have properly ruled that write-offs and adjustments are *not even discoverable*. These courts recognize the inordinate and unduly burdensome amount of time and resources spent by the litigants, providers and the courts arguing over collateral source information that is no longer admissible when the collateral source has a right of subrogation.

Recent decisions holding that write-offs by a *subrogated* collateral course are inadmissible under R.C. §2315.20 for claims arising on or after April 7, 2005 include the following:

Cuyahoga County
Daugherty v Grange, Cuyahoga County Common Pleas Case No. CV-08-655032, August 26, 2008 (Judge McCafferty)
David v Adams, Cuyahoga County Common Pleas Case No. CV-08-655666, August 25, 2008 (Judge McCafferty)
Kral v Hren, Cuyahoga County Common Pleas Case No. CV-07-642068, August 27, 2008 (Judge Corrigan)
Kuchta v Merchant, Cuyahoga County Common Pleas Case No. CV-07-637839, October 9, 2008 (Judge Kilbane-Koch)
Lococo v. Loprich, Cuyahoga County Common Pleas Case No. CV-07-629522 (Judge Synenberg)
Marinai v Garcia, Cuyahoga County Common Pleas Case No. CV-08-646292, October 17, 2008 (Judge Matia)
Medenis v Cinadar, Cuyahoga County Common Pleas Case No. CV-07-632215, September 26, 2008 (Judge Friedman)
Pride v Ortez, Cuyahoga County Common Pleas Case No. CV-07-630869, May 16, 2008 (Judge Ambrose)
Rock v. Siegfried, Cuyahoga County Common Pleas Case No. CV-07-623550 (Judge Fuerst)
Samano v. Suleiman, Cuyahoga County Common Pleas Case No. CV-07-644144 (Judge Kathleen Ann Sutula)

Fairfield County
Caudill v Lemaster, Fairfield County Common Pleas Case No. 97CV847, October 8, 2008 (Judge Berens)

Fulton County
Clausen v Lester, Fulton County Common Pleas Case No. 06CV000268, November 30, 2007 (Judge Barber)
Gutierrez v Kure, Fulton County Common Pleas Case No. 07CV000123, January 17, 2008 (Judge Barber)
†*Perez v. Rite Aid*, Fulton County Common Pleas Case No. 08CV000007, June 25, 2008 (Judge Barber)

Highland Court of Common Pleas
†*Attard v. Williamson*, Highland County Court of Common Pleas Case No. 07CV257, June 18, 2008 (Judge Hoskins)

Licking County
Hudnall v Reeves, Licking County Common Pleas Case No. 06 CV 00773, March 17, 2008

Lorain County
Rivera v Ubansky, Lorain County Common Pleas Case No. 08CV154436, September 17, 2008 (Judge Miraldi)

Lucas County
Almaguer v. King, Lucas County Common Pleas Case No. CI-200605776, September 15, 2007 (Judge McDonald)
†*Burk vs. Intermed Assoc.*, Judge S. Cook (February 12, 2008) Case No. CI 06-3809
Chang v Uzenel, Lucas County Common Pleas Case No. CI-0200706325, March 18, 2008 (Judge Jensen)
Decair v Krisjanis, Lucas County Common Pleas Case No. CI-200705073, August 13, 2008 (Judge Dartt)
Goney v. Hill, Lucas County Common Pleas Case No. CI-200605002, May 7, 2008 (Judge G. Cook)
Kissinger v Hollosi, Lucas County Common Pleas Case No. G-4801-CI-200703285-000, November 1, 2007 (Judge Bates)
Martin v Kornowa, Lucas County Common Pleas Case No. CI-200701168-000, November 30, 2007 (Judge Zmuda)
Palm v Burmeister, Lucas County Common Pleas Case No. CI-200603579, July 31, 2007 (Judge Dartt)

Summit County
Bender v Waste Management of Ohio, Summit County Common Pleas Case No. CV 2007-09-6769, April 30,

2008 (Judge Teodosio)
Brockman v. Progressive Ins. Co., Summit County Common Pleas Case No. CV 2007-12-8627, October 24, 2008 (Judge Teodosio)
Herron v Anderson, Summit County Common Pleas Case No. CV 2007-04-2600, March 18, 2008 (Judge Hunter)
Masaveg-Barry v. Stewart, Summit County Common Pleas Case No. CV 2007-08-5997, May 8, 2008 (Judge Spicer)
Ohlson v. M. Bjorn Peterson Transp., Inc., Summit County Common Pleas Case No. CV 2006-05-3285, April 12, 2007 (Judge Stormer)

The minority of courts who have ruled that write-offs are still admissible despite R.C. §2315.20 seem to grapple with the issue of whether a write-off is a "benefit." These decisions ignore the fact that, regardless of whether or not a write-off is now considered a benefit, permitting *evidence* of a write-off by a subrogated collateral source has the same practical effect as disclosing evidence of "any amount payable as a benefit" by that source. And that is exactly what R.C. §2315.20 prohibits and renders inadmissible.

The decisions listed above, unless otherwise noted (†), together with other cases and briefs surrounding these issues are archived at *http://www.schepislaw.com/archive*. We wish to thank our colleagues who have contributed documents and encourage others to make use of the archive and add decisions and briefs for the benefit of all.

1. One court has ruled that R.C. §2315.20 doesn't apply to UM/UIM cases on the ground that *uninsured motorist* benefits arise as a matter of contract law, not tort law. *Jordan v. Westfield Ins. Co.,* 2008-Ohio-1542. The authors of this article believe *Jordan* was improperly decided, particular since a third party's payment of medical expenses based on *tortuous* conduct of a wrongdoer is unrelated to a plaintiff's contract with his/her own personal auto insurance carrier. In fact, the collateral source of the medical payments is not a party to a plaintiff's personal UM/UIM contract with his/her auto insurer.

R.C. §2315.20 defines a "tort action" as a "civil action for damages for injury, death or loss to person or property." *All* auto accidents will *always* qualify as a "tort action" under that definition. And in many UM/UIM cases, claims are brought against both the uninsured/underinsured *tortfeasor* and the personal auto insurer who is obligated to pay for Plaintiff's *tort*-based damages due to the tortfeasor's lack of insurance or not having enough insurance. While a plaintiff's entitlement to recover from his own insurer arises out of contract, the action itself is one "for damages for injury, death or loss to person or property." And the recoverable medical expenses sought in a UM/UIM claim *necessarily* arise from "damages for injury, death or loss to person or property" caused by the tort of a *third party.* Without the underlying tort, the UM/UIM claim doesn't even exist. In fact, a plaintiff cannot even pursue a UM/UIM claim unless it is first shown that he/she is legally entitled to recover those damages from an uninsured or underinsured motorist *based on tort principles*.

2. Although the 1st District and the Ohio Supreme Court reached different conclusions with respect to the application of *Pryor's* common law collateral source rule, both courts agreed that: (1) the measure of damages with respect to medical expenses is the reasonable value of such services, (2) the original amount of the bill is prima facie evidence of the reasonable value of those services, and (3) a trial court may neither exclude the amount of the original medical bill, nor limit a plaintiff's recovery to only the amount actually accepted by the medical provider. *Robinson,* 112 Ohio St.3d at ¶¶7-9, 17; *Robinson,* 160 Ohio App.3d at ¶¶26-27, 83, 85. Unlike the 1st District, however, the Ohio Supreme Court held that the "amount accepted as payment" by a collateral source (i.e., after write-offs and adjustments are taken into account) are also admissible.

3. Judge S. Cook and Judge Jensen have since changed their position.

Intentional Torts in the Workplace Under R.C. 2745.01:

Strike three for the General Assembly or the end of Constitutional protection for Ohio's employees?

By Jarret Northup, Esq.

For attorneys who litigate either side of employment intentional tort cases, the applicable law is in a serious state of flux. For veterans of these unique and difficult cases, this is not a new development. For years the General Assembly and the Ohio Supreme Court have been playing a drawn-out match of inter-branch ping-pong with the issue. In order to put the present state of the law in proper context, let's go back in time to the beginning of this match when the Ohio Supreme Court made the first service.

Ohio employers enjoy broad immunity from negligence suits by injured employees pursuant to the system of workers' compensation constitutionally authorized and governed by Sections 34 and 35, Article II of the Ohio Constitution. Since the Ohio Supreme Court's decision in *Blankenship v. Cincinnati Milacron Chemicals, Inc.* (1982), 69 Ohio St.2d 608, employers in Ohio have been subject to civil liability for intentional torts committed against an employee. The *Blankenship* court reasoned that intentional torts against an employee did not arise out of the employment relationship, were not a natural hazard of employment and therefore were not precluded by the immunity granted pursuant to the Workers' Compensation Act.

The crack in the Constitutional immunity afforded employers is narrow: an employee is subject to strict common law requirements of proof of intent to injure. The employee must prove: (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition then harm to the employee will be a substantial certainty and not just a high risk; and (3) that the employer under such circumstances and with such knowledge did act to require the employee to continue to perform the dangerous task. *Van Fossen v. Babcock & Wilcox* (1988), 36 Ohio St.3d 100, syllabus at 5. These cases are extremely fact intensive and time consuming.

The General Assembly has demonstrated a dogged determination to volley with Ohio Supreme Court in response to *Blankenship*. It has tried repeatedly to supercede the decisions of the Ohio Supreme Court and effectively extinguish an employee's right to recover for an intentional tort committed by an employer. Of particular concern to the General Assembly is the "substantial certainty" element of the common law tort which allows proof of the employer's intent to injure the employee to be inferred rather than proven directly.

In 1986 and again in 1995, the General Assembly codified laws which sought, in part, to replace the "substantial certainty" element of the common law analysis with an evidentiary burden requiring the employee to produce proof of the employer's deliberate intent to injure the employee. See former R.C. §4121.80 and former R.C. §2745.01.

The Ohio Supreme Court responded to former R.C. §4121.80 with a decision that took away the General Assembly's paddle. The Court informed the General Assembly that it had no Constitutional authority under Section 34 or 35, Article II to undo the holding of *Blankenship* or require proof of a deliberate intent to injure. *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624. Section 34, Article II authorizes laws which further the "…comfort, health, safety and general welfare of all employees..." The *Brady* court held that former R.C. §4121.80 could not be authorized under section 34 as it is a law which "attempts to remove a right to a remedy under common law which would otherwise benefit the employee." Id. at 633. The *Brady* court determined that the purpose of Section 35, Article II was to "create a source of compensation for workers injured or killed in the course of employment." Relying on *Blankenship*, the Brady court found no Constitutional authority for the statute under Section 35, Article II as "intentionally tortuous conduct will always take place outside of [the employment] relationship." *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 634.

When the ball came bouncing back to the Ohio Supreme Court via former R.C. §2745.01, the Court's response was succinct: the statutory burden of proof was unreasonable and excessive, not authorized by either Section 34 or 35 of Article II, and by the way, General Assembly, we thought we had made this abundantly clear the last time you tried this. *Johnson v. B.P. Chemicals*, Inc. (1999) 85 Ohio St. 3d. 298, 305, 707 N.E.2d 1107.

The General Assembly has been mulling over its defeats in this match for the last twenty years. At the same

time, the Ohio Supreme Court has had to deal with the practical ramifications of its common-law Blankenship logic: if the tort occurs outside the scope of employment can the employee seek workers' compensation benefits and still sue the employer? Can an employer insure against a "substantial certainty" intentional tort even though insuring against intentional torts is against public policy in Ohio? Citing practical reasons over common-law purity, the Court answered both questions in the affirmative. See *Jones v. VIP Dev. Co.* (1984), 15 Ohio St.3d 90; *Penn Traffic Co. v. AIU Ins. Co.*, 99 Ohio St.3d 227. Have leaks sprung in the S.S.*Blankenship*?

Enter the latest volley: current R.C. §2745.01. The statute codifies the common-law intentional employment tort with lip service to "substantial certainty" but then defines "substantial certainty" as the "deliberate intent to injure the employee." The statute does contain some employee-friendly provisions for employers who deliberately remove safety guards or who misrepresent the nature of harmful substances. However, the statute effectively prevents an employee from proving the intentional nature of the employer's conduct by showing that his or her injury was substantially certain to occur.

The enactment of R.C. §2745.01 comes at a time when the Ohio Supreme Court has shown a great degree of explicit and implicit deference to the legislative branch in a wide variety of contentious cases. For years the defense has argued that the General Assembly has the constitutional right to abolish common-law intentional tort claims against an employer pursuant to the police power. The Ohio Supreme Court has never adequately addressed the question in its prior substantive intentional employment tort opinions, and its relevant controlling decisions have been rife with plurality and dissent. The constitutional outcome of this latest volley is not clear despite the gallons of ink the Ohio Supreme Court and Ohio Courts of Appeals have spilled on the subject since 1986.

Few cases have worked their way through the Courts of Appeals on the issue of whether current R.C. §2745.01 is authorized by the Ohio Constitutional. The first opinion on the subject was issued March 18th of this year. See *Kaminski v. Metal & Wire Prod. Co.* (7th Dist. Ct. App., Columbiana County), 2008-Ohio-1521, 175 Ohio App.3d 227. (A summary of this decision is included in this issue's Law Updates).

The trial court in *Kaminski* granted the Defendant employer's motion for summary judgment on its counterclaim declaratory action seeking to uphold the constitutionality of R.C. §2745.01. On appeal, Ms. Kaminski made a dual-pronged constitutional attack.

The first prong was to relate the positive but tenuous line of prior Ohio Supreme Court precedent on the topic: this statute was no different from its unconstitutional first and second generations and was thus unconstitutional for the same reasons. The second prong relies upon the basic tenet of due process jurisprudence in Ohio: "a legislative enactment will be deemed valid on due process grounds if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and if it is not unreasonable or arbitrary." See *Morris v. Savoy* (1991), 61 Ohio St.3d 684, 688-689. To simultaneously provide a legislative cause of action for a substantial certainty intentional tort and then define it out of existence is both unreasonable and arbitrary and not related to the public health, safety, morals or general welfare of the public.

The *Kaminski* defense argument chipped away at the precedential value of plurality decisions, argued the strong points of the dissent and made that pesky oft-cited claim that the legislature has the constitutional authority to "alter modify, or reject the common law." More on that troubling assertion momentarily.

As *Kaminski* was being litigated in the trial court, here in Cuyahoga County Plaintiff Timothy Barry found his intentional tort claim against his employer kicked out of the trial court pursuant to R.C. §2745.01 and the purported ability of the Legislature to have its way with the common law. Mr. Barry appealed to the 8th District.

The 7th District Court of Appeals applied a thorough review of the law and facts to *Kaminski* and make a unanimous determination that R.C. §2745.01 was unconstitutional *en toto* and, at Defendant-Appelle's invitation, that the facts of the case warranted a trial under the common law elements of the tort. I bet counsel will think twice about trying that strategy again. The court's decision was premised on the prior precedent discussed above: pursuant to Sections 34 and 35, Article II, the General Assembly does not have the authority to create an insurmountable evidentiary burden upon employees to prove an intentional tort committed by an employer. Because of this determination, the court did not reach the due process issue.

The *Kaminski* Defendant rounded up employer-friendly amicus curiae and collectively appealed the 7th District's decision to the Ohio Supreme Court on four different jurisdictional grounds. While three of the claimed grounds for jurisdiction appear to lack merit

and do not go to the constitutional issue, it may be a longshot to convince the Ohio Supreme Court that no constitutional question is raised in the appeal simply because the ultimate constitutional question regarding R.C. §2745.01 has been answered before. And before that, too, your honors! The jurisdictional issues have been fully briefed and the parties have been awaiting a jurisdictional decision. See Ohio Supreme Court Case No. 2008-0857. Meanwhile, the 8th District has weighed in on the subject.

Less than a week ago at the time of this writing, the 8th District Court of Appeals issued its opinion in *Barry v. A.E. Steel Erectors, Inc.* (8th Dist.), 2008-Ohio-3676. In reversing the trial court's decision the Barry court unanimously agreed with the logic and holding of *Kaminski*. As in *Kaminski*, the 8th District did not reach the Appellant's due process and equal protection arguments, but parenthetically noted the success of those arguments in the past decisions of the Ohio Supreme Court. While it is doubtful the 8th District's concurrence with the 7th District will ultimately affect the jurisdictional question in the *Kaminski* appeal, it sure doesn't hurt Ms. Kaminski to have both courts in unanimous alignment.

One other notable but fleeting examination of the subject has come from the federal court for the Northern District of Ohio. *Vold v. ARPAC, LP* (N.D. Ohio), 2008 U.S. Dist. LEXIS 54576. The District Court noted, pursuant to *Kaminski*, that R.C. §2745.01 has been declared unconstitutional and that "Ohio courts now look to [the common law] for the elements of the claim." *Id*. at 15.

Two other courts have noted *Kaminski's* precedential value but have not been in a position to apply it to the facts, opting instead to apply both the R.C. §2745.01 standard and the common law elements to factually weak intentional employment tort actions in order to reach the same dismissive conclusion under either standard. See *McDermott v. Cont'l Airlines, Inc.* (S.D. Ohio), 2008 U.S. Dist. LEXIS 29831; *Gaines v. MQSW Acquisition Co.* (11th Dist.), 2008-Ohio-3744.

So what are the intentionally injured employee's chances if the Ohio Supreme Court accepts jurisdiction over the *Kaminski* appeal? And what about the legislative branch's alleged ability to commit hari-kari with all aspects of the common law? Perhaps the best support for affirming the decision of the 7th District and reigning

in the myth of the legislature's absolute swath of power comes from what many plaintiffs' attorneys would consider an unusual place: *Arbino v. Johnson & Johnson,* 116 Ohio St.3d 468, 2007 Ohio 6948 at ¶ 32.

In *Arbino*, a nugget of important constitutional jurisprudence was re-affirmed: the legislature does not have the constitutional authority to eliminate an Ohio Citizen's right to a jury trial in a negligence or intentional tort action, as those rights existed in the common law prior to the enactment of Section 5, Article I of the Ohio Constitution. *Id*, citing *Belding v. State ex. Rel. Heifner* (1929), 121 Ohio St. 393, 169 N.E. 301, syllabus, and *Arrington v. DaimlerChrysler Corp.*, 109 Ohio St.3d 539, 2006-Ohio 3257 at ¶ 21.

Blanket citations to unchecked legislative power to modify the common law are often taken out of context from the case of *Thompson v. Ford* (1955), 164 Ohio St. 74, 79. *Thompson* arose from the limited context of an automobile negligence case examining the effect of a municipal ordinance upon the common law standard of care regarding parked automobiles. Defendants, including the *Kaminski* Defendant-Appellant in its brief to the Ohio Supreme Court, often fail to cite the underlined portion of the following quote from *Thompson*: "[t]here is no question that the legislative branch of the government, unless prohibited by constitutional limitations, may modify or entirely abolish common-law actions and defenses." *Id*. at 79.

The main argument in *Kaminski* follows this logic: without Section 5, Article I constitutional authority to eliminate a common law intentional tort against an employer, the General Assembly's multiple efforts to do so post-*Blankenship* must be grounded upon another section of the Ohio Constitution to be a valid exercise of legislative power. The Ohio Supreme Court has made it very clear that the General Assembly has no such authority under the remaining applicable Sections of the Ohio Constitution: Sections 34 and 35 of Article II. If that line of reasoning fails, the meritorious due process argument remains before the Court.

While policy issues are not the domain of jurists, policy considerations occasionally enter the fray when employment issues are before the bench. The Honorable Mary DeGenaro of the 7th District raised an interesting point with the Appellee in the *Kaminski* oral arguments: if current R.C. §2745.01 is declared constitutional, won't the net effect be to punish the "safe" employers due to rise in workers' compensation rates attributable to the influx of "dangerous" employers no longer subject to liability for their misconduct? Also at play is the fact that the workers' compensation system is now statutorily subrogated to any successful intentional tort claimant's recovery from his employer and that the tort is an insurable liability. See *Groch v. General Motors Corp., et al.*, 117 Ohio St.3d 192, 2008-Ohio-546 and *Penn Traffic,* supra.

What would be helpful to this area of the law is a clarification of the roots of *Blankenship* and the retirement of the moniker "Intentional Employment Tort". Here's why -- an intentional tort committed by an employer is not some special creation of an activist judiciary. It is a cause of action that has existed from the first days of the judiciary. If you are an attorney handling these cases, please choose your words carefully. A focus on the intentional nature of the tort rather than on a defendant's status as an employer will frame the issue in the appropriate legal context.

A civil remedy for an intentional tort, provable through the totality of surrounding circumstance no matter who commits it, is a Constitutionally protected right of Ohio citizens. With perseverance and precedent on the side of Ohio employees, this right shall not be abridged.

[Postscript: *Kaminski* appeal accepted on all four jurisdictional grounds. *Barry* case anticipated to be appealed to the Ohio Supreme Court as well.]

Jarret Northup is an Associate at the law firm of Jeffries, Kube, Forrest & Monetelone Co., L.P.A. where he practices civil litigation in the areas of personal injury, premises liability, product liability, insurance law, intentional torts, and contract disputes. He can be reached at jnorthup@jkfmlaw.com.

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Law Updates

by Andrew Thompson

Alternative Dispute Resolution

Nursing Home Resident Not Bound By Arbitration Agreement That Is Found Unconscionable

***Hayes v. Oakridge Home, et al.*, 8th Dist App. No. 89400, 175 Ohio App.3d 334, 2008-Ohio-787.**

In May 2005, Florence Hayes was admitted to Oakridge Home at the age of 94. About a month later, she suffered a fall from her wheelchair and broke her hip. Hayes filed a complaint against the nursing home alleging that its negligence caused her fall. The nursing home filed a motion to stay the action and sought referral to binding arbitration based on an agreement signed by Hayes at the time of her admission. The agreement provided that the parties "shall submit to binding arbitration all medical malpractice disputes against each other…," and that "each party may be represented by counsel in connection with all arbitration proceedings and each party agrees to bear their own attorneys fees and costs." The agreement also stated that any award in arbitration shall not include exemplary or punitive damages. The trial court granted the nursing home's motion for a stay and referred the matter to arbitration.

The court of appeals considered the issue of whether the arbitration clause is procedurally and substantively unconscionable, and therefore unenforceable. In order to negate an arbitration clause, the party challenging the provision must establish both procedural and substantive unconscionability. Procedural unconscionability refers to the relative bargaining power of the parties, and involves "factors such as age, intelligence, education, business experience, bargaining power, who drafted the document, whether the terms were explained to the weaker party, whether alterations were possible, and whether there were alternate sources of supply." Substantive unconscionability encompasses the commercial reasonableness of the terms of the agreement, and requires examination of the "fairness of terms, charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability."

Applying this law to Hayes' circumstances, the court found that the arbitration clause at issue was unenforceable. The agreement was substantively unconscionable because it forced Hayes to give up her legal rights under Ohio law, including the right to a jury trial, punitive damages, and attorneys' fees. The arbitration clause was also procedurally unconscionable. The court noted that Hayes was 94 years old, had no business or contract experience, and was faced with an agreement drafted by attorneys for the nursing home, without a full explanation of the terms or her right to alter the agreement. The court also relied on the fact that Hayes' source of supply was limited – "finding a quality nursing home is difficult." Even if not unconscionable, the court finds the agreement invalid because of a lack of consideration. Hayes gave up her legal rights and received nothing in return. The order of the trial court referring the matter to arbitration was overruled.

[Editor's Note: This case has been accepted by the Ohio Supreme Court for review. See 119 Ohio St.3d 1407, 2008-Ohio-3880.]

Other Noteworthy Cases

***Taylor Building Corporation of America v. Benfield, et al*., 117 Ohio St.3d 352, 2008-Ohio-938.** An arbitration clause in a commercial contract was found by the Court not to be unconscionable.

Civil Procedure

A Plaintiff Or Counterclaimant Moving For Summary Judgment Does Not Bear The Initial Burden Of Addressing The Nonmoving Party's Affirmative Defenses

***Todd Development Co., Inc., et al. v. Morgan, et al*., 116 Ohio St.3d 461, 2008-Ohio-87.**

This case resolves a conflict of authority between the Twelfth District's decision in the instant matter and a previous ruling by the Third District, *Countrymark Coop., Inc. v. Smith* (3rd Dist. 1997), 124 Ohio App.3d 159. The case arises out of a land dispute between residents of a subdivision and a developer owning certain lots in the neighborhood. The homeowners sought enforcement of various covenants on the property, including a prohibition on further subdivision of the lots. The developers filed a declaratory judgment action claiming that the covenants are unenforceable because the lots have been replatted, resulting in a change in circumstances sufficient to relieve the developers of any requirement to honor the restrictions.

Both parties filed motions for summary judgment with

the trial court. The trial court granted judgment to the homeowners, and held that the covenants should be enforced. The court of appeals reversed the decision in part, finding that the restriction on further subdivision was valid, but other restrictions were unenforceable. The court of appeals also held that the trial court abused its discretion in failing to address the developers' second motion for summary judgment, which argued that there existed a genuine issue of material fact relating to their affirmative defense of laches. The court of appeals found that a party moving for summary judgment has the initial burden of addressing affirmative defenses, and if it fails to do so the nonmoving party has no reciprocal burden to present evidence on its defenses. A trial court errs in granting summary judgment when the moving party fails to address available defenses. Since the homeowners did not present evidence negating the developers' defense of laches in its original motion for summary judgment, the trial court erred in granting the motion.

The Ohio Supreme Court reversed the Twelfth District's holding. The Court concluded that the "language of Civ.R. 56 and our case law do not support the proposition that a party moving for summary judgment has the burden to prove its case *and disprove* the opposing party's case as well." If a moving party demonstrates that it is entitled to judgment on its claims, Civil Rule 56(E) requires the nonmoving party to set forth specific facts showing that there is a genuine issue at trial. This burden, the Court reasoned, includes presenting evidence of affirmative defenses that might create a genuine issue of fact. If the nonmoving party fails to do so, a trial court does not err in granting summary judgment to the moving party. The Court noted a number of other states that similarly follow this rule. It also noted that its holding furthers the policy underlying Civil Rule 56, which is to "effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice." Requiring a moving party to present evidence on every defense raised in a case "would delay the filing of summary judgment motions and increase the expense of litigation."

Employment Law

The Filing Of A Lawsuit By An Employer Against An Employee Who Engaged In Protected Activity Is Not Per Se Retaliatory

***Greer-Burger v. Temesi,* 116 Ohio St.3d 324, 2007-Ohio-6442.**

Appellee, Tammy Greer-Burger, filed a sexual-harassment claim against her employer, Laszlo Temesi. At trial, a jury found in favor of Temesi. Temesi thereafter filed suit against Greer-Burger alleging claims for abuse of process, malicious prosecution, and intentional infliction of emotional distress. He sought $42,334 in attorneys' fees and costs incurred in defending the prior suit and compensatory and punitive damages. In response to Temesi's suit, Greer-Burger filed a charge with the Ohio Civil Rights Commission. The OCRC found that the act of filing suit against Greer-Burger constitutes retaliation under Revised Code §4112.02(I). The administrative law judge issued a "cease and desist" order that prohibited Temesi from prosecuting his lawsuit, and further ordered Temesi to pay Greer-Burger $16,000 in legal expenses. The Cuyahoga County Court of Common Pleas and the Eighth District Court of Appeals affirmed the OCRC's order.

The Ohio Supreme Court accepted Temesi's discretionary appeal. The majority opinion, written by Justice O'Connor, concluded that Temesi's act of filing a lawsuit was not per se retaliatory. The majority stated that such a holding would be a violation of Temesi's fundamental Constitutional right, found in the First Amendment, to petition the government for redress of his grievances. This right is not absolute, however. The First Amendment does not protect "sham" litigation, which has been defined by the United States Supreme Court as a "lawsuit [that is] objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.* (1993), 508 U.S. 49, 60. In the instant case, the majority held that the OCRC's adoption of a per se standard did not allow Temesi an opportunity to demonstrate that there was an objective basis for his lawsuit.

To replace the per se prohibition of such an action, the majority opinion would require the OCRC administrative law judge to review the employer's lawsuit using the summary judgment standard. An employer would have to show that his action raises genuine issues of material fact. If so, the lawsuit should not be considered "sham" litigation and would be protected by the First Amendment. The lawsuit would proceed in court while the retaliation claim brought before the OCRC would be stayed. The majority argues that this procedure "promotes judicial economy because the employer's lawsuit will not have to be fully litigated in the trial court before the OCRC can make its determination as to the reasonableness of the suit. In this way, the OCRC essentially shall vet the action to ensure that it is not sham litigation."

The majority also held that the fact that Temesi sought punitive damages from Greer-Burger, standing alone, does not establish retaliation. A claim for punitive damages is merely evidence that must be considered by the administrative law judge in determining whether retaliatory motive exists. The majority did note that if the OCRC finds probable cause to pursue a discrimination claim brought pursuant to R.C. §4112, any lawsuit filed by the employer thereafter with a punitive damages claim "would support a strong inference of a retaliatory motive, as the administrative agency would have essentially vetted the employee's case and found that it had some merit." In considering the chilling effect this rule would have on employees pursuit of discrimination claims, the majority simply points out that "a blanket prohibition on employer punitive damages would open the door to truly frivolous cases."

The matter was remanded to the OCRC for a determination of whether Temesi can establish that his claims are not objectively baseless. If he can meet this standard, the OCRC matter is stayed and the litigation can progress in the trial court. The majority also held that Greer-Burger was equitably and judicially estopped from recovering attorneys' fees on her retaliation claim because she failed to list that action in a bankruptcy proceeding.

In partial dissent, Justice Lanzinger, joined by Justices Lundberg Stratton and Pfeifer, comment on the "lopsided balancing of the competing interests at hand." They note that the "not objectively baseless" test sets too low a threshold. "Because a sham lawsuit is 'objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits'…it is difficult to see how any lawsuit filed by an employer who successfully defended a discrimination action falls within that category." Justice Lanzinger also disagrees that a claim for punitive damages is not per se retaliatory. The Justice points out that the purpose of punitive damages "is to punish and deter the conduct of the defendant." In addition, "[a]llowing the routine inclusion of punitive damages in suits against employees who lose their cases will have a freezing, rather than a chilling, effect on others who wish to exercise their rights under anti-discrimination statutes."

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Age Discrimination Claims Brought Pursuant To R.C. §4112.99 Are Subject To Six Year Statute Of Limitations; Trial Court Committed Reversible Error In Allowing Statutory Claim For Workers' Compensation Retaliation To Be Tried Before A Jury

***Meyer v. United Parcel Service, Inc.*, 1st Dist App. No. C-060772, 174 Ohio App.3d 339, 2007-Ohio-7063.**

Robert Meyer began working for UPS in 1978, and was promoted to a full-time delivery driver in 1984. In August 2002, Meyer suffered an injury at work that forced him to miss time. When he returned to work, his supervisor warned him that if he wanted to continue his employment for UPS, he "better not get hurt [again]." In November 2002, Meyer suffered an inguinal hernia while working that required two surgeries. Meyer was off work for about two months and filed for workers' compensation benefits. In January 2003, about three weeks after returning to his job, Meyer was discharged for allegedly inflating the miles he claimed to have driven on his route. His discipline was reduced to a suspension following a grievance hearing. His supervisor again warned him that it was important for him not to suffer another workplace injury. In September 2003 UPS fired Meyer again based on a customer's complaint. Meyer was successfully reinstated through the grievance procedure. Two months later, Meyer injured his groin at work and filed for workers' compensation benefits. On December 3, 2003, the day he returned to

work, he was discharged for dishonesty for allegedly making fraudulent entries into the UPS wireless computer system. This time, his discharge was upheld in the grievance process.

Meyer sued UPS for age discrimination and workers' compensation retaliation. Following a jury trial, Meyer was awarded $113,352 in back pay for the retaliation claim, and $113,352 in back pay, $175,000 for "other damages," and $25,000 in punitive damages on his age discrimination claim. The trial court awarded over $47,000 in prejudgment interest and $135,194 in attorneys fees. Meyer was ordered reinstated to his prior position with the company.

UPS challenged the verdict on a number of grounds. First, it argued that the age discrimination claim was barred by the statute of limitations because the complaint was not filed within 18 months of Meyer's termination. R.C. §4112.02(N) prohibits age discrimination in employment and provides for "any legal or equitable relief that will effectuate the individual's rights." A complaint filed pursuant to this provision must be brought within 180 days of the unlawful act. Meyer argued, however, that his claim was based on R.C. §4112.99, which provides for a cause of action premised on any type of discrimination identified in Chapter 4112, including discrimination based on age. Claims brought pursuant to R.C. §4112.99 are subject to a six year statute of limitations. UPS argued that since R.C. §4112.99 does not contain any substantive provisions, any statute of limitations for such a claim must be premised on the other age discrimination statutes found within Chapter 4112. UPS also suggested that the more specific limitations provisions of R.C. §4112.02 should prevail over the general provisions of R.C. §4112.99.

The court held that Meyer's claim for age discrimination was timely commenced within the six year limitations period that applies to R.C. §4112.99. The statute allows an independent civil action to seek redress for any type of discrimination identified in Chapter 4112, including age discrimination. In *Cosgrove v. Williamsburg of Cincinnati Mgt. Co., Inc.* (1994), 70 Ohio St.3d 281, the Court held that R.C. §4112.99 is a remedial statute and is subject to a six year statute of limitations. The Ohio Supreme Court also recently noted in *Leininger v. Pioneer Natl. Latex,* 115 Ohio St.3d 311, 2007-Ohio-4921, that when a claim for age discrimination accrues, a plaintiff has the right to choose from the full spectrum of remedies available under Chapter 4112, including a claim for damages, injunctive relief, and any other appropriate relief under R.C. §4112.99.

The court also rejected UPS's argument that Meyer's age discrimination claim was barred because he had already arbitrated his case and lost through the grievance procedure. In *Hopkins v. United Parcel Service* (1st Dist.), 2000 WL 279228, the court held that R.C. §4112.14(C) precludes any claim under Chapter 4112 if a labor-grievance panel has determined that a discharge was for just cause. The court rejected this argument because after the decision in *Hopkins*, the statute at issue was amended to state that only claims brought pursuant to R.C. §§4112.01 to 4112.11 are precluded. Since the plain language of the act does not include claims brought pursuant to R.C. §4112.99, the ruling in *Hopkins* was inapplicable.

UPS next challenged the trial court's decision to deny its motion to strike Meyer's jury demand on the workers' compensation retaliation claim. Meyer originally brought claims against UPS for retaliation under R.C. §4123.90, and premised on common law wrongful discharge in violation of public policy. The latter claim was dismissed by the court because Meyer was a member of a union. UPS thereafter moved to strike Meyer's jury demand and requested the case be assigned to a bench trial. The law is clear that a statutory retaliation claim is primarily an equitable claim that does not afford the claimant a right to a jury trial. The court, without explanation, denied UPS's motion. Six months later, Meyer amended his complaint to include a cause of action for age discrimination. Both claims were tried before a jury.

The court of appeals held that it was error for the trial court not to grant UPS's motion to strike Meyer's jury demand on the statutory claim. By filing a motion to strike, UPS preserved the matter for appeal and did not consent to the matter being tried to a jury. As a consequence of this error, the court of appeals overturned the verdict on *both* claims. The court reasoned that the facts presented to the jury were intertwined to such an extent that it was impossible for the facts relating to one claim not to affect the outcome of the other. The court stated that "the evidence adduced at trial on the retaliatory-discharge claim and the age-discrimination claim presented a seamless web of facts…The impact on the jury of the evidence of workers' compensation retaliation, along with the arguments and the instructions given on that evidence, was so prejudicial that the jury's verdicts on both claims must be overturned."

[Editor's Note: This case has been accepted by the Ohio Supreme Court for review. See 118 Ohio St.3d 1432, 2008-Ohio-2595.]

Ninth District Court Of Appeals Holds No Claim Exists For Wrongful Discharge In Violation Of Public Policy Based On Workers' Compensation Retaliation

***Pinkerton v. Thompson, et al.*, 9th Dist App. No. 06CA008996, 174 Ohio App.3d 229, 2007-Ohio-6546.**

In this case, the Ninth District Court of Appeals reviewed a jury verdict awarded to an individual who was "laid off indefinitely" after suffering injuries at work. Pinkerton initially injured his left hand and fingers on June 4, 1999 while operating a press machine during his employment for Envelope Mart. He filed a workers' compensation claim and was off work for 45 days. His employer kept his job available to him until he could return. During the next couple years, Pinkerton suffered other injuries to his upper extremities that were unrelated to his job. In April 2001, he reported a pain in his right shoulder to his doctor. The doctor found that the pain was work-related, and resulted from Pinkerton's repetitive use of his right arm at work to compensate for his left hand and wrist being in a cast for lengthy periods of time. The doctor provided Pinkerton with a First Report of Injury form. On the same day, Pinkerton reported the injury to his employer. He was immediately "laid off indefinitely." On May 29, 2001, Pinkerton filed a workers' compensation claim relating to his right shoulder injury.

Pinkerton filed suit against Envelope Mart and its owner, Robert Thompson, alleging three causes of action: (1) employer intentional tort for his June 4, 1999 injury to his left hand and fingers; (2) retaliatory discharge brought under Ohio Revised Code §4123.90, premised on Pinkerton's April 2001 shoulder injury; and (3) common law wrongful discharge in violation of public policy, based on the policy as set forth in R.C. §4123.90. After the trial court awarded summary judgment on the intentional tort claim, the matter proceeded to trial. The trial court found in favor of Defendant on the statutory claim, holding that R.C. §4123.90 does not support a claim when the individual is discharged prior to filing a workers' compensation claim. A jury found in favor of Pinkerton on his common law wrongful discharge claim, and awarded him compensatory and punitive damages. The Defendants appealed the verdict and Pinkerton cross-appealed.

The Ninth District first considered whether a wrongful discharge claim premised on the public policy found in R.C. §4123.90 is viable as a matter of law. In *Coon v. Technical Construction Specialists, Inc.* (9th Dist.), 2005-Ohio-4080, the court previously answered that it is not. The same decision was later reached in *Polzin v. Mail Room* (9th Dist.), 2006-Ohio-4418 at ¶20, wherein the court stated that "until the Ohio Supreme Court has spoken, we find no rationale to revisit our decision [in *Coon*]." The same rationale was applied to the instant case. The court stated that other districts that recognize a public policy wrongful discharge claim for violations of R.C. §4123.90 are unpersuasive, and the statutory remedy available to a claimant sufficiently protects the public policy at issue. Therefore, the court reiterated its position that no public policy tort exists for violation of the workers' compensation statute. As such, the jury's verdict was reversed.

In his cross-appeal, Pinkerton challenged the trial court's grant of summary judgment on his employer intentional tort claim. He alleged that the employer was aware that employees cleaned a part of the press while the machine was still running, but chose not to install safety guards because doing so would slow production. The court of appeals held that this fact, even if true, was not enough to impose liability for an intentional tort. In order to set forth a prima facie case, a plaintiff must establish all three of the following elements: (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation, (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty, and (3) that the employer, under such circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task. *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, syllabus. The court held that Pinkerton failed to present evidence that his employer required him to clean the press while it was still running; the fact that some of the employees may have done so is not enough. The evidence showed that the employer actually had a rule instructing their employees to shut off the press before attempting to clean its parts. Under these circumstances, the court found that the trial court properly entered summary judgment for Defendants.

Pinkerton also assigned as error the trial court's judgment in favor of Defendants on his retaliatory discharge claim brought pursuant to R.C. §4123.90. The trial court's decision was based solely on the fact that Pinkerton had not filed a workers' compensation claim prior to his discharge. The court of appeals held that this was reversible error, since the statute provides protection to workers even without the physical filing of a workers'

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compensation claim. The Ohio Supreme Court held that R.C. §4123.90 applies whenever an employee has been terminated because of "taking some action which would constitute the actual pursuit of his claim." *Bryant v. Dayton Casket Co.* (1982), 69 Ohio St.2d 367, 371. To determine if "actual pursuit" has occurred, courts consider whether the employee (1) told his employer that he was injured on the job, (2) notified the employer of his intention to file a claim, and (3) requested any paperwork that would allow him to file a claim. Since the trial court below did not consider these factors, the court of appeals ordered the matter remanded for determination of whether Pinkerton actually pursued his workers' compensation claim prior to his discharge.

Other Noteworthy Cases

***Conti, et al. v. Spitzer Auto World Amherst, Inc., et al.,* 9th Dist. App. No. 07CA009121, 2008-Ohio-1320, 2008 WL 754759.** Defense verdict in sexual harassment case partially overturned. The court found that it was an abuse of discretion to allow evidence of the employee victim's alleged promiscuity.

***Williams v. Spitzer Auto World, Inc., et al.,* 9th Dist. App. No. 07CA009098, 2008-Ohio-1467, 2008 WL 835839.** The court held that to establish a disparate treatment claim, the employee had to establish only that race was "a" determining factor for discharge.

Insurance Law

Trial Court Erred By Deducting Collateral Source Benefits From General Verdict Without Factual Or Legal Basis For Setoff

***Jordan, et al. v. Westfield Insurance Company, et al.,* 7th Dist. App. No. 07 MA 18, 2008-Ohio-1542, 2008 WL 852070.**

This case involves a claim for uninsured motorist benefits following a rear-end collision by Douglas Jordan and two passengers in his vehicle, Mary and Melvina Jordan. Defendant, Westfield Insurance Company, admitted liability and coverage at trial, but disputed proximate cause and damages. Plaintiffs' counsel submitted to the jury as exhibits a list of all medical bills relating to the case, as well as evidence of collateral source payments made by the Plaintiffs' medical insurance carrier. The trial court rejected Plaintiffs' request to instruct the jury to disregard any collateral source payments in making their determination because the trial court would later deduct those amounts from any award. Instead, the trial court gave a general damages instruction with no mention of collateral source payments. The jury returned general verdicts in favor of Mary Jordan for $12,000 and Melvina Jordan for $1,700, and a defense verdict on the claims of Douglas Jordan.

Westfield thereafter filed a post-trial motion with the court asking for a setoff for collateral benefits paid by the medical insurance provider, with whom Westfield settled a subrogation claim with prior to trial, and for direct payments made by Westfield to Plaintiffs to cover medical expenses. The trial court granted Westfield's motion and deducted $10,926.61 from Mary Jordan's award and $1,385.32 from Melvina Jordan's award. This resulted in a net recovery on both claims of $1,388.07. Plaintiffs appealed the trial court's refusal to submit their proposed jury instruction and its decision to grant Westfield's motion for a setoff.

Although both parties focused their arguments on the collateral source rule, the court of appeals noted that the rule applies only in tort actions, not in a contract case. The instant case, although premised on an underlying tort, is for uninsured motorist benefits and therefore based on an insurance contract. The collateral source rule would only have applied to exclude evidence from trial; since Plaintiffs submitted that evidence to the jury, the collateral source rule does not apply here.

The court of appeals instead focused on Plaintiffs' argument that the setoff was error because the jury was never told whether and to what extent its damage award would be reduced by the trial court after the verdict was rendered. Without jury interrogatories to determine what elements of damage the jury included in its award, there is no way to tell if the jury already made the collateral source deductions. The court of appeals concluded that the trial court "needed to make sure there was some basis established in the record for the setoff, such as providing a jury instruction or other explanation to the jury as regards the amount that would ultimately be included in the setoff. The record does not show any factual or legal basis for deducting a setoff from the jury award, and it should not have been allowed." The court also noted that Westfield failed to provide sufficient factual evidence to support the amount it claimed was appropriate for the setoff, such as receipts of bills paid by Westfield and the agreement with Plaintiffs' medical insurer showing the actual amount of the settlement.

Determination Of Whether Claimant Is Underinsured Is Made By Considering Amount Actually Paid In Settlement, Not By Comparing Policy Limits

***Kuchmar, et al. v. Nationwide Mutual Insurance Company, et al.,* 1st Dist App. No. C-060866, 2007-Ohio-6336, 2007 WL 4208719.**

This case arises out of the death of Monica Kuchmar, who was a passenger in a vehicle driven by Defendant Brian Peters. In July 2001, Peters drove his vehicle into high water. Monica was trapped inside, swept away by the current, and drowned. Monica's estate sued several parties. The owner of the vehicle carried liability insurance through the United States Automobile Association in the amount of $300,000, and an umbrella policy with USAA in the amount of $1 million. The Kuchmars had an insurance policy with Nationwide that contained $300,000 in underinsured motorist coverage per occurrence. They also had an umbrella policy with Nationwide with $1 million in coverage.

The Kuchmars settled their claims with USAA for $150,000 less than the combined $1.3 million available from the two policies at issue. Nationwide thereafter filed a motion for summary judgment, arguing that no underinsured motorist coverage was available because the policy limits of the USAA policies were not less than the available underinsured coverage. The trial court denied Nationwide's motion, finding that "the amount 'available for payment'…to each of the Kuchmar Plaintiffs from the insurance coverage applicable to the vehicle operated by Defendant Peters…is less than the amount of underinsured coverage available to each of the Kuchmar plaintiffs under the Nationwide policy by virtue of the fact that the claims of these multiple claimants…resulted in a reduction of the amount available for payment to each of the Kuchmar insureds below the underinsured motorists limits." The trial court held that each Plaintiff was entitled to receive in underinsured benefits the difference between the amount recovered by each Plaintiff and the amount available to each Plaintiff in underinsured benefits.

The court of appeals disagreed, in part, with the trial court's decision. If the Kuchmars' arguments were accepted, each Plaintiff would be entitled to the full $1.3 million in coverage, exposing Nationwide to $5.2 million in payments for the single occurrence. This would have the effect of converting Nationwide's policies into excess coverage and would convert the per-occurrence limits to per-person limits. The Ohio Supreme Court stated in *Clark v. Scarpelli,* 91 Ohio St.3d 271, 276, 2001-Ohio-39, that underinsured motorist coverage was not intended to provide excess coverage to a tortfeasor's liability coverage, and should never provide greater coverage to an injured party than what would have been available if the tortfeasor was not insured. The court concluded that each Plaintiff in the instant case was not entitled to $1.3 million in coverage.

The next issue presented was determining the "amount available for payment," which controls whether underinsured coverage is available. Nationwide argued that the Kuchmars had the full limits of the USAA policy available for payment, and it was their choice to accept less. Since the limits of the USAA policies and the Nationwide policies were the same, Nationwide argued that no underinsured coverage was available. Although the court of appeals indicated its preference to follow the Nationwide argument, it was compelled by the holding in *Webb v. McCarty,* 114 Ohio St.3d 292, 2007-Ohio-4162, to find the amount available for payment was the actual amount accepted by the Kuchmars in settlement of its claims with USAA. In *Webb,* the Ohio Supreme Court stated that "[w]e have rejected this argument, that a limits-to-limits comparison controls, in situations involving multiple claimants. Today we reject it again…" *Id.* at ¶2. In a case involving multiple claimants, the amount available for payment to a claimant is determined by examining the amount paid on a claim, not the policy limits. Therefore, the court held that Nationwide was not entitled to summary judgment. Nationwide owed the Kuchmars underinsured motorist coverage in an amount equal to the difference between its underinsured policy limits and the amount actually paid to the Plaintiffs in settlement, or $150,000.

Other Noteworthy Cases

***American Modern Home Insurance Co. v. Safeco Insurance Co. of Illinois,* 11th Dist. App. No. 2007-L-044, 2007-Ohio-6247, 2007 WL 4147932.** Court holds that coverage exists under UIM policy for loss of consortium damages.

***Boila v. Nationwide Mutual Insurance Co.,* 7th Dist. App. No. 06 MA 166, 2007-Ohio-6071, 2007 WL 3377387.** A person who is insured under a UIM policy cannot increase his or her UIM benefits in order to compensate for a statutory Medicare lien.

***Hans v. Hartford Fire Insurance Company,* 1st Dist. App. No. C-061066, 174 Ohio App.3d 212, 2007-Ohio-7074**. The adult son of an employee was considered an "insured" under the employer's commercial auto policy and was entitled to UIM benefits.

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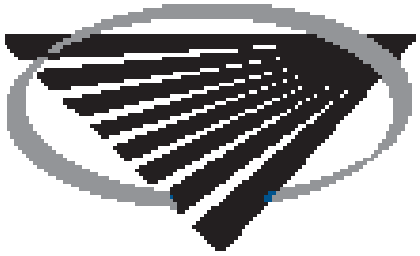

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***Hostottle, et al. v. Nationwide Mutual Insurance Co., et al.*, 8th Dist. App. No. 89036, 2007-Ohio-5857, 2007 WL 3203063.** "Regular use" exclusion in an insurance policy barred uninsured motorist coverage.

***Vairetta, et al. v. Papesh, et al.*, 8th Dist. App. No. 90350, 2008-Ohio-933, 2008 WL 598536**. Trial court's determination that Allstate was obligated to provide coverage under an umbrella policy was upheld because a signed rejection of coverage produced by Allstate was invalid.

***Yoder v. Thorpe, et al.*, 10th Dist. App. No. 07AP-225, 07AP-302, 2007-Ohio-5866, 2007 WL 3197394.** Jury verdict against tortfeasor was found not to be against the weight of the evidence. The court also held, however, that UIM coverage was not available based on "regular use" exclusion.

Limitation of Actions

Noteworthy Cases

***Eppley, et al. v. Tri-Valley Local School District, et al.*, 5th Dist. App. No. CT2007-0022, 2008-Ohio-32, 2008 WL 77471.** Court finds the wrongful death savings statute found at R.C. §2125.04 unconstitutional as applied to this case. There is no legitimate state interest to which the difference between that statute and the general savings statute are rationally related.

Medical Malpractice

Trial Court May Conduct In Camera Inspection Of Incident Reports To Determine Whether They Are Protected From Discovery By Peer Review Privilege

***Manley v. Heather Hill, Inc.*, 11th Dist. App. No. 2007-G-2765, 2007-Ohio-6944, 2007 WL 4485366.** This case involves the application of Ohio's peer-review statutes. Revised Code §2305.252 states that "[p]roceedings and records within the scope of a peer review committee of a health care entity shall be held in confidence and shall not be subject to discovery or introduction in evidence in any civil action against a health care entity or health care provider." R.C. §2305.253 similarly provides that "an incident report…and the contents of an incident report are not subject to discovery in, and are not admissible in evidence in the trial of, a tort action." An "incident 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."

Plaintiff, the executor of the estate of a woman who allegedly died as a result of the negligence of Heather Hill in providing her care, sought in discovery the production of any incident reports relating to decedent, witness statements, and the identities of other patients who suffered injuries while residents at Heather Hill. Heather Hill refused to produce the documents, claiming they were privileged based on the above-quoted statutes. Plaintiff filed a motion to compel. The trial court granted the motion to compel and ordered production of all of the materials requested, provided they were not prepared for peer-review purposes. The court ordered an in camera review of the documents to verify that any claimed privilege did not apply.

In its first assignment of error on appeal, Heather Hill claimed that the trial court did not have discretion to conduct an in camera inspection. It argued that since Plaintiff sought "incident reports" in its discovery request, the items were by definition privileged and not subject to an in camera inspection. The court rejected this argument, and correctly pointed out that "the fact that a document is referred to as an 'incident report' or describes an injury or incident does not necessarily mean that it falls within the statutory definition of 'incident report.'" The items requested are only protected by the peer review privilege if they were prepared by or for the use of a peer review committee. The court found that there was no evidence presented by Heather Hill that indicated the documents were prepared for use by a peer review committee, or that such a committee even exists at Heather Hill. There is otherwise nothing in the peer review statute that prohibits a court from conducting an in camera inspection to determine whether documents are privileged.

The court also considered *Tenan v. Huston* (11th Dist.), 165 Ohio App.3d 185, 2006-Ohio-131, ¶32, in which it previously held that the peer review statutes prohibit an in camera inspection and "essentially build an impenetrable wall of secrecy around all peer review documents, participants, and proceedings." The court reconciled this decision with its current holding by noting that the majority in *Tenan* considered the former peer review statute, and its comments were "essentially dicta." It concluded that *Tenan* should not be relied upon for these broad propositions, and an in camera inspection of documents

is appropriate when there is no evidence to establish that the peer review privilege should apply.

Heather Hill's other assignment of error, challenging the ordered production of reports of other injuries at the facility, was likewise overruled. The court found that there is no evidence indicating that the requested information is contained in an incident report, as that term is defined by the statute. Absent such a showing, there is no privilege that prevents the documents from being produced in discovery.

Although Physician Breached The Standard Of Care, Plaintiffs Did Not Present Sufficient Evidence To Support Verdict For Loss Of The Chance At A Cure

***Turner, et al. v. Rosenfield, et al.*, 8th Dist. App. Nos. 89441, 89719, 2008-Ohio-1932, 2008 WL 1822384**.

Alvin Turner received medical treatment from Dr. Allan O. Rosenfield, M.D. at Suburban Geriatrics from 1997 to 1999. During that time, Dr. Rosenfield does not recall discussing prostate cancer with Turner. Dr. Rosenfield admits that he did not order any diagnostic screen for early detection of prostate cancer. Turner had a test completed at the Veteran's Administration Hospital in January 2000 that revealed an extremely elevated "PSA level," which is a compound produced by the prostate that may indicate the presence of cancer. The VA confirmed the presence of cancer and Turner underwent hormone therapy to treat the condition. In May 2004, Turner filed suit against Dr. Rosenfield and his practice claiming that he failed to timely diagnose and treat his cancer, and as a result, the cancer progressed and precluded any chance for survival.

At trial, Turner called Dr. Raymond Rozman, who testified that the standard of care requires a physician to discuss prostate cancer screening with men over the age of 50. (Turner was 70 years old at the time of trial). He stated that Dr. Rosenfield breached the standard of care by not offering Turner a screening, and that breach resulted in allowing the cancer to become more advanced prior to the diagnosis. Dr. Joseph Schmidt also testified for Plaintiff, and stated that Turner's PSA level was "markedly abnormal," and at such a high level that in his experience the disease is always metastatic. He testified that "[o]nce the disease has metastasized, it is no longer curable, but it is treatable." Had the cancer been discovered sooner, Turner could have been treated with surgery and radiation, which are potentially curative if the disease is localized. In his condition at the time of trial, Dr. Schmidt opined that Turner would likely succumb to the cancer in two or more years.

Following trial, the jury returned a verdict in favor of Plaintiffs for $2,000,000. The court, which had previously denied Defendants' motion for a directed verdict, similarly overruled Defendants' post-trial motions. Plaintiffs moved for prejudgment interest, but the motion was denied by the court. Both parties appealed these rulings.

In considering whether the trial court properly denied Defendants' motion for a directed verdict and judgment notwithstanding the verdict, the court of appeals first determined that there was sufficient evidence in the record to support the conclusion that Dr. Rosenfield breached the standard of care by not offering Turner a prostate cancer screening. The evidence also established that at the time of diagnosis, Turner's cancer had metastasized. Thus, a jury could reasonably conclude that Dr. Rosenfield's negligence denied Turner with the opportunity to seek a potential cure for the disease. To support the damage award, Plaintiffs argued that the loss of opportunity cost him eight years of his life expectancy. Dr. Rozman testified that based on the U.S. government mortality tables, Turner had a life expectancy of ten years if he did not develop cancer. Dr. Schmidt stated that Turner would likely succumb to the cancer in another two years. The court of appeals rejected this argument to establish damages, however, because it is based on the assumption that Turner would have been cured if his cancer was diagnosed while it was still localized. Plaintiffs' experts testified at trial that treatment of localized prostate cancer is potentially curable, but no evidence was presented that it was more likely than not that Turner would have survived if diagnosed earlier. Absent this evidence, the court of appeals held that Turner cannot prove with reasonable probability that Defendants' negligence proximately caused his loss of life expectancy.

The court also considered whether the evidence supported the verdict based on a "loss of chance" theory of damages. In *Roberts v. Ohio Permanente Med. Group, Inc.,* 76 Ohio St.3d 483, 488, 1996-Ohio-375, the Ohio Supreme Court outlined the evidence necessary to support a claim based on a loss of chance of survival: "In order to maintain an action for the loss of a less-than-even chance of recovery or survival, the plaintiff must present expert medical testimony showing that the health care provider's negligent act or omission increased the risk of harm to the plaintiff. It then

becomes a jury question as to whether the defendant's negligence was a cause of the plaintiff's injury or death. Once this burden is met, the trier of fact may then assess the degree to which the plaintiff's chances of recovery or survival have been decreased and calculate the appropriate measure of damages. The plaintiff is not required to establish the lost chance of recovery or survival in an exact percentage in order for the matter to be submitted to the jury. Instead, the jury is to consider evidence of percentages of the lost chance in the assessment and apportionment of damages." Applying this theory to the instant case, the court of appeals held that although Turner presented evidence from which the jury could conclude that he was denied the possibility of a cure, there was no evidence of the percentage of the chance lost. Since there was no statistical evidence of this percentage, there was no basis upon which the jury could award damages. The court overruled the jury's verdict and held that Defendants' motion for a directed verdict should have been granted.

Other Noteworthy Cases

***Colon v. Fortune, et al.*, 8th Dist. App. No. 89527, 2008-Ohio-576, 2008 WL 384166.** Court held that failure of plaintiff to secure a deposition of defendant doctor did not present good cause that allows plaintiff additional time in which to file an affidavit of merit.

***Haney v. Barringer, et al.*, 7th Dist. App. No. 06 MA 141, 2007-Ohio-7214, 2007 WL 4696827.** Summary judgment on behalf of defendants was reversed after court of appeals held that plaintiff's expert witness could testify as to standard of care and proximate cause. The court also noted that a medical malpractice plaintiff cannot use a loss-of-chance theory of recovery as a "fall back" position, but must either prove traditional proximate cause or that the chance of survival or recovery was less than 50%.

***Jackson v. Sunforest OB-GYN Associates, Inc., et al.*, 6th Dist. App. No. L-06-1354, 2008-Ohio-480, 2008 WL 344134.** Trial court did not abuse its discretion in failing to remove two jurors for cause who admitted to a bias in favor of the medical profession.

***Johnson, et al. v. Patel, et al.*, 5th Dist. App. No. 2006AP100058, 2008-Ohio-596, 2008 WL 399022.** Defendants held to be immune from suit under R.C. §5122.34 in medical malpractice case in which a mentally ill patient was improperly released from the hospital and later committed suicide.

***Keck, et al. v. MetroHealth Medical Center, et al.*, 8th Dist. App. No. 89526, 2008-Ohio-801, 2008 WL 519320.** Nurse practitioner was not qualified to provide an opinion on proximate cause in a case involving bed sores.

***Stewart, et al. v. Forum Health, et al.*, 7th Dist. App. No. 06-MA-120, 2007-Ohio-6922, 2007 WL 4465514.** Dismissal of medical malpractice case reversed on appeal because the trial court failed to rule on plaintiff's motion for an extension of time in which to file an affidavit of merit. Court notes that failure to file such an affidavit does not create good grounds for dismissal under Rule 12(B), but should be met with a request for a more definite statement under Rule 12(E).

Motor Vehicle Accident

Injured Motorist Entitled To New Trial On Limited Issue Of Damages After Jury Finds For Defendant In Admitted Liability Case

***Hoschar v. Welton*, 7th Dist App. No. 06 CO 20, 2007-Ohio-7196, 2007 WL 4696813.**

Appellant John Hoschar was involved in a motor vehicle accident with Appellee. The impact from the ac-

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cident caused Hoschar to hit his head on the driver's side window. He was transported by ambulance to Salem Community Hospital where he was diagnosed with a sore neck, right hip pain, lower and upper back pain, and a headache. The emergency room physician diagnosed him with a cervical and lumber strain and degenerative disc disease. Hoschar missed five days from work and had follow up care with a chiropractor, Dr. James Morgenstern. Dr. Morgenstern testified at trial that Hoschar's 37 visits for treatment were proximately caused by the motor vehicle accident, which aggravated a prior back injury. Appellee did not present any evidence at trial. During cross examination of Hoschar and his chiropractor, Appellee's counsel elicited testimony about prior accidents where a Jeep partially rolled on Hoschar in 1978, and where Hoschar slipped and fell on ice at a gas station the year before the subject accident. Hoschar admitted that he took Naprosyn prior to the accident three to five times per month. Following trial, the jury found in favor of Appellee and awarded no damages. The trial court denied Hoschar's motion for a new trial and Hoschar appealed.

The standard for setting aside a verdict as against the weight of the evidence is as follows: "a reviewing court must determine that the verdict is so gross as to shock the sense of justice and fairness, cannot be reconciled with the undisputed evidence in the case, or is the result of an apparent failure by the jury to include all the elements of damage making up the plaintiff's claim." *Burris v. Burnworth* (7th Dist.), 2007-Ohio-4619, ¶10. Hoschar argued that the jury's verdict was against the weight of the evidence because, given the admission of liability, he should have at least been awarded damages for his emergency room treatment. Appellee argued that Hoschar's injuries were preexisting and that his treatment with a chiropractor was unreasonable. Appellee did not, however, take issue with Hoschar's initial treatment following the incident. The evidence at trial showed that Appellee's vehicle struck Hoschar's car with significant force. The court of appeals, after considering several similar cases, concluded that "the jury lost its way when it failed to award Appellant any compensation for his uncontested emergency treatment and transport on the day of the accident." The case was remanded for a new trial, however the court limited the issue for consideration to the damages arising from Hoschar's emergency transportation and care on the day of the accident.

Other Noteworthy Cases

***Bolton v. Hintz,* 6th Dist. App. No. L-07-1008, 2007-Ohio-5883, 2007 WL 3227318.** Prejudgment interest award upheld following verdict in motor vehicle accident case when liability was admitted and insurer offered an amount in settlement less than the medical bills.

***Owens v. Smith,* 5th Dist. App. No. 07CA42, 2007-Ohio-6766, 2007 WL 4395136.** When injured parties intervened in action brought by their insured for subrogation against tortfeasors, claims related back to original filing and precluded summary judgment based on statute of limitations defense.

***Yock v. Kovalyk,* 7th Dist. App. No. 06-BE-2, 2007-Ohio-6259, 2007 WL 4166241.** Court ordered new trial after jury awarded compensation for medical bills but nothing for pain and suffering.

Political Subdivision Immunity

Noteworthy Cases

***Coleman, et al. v. Greater Cleveland Regional Transit Authority, et al.*, 8th Dist. App. No. 89413, 174 Ohio App.3d 735, 2008-Ohio-317.** RTA was not afforded immunity in claim for negligence based on a driver's failure to respond to a passenger's pleas for help.

***Pearson, et al. v. Warrensville Hts. City Schools, et al.,* 8th Dist. App. No. 88527, 2008-Ohio-1102, 2008 WL 660856.** Defendants were not immune from suit for releasing a student to the custody of a parent who subsequently abducted the child.

Premises Liability

Noteworthy Cases

***Briel v. Dollar General Store,* 11th Dist. App. No. 2007-A-0016, 2007-Ohio-6164, 2007 WL 2098590.** Summary judgment for defendant reversed because attendant circumstances created an issue of fact about whether boxes that plaintiff tripped over were an open and obvious hazard.

***McElhaney v. Marc Glassman, Inc., et al.,* 7th Dist. App. No. 07 MA 20, 174 Ohio App.3d 387, 2007-Ohio-7203.** Directed verdict was improperly

granted by the trial court. It was for the jury to decide whether the weight limit for a lawn chair in a store display was an open and obvious danger.

***Ruz-Zurita v. Wu's Dynasty, Inc., et al.*, 10th Dist. App. No. 07AP-616, 2008-Ohio-300, 2008 WL 224354.** Attendant circumstances were established when a waitress escorted a restaurant patron to the area where the accident occurred.

***Torchik v. Boyce, et al.*, 4th Dist. App. No. 06CA2921, 2008-Ohio-399, 2008 WL 308460.** "Fireman's rule" applied to both property owner and contractor and precluded claim of Sheriff's Deputy when he was injured responding to a burglar alarm.

***Walker v. RLI Enterprises, Inc., et al.*, 8th Dist. App. No. 89325, 2007-Ohio-6819, 2007 WL 4442725.** The trial court's grant of summary judgment in favor of defendant in a slip and fall case was overturned when it was determined that a leaky faucet contributed to the accumulation of ice and snow.

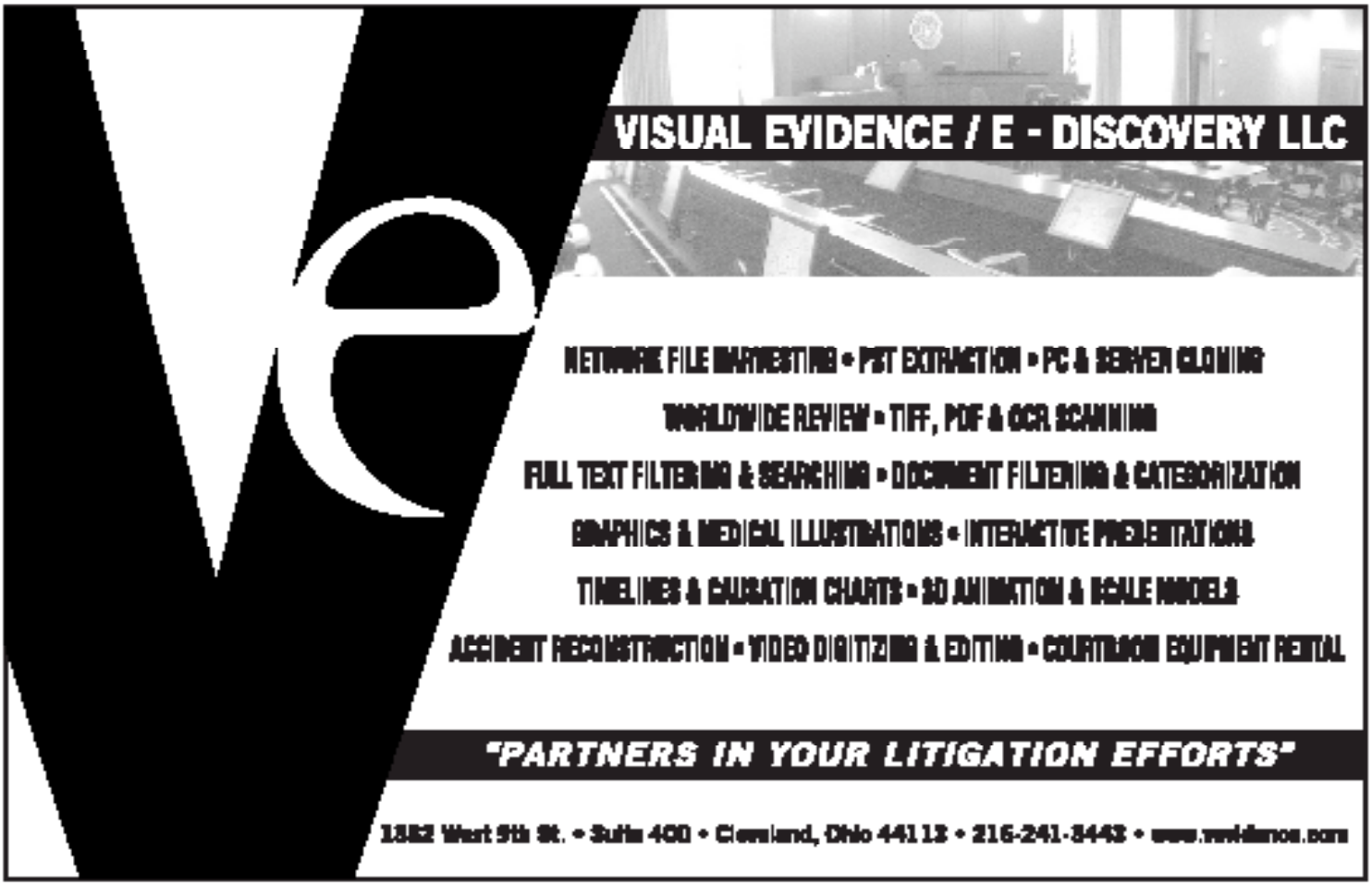
***Whitley, et al. v. National City Bank*, 8th Dist. App. No. 90095, 2008-Ohio-131, 2008 WL 151882.** Genuine issue of fact existed regarding whether attendant circumstances created conditions that made the rumpling of a carpet at defendant's premises an open and obvious danger.

Products Liability

Common Law Products Liability Claims That Accrue Before April 7, 2005 Not Abrogated By Provisions Of Tort Reform Statute

***Doty, et al. v. Fellhauer Electric, Inc., et al.*, 6th Dist. App. No. OT-07-023, 2008-Ohio-1294, 2008 WL 746971.**

On November 11, 2003, a fire started at the residence of Stan and Lela Doty that was caused by a malfunctioning electrical apparatus. On December 15, 2005, Plaintiffs filed a complaint against Intermatic, the manufacturer of the apparatus, and Fellhauser, the company that installed it in the Doty's home. The complaint included both common law and statutory product liability claims. In response to a motion to dismiss filed by Defendants,



the trial court held that Plaintiffs' common law claims were not abrogated by the Ohio Product Liability Act, that their negligent design claim was not barred by the statute of limitations, but that the breach of implied warranty claim was time-barred. Both parties appealed portions of the trial court's decision.

The court of appeals succinctly narrowed the issues on appeal as follows: "(1) whether the S.B. 80 amendments to R.C. 2307.71 et seq. retroactively abrogate appellants' common-law product-liability claims and (2) whether R.C. 2305.10, setting forth the two-year products-liability statute of limitations, applies to bar appellants' claims." In addressing the first issue, the court noted that the express language of the statute shows the clear intent of the legislature to abrogate all common law product liability claims. It does not, however, state that claims that accrue prior to the effective date of the statute would be affected. (The statute did not become effective until April 7, 2005, well after the date of the fire). Relying on R.C. §1.48, which states that a "statute is presumed to be prospective in its operation unless expressly made retrospective," and other appellate decisions that have dealt with the same issue, the court concluded that common law claims that accrued before the effective date of the statute are not abrogated.

The court resolved the second issue by distinguishing between claims for damages to personal property and real property. The trial court erroneously applied R.C. §2305.10, which provides a two year statute of limitations, to plaintiffs' breach of implied warranty claims. In *United States Fid. & Guar. Co. v. Truck & Concrete Equip. Co.* (1970), 21 Ohio St.2d 244, the Ohio Supreme Court held that R.C. §2305.10 applies to an "action in tort for damages to personal property." Plaintiffs' breach of implied warranty claim relates to damages to real property, not personal property, and it therefore is governed by the four year statute of limitations found in R.C. §2305.09. The trial court's decision to dismiss this claim as time-barred was overruled.

Tort Reform

Provisions of Tort Reform Statute Limiting Noneconomic Damages And Punitive Damages In Tort Actions Held Constitutional

***Arbino v. Johnson & Johnson, et al.,* 116 Ohio St.3d 468, 2007-Ohio-6948.**

This case examines the constitutionality of portions of Ohio's tort reform statute. Arbino brought a products liability action against the makers of the Ortho Evra Birth Control Patch, which caused her to suffer blood clots and other medical side effects. Her case was consolidated with other claims relating to this product and assigned to Judge Katz in the United States District Court, Northern District of Ohio, Western Division. Arbino's complaint included challenges to four provisions of the tort reform statute. Judge Katz certified four questions to the Ohio Supreme Court for review. The Court accepted three of the questions, but failed to address one of the issues (relating to the admissibility of collateral source benefit evidence) because Arbino lacked standing. The Ohio Supreme Court held that Revised Code §2315.18 (limiting non-economic damages) and §2315.21 (limiting punitive damages) are facially constitutional.

The Court first addressed the issue of stare decisis, since several previous tort reform bills have been declared unconstitutional. Despite the consistency of its past rulings, the Court held in the instant case that stare decisis did not apply because the language used by the legislature in the current bill was not substantially the same as the language used in past bills. The Court claimed that "the General Assembly has made progress in tailoring its legislation to address the constitutional defects identified by the various majorities of this court." In addition, the Court distanced itself from past denunciations of tort reform statutes by asserting that tort reform as a concept has never been viewed as an "unconstitutional concept." Prior cases have merely examined particular unconstitutional facets of the previous tort reform laws.

The Court next examined the statutes being challenged. R.C. §2315.18 provides a specific procedure for awarding damages in particular tort actions. The trier of fact is required to answer interrogatories following a trial that include the total amount of compensatory damages, both economic and noneconomic. The court must then enter judgment for the total amount of economic damages, without limitation. The court will limit the award of noneconomic damages to the greater of "(1) $250,000 or (2) three times the economic damages up to a maximum of $350,000, or $500,000 per single occurrence." These limits are inapplicable when the plaintiff suffers "[p]ermanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system," or "[p]ermanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities."

This statute is challenged on a number of grounds, including as a violation of an individual's right to a trial by

jury. This right allows an individual to have all issues of fact in his or her case decided by a jury. Since the amount of damages is a fact issue, Arbino argues that any legislative attempt to reduce the findings of the jury violates the Constitution. The Court disagreed. Several examples were cited in which a court is permitted to increase a jury's award, such as an additur or award of treble damages in certain cases. The Court reasoned that if the decision to *increase* a jury's award does not violate the Constitution, "the corresponding *decrease* as a matter of law cannot logically violate that right." Also, the Court stated that the statute at issue does not alter the jury's findings of fact themselves, but simply applies the damage caps to the jury's determination of the facts as a matter of law. This theoretical distinction, according to the majority, allows the statute to avoid constitutional conflicts.

The Court also rejected the argument that the statute violated the "open courts" provision in the Ohio Constitution, which states that "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." This provision has previously been interpreted to prohibit legislation that prevents individuals from pursuing relief for their injuries or eliminates an individual's right to a judgment or verdict properly rendered in a suit. The Court reasoned that although the statute at issue may lessen a jury's award, it does not wholly deny a person's remedy for injuries and neither forecloses their ability to pursue a claim nor "completely obliterates the entire jury award."

Due process and equal protection arguments were similarly unsuccessful. The Court found that the statute "bears a real and substantial relation to the general welfare of the public. The General Assembly reviewed evidence demonstrating that uncertainty related to the existing civil litigation system and rising costs associated with it were harming the economy." The legislature addressed this perceived problem with a bill that was neither unreasonable nor arbitrary. The Court concluded that the statute "is tailored to maximize benefits to the public while limiting damages to litigants." In evaluating the equal protection argument, the Court similarly held that the statue was rationally related to the legitimate state interest of improving the civil justice system and the economy.

Arbino also argued that a statute imposing damage caps violates the separation of powers among the three branches of government because it "abrogates to the legislature the exclusively judicial power to decide damages for personal injuries" and is an impermissible reenactment of a law previously declared unconstitutional by the Ohio Supreme Court. In rejecting the first part of Arbino's argument, the Court again noted several examples where statutes allow damages to be increased by statute. These examples provide the foundation for the Court's conclusion that the judicial function of deciding factual issues in a case "is not so exclusive as to prohibit the General Assembly from regulating the amount of damages available in certain circumstances." The second prong of the separation of powers argument was disposed of by the Court by noting that the current statute is "sufficiently different from the previous economic damages caps to warrant both a fresh review of its merits and approval of its validity." The Court characterized the legislature's actions in passing the bill not as a infringement on the Court's prior decisions, but as an attempt to look to the Court for guidance in creating constitutional legislation.

Arbino's final challenge was based on the single-subject rule, as stated in Section 15(D), Article II of the Constitution, which states that "[n]o bill shall contain more than one subject, which shall be clearly expressed in its title." The Court dismissed this argument without analysis because the entire enactment was not made an issue in the case. Its decision was limited solely to the questions certified from the District Court.

The second statute at issue is R.C. §2315.21, which provides for bifurcation of a trial in certain tort actions for compensatory and punitive damages and a limitation on the amount of punitive damages that can be awarded. The statute states that punitive damages cannot be more than two times the total amount of compensatory damages awarded to a plaintiff per defendant. The limitations do not apply if the defendant committed a felony in causing the injury, one of the elements of which is that it was committed purposely or knowingly. The statute further limits punitive damages if the defendant is a "small employer" to "the lesser of two times the amount of compensatory damages awarded to the plaintiff from the defendant or ten percent of the employer's or individual's net worth when the tort was committed, up to a maximum of three hundred fifty thousand dollars." Arbino did not challenge the bifurcation process, but argued that the limit on punitive damage awards is unconstitutional.

The basis of Arbino's arguments against the punitive damage caps are the same as those discussed above. The Court held that the right to a jury trial is protected

by the instant legislation because the amount of damages awarded is not wholly removed from the jury. A court's ability to potentially lessen the amount does not, in the Court's view, abrogate this established function of a jury. In addition, the Court relies on recent cases decided by the United States Supreme Court in which it was held that legislatures have broad discretion in limiting permissible punitive damage awards. These decisions "conclusively establish" the right of the General Assembly to limit the amount of punitive damages available without violating a person's right to a jury trial.

The challenge premised on the open courts doctrine was also rejected. A limit on punitive damages does not deny a litigant the right to seek a meaningful remedy, particularly because punitive damages are not intended to compensate a plaintiff for injuries. The due process and equal protection arguments were rejected for the same reasons discussed above. The limitations were deemed necessary to address the subjectivity of the civil justice system that caused harm to the state's economy. The Court held that the "general goal of making the civil justice system more predictable is logically served by placing limits that ensure that punitive damages generally cannot exceed a certain dollar figure." The Court also found that the statute did not violate the separation of powers provision. Limits imposed by statute on punitive damages do not infringe on the judiciary's ability to determine damages. Since the legislature "alleviated" the prior constitutional problems with past tort reform bills, this measure was not a reenactment of the same law previously deemed unconstitutional.

Provisions Of Statute Governing Subrogation In Workers' Compensation Recovery And Tort Reform Provision Relating To Statute Of Repose In Products Liability Actions Held Constitutional

***Groch, et al. v. General Motors Corporation, et al.*, 117 Ohio St.3d 192, 2008-Ohio-546.**

Plaintiff, Douglas Groch, was injured during his employment with General Motors Corp. ("GM") when the trim press he was operating came down on his right arm and wrist. He filed an employer intentional tort claim against GM, and a products liability claim against the manufacturers of the trim press, Defendants Kard Corporation and Racine Federated, Inc. The action was removed to federal court based on the diversity of the parties.

GM asserted a subrogation interest in any recovery by Groch for its payment of workers' compensation benefits to him based on the provisions of R.C. §4123.931. Groch challenged the constitutionality of the statute. Defendants Kard and Racine argued that they were immune from liability based on the statue of repose for products liability claims found in Ohio's tort reform statute at R.C. §2305.10. The constitutionality of this provision, as well as the entire tort reform statute, were also challenged. The District Court certified these questions to the Ohio Supreme Court.

The first issue considered was the constitutionality of the workers' compensation subrogation statute. In *Holeton v. Crouse Cartage Co.* (2001), 92 Ohio St.3d 115, the Court struck down as unconstitutional the previous version of this law, finding that it violated the taking, right-to-a-remedy, due process and equal protection clauses of the Ohio Constitution. The prior version stated that a statutory subrogee's interest includes estimated future values of compensation and medical benefits related to the injury of the claimant. By creating a current interest in potential future payments, it was possible that a prohibited taking could occur. For example, if the amount of the subrogation interest for estimated future benefits proved to be substantially more than the actual compensation received by the claimant, the statutory subrogee would receive a windfall at the expense of the claimant's tort recovery. The Court held that this and other instances where the claimant had to reimburse subrogee when no double recovery occurred was unconstitutional. The prior statute also stated that the entire amount of any settlement was subject to the subrogation interest of a statutory subrogee, regardless of how the proceeds of the settlement were characterized. If a claimant recovered by way of a jury verdict, however, he or she could obtain a special verdict or interrogatory that classified any part of a verdict as something other than compensation and medical benefits subject to the right of subrogation. The *Holeton* Court held that this procedural framework violated the equal protection clause of the Ohio Constitution by arbitrarily distinguishing between those who settle their claims and those who go to trial.

In response to the Court's decision in *Holeton*, the General Assembly amended the subrogation provisions of R.C. §4123.931. The current version allows a claimant to establish "an interest-bearing trust account for the full amount of the subrogation interest that represents estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits, reduced to present value, from which the claimant shall make reimbursement payments to the statutory subrogee for the future payments of compensation, medical benefits, re-

habilitation costs, or death benefits." R.C. §4123.931(E)(1). This would avoid the problem cited in *Holeton* that results in overpayment to the statutory subrogee. In addition, a new settlement procedure was developed that replaced the prior presumption that the entire settlement proceeds were subject to the subrogation interest. R.C. §4123.931(B) provides that a claimant would receive "an amount equal to the uncompensated damages divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered," and the statutory subrogee would receive "an amount equal to the subrogation interest divided by sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered." The statute also allows the claimant and subrogee to divide the net amount in a manner agreed to by the parties that is more fair and reasonable.

Groch argues that the current statute violates the same constitutional provisions as the one struck down in *Holeton*. The Court disagreed. The amendments to the statute sufficiently address the concerns raised in *Holeton* and the subrogation statute is constitutional on its face. Specifically, the Court held that utilizing a trust account to make payments of future benefits allows the claimant to avoid the consequences of overestimating future benefit values. Groch argued that use of such an account is unrealistic, that the fees and expenses will deplete the principal, and therefore the benefits are illusory. The Court rejected this argument as "too speculative." The Court held that the formula devised by the General Assembly to divide the net recovery was a fair compromise between the interests of the parties and the procedure was facially constitutional. If the claimant is undercompensated by a third party, the burden of undercompensation is proportionally shared by the claimant and the subrogee. The Court reasoned that it "is not inequitable for the subrogee to obtain some level of reimbursement, and the formula significantly reduces the excessive reimbursement that occurred too often under the previous legislation." Finally, the arbitrary distinction between recoveries from settlement and verdict were eliminated under the current statute, and therefore there is no equal protection violation. The Court stated that "the statutory formula for dividing the net amount recovered itself provides the rational basis required to pass equal-protection scrutiny."

The Court next tackled the question of whether the statute of repose for products liability actions found in R.C. §2305.10 is constitutional. Groch argued that the statute violated the open-courts and right-to-a-remedy provisions of the Ohio Constitution, and cited several previous decisions of the Court striking down other statutes of repose. The Court's analysis focused primarily on a comparison of two prior cases that sharply differed in how they dealt with a statute of repose that applied to architects and builders. In *Sedar v. Knowlton Construction Company* (1990), 49 Ohio St.3d 193, the Court upheld the application of this statute of repose. The Court found that the constitutional rights at issue apply only to existing, vested rights. Any claims against an architect or builder under the statute at issue, if they were more than ten years old, do not exist. Therefore, the constitutional rights asserted did not apply. The Court stated that "[u]nlike a true statute of limitations, which limits the time in which a plaintiff may bring suit *after* the cause of action accrues, a statute of repose…potentially bars a plaintiff's suit *before* the cause of action accrues." *Id.* at 195. The Court distinguished a different statute of repose that applied to medical malpractice claims, which "takes away an existing, actionable negligence claim before the injured person discovers it."

By contrast, the claims against the architect and builder, under the Court's logic, never existed. The statute of repose in *Sedar* was again challenged in *Brennaman v. R.M.I. Co.* (1994), 70 Ohio St.3d 460. This time, ignoring the rationale of *Sedar*, the Court found the statute unconstitutional, stating that the General Assembly is constitutionally precluded from depriving a claimant of a right to a remedy before the claimant knew or should have known of the injury.

In deciding which precedent to follow in the instant case, the Court described the *Sedar* decision as "thorough and concise." Conversely, *Brennaman* was characterized as "an abbreviated discussion devoid of any in-depth analysis," and the "classic example of the 'arbitrary administration of justice' that *Galatis* cautions against." The Court held that "[g]iven all of the deficiencies in *Brennaman*, and the context in which it arose, *Brennaman* cannot control here…To the extent that Brennaman stands for the proposition that all statutes of repose are repugnant to Section 16, Article I, we expressly reject that conclusion." Instead, the Court upheld the tort reform statute of repose limiting products liability actions based on the reasoning stated in *Sedar*. Since a plaintiff's cause of action against a product manufacturer or supplier never accrues, it never becomes a vested right. "The right-to-a-remedy provision…applies only to existing, vested rights, and it is state law which determines what injuries are recognized and what remedies are available." The Court also rejected due process and equal protection challenges to the statute of repose. Applying a rational basis standard

of review, the Court extensively quoted the legislative rationale for the statute and held that the "findings adequately demonstrate that the statute bears a real and substantial relation to the public health, safety, morals, or general welfare of the public and are not unreasonable or arbitrary."

Finally, Groch argued that the statute of repose is unconstitutional as applied to him because it violated Section 28, Article II of the Ohio Constitution, which prohibits retroactive laws. On this limited point, as applied only the facts of this case, the Court agreed. Groch was injured on March 3, 2005. S.B. 80, which includes the statute of repose at issue in this case, became effective on April 7, 2005, after the injury. The Bill applied to all actions "commenced on or after" the effective date. Groch filed his complaint on June 2, 2006. A statute applied retroactively violates Section 28, Article II, only if it is "substantive." A statute is substantive "if it impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligations or liabilities as to a past transaction, or creates a new right." A remedial statute, on the other hand, which only effects the remedies provided, may be constitutionally applied retroactively. The Court held that on its face the statute of repose is constitutional because for most plaintiffs, the cause of action never accrues and becomes a vested right. As applied to Groch, however, a substantive right was affected. On March 3, 2005, at the time of his injury, his cause of action accrued and became a vested right because the statute of repose was not yet effective. It was therefore unconstitutional because it took away his vested right to bring a claim.

Justice Pfeifer wrote a scathing dissent to the majority's decision that the statute of repose is constitutional on its face. He stated, "[i]t is hard to decide what is more offensive about the majority opinion regarding the facial constitutionality of R.C. 2305.10: how it arrives at its decision or what the decision means for Ohioans." He argues that the *Brennaman* decision controls this case, and that all statutes of repose are a violation of the Ohio Constitution.

Other Noteworthy Cases

***Mastellone, et al. v. Lightning Rod Mutual Insurance Company,* 8th Dist. App. No. 88783, 175 Ohio App.3d 23, 2008-Ohio-311.** Provision of tort reform statute requiring bifurcation of jury trial in action seeking compensatory and punitive damages did not apply retroactively, however decision of court to bifurcate the instant case was harmless.

Workers' Compensation

Intentional Tort – Seventh District Court Of Appeals Finds Ohio's Employment Intentional Tort Statute, R.C. §2745.01, Unconstitutional

***Kaminski v. Metal & Wire Products Company, et al.*, 7th Dist. App. No. 07-CO-15, 175 Ohio App.3d 227, 2008-Ohio-1521.**

Plaintiff worked as a press operator at Defendant's manufacturing facility. On June 30, 2005, Plaintiff's press ran out of metal coil and she asked a coworker to assist her in replacing it. The coworker brought the new coil, which weighs approximately 800 pounds, to the press with a forklift. Prior to loading the coil into the press, the coworker had to put the new coil on the ground to transfer it from one fork to another. To complete the maneuver, Plaintiff had to balance the coil on the ground. The coworker bumped the coil with the forklift while she was balancing it and the coil fell on Plaintiff's legs and feet, causing her serious injuries.

Plaintiff filed a complaint stating claims for employer intentional tort pursuant to R.C. §2745.01 and pursuant to common law. She asserted in her complaint that the intentional tort statute was unconstitutional. Defendant filed a counterclaim for a declaratory judgment that the statue was constitutional. The parties filed dispositive motions on the issue. The trial court held that the statute was constitutional. Defendant thereafter moved for summary judgment on the merits of the case. The trial court granted that motion as well, finding that Plaintiff could not point to evidence that Defendant had an intent to injure her, nor that Defendant acted with the knowledge that injury was likely to occur.

In considering the constitutionality of the statute, the court of appeals provided a thorough review of past attempts by the legislature to pass an employer intentional tort statute. In 1986, the General Assembly passed R.C. §4121.80 in response to Ohio Supreme Court cases that allowed employees to pursue a common law claim for intentional tort against their employers. This statute was an extension of the workers' compensation statute, and allowed the employee to receive excess benefits under the system if the employer was found to have acted with the intent to injure the employee or with the belief that injury was substantially certain to occur. In *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, the Ohio Supreme Court declared the statute unconstitutional because it exceed the General Assembly's authority granted to it under the Ohio Constitution. Section

34, Article II of the Ohio Constitution states that "[l]aws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power." The Court's plurality decision held that a "legislative enactment that attempts to remove a right to a remedy under common law that would otherwise benefit the employee cannot be held to be a law that furthers the…comfort, health, safety and general welfare of all employees." *Id.* at 633.

The legislature thereafter passed R.C. §2745.01. The new statute set out the exclusive remedy for employer intentional tort, which was defined in section (D)(1) as "an act committed by an employer in which the employer deliberately and intentionally injures, causes an occupational disease of, or causes the death of an employee." The act went on to require proof of the claim by clear and convincing evidence. This heightened standard expressly applied to both the trial and the summary judgment phase of the case. In *Johnson v. BP Chems., Inc.* (1999), 85 Ohio St.3d 298, the Ohio Supreme Court again struck down the law, for the same reasons stated in *Brady.* The Court made clear in *Johnson* that *any* statute that limited an employer's liability for an intentional tort violated the Ohio Constitution. "In *Brady,* the court invalidated former R.C. 4121.80 in its entirety, and, in doing so, we thought that we had made it abundantly clear that *any statute created to provide employers with immunity from liability for their intentional tortious conduct cannot withstand constitutional scrutiny*… Notwithstanding, the General Assembly has enacted R.C. 2745.01, and, again, seeks to cloak employers with immunity. In this regard, we can only assume that the General Assembly has either failed to grasp the import of our holdings in *Brady* or that the General Assembly has simply elected to willfully disregard that decision." *Id.* at 304.

Undeterred by the Court's pronouncement, the legislature amended R.C. §2745.01. The latest version of the statute became effective on April 7, 2005. It makes its remedy the employee's sole recourse for an employer's intentional tort, and limits the employer's liability to those situations where "the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur…'[S]ubstantially certain' means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death." The court of appeals held that "it is reasonable to conclude that the General Assembly's latest attempt at codifying employer intentional tort is unconstitutional as well. The Ohio Supreme Court has made it abundantly clear that any statute that codifies the common-law employer intentional tort and attempts to limit employers' liability for such intentional torts is unconstitutional…" The court overruled the trial court's order that the statute is constitutional.

The court of appeals also overruled the trial court's decision to grant summary judgment to Defendant on the underlying case. Since the statute at issue is unconstitutional, the court applied the common law test found in *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115. The issue was whether Defendant required its employees to load the coils into the press as described by Plaintiff with knowledge that the method was dangerous and that by requiring employees to do it this way, it was substantially certain that someone would be injured. After reviewing the evidence from both sides, the court held that genuine issues of material fact exist for each element of the claim and summary judgment was not warranted.

[Editor's Note: This case has been accepted by the Ohio Supreme Court for review. See 119 Ohio St.3d 1407, 2008-Ohio-3880.]

Other Noteworthy Cases

***Ferryman, et al. v. Conduit Pipe Products Co., et al.,* 12th Dist. App. No. CA2007-02-007, 2007-Ohio-6417, 2007 WL 4225745.** Summary judgment for employer in intentional tort claim upheld because there was no evidence that employer knew that injury was substantially certain to occur.

***Minno, et al. v. Pro-Fab, et al.,* 11th Dist. App. No. 2007-T-0021, 2007-Ohio-6565, 2007 WL 4292625.** Fact issues preclude summary judgment on issue of whether sister company of employer is vicariously liable for damages in intentional tort claim.

***Reneau v. Con-Way Transportation Services, Inc., et al.,* 6th Dist. App. No. WD-07-003, 2007-Ohio-6368, 2007 WL 4216136.** Trial court's award of workers' compensation benefits for medication dependency/mood disorder stemming from addiction to pain medications following back injury at work was upheld.

***Saunders, et al. v. Holzer Hospital Foundation, et al.*, 4th Dist. App. No. 06CA3, 2008-Ohio-1032, 2008 WL 624996.** A physical therapist was not immune from suit for medical malpractice for causing further injury to a hospital employee receiving workers' compensation benefits.

***Talik v. Federal Marine Terminals, Inc.*, 117 Ohio St.3d 496, 2008-Ohio-937.** An intentional tort claim brought by a longshoreman injured during the course of his employment was preempted by the Longshore and Harbor Workers' Compensation Act (LHWCA).

Practice Spotlight

In this new feature of the CATA News, we will profile distinguished CATA members and their practice. Featured members will provide answers to questions posed by the Editors of CATA News. If you are interested in being profiled in the Practice Spotlight, please contact one of the Editors. In selecting one of our many great members for this profile, consideration will be given to those members who have volunteered to author an article for the CATA News, so there is a new incentive to perform this valuable service to the membership. Who doesn't love free advertising?

For more information, please contact CATA editors Andrew Thompson athompson@stege-law.com or Abby Botnick abotnick@shaperoroloff.com.

In this edition, we profile Brian Eisen, CATA's current Secretary.

Brian N. Eisen, Esq.
Greene & Eisen Co., L.P.A.
1300 E. Ninth St., Suite 1801
Cleveland, OH 44114
216-687-0900
www.malpracticeohio.com
beisen@malpracticeohio.com

Years Practicing: 16 years – since 1992

Area(s) of Practice: Medical Negligence/Wrongful Death

What do you think is the biggest challenge currently facing your clients and/or your representation of those clients?
One big challenge is overcoming the biases the general public has against victims of medical negligence and in favor of doctors and hospitals. Those biases were sown and cultivated over many years by big corporations, insurance companies, and hospitals, and it will take a great deal of time and money to overcome them in the public at large. Fortunately, with proper and rigorous jury selection techniques, those biases can be identified and biased jurors can be eliminated from the petit jury.

Another significant challenge relates to the reluctance (or flat out refusal) of physicians to stand up for patients who have been injured by medical negligence. Some have been bullied by hospitals, specialization boards, and peers into refusing to provide legitimate, honest testimony in malpractice cases. Others are simply taking out on their patients their dissatisfaction with decreasing insurance reimbursements and increasing malpractice insurance premiums. Either way, physicians who once considered patient advocacy part of patient care will no longer stand up and give truthful testimony that benefits their patients.

Do you think the climate we face that is pro-corporations and against individual rights will change?
It will but not quickly and not spontaneously.

What do you think needs to happen to change the climate?
We cannot change the climate everywhere or all at once. It will take a change in many "microclimates" before we see an appreciable climate change. This means that we must all work on an individual level on promoting change, even if this means something as small or "micro" as confronting an acquaintance at a dinner party who is spouting off about frivolous lawsuits or jackpot justice. Hit him with facts, not rhetoric. You may not get invited back (just ask my wife), but you will have given a small group of folks something to think about.

Why do you practice in the areas you do?
My practice is composed almost exclusively of medical negligence cases. I love the intellectual challenge of learning the medicine in each case, and I love taking on the role of underdog in the courtroom.

What one piece of advice would you give an attorney beginning his/her career as a trial attorney?
Watch as many trials as you can, pick up ideas here and there, but always be yourself in the courtroom.

What are your hobbies?
I am way too deeply involved in coaching and watching my kids' athletic events – hockey, baseball, soccer, etc.

In your opinion, what are the most rewarding types of cases (personally, not financially)?
Without question the most rewarding cases are those that involve significant, permanent injuries to children. It is in those cases that I believe I can make the greatest contribution, both to the injured child and to that child's family. I am proud to say that I keep in touch with the families of every brain injured child I have been fortunate enough to represent in my career.

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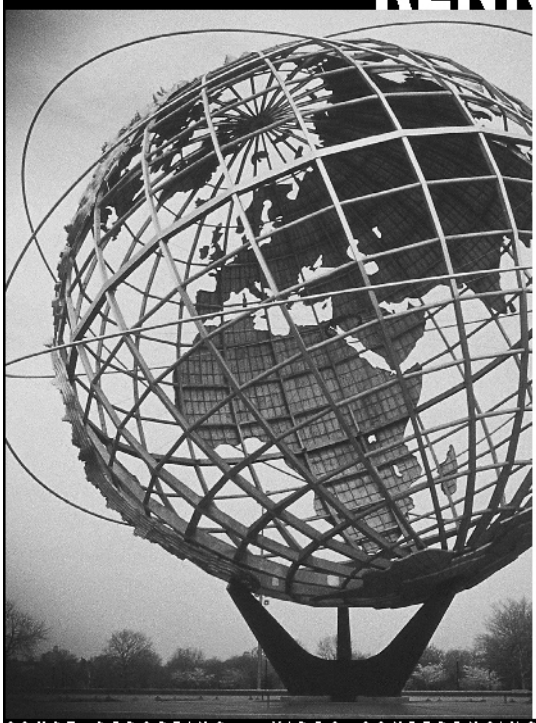

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Verdicts & Settlements

(For members and educational purposes only)

Calvin Robert Block, et al. v. State Farm Insurance Co., et al.

Type of Case: MVA
Verdict: $62,500.00
Plaintiff's Counsel: Mitch Weisman, Esq. of WEISMAN, KENNEDY & BERRIS CO., L.P.A.
Defendant's Counsel: Terry Kenneally, Esq.
Court: Cuyahoga County Court of Common Pleas; Case No. CV 06 596732; Judge Markus (visiting)
Date: December 4, 2007
Insurance Company: State Farm

Summary: Cal Block, a 60 year-old male, scrap metal collector, was injured when his car was struck by a vehicle driven by Brian Klein. The Defendant turned left at an intersection into Mr. Block's car. There was significant impact and severe damage to the vehicles. Mr. Block sustained soft tissue injuries and developed right hip pain eight months after the accident. His orthopedic physician, Dr. Barsoum, related the hip pain to the accident. The Defendant admitted liability. The issue in the case was the extent and nature of Mr. Block's injuries. The jury considered only the expenses unrelated to the hip, which totaled $17,000. Defendant offered $16,000 prior to trial. The Jury awarded $62,500.

Damages: $90,000.00 (including hip replacement surgery), jury only accepted $17,000.00

Plaintiff's Experts: Dr. Barsoum (orthopedic surgery)
Defendant's Experts: Dr. Jeffrey Morris

Nancy A. Chilcote v. Progressive Max Insurance Co., et al.

Type of Case: MVA
Verdict: $135,000.00
Plaintiff's Counsel: Mitch Weisman, Esq. of WEISMAN, KENNEDY & BERRIS CO., L.P.A.
Defendant's Counsel: Terry Kenneally, Esq.
Court: Cuyahoga County Court of Common Pleas; Case No. CV 06 583745; Judge John J. Russo
Date: January 25, 2007
Insurance Company: Progressive Max Insurance Company

Summary: On April 5, 2004, Plaintiff was injured when her disabled vehicle was struck from behind on Mayfield Road in Mayfield Heights. The impact was moderately severe, pushing Ms. Chilcote's vehicle partially up a hill. The nature and extent of Ms. Chilcote's injuries were at issue in the case. Although she tried to maintain an active lifestyle, including alpine skiing, she was limited due to her injuries. Plaintiff called a swim club employee to testify at trial that Plaintiff was no longer able to move her head from side to side while swimming. The final offer to settle the case before trial was $37,000. The jury jury awarded $135,000.

Damages: $34,402.22 in medical bills, no lost earnings

Plaintiff's Experts: Dr. Jack Anstandig
Defendant's Experts: None

Jane Doe, et al. v. John Doe Company

Type of Case: MVA -- Pedestrian
Settlement: $2,150,000.00
Plaintiff's Counsel: Susan E. Petersen, Esq. of PETERSON & IBOLD
Defendant's Counsel: Withheld
Court: Withheld
Date: January 2008
Insurance Company: Withheld

Summary: A 47 year old female suffered a traumatic brain injury after being struck by a medium duty vehicle while crossing the street as a pedestrian in a crosswalk in Ohio. The impact fractured the woman's skull and caused damage to both frontal lobes of her brain. The woman was hospitalized for two weeks as a result of the injury. The x-rays showed obvious large and complicated hemorrhagic contusions in the frontal lobes bilaterally at the top of the brain as well as a left occipital contusion which later developed. Plaintiff's neurology expert concluded that the brain injury resulted in permanent impairments of cognition, vertigo, ability to smell/taste, and behavior, and that she would require intermittent psychological counseling and medical visits to help control her symptoms for life. Plaintiff's neuropsychologist supported this testimony and concluded that Plaintiff continued to have difficulty with self-regulation, which manifested itself as a poor frustration tolerance and irritiability, emotional liability, suboptimal (and diminished compared to premorbid status) stress management and ability to handle multiple life roles, including that as a mother, homemaker and being involved in a full time profession. The driver of the vehicle did not have a valid Ohio driver's license at the time of the incident. Plaintiff pursued the case under both negligence and negligent hiring and retention causes of action.

Damages: The medical bills totaled $57,316.21. Past lost wages were $17,805.72. Economist John Burke concluded that a reduction in work from 40 hours to 20 hours per week would result in a loss of earnings in the future of between $703,537 to $1,151,448 and a loss of services valued at

$221,462. The spouse of the injured woman also claimed a significant financial loss, estimated in the range of $513,022 to $1,437,205. The children of the victim, ranging in age from 6 to 12 years old at the time of the incident, also claimed damages.

Plaintiff's Experts: James Bagley, M.D. (neurology); Kip Smith, Ph.D. (neuropsychology); James Valatis (dentistry); John Burke (economist)
Defendant's Experts: None

Jane Doe v. Dr. Roe
Type of Case: Medical Malpractice
Settlement: $5,850,000.00
Plaintiff's Counsel: Charles Kampinski, Esq. and Kent B. Schneider, Esq.
Defendant's Counsel: Withheld
Court: Withheld
Date: Not provided
Insurance Company: Withheld

Summary: On 08/30/05, Jane Doe presented to Dr. Roe with right leg discomfort. He diagnosed plantar fasciitis and referred her to a podiatrist. On 10/19/05, Jane again went to Dr. Roe's office, complaining of pain in her right leg and shortness of breath which had been present for roughly two to three days. Dr. Roe suspected either pulmonary embolism, pneumonia or fluid overload and sent her to the hospital where she was admitted at roughly 5:30 p.m. He arrived at the hospital at approximately 8:00 p.m. and ordered some tests including a "stat D-dimer." He did not initiate Heparin therapy, he did not order a stat chest CT and he did not order an ultrasound, all of which should have been done to comply with the standard of care. The stat D-dimer was not completed until 3:30 a.m., at which time it was extremely elevated. Dr. Roe ordered an IV, which had infiltrated and not been restarted, to be restarted. Upon arrival at her room, a nurse found Jane to be unresponsive and she was subsequently pronounced dead. No autopsy was initially done, but Jane was later exhumed and the cause of death was found to be a saddle pulmonary embolism.

Unbeknownst to Dr. Roe, after Jane's death, Jane's sister (an employee at Dr. Roe's office) obtained a copy of Jane's records from the receptionist. After suit was filed, a copy of Dr. Roe's records were provided during discovery. The records provided during litigation were different from the original records obtained by Jane's sister.

Although the Defendant's denied liability, their primary argument was the issue of proximate cause. They claimed that Heparin would not have dissolved the clot because it was an "old clot," and even if administered immediately it would not have prevented Jane's death.

Damages: Death of a 38 year-old female.

Plaintiff's Experts: Elbert P. Trulock III, M.D. (pulmonologist); Gary R. Weine, M.D. (internal medicine); Eric Vey, M.D. (forensic pathology); Vicki B. Turner, RN, CCRN
Defendant's Experts: Harry Bonnell, M.D. (forensic pathologist); Peter Kaboli, M.D. (internal medicine); Richard Matthay, M.D. (pulmonologist); Victor Tapson, M.D. (pulmonary vascular disease); Michele Kwiatkowski, RN

John Dostal, et al. v. Heather Warholic, et al.
Type of Case: MVA
Verdict: $147,000.00
Plaintiff's Counsel: Scott Kalish, Esq. of SCOTT KALISH CO., LLC
Defendant's Counsel: James Burns, Esq.
Court: Cuyahoga County Court of Common Pleas; Case No. 06 CV 595037; Judge Carolyn B. Friedland
Date: August 19, 2008
Insurance Company: Allstate Insurance Company

Summary: On July 8, 2004, John Dostal was driving on State Route 18 when Defendant Heather Warholic pulled in front of Mr. Dostal's vehicle and caused him to violently turn his wheel to the left. This turning motion caused lateral epicondylitis in Mr. Dostal's left elbow and required surgical repair. Plaintiff's counsel asked the jury to award $247,000 in closing argument, while the Defendant suggested that Plaintiffs should receive $20,000.

Damages: Lateral Epicondylitis; Medical expenses $9,100.00

Plaintiff's Experts: Dr. Bucchieri, M.D.
Defendant's Experts: None

Denise Giunto v. Metropolitan Life Auto & Home Insurance Co.
Type of Case: MVA – hit and run
Verdict: $379,000.00
Plaintiff's Counsel: Mitch Weisman, Esq. of WEISMAN, KENNEDY & BERRIS CO., L.P.A.
Defendant's Counsel: Tom Couglin, Esq.
Court: Cuyahoga County Court of Common Pleas; Case No. CV 06 600184; Judge James Porter (visiting)
Date: December 14, 2007

Insurance Company: Metropolitan Life Auto & Home Insurance Co.

Summary: Denise Giunto, a 41 year-old female with a ten year history of lower back pain, was involved in a hit and run accident on Interstate 271. The vehicle that struck her was traveling 55 miles per hour, and caused her to spin 180 degrees and strike a guardrail. Plaintiff called Dr. Riad Laham to testify that the accident aggravated a lower back problem. Plaintiff had uninsured motorist coverage through Defendant. The final offer to settle the case was $37,000. Plaintiff is pursuing a bad faith claim against Defendant.

Damages: Medical specials totaled $61,227.35. Plaintiff lost $4,146.80 in earnings.

Plaintiff's Experts: Dr. Riad Laham
Defendant's Experts: Dr. Robert Corn

Michael Halleck, Executor of the Estate of Michael Nagy v. Rolf Brunckhorst, M.D.
Type of Case: Medical Malpractice
Verdict: $2,500,000.00
Plaintiff's Counsel: Dennis Mulvihill, Esq.
Defendant's Counsel: David Lockemeyer, Esq. and Joel Peschke, Esq.
Court: Butler County Court of Common Pleas; Case No. CV 2006 10 3748; Judge Keith Spaeth
Date: April 15, 2008
Insurance Company: ProAssurance

Summary: During a Greenfield Filter placement procedure, the surgeon pierced the atrium and pericardium with either a guide wire or dilator, causing the patient to bleed to death on the operating table.

Damages: Wrongful death of a 64 year old college professor.

Plaintiff's Experts: Paul Collier, M.D. (general and vascular surgery)
Defendant's Experts: Robert Vogelzang, M.D. (interventional radiology); Thomas Klamer, M.D. (vascular surgery); Defendant Rolf Brunckhorst, M.D. (general surgery)

Frankie Hamilton v. Ohio Savings Bank
Type of Case: Consumer Class Action
Verdict: $14,000,000.00
Plaintiff's Counsel: Steven M. Weiss, Esq. of LAW OFFICES OF STEVEN M. WEISS; William Isaacson, Esq. and Jennifer Milici of BOIES, SCHILLER & FLEXNER, LLP; Mark Wintering, Esq. of ROBERT E. SWEENEY CO., LPA
Defendant's Counsel: Hugh Stanley, Esq. and Thomas Simmons, Esq. of TUCKER ELLIS & WEST, LLP; Roy Lachman, Esq., General Counsel for AmTrust Bank f/k/a Ohio Savings Bank
Court: Cuyahoga County Court of Common Pleas; Case No. 086378; Judge Brain J. Corrigan
Date: November 15, 2007 (Court entered Order approving class settlement)
Insurance Company: None

Summary: In the mortgage industry, there are two widely recognized methods of calculating interest, neither of which can distort or increase the borrower's interest rate. The first method is called the 365/365 method. It uses the actual number of days in each month, multiplied by the borrower's interest rate and the borrower's principal balance, to arrive at the appropriate interest charge for any given month. Since the fraction "365/365" equals one, and one multiplied by the borrower's interest rate equals the interest rate, the 365/365 method will not distort the borrower's interest rate.

The second method is called the 360/360 method. It became popular because of its ease in application, particularly when interest calculations were done by hand. The 360/360 method assumes there are 30 days in each month, and 360 days in each year. However, because the fraction 360/360 equals one, and one multiplied by the borrower's interest rate equals the interest rate, the 360/360 method will not distort the borrower's interest rate.

The Defendant bank used a hybrid of the 365/365 and 360/360 methods. The hybrid is known as the "365/360" method. The fraction 365/360 equals 1.014, not one. Thus, when the Defendant used this method on, for example, a 10% loan, it was actually charging the borrower interest at the rate of 10.14%. However, the mortgage note inaccurately described the loan as a 10% loan as opposed to a 10.14% loan. The plaintiffs alleged various theories of relief including breach of contract, unjust enrichment, fraud, estoppel, and violations of the Truth in Lending Act.

Damages: Economic loss due to overcharges on residential mortgages.

Plaintiff's Experts: Vince Love, CPA, of New York (audited methodology of each step in the process which led to the calculation of class-wide damages); Paul Albin of Cincinnati (testified about usual/customary lending practices in consumer mortages); Jack Evans of Carleton Inc. from Holliston, MA (calculated damages on each class loan)
Defendant's Experts: Shauna C. Woody-Coussens, MBA (damages expert); Kim A. Nunley, CPA (usage of the 365/360 method)

Danny E. Jones, et al. v. Allstate Insurance Company, et al.
Type of Case: MVA
Verdict: $80,000.00
Plaintiff's Counsel: Mitch Weisman, Esq. of WEISMAN, KENNEDY & BERRIS CO., L.P.A.
Defendant's Counsel: Ian Luchin, Esq.
Court: Cuyahoga County Court of Common Pleas; Case No. CV 07 624711; Judge Bridget McCafferty
Date: January 4, 2008
Insurance Company: Allstate

Summary: Plaintiff, a retired laborer, suffered injuries to his lower back when his car was struck from behind on an Interstate 71 exit ramp near West 65th Street. Although damage to his car was minor, Mr. Jones was diagnosed with an L4-L5 disc herniation. Prior to the accident, Mr. Jones had driven his church's bus every Sunday for 18 years. The last offer before trial was $17,500. Plaintiff is pursuing a bad faith claim.

Damages: Property damage $415, medical specials $11,000 (no surgery)

Plaintiff's Experts: Dr. Denise Jennings (general practitioner); Dr. Daniel Leizman (orthopedic)
Defendant's Experts: Kim Stearns, M.D.

Tara Ketvertes v. MetLife Insurance, et al.
Type of Case: MVA
Verdict: $110,000.00
Plaintiff's Counsel: Mitch Weisman, Esq. of WEISMAN, KENNEDY & BERRIS CO., L.P.A.
Defendant's Counsel: Darrel A. Bilancini, Esq.
Court: Cuyahoga County Court of Common Pleas; Case No. CV 06 597616; Judge James Porter
Date: February 5, 2008
Insurance Company: Allstate

Summary: On November 18, 2005, Tara Ketvertes, a 28 year-old fifth grade teacher was injured when her vehicle was struck from behind by a drunk driver while she was stopped at a red light. The impact was significant, causing severe damage to the vehicle. Plaintiff suffered soft tissue injuries, affecting her neck, low back and right shoulder. She did not undergo surgery. The driver of the other vehicle, Dwayne Hampton, was drunk and driving his girlfriend's car. Defendant's insurance company offered only $8,600, $300 less than the medical bill total.

Damages: Medical bills totaled $8,300. There was no claim for lost wages.

Plaintiff's Experts: Juan Hernandez of Medical Care Group
Defendant's Experts: None

Karen Lostracco, et al. v. The Cleveland Clinic
Type of Case: Wrongful Death, Medical Malpractice
Verdict: $1,350,000.00
Plaintiff's Counsel: Henry W. Chamberlain, Esq., and Joseph P. Muenkel, Esq. of ROSENTHAL, SIEGEL, MUENKEL & MEYERS, LLP (Buffalo, NY)
Defendant's Counsel: Michael J. Hudak, Esq. and Douglas G. Leak, Esq., both of ROETZEL & ANDRESS
Court: Cuyahoga County Court of Common Pleas; Case No. 546903; Judge Timothy McGinty
Date: November 27, 2007
Insurance Company: N/A

Summary: Patricia Penque was diagnosed with cecal adenocarcinoma of the colon with metastasis to the liver by a pathologist in Niagara Falls, New York. She sought her definitive diagnosis and treatment at the Cleveland Clinic Foundation. Upon arrival at the Clinic and counsel with surgeons there, Ms. Penque underwent a radical curative surgery for the cecal adenocarcinoma which removed her cecum, the right side of her colon, small bowel, pancreas, and a portion of her liver. Upon pathology review of the surgical specimens, it was determined that Ms. Penque had lymphoma, which is treatable by chemotherapy alone. Defendant had been sent the pathology slides from Niagara Falls 18 days prior to the surgery, but neglected to review the slides at any time before the operation. When the slides were reviewed by Defendant's pathologist after the operation, he immediately disagreed with the diagnosis of adenocarcinoma and diagnosed lymphoma from the same slides. As a direct result of the massive abdominal surgery, over the course of 1 1/2 years, Ms. Penque became malnourished, dehydrated, contracted a staff infection and died because her immune system had been so suppressed she couldn't fight of the infection.

Damages: Death of a 51 year-old female. She was survived by a sister and brother.

Plaintiff's Experts: Michael Leitman of New York (general surgeon); David Rizzieri, M.D. of Duke University (medical oncologist); Lisa Teot, M.D., Children's Hospital in Pittsburgh (pathologist); John Burke (economist)
Defendant's Experts: Arnold Baskies of New Jersey (general surgeon); Thomas Butler, M.D. of Virginia (oncologist)

Jane Mack v. Rosalind Hughes
Type of Case: MVA
Settlement: $50,000.00 (Policy Limits)
Plaintiff's Counsel: Scott Kalish, Esq. of SCOTT KALISH CO., LLC
Defendant's Counsel: Withheld
Court: Matter settled without litigation.
Date: May 29, 2007
Insurance Company: Progressive Insurance Company, Omni Insurance Group

Summary: On about May 7, 2006, Plaintiff Jane Mack was riding her motorcycle when she attempted to turn left and a motor vehicle operated by Defendant Rosalind Hughes caused a collision. Plaintiff was intoxicated at the time of the crash.

Damages: Medical bills totaled $13,875.76. Plaintiff suffered a fractured pelvis.

Plaintiff's Experts: Dr. Brownlee and Dr. Ahmed of Meridia Medical Group
Defendant's Experts: None

William E. McKahan v. CSX Transportation, Inc.
Type of Case: Federal Employers' Liability Act ("FELA")
Verdict: $459,487.64, reduced by 5% contributory negligence
Plaintiff's Counsel: Andrew J. Thompson, Esq. of STEGE & MICHELSON CO., LPA
Defendant's Counsel: Daniel J. Hampton, Esq. and Nicole E. Bazzy, Esq. of BURNS, WHITE & HICKTON
Court: Franklin County Court of Common Pleas; Case No. 05 CVC 10-11612; Magistrate Judge Timothy McCarthy
Date: January 2008
Insurance Company: None

Summary: Plaintiff was employed as a signalman for CSX Transportation, Inc. from June 1999 until October 2004. In about 2003, he first noticed numbness and tingling in both of his hands. He was diagnosed with bilateral carpal tunnel syndrome and cubital tunnel syndrome. He went through release surgeries on both of his wrists. After a brief attempt at returning to his job, he was forced to retire prematurely because of his injuries.

Plaintiff filed suit under the FELA, alleging that the railroad failed to implement an appropriate ergonomic program in its workplace to protect him from exposure to the risks of developing cumulative trauma disorders. The railroad denied liability and argued that Plaintiff's injuries resulted from a history of alcohol abuse. The railroad also presented testimony from two ergonomists who stated that Plaintiff's job did not involve the type of work activities that have been recognized as risk factors for the development of carpal tunnel syndrome.

The jury returned a verdict in favor of Plaintiff for $459,487.64, including $109,487.64 in lost wages and $350,000 in pain and suffering. The verdict was reduced by 5% contributory negligence attributed to Plaintiff. The jury's decision was influenced by the fact that CSX did not follow the suggestions of the American Association of Railroads published in 1995 for reducing the risks associated with carpal tunnel syndrome, even though CSX's corporate ergonomist worked for the AAR at the time these guidelines were published. In addition, the jury found that the work task analysis performed by Defendant's expert witnesses was not an accurate depiction of the day-to-day work actually performed by Plaintiff.

Damages: Bilateral carpal tunnel and cubital tunnel syndrome with surgical repair. $109,487.64 in past and future lost wages. Medical bills were not at issue in the case.

Plaintiff's Experts: Gerald M. Rosenberg, M.D. (orthopedic surgeon); Michael D. Shinnick, Ph.D. (ergonomist)
Defendant's Experts: David F. Lang, M.D. (neurologist); Dennis Mitchell, Ph.D. (ergonomist); Todd Brown (consulting ergonomist); Donna Kulick, Ph.D. (vocational rehabilitation)

Brian Polasko v. Allstate Insurance Company, et al.
Type of Case: MVA
Settlement: $97,500.00
Plaintiff's Counsel: Scott Kalish, Esq. of SCOTT KALISH CO., LLC
Defendant's Counsel: Withheld
Court: Cuyahoga County Court of Common Pleas; Case No. CV 07 622778; Judge Kenneth Callahan
Date: April 10, 2008
Insurance Company: Allstate Insurance Company

Summary: On May 1, 2005, Brain Polasko's automobile was disabled on the side of I-90 when he was hit from behind by an automobile driven by Defendant Steven lequay, who was uninsured at the time of the crash. Mr. Polasko suffered a herniated disk in his neck that required surgery.

Damages: Medical expenses were $19,648.01.

Plaintiff's Experts: Dr. Morris, M.D.
Defendant's Experts: none

Tom Sharratt v. MetLife Insurance, et al.
Type of Case: MVA
Verdict: $100,000.00
Plaintiff's Counsel: Mitch Weisman, Esq. of WEISMAN, KENNEDY & BERRIS CO., L.P.A.
Defendant's Counsel: David Utley, Esq.
Court: Summit County Court of Common Pleas; Case No. 2007-03-2222; Judge Shapiro
Date: February 2008
Insurance Company: Bristol West

Summary: On December 21, 2004, Tom Sharratt, an 86 year-old practicing lawyer, was injured when Defendant Nellie Hunt failed to yield and turned left in front of Plaintiff. The collision caused a moderate impact. Both vehicles were totaled. Plaintiff's treating physician testified that Plaintiff suffered an aggravation of a pre-existing condition. The Defendant's expert argued that the injury was a low back strain that resolved within three months. The final offer before trial was $25,000.

Damages: Medical expenses were $26,000, but that amount was adjusted to $13,000 pursuant to Robinson v. Bates.

Plaintiff's Experts: Susan Arceneaux, M.D. (pain management); Dr. Kushnir (orthopedic surgery)
Defendant's Experts: Susan Stephen, M.D.

Natalya Shvets v. State Farm Insurance Company
Type of Case: MVA
Settlement: $100,000.00 (policy limits)
Plaintiff's Counsel: Scott Kalish, Esq. of SCOTT KALISH CO., LLC
Defendant's Counsel: None
Court: Matter settled without litigation
Date: March 4, 2008
Insurance Company: State Farm Insurance Company

Summary: On May 25, 2007, Natalya Shvets was driving her automobile when she was "t-boned" by Oscar Williams. The impact propelled Ms. Shvets into another vehicle. Ms. Shvets suffered a fractured pelvis and laceration on her forehead.

Damages: Fractured pelvis, head laceration; medical expenses $13,374.24; lost wages $12,745.51

Plaintiff's Experts: Dr. Sontich, M.D., MetroHealth Medical Center
Defendant's Experts: none

Rebecca Utovich v. Thomas Olchon, et al.
Type of Case: MVA
Settlement: $59,400.00
Plaintiff's Counsel: Scott Kalish, Esq. of SCOTT KALISH CO., LLC
Defendant's Counsel: Withheld
Court: Cuyahoga County Court of Common Pleas; Case No. 07 CV 615615; Judge John D. Sutula
Date: December 17, 2007
Insurance Company: Allstate Insurance Company

Summary: On about February 20, 2005, Rebecca Utovich was a passenger in a car being driven by Thomas Olchon. Mr. Olchon failed to maintain control of his vehicle on an exit ramp of I-90 and crashed. Ms. Utovich sustained soft tissue injuries to her neck and back, and a concussion. Mr. Olchon was intoxicated at the time of the accident.

Damages: Medical expenses $16,054.97

Plaintiff's Experts: Jeffrey Morris, M.D.
Defendant's Experts: none

Versible Williams, Administrator of the Estate of Robert E. Williams, Jr., Deceased v. General Motors Corporation, et al.
Type of Case: Wrongful Death/Product Liability
Settlement: Confidential amount
Plaintiff's Counsel: Susan E. Peterson, Esq. and Todd E. Peterson, Esq. of PETERSON & IBOLD
Defendant's Counsel: Withheld
Court: U.S. District Court for the Northern District of Ohio; Case No. 1:03CV2060; Judge Ann Aldrich
Date: November 5, 2007
Insurance Company: N/A

Summary: This case was an automotive products liability action alleging defects relative to the design of the fuel system on a medium duty truck designed and manufactured by General Motors Corporation. The Plaintiff's decedent, Robert E. Williams, Jr., was involved in a one vehicle accident on I-90 East just west of Cleveland. Mr. Williams' traumatic injuries were minor, but the vehicle's 50 gallon fuel tank was compromised in the collision and Mr. Williams was badly burned in the post-collision fuel-fed fire. It was alleged in the case that the fuel tank was defective because it was mounted in a hostile environment, 1) outside the frame rails without the protection of a cage or shield, 2) in close proximity to puncture producing components (three protruding bolts), and 3) in close proximity to an electrical source of energy (battery).

Damages: Mr. Williams was a 47 year old male, with no children, who was burned over 55% of his body from the fire. For 3 1/2 months, Mr. Williams was treated in the burn unit at MetroHealth Medical Center. After 14 surgeries, including bilateral leg amputations, Mr. Williams succumbed to his injuries and died on December 21, 2001. Medical bills totaled $1,517,288.10.

Plaintiff's Experts: Patrick Kennedy of John A. Kennedy & Associates Inc. (fire cause & origin); Gerald Rosenbluth of Automotive Consulting Services, Inc. (design engineering); Alexander Zhukov of A. Zhukov, Ph.D. & Associates (accident reconstruction); Charles Yowler, M.D. of MetroHealth Medical Center (burn/causation)
Defendant's Experts: Jeffrey Santrock, General Motors (design); Norm Alvarez (fire cause and origin); Russ Noble, P.E. (design); Cleve Bare, P.E. of Exponent, Inc. (accident reconstruction)

LISTING OF EXPERTS - CATA DEPOSITION BANK
(by specialty)

Anesthesiology
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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
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Kenneth E. Smithson, MD
Jeffrey S. Vender, MD
Jean-Pierre Jarned, MD

Cardiology
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Mandeep Bhargava, MD/Card. Elec. Physio.
Mark T. Botham, MD
Robert E. Botti, MD
Delos Cosgrove, MD
Reginald P. Dickerson, MD
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Barry George, MD
Wayne Gross, MD
Patricia Gum, MD /Interventional Cardio.
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Alfred Kitchen, MD
Allan Klein, MD
Alan Kravitz, MD
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Raymond Magorien, MD
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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
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John Distefano, DDS
Michael Hauser, DDS
Don Shumaker, DDS
Pankaj Rai Goyal, MD /Oral Surgery
John F. Zak, MD /Oral Maxillofacial Surg.

ER Medicine/Physicians
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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
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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
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Pradyumna Padival, MD
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Douglas L. Burchett, MD

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Stanley P. Ballou, MD /Unknown
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Sandy Brightwell, Registered Technologist
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Judith Wright Lott, RN /Neonatal N.P.
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Darlene McCullough, RN
Rosiland McKeon, RN
Kathleen McKillip, RN
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Cassandra Minocchi, RN
Robbin Moore, RN
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Karen Nye, CRNA
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All Saylor, RN
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Joanne Zelton, RN, Legal Nurse Consultant
Catherine Zilka, RN

Administration/Professional

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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/Docket/Case No.: _____

Date of Settlement/Verdict: _____

Insurance Company: _____

Damages: _____

Brief Summary of the Case: _____

_____

_____

_____

_____

Experts for Plaintiff(s): _____

_____

_____

Experts for Defendant(s): _____

_____

_____

Contributor's Name: 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
"Access to Excellence"

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   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:**
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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:______________________________

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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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