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## D&Y On The Move



**W**e will be moving our Cleveland Offices on October 1st to the **Fifth Third Building** (formerly Bank One Center) at 600 Superior Avenue, 12th Floor, Cleveland, Ohio 44114. This building, constructed as the Bank One Center, features a distinctive

green hipped roof and twin-spired antennae. The tower was renamed in 2003 when Fifth Third Bank of Cincinnati relocated to the structure. The site was formerly the home to the Hollenden Hotel.

Our clients will continue to receive the highest level of service that they have come to expect. This move will ensure that Davis & Young continues to serve their clients needs of today and tomorrow.



## **SAVETHEDATE** Upcoming D&Y Events

**FRIDAY, AUGUST 4, 2006**  
**D&Y 2nd Annual Women's Golf Outing**

Mark your calendar for Davis & Young's 2nd Annual Women's Golf Outing (sorry guys!). The Outing will take place on Friday, August 4th at Pine Ridge Country Club.  
*More details to follow via mail.*

## “Rent-A-Judge” The Process & Debate

by  
*Beverly A. Adams*



Recently, Davis & Young’s Rick McDonald proceeded to jury trial in a complex medical malpractice case by means of a statute that allows civil actions or proceedings to be determined and resolved by a “Rent-a-Judge.” Although the 20-year-old statute was rarely used in the past, parties in civil actions are now turning to the old law as an avenue to resolve civil actions. Ohio Revised Code §2701.10 allows parties, by unanimous agreement, to refer or submit their action, in whole or in part, to a retired judge of their choosing, provided the judge meets certain requirements. The retired judge is given the power and duty to enter a judgment in the action in the same manner as if he were an active judge, conduct pre-trials, set schedules, etc. Further, the judgment has the same force and effect as if entered by an active judge and to which an appeal may be taken.

The procedure for referring a matter to a retired judge is ostensibly easy, assuming that the parties have come to an agreement as to which retired judge will preside over the matter. The parties to the action and the retired judge must enter into a written agreement that designates, among other things, the judge to whom the referral is made, the issues submitted to the judge, and the compensation to be paid to the judge. It must also indicate that the parties “will assume the responsibility for providing facilities, equipment, and personnel needed by the retired judge” and “will pay all costs arising out of the provision of the facilities, equipment, and personnel.”

The agreement is then filed with the clerk of court, and upon filing, the judge before whom the action is pending must order the referral by journal entry in accordance with the agreement. After the order of referral is made, the retired judge is granted all the powers, duties, and authority of an active judge of the court in which the action is pending.

An issue has arisen surrounding the statute as to whether it gives the authority of the retired judge to preside over a jury trial. In State of Ohio, ex rel **Metrohealth Medical Center v. John Sutula**, Judge (Nov. 23, 2005-Ohio-6243), the Eighth District Court of Appeals found, in essence, that Judge Sutula’s order refusing to allow an underlying medical malpractice action to proceed to a jury trial before a retired

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## Q&A with Rick McDonald



**Q.** You recently used a “Rent-A-Judge” in a medical malpractice case. Did you think the process was useful, and what was the best aspect of utilizing the judge?

**A.** This was a positive experience for both myself and my client. The trial lasted several days and had many experts. It was very efficient, especially since all of the lawyers knew what dates they would need their experts to testify and could make them available, given the definitive scheduling of the visiting judge.

**Q.** Was your client pleased with the use of a visiting judge?

**A.** The client was very pleased, because, in reality, although the fee of the judge had to be paid (split three ways), in the long-run it was more economical for the client. There were full trial days with no interruptions, and what took eight days to try, probably would have taken at least two weeks, given all of the burdens that all of the Common Pleas judges have in terms of criminal pleas, sentencings, emergency matters, pretrials, etc.

**Q.** What type of cases do you feel are most amenable to you using a “Rent-A-Judge?”

**A.** Obviously, the larger, more complex cases involving a significant amount of expert testimony are the cases that are most amenable to using a “Rent-A-Judge.” Clearly, most plaintiffs’ lawyers in smaller cases would not want to spend the money involved in the reimbursement of the judge.

**Q.** Were there any negative aspects for the use of the “Rent-A-Judge?”

**A.** No, not really.

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## D&Y Lawyers In The News

In February, **Greg Collins** and **Jim Salamone** addressed the Summit County Claims Association on construction coverage, ethical rule changes affecting insurance defense, medical expense recovery involving contractual reduction, and the Landlord Tenant Act vs. the open and obvious doctrine.

In March 2006 **Rich Garner** co-hosted 2-days of seminars for the National Business Institute titled "The Definitive Guide to Settling UM/UIM Claims in Ohio" in Cuyahoga Falls, Ohio and Independence, Ohio.

**Hank Hentemann** was a speaker at the Insurance Law Seminar in Columbus, Ohio hosted by the Ohio State Bar Association on April 5, 2006 and he spoke on the topic "Uninsured/Underinsured Motorist Coverage".

In April, **Rich Garner** was selected as a delegate to the Eighth Judicial Conference (an organization of judges and lawyers dedicated to improving the legal system in Northeastern Ohio).

**Rich Garner** was admitted on April 21, 2006 as a member of the Bar of the Supreme Court of the United States. ■

### D&Y TRIALS

**Greg Collins** won a victory in the U.S. 6th Circuit Court of Appeals defending claims of bad faith and UM coverage in a holding finding the "who is an insured" provisions of the policy to be unambiguous.

**Greg Collins** also had judgment affirmed in the 9th District Court of Appeals in favor of a construction contractor sued for the wrongful death of a 7-year old girl in a car accident within a construction zone.

**Shawn Cormier** successfully defended a property owner/developer in a negligent security case in Cuyahoga County. Plaintiff moved into a condominium complex that was still under construction in November 2003. The Defendant property owner/developer had a master key to all condos, as did the general contractor. In April 2004, the Plaintiff returned home to find that her home was burglarized and over \$70,000.00 worth of jewelry was missing, as well as other home electronic items including her DVD player and camera. There was no evidence of forced entry and Plaintiff felt it was an "inside job." Plaintiff claimed that the Defendant property owner/developer was negligent with the master key. The demand prior to and at trial was \$75,000.00 and there was no offer. The jury returned a unanimous defense verdict.

**Pat Roche, Jr.** obtained a favorable result in a personal injury/motor vehicle accident trial. Pat represented the driver of a 30-foot flatbed truck that was carrying one ton of I-beam steel. The driver struck the rear end of a vehicle in which Plaintiff was a passenger. Plaintiff was

a 64 year-old woman with a significant history of degenerative arthritis in the right knee. Following this accident, she had a total right knee replacement, and alleged that the surgery was necessitated by the motor vehicle accident. The main

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*The demand prior to and at trial was \$75,000.00 and there was no offer. The jury returned a unanimous defense verdict.*

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issue in the case was the credibility of the Plaintiff's surgeon. He wrote a report that indicated that Plaintiff was going to need the surgery even if she had never been involved in the MVA. However, at trial, he changed his opinion and testified that the surgery and all of the medical treatment was related to the MVA. Plaintiff's total medical bills were approximately \$80,000.00. Plaintiff asked the jury for approximately \$350,000.00. The verdict was \$11,000.00.

**Rich Garner** successfully defended a group of housing contractors from intentional tort and malicious prosecution claims brought by another contractor who alleged he had been wrongly accused of theft. In complex litigation involving multiple filings, dismissals and refilings in state and federal court, Rich convinced the Eighth Appellate District to affirm the trial court's ruling dismissing the Plaintiff's claims after the Plaintiff failed to follow federal law when trying to refile his claims in state court.

**Rich Garner** and **Jan Roller** were successful in two high-profile wrongful birth cases before the Supreme Court of Ohio. The lead case was **Schirmer v. Mt. Auburn OBGYN, Inc.** Their arguments were critical in convincing the high court to limit damages in wrongful birth cases to costs associated with pregnancy and the birth of the child eliminating the possibility of high exposure verdicts resulting from undiagnosed genetic birth defects. Moreover, their arguments were used by the General Assembly to pass legislation outlawing wrongful birth claims in all but a few extreme cases. The follow-up case was **Coleman v. Dogra** in which simply applied Schirmer to a case pending against the hospital.

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**Rich Garner** successfully defended one UM/UIM insurer against the overreaching claims of another UM/UIM insurer. For some time, Defendant has precluded UM/UIM coverage under its policies for claimants simply because they were occupying an auto insured by Defendant. Rather, such coverage was only provided if the claimant did not have other UM/UIM coverage available to them. Although Plaintiff prevailed in the trial court, Rich convinced the

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*"Rent-A-Judge" • continued from front page*

judge pursuant to R.C. 2701.10 was proper. The appellate court cited numerous portions of R.C. 2701.10 and Gov. Jud. R. VI stating that the plain and ordinary reading of both laws are "replete with reference to the fact that the voluntary retired judge... shall sit as the trier of fact..." Id at ¶8. Specifically, R.C. §2701.10 (D) provides that "[t]he retired judge shall try all of the issues, prepare relevant findings of fact and conclusions of law..." The preparation of findings of fact and conclusions of law are done only when a trial or proceeding is before the bench—such findings and conclusions are not prepared by the judge when the matter has been submitted to a jury. But, the ability to obtain a jury trial is the main attraction in referring a matter to a retired judge.

Beyond the statutory language issues of R.C. 2701.10, et seq., there are advantages and disadvantages that have been identified with "Rent-a-Judge" laws. Foremost, advocates of the law cite the advantage of the curtailed time investment. Generally, a case on a general court-assigned docket can be delayed by the "all-too-familiar" backlogged court docket. It is sometimes impossible to get an action to trial where criminal trials take precedent or where the assigned judge has numerous civil cases set on the same day. Parties may prepare and appear for trial several times before the matter is actually heard. Numerous hours are spent preparing for trial and waiting in court for a trial that may not even proceed,

which in turn equates into higher legal fees. By hiring a private judge, parties get a trial date and have peace of mind that the trial is certain to proceed to trial on the scheduled date. In an overloaded justice system, a hired judge can actually increase the accessibility to the justice system.

Critics of "Rent-a-Judges," however, assert constitutional issues in opposition to such laws, including due process and Equal Protection concerns. For example, critics identify the compensation to the retired judge as a danger of discrimination since only parties with available funds can choose their judge, while non-affluent parties must utilize the judge to whom they are assigned.

Recently, the Cuyahoga County Common Pleas Court Judge's Policy Committee endorsed the use of private judges with several changes: (1) a sixty-day notice of trial must be given so a courtroom can be reserved and additional jurors called for duty; (2) the trials may only start on Wednesday; and (3) the only county employees allowed to be utilized will be hired county court reporters. At the same time, however, an active judge on the Cuyahoga County Common Pleas Court filed a writ of prohibition against the Administrating Judge to block public funds, employees or courtrooms from use by private judges. As it stands, therefore, the ability to "Rent-A-Judge" for a jury trial in Cuyahoga County remains in controversy. ■

*D&Y Trials • continued from page 2*

Eighth Appellate District to reverse the trial court decision and enter judgment for Defendant.

**Bill Vance** tried a case where Plaintiff and her boyfriend sued Defendant and its Manager on claims of assault in the Cuyahoga Court of Common Pleas. Plaintiffs and their witnesses testified that either just before last call or during last call Defendant's Manager for no apparent reason insulted Plaintiff and grabbed her violently around the throat pushing her up against a wall. Seeing this, Plaintiff's boyfriend came to her aid and was pummeled by Defendant's Manager and a couple of other bouncers. Plaintiffs were ejected from Defendant's place of business. Despite their having been assaulted and injured, and a hospital and police station only a few miles away, Plaintiffs chose to go home. The following day, Plaintiffs sought emergency room treatment and then personally appeared at the police station to report the assault. Defendant's Manager later pled no contest to disorderly conduct. This conviction was not admitted into evidence.

Defendant's Manager testified that despite repeated requests, Plaintiff failed to give up her beer past last call. He grabbed her wrist by one hand and extricated the beer with the other. He denied choking her.

Plaintiff testified she was caused to suffer TMJ due to the assault. She had extensive treatment with a TMJ specialist

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in Wheeling, West Virginia. She acknowledged a remote history of TMJ when she was a child. However, more recent records from a local dentist suggested she still continued with these problems. Plaintiff's boyfriend had only emergency room treat-

ment. Plaintiff's dental bills were approximately \$8,000.

The jury returned defense verdicts for Plaintiffs finding that a technical assault occurred and awarded Plaintiff \$500 in compensatory damages and \$1,000 in punitive damages against Defendant's Manager. The settlement demand was \$20,000. The settlement offer was \$3,000.

**Bill Vance** also tried an admitted liability intersection collision case in Geauga County. Both cars were totaled. Plaintiff claimed an inoperable herniated lumbar disc. Plaintiff's expert testified that he found such a herniation on MRI and that this condition was caused by the accident. Plaintiff had a history of degenerative disc disease in the lumbar spine and his primary care physician noted chronic back pain in an office note about four years before the car accident.

Plaintiff's medical bills were just under \$10,000. His lost wage claim was around \$2,000. Plaintiff's last settlement demand was \$30,000. The last settlement offer was \$17,000. The jury awarded Plaintiff \$17,776 and his wife \$2,000 on her consortium claim. ■

# How Does an Insurer Protect Itself?



by  
Dan Burley

If an insurer is not careful during settlement negotiations and/or upon judgment, it may put itself in a position of having to pay additional medical liens above and beyond that which were expected. This occasion arises when an insured enters into an agreement with a health care provider to assign the provider the insured's rights to proceeds, to the extent of the provider's treatment fees, resulting from a settlement or judgment from the insured's injury claim. The insurer must not ignore a proceeds assignment from the provider. If on notice of such an assignment, the insurer would be unwise to take the position that the assignment is not binding on its company. As explained further below, if the insurer takes a position that such an assignment is not binding, it can expect serious litigation problems, including being liable for attorney fees.

The insured's policy cannot prohibit an insured from assigning medical payments coverage amounts for a specific occurrence or claim under the policy. A specific claim made to an insurer by an insured under an insurance policy, and the insured's right to payment for that claim pursuant to the insured's policy, is called a "chose in action." See **Leber v. Buckeye Union Insurance Co.** (1997), 125 Ohio App.3d 321, holding that it is permissible to assign a chose in action. An insured's assignment to a provider is valid despite any policy term restricting the insured's ability to assign rights in the policy; after a loss has occurred and policy rights have accrued for a specific claim, the assignment is not treated as a transfer of policy rights, but rather as a chose in action, which may not be limited by the insurer. **Fiorentino v. Lightning Rod Mutual Insurance Company** (1996), 114 Ohio App.3d 188.

In **Akron Square Chiropractic v. Creps & Allstate Insurance Co.** (2004), 2004 WL 840131, a motorist received

treatment from a health care provider for injuries the motorist received in an accident with an insured. The insurer received notice of an assignment of proceeds to the provider, but refused to honor same. The insurer was held to be directly liable for disregarding a proceeds assignment from the provider.

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The courts also note that their decision to bind insurers to these assignments of proceeds is sound public policy. The courts hold that allowing injured persons to assign potential future insurance proceeds promotes timely medical treatments for injured persons otherwise unable to pay, and it avoids needless litigation. **Richard Carter, D.C. v. Nationwide Ins. Co.** (2003) Delaware Cty. M.C. No. 03 CVI 663.

Further in *Carter*, supra, the court held that the proceeds assignment created a legally enforceable obligation on the part of the insurer to disburse settlement proceeds in accordance with the assignment. The Court stated:

"By any interpretation of [the language of the assignment], the funds disbursed by Defendant [insurer] to [the claimant] belonged to Plaintiff, not to [claimant]. Further, Defendant was clearly advised by Dr. Carter's counsel of his claim to the funds. Inexplicably, Defendant, in possession of funds belonging to Plaintiff, elected to disburse the funds to a third party who had no claim on the funds." Id.

Nationwide was held liable to the

provider for the portion of the settlement proceeds that covered the treatment fees together with court costs and interest. Id.

The argument that Ohio Revised Code Section 3929.06 shields a third party insurer from complying with a medical assignment has also been rejected. R.C. 3929.06 proscribes the manner in which liability insurance is applied to satisfaction of final judgment, supplemental complaints stemming from same, and coverage defenses to same. The Ninth District Court of Appeals has stated emphatically:

"This Court has never construed R.C. 3929.06 as impacting an injured party's right to assign potential or prospective proceeds from claims not yet filed. The statute makes no mention of such a prohibition and we will not stray from our precedent and read such a prohibition into the statute." *Creps*, supra.

*"The statute makes no mention of such a prohibition and we will not stray from our precedent and read such a prohibition into the statute."*

How does an insurer protect itself? The insurer needs to make itself aware of any notices of such an assignment within the file before settlement and/or judgment. If such a proceeds assignment exists, simply pay the proceeds directly to the provider. Alternatively, the insurer may simply name all treating providers on the settlement and/or judgment check. However, Plaintiff's counsel are often unwilling to agree to this during any negotiations, and such a tactic may be a potential deal-breaker. The ways an insurer can protect itself are rather simple, but if ignored, may create unnecessary and costly litigation. ■

# Damages for Conscious Pain & Suffering



by  
Enzo Cantalamessa

**D**amages for conscious pain and suffering are, quite simply, those which are sought in an injury action brought either by the injured claimant, or by a decedent's estate on behalf of the deceased claimant (the latter being categorized as a survivorship action falling under the purview of O.R.C. 2305.21). A claim for damages for conscious pain and suffering, which is brought when the claimant died as a result of his or her injuries, differs from those damages which may be sought in a wrongful death claim insofar as damages in a wrongful death action generally accrue to the decedent's heirs in actions brought under the Ohio Wrongful Death Statutes (O.R.C. 2125) whereas damages for conscious pain and suffering are intended to compensate the Plaintiff. **Dickerson v. Thompson**, 624 N.E.2d 784 (1993). Conversely, damages for conscious pain and suffering, when awarded, are intended to compensate the decedent via his or her estate for the actual conscious pain and suffering endured by the deceased.

The claim for conscious pain and suffering is difficult to quantify due mainly to the fact that no established formula exists for how to measure what is appropriate compensation for an interval of time in which the now deceased consciously experienced pain and suffered. Of great importance, however, is the fact that claims for conscious pain and suffering, if successfully proven, add to the value of an injury claim considerably.

What is relatively certain, however, is that no damages for conscious pain and suffering are generally awarded in the absence of a showing that the claimant was actually conscious long enough to experience pain and suffering. The case of **Nationwide Mutual Ins. Co. v. Wright**, 1996 WL 304205 (Ohio App. 9 Dist.) (1996) is generally considered authoritative concerning damages for conscious pain and suffering inasmuch as the Court, citing **Monnin v. Fifth Third Bank of Miami Valley, N.A.**, (1995) 103 Ohio App.3d 213, 227, held that, "In order to maintain a survivorship claim, there must be some evidence that the victim/decedent experienced conscious pain and suffering prior to his death." Evidence of whether a deceased was conscious long enough to

experience pain and suffering is most often fodder for Motions for Summary Judgments.

In **Johnston v. Johnston**, 119 Ohio Misc.2d 143 (Lake County Court of Common Pleas, 2001), the Court, when faced with the question of when a decedent may recover for conscious pain and suffering held, "Under Ohio law, a decedent may not recover for pain and suffering when it is shown that the decedent was rendered unconscious at the instant of the injury and died of such injuries without ever having regained consciousness. However, one may recover for the pain and suffering endured when there is affirmative evidence to show that the decedent was not completely unconscious during the interval between the injury and death." *Id.*

Consciousness for the purposes of determining whether a deceased Plaintiff experienced pain and suffering is a concept which will be debated in practically all survivorship cases. One school of thought maintains that consciousness is multilayered to the extent that an unresponsive accident victim, while appearing unconscious, may still be able to cerebrally process audible sounds, but not be able to respond. This theory, if properly supported by medical testimony may be sufficient to create a genuine issue of material fact, which, in turn, can cause a denial of a Motion for Summary Judgment that maintains otherwise. The outcome of a Motion for Summary Judgment concerning the potential existence of multiple layers of consciousness will almost always depend on the inclinations of the Judge before whom the Motion comes. Furthermore, the relative paucity of caselaw concerning this issue results in an absence of guidance from higher Courts, when trial Judges are faced with determining what credence to lend medical testimony relative to the potential existence of the many layers of consciousness.

Without delving into the metaphysical too greatly, suffice it to say that Courts in the future will likely, at least, entertain the "levels of consciousness" argument, when deciding issues of conscious pain and suffering if for no other reason other than the argument remains underdeveloped by the existing caselaw. ■