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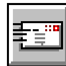
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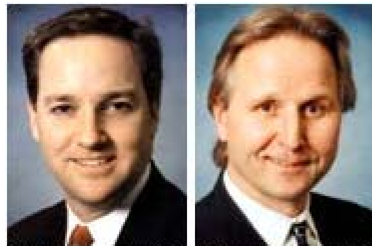
PAUL W. FLOWERS THOMAS I. MICHALS

Ohio's Million Dollar Verdicts & Settlements

Avoiding Issues On Appeal Leading Strategy In $15.6M Verdict - *Scott-Pontzer* Coverage Also At Issue In Wrongful Death Case

By Paul D. Boynton

#1. $15.6 MILLION
Sharp, et al. v. Leiendecker
Cuyahoga Court of Common Pleas

When armed with sympathetic plaintiffs, a concession on liability and a solid case for damages, it's best to play it safe at trial and work to minimize issues on appeal, according to Cleveland attorney Thomas I. Michals, who was part of a $15.6 million wrongful death verdict.

A Cuyahoga Common Pleas jury recently awarded Michals' client $3.6 million in compensatory damages, as well as $2 million to the client of Paul W. Flowers of Cleveland. Each plaintiff also obtained $5 million each in punitive damages.

Their clients are the estates of Craig Austin and Janet Meden, both of whom died when a drunk driver barreled through a stop sign and collided with the car in which they were riding.

An example of playing it safe was not attacking the trial judge's order excluding evidence of prior DUI convictions of the defendant driver, according to Michals.

"I thought we had enough evidence without it," he said. "I would have liked to have had it in, but I believe the defense was trying to create as many issues on appeal as possible. We took great caution to avoid issues on appeal."

Michals said he and Flowers made "good moves in thwarting appellate issues," including not contesting the defendants' demand for arbitration under the Scott-Pontzer policies.

Trial judge Nancy R. McDonnell ruled in favor the plaintiffs that various policies purchased by Mentor-based OSI Sealant, Inc. — which employed the decedents — provided Scott-Pontzer coverage.

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At that point, the insurance defendants then claimed one of the policies, with a $1 million cap, required arbitration.

"If the judge had denied the defendants' motion to compel arbitration, that would have created an immediate issue for appeal, and we would have lost over a year's time in the appellate process," Michals said. "We agreed to arbitration, which I don't think they expected."

The case was never arbitrated, in part because of the difficulty in securing the services of an arbitrator, and because the defendants eventually conceded that damages likely would exceed the $1 million policy limit, Michals said.

The fact that the carrier defendants actively participated at trial was unusual, according to Flowers.

"At trial," Flowers said, "the big issue was how the Scott-Pontzer coverage issue would play out."

The trial judge allowed into evidence the defendants' explanation of the coverage and how it came about.

The carriers essentially attempted to impress upon the jury that it would be unfair to make them pay when the accident did not occur during the course of the decedents' work, he said.

"They came right of the box arguing the policy was not purchased by the decedents, and that they and the employer had done nothing wrong," Flowers recalled.

"But we were allowed to respond, and we argued how underinsurance coverage is necessary, particularly against drunk drivers in a wrongful death case," he added.

"The fact that the employer purchased the policy is immaterial. And we emphasized that the trial judge had already considered this issue and had ruled there was coverage. Jurors always hold trial judges in high esteem."

Another important challenge for Flowers and Michals was to make sure the jury understood the difference between punitive and compensatory damages.

The plaintiffs pushed for punitive damages to send a message that drunk driving cannot be tolerated, their lawyers said.

But the defendant driver is currently incarcerated on unrelated charges and is essentially judgment proof.

"Our clients," according to Flowers, "could have received very little by way of compensatory damages, while getting a huge punitive damages award. But the jury appreciated the difference. If they mix that up, you would have very little recourse at the appellate level."

Counsel for the carriers indicated that his clients would appeal the trial judge's ruling allowing Scott-Pontzer coverage.

The Loss Of 'Good People'

Craig Austin and Janet Meden were both described as "good people" devoted to family, church and community.

On May 25, 2001, Austin, 43, and Meden, 54, finished work at OSI Sealant and Austin agreed to drive Meden to look at a car she was interested in buying.

On their way back home at about 8 p.m., the defendant driver, Scott Leiendecker, 49, ran a stop sign at an intersection of State Route 306 in Geauga County. He was traveling about 45 mph when his 1990 Mazda slammed into the 1991 Oldsmobile owned by Meden and operated by Austin. A passenger in Leiendecker's car, Salvatore Manzo, 47, also died.

Authorities said Leiendecker's blood alcohol level was two and one half times the presumed level of intoxication.

Establishing sympathy for the plaintiffs was not difficult.

"Craig Austin was just such a good man," Michals said. "He wasn't a rock star or star athlete, but was the kind of man you hope your kid grows up to be. He worked 24 years at the same company, and was a loving husband and father active in the community and church."

The way Austin's wife and then 11-year-old son found out about the tragic accident was heart-wrenching, according to Michals.

Lori Austin had fallen asleep on the couch the evening of the accident and when she awoke in the morning had assumed Craig had already left for work.

The son had planned to go to a Cleveland Indians' game that afternoon with Craig.

Dressed in an Indians' hat and T-shirt, the son was awaiting his father's arrival, when, instead, a police cruiser came to the house and a patrolman delivered the terrible news.

"Just horrible," Michals recalled. "It was very emotional just getting that testimony in."

The loss of Meden was no less devastating, according to Flowers.

Her children were grown, and she was divorced, but she was active at work in organizing charity events, and she volunteered her time with the Girl Scouts. She also helped to establish a children's summer camp.

"She was literally up and active 12 to 14 hours a day, seven days a week, helping people, and organizing events," Flowers said. "She was a good person who was taken from her family and friends."

Proving Damages

Nonetheless, establishing compensatory damages for the Meden estate "was a little tricky," according to Flowers, because as a full-time receptionist, her annual income was not high.

"Her economic loss was about $120,000, so the award of $2 million was impressive in light of that," he said.

Austin's damages were somewhat easier to establish since he was supporting a family and was earning about $70,000 a year, according to Michals.

An economist expert testified that Austin's loss of future earnings was in the range of $1.5 million to $1.9 million.

"I asked the jury to put a number on the qualities we most value — a loving father and husband, and dependable employee. He died in a senseless accident because the defendant was drunk and didn't stop at the stop sign," Michals said.

The balance of the damages was for mental anguish suffered by the Meden and Austin families, which was established through emotional testimony of family members.

Michals also had a representative of OSI Sealant testify to Austin's qualities as an employee.

The plaintiffs attempted to portray a stark contrast between the decedents and Leiendecker as part of the case on damages.

"He had never been married, had no kids, does remodeling work when he can get it," Michals said. "Craig Austin worked at the same job for 24 years, had a family.

He was helping someone out at the time of the accident after working, while Leiendecker was drinking in a bar all day."

For added emotional impact, the plaintiffs' attorneys during closing arguments showed pictures of the smashed cars at the accident scene and also images of the defendant from his videotaped deposition taken while he was in jail.

"He was a sickly looking guy, stringy brown hair, not clean-shaven when we took his deposition," Michals recalled.

The insurance defendants and the individual defendant were somewhat at cross-purposes during trial.

"The carriers were saying 'we didn't kill anybody, we're not the bad guy. If you're mad at anybody it has to be the defendant driver, and don't award big compensatory damages,'" Michals noted. "And the role of the tortfeasor's lawyer was to keep the punitive damages down. He argued 'we made a mistake, but don't punish us.' They were kind of shooting at each other and that worked very well for us."

Editor's Note: *At the time Ohio Lawyer's Weekly went to press, Thomas Michals and Paul Flowers confirmed that the case was in the earliest stages of appeal.*

Presently, the issue of when to begin accruing prejudgment interest is preventing the matter from proceeding any further in the process of appeal.

Both attorneys believe that they will not be able collect punitive damages from Leiendecker.

Ohio Juries Generous In 2002

By Edward F. Cohn

The largest verdict reported to Ohio Lawyers Weekly in 2002 was $15.6 million, and it appears that Ohio juries were quite generous in several other matters as well.

The second through fifth largest verdicts in Ohio last year were cases involving medical malpractice, intentional torts and negligence. The verdicts, which ranged from $10.4 million to $7.5 million, are listed here in descending order.

#2. $10.4 MILLION
Yardley, et al. v. West Ohio Conference of the United Methodist Church et al.

The second largest verdict involved a cause of action alleging an intentional tort.

In this case, a Franklin County jury awarded more than $10 million to the estate of a woman who claimed her relationship with the minister exacerbated her alcohol abuse and caused clinical depression.

According to Clifford O. Arnebeck Jr., attorney for the plaintiff's estate, the woman sought the counseling of the minister for her emotional and alcohol problems. The two wound up having an affair.

The plaintiff claimed that the minister caused the woman more emotional distress, which led to more drinking and eventually death from liver failure.

The plaintiff further alleged that the decedent lost $181,681 in wages and $131,074 in medical expenses.

The jury held the minister responsible for mind control and sexual abuse — an intentional tort — and awarded the family of the decedent $10 million in punitive damages and $373,00 in compensatory damages.

Arnebeck told Lawyers Weekly the key to winning was taking the victim's deposition testimony while she was in a protective institutional setting because this allowed her to "speak with objectivity, intelligence and spiritual sensitivity."

#3. $8.6 MILLION
Watson v. Cahill

The third largest verdict involved a medical malpractice claim.

In this case, a Franklin County jury returned an $8.6 million verdict to a 47-year-old woman who alleged her doctor failed to recommend immediate surgery that may have prevented the woman's loss of eyesight.

According to the plaintiff, she experienced problems with her eyesight in January 1997. Shortly after, she was diagnosed with pseudo tumor cerebri, a condition in which the body has difficulty eliminating cerebral spinal fluid.

The plaintiff said the doctor recommended that she lose weight and take medication to reduce the production of spinal fluid. The plaintiff further claimed that approximately eight months later, she returned to the same doctor and tests showed that her eyesight had deteriorated.

Meanwhile, the doctor alleged the plaintiff was not cooperative in losing weight and taking medication.

The doctor further claimed that he recommended for her to undergo an immediate spinal tap followed by another procedure that would relieve the pressure on the optic nerve and the woman refused.

However, the plaintiff argued the doctor suggested she take more medication instead of undergoing an immediate surgery.

The plaintiff ultimately went to the emergency room, but was sent home because tests showed no infection in her spinal fluid.

After a second emergency visit — in which she was admitted — the plaintiff woke up blind in both eyes. A procedure was done immediately that preserved her vision slightly in one eye.

The jury held the plaintiff partially negligent and the award was reduced to $5,848,000.

David Shroyer, attorney for the plaintiff, told Lawyers weekly, "I don't believe the jury was trying to send a message. The verdict does, however, reflect the value that we place on vision and eyesight. As one of the experts testified, 'vision is our most valued sense.'"

#4. $8.2 MILLION
Kaszar, et al. v. Acute Care Specialists, Inc., et al.

Another cause of action alleging medical malpractice was the fourth largest verdict.

In this case, a Cuyahoga County jury awarded $8.2 million to the plaintiff and his family.

The plaintiff, a 40-year-old man, herniated several discs in his thoracic spine that were compressing his spinal cord. The emergency room doctor failed to diagnose the spinal cord compression during the more than seven hours the plaintiff was in the emergency room.

During that time, the plaintiff was rendered a paraplegic.

The defense contended the plaintiff's symptoms were consistent with a lumbar radiculopathy and that the doctor was independent contractor.

A defendant staffed the emergency room with personnel, including the physician.

Attorneys for the plaintiff stated that a key factor in the case was establishing that the defendant doctor was an agent of the staffing company.

The jury awarded $7 million to the plaintiff, $1 million to his wife and $100,000 to each of their two children.

#5. $7.5 MILLION
Baby Doe v. Doctor & Hospital

The fifth largest verdict involved a wrongful death action.

In this case, a Monroe County jury awarded more than $7 million to the parents of an infant

who allegedly died because of the defendant's failure to treat the infant's life threatening symptoms.

According to the plaintiff, on Oct. 16, 1999, at 11:05 a.m., the plaintiff brought her nine-month-old to a community hospital emergency room with a history of fever, grunting respirations, seizures, mottling of the skin and respirations of 60 (which decreased to 43 over a five-hour period).

The plaintiff claimed that the ER physician failed to obtain an adequate history and also failed to appreciate the severity of the child's condition.

According to William Mitchell, attorney for the plaintiff, the ER physician admitted that her working diagnosis after the first 20 minutes in the ER was possible sepsis or bacterial meningitis. Rather than treating the child for these life threatening illnesses or transferring her to a tertiary care center, however, she chose, after four hours, to transfer the child to a pediatric floor.

The plaintiffs further alleged that the baby received inadequate oxygen, fluids and monitoring, and that antibiotics were not ordered or given until five hours after the child arrived in the ER.

The child died at 8:10 p.m. as a result of pneumococcal sepsis.

According to the plaintiff, the autopsy revealed that she had a very small spleen (hyposplenia).

Mitchell told Lawyers Weekly that "blood tests done at another hospital where she had prior surgeries showed Howell Jolly Bodies on her peripheral blood smear at five months of age."

Moreover, "these clues as to a nonfunctioning spleen were never followed by her surgeon," Mitchell explained. "Her pediatricians were totally unaware of the findings in her blood work because they never obtained any of her hospital records."

The plaintiff contended that the combined negligence of the defendants caused her baby's death.

A Monroe County jury awarded $7.5 million on the survivorship and wrongful death claims brought against the ER physician, and found the child's pediatricians and surgeon were not liable.

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