2013 Annual Convention

Insurance and Negligence Law Update

Insurance Law Committee/
Negligence Law Committee

3.0 General CLE Hours

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Patrick W. Allen

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CIVIL PROCEDURE AND RELATED TOPICS

COMMENCEMENT OF ACTION

A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant, CR 3 (A). The mere filing of a complaint does not constitute an attempted commencement of an action for purposes of the Wrongful Death Act’s savings statute, § 2125.04 ORC, or under the general savings statute, § 2305.19 ORC. CR 3 (A) controls over the statute, and an unsuccessful attempt to serve comes within “commencement,” although the plaintiff does not actually obtain service of process.

Rossiter v. Smith, 2012-Ohio-4434 (9th Dist., Wayne)

SERVICE OF PROCESS

Eastwind sued Fleming. The certified mail receipt was signed by Fleming’s son (age 14). After a default, Fleming moved to vacate the judgment, arguing that her son was not competent to receive service of process for her, CR 4.2. The trial court overruled her CR 60 (B) motion and the Court of Appeals affirmed. CR 4.2 does not make service on an adult party to the action ineffective if signed for by a person under the age of sixteen. Rather, CR 4.2 requires service on a parent or guardian when the person named in the lawsuit was under the age of.
sixteen. CR 4.1 specifically allows service by certified mail to be signed for by any person. Here, service was not ineffective simply because the certified mail receipt was signed by Fleming’s fourteen-year-old son.

_**Eastwind Surgical LLC v. Fleming, 2012-Ohio-1352 (5th Dist., Muskingum)**_

**SERVICE: JOHN DOE [CR 15 (D)]**

CR 15 (D) allows a plaintiff to designate a defendant in a complaint by any name and description when the plaintiff does not know the name of that party. The Rule does not permit a plaintiff to designate a defendant by a fictitious name when the plaintiff knows or should know the name of that defendant. Further, when a plaintiff designates a defendant by a fictitious name, CR 15 (D) requires that the plaintiff provide a description of the defendant in the pleadings and aver in the complaint the fact that the plaintiff could not discover the name. The rule also directs that the summons contain the words “name unknown” and be personally served on the defendant.

_**Fin Freedom Acquisition LLC v. Heirs of Thomas, 2012-Ohio-3845 *2nd Dist., Montgomery**_

**COMPLAINT**

Allstate paid a fire loss claim to its insured and filed this subrogated property damage action against the product manufacturer. The trial court sustained the defendant’s motion to dismiss, CR 12 (B)(6), ruling that the complaint alleged only legal conclusions, without alleging supporting facts. The Court of Appeals affirmed. Ohio is a notice-pleading state and does not require a plaintiff to plead operative facts with particularity. A plaintiff need only plead sufficient, operative facts to support recovery under his claims. Nevertheless, to constitute fair notice, the complaint must allege sufficient underlying facts that relate to and support the alleged claim; the complaint may not simply state legal conclusions.

_**Allstate Ins v. Electrolux Home Prods Inc, 2012-Ohio-90 (8th Dist., Cuyahoga)**_

**THIRD-PARTY COMPLAINT**

A third-party complaint cannot be based on an independent cause of action even if the cause of action arises out of the same occurrence as the original complaint. In order to be a subject of a third-party action, the defendant’s alleged right, or the third-party defendant’s alleged breach, must arise from the plaintiff’s successful prosecution of the main action against the defendant. A third-party claim must be derivative of the outcome of the main claim, and the third-party must be secondarily liable.

_**Barton v. Realty Corp of Am, 2012-Ohio-1838 (8th Dist., Cuyahoga)**_
RELATION BACK, SUBSTITUTION [CR 15]

James Robinson was delivering supplies to Spurlock’s business. Spurlock’s employee used a skid loader to unload the truck. The pallets were heavy and the skid loader began to tip forward, so Robinson stood on the back of the skid loader to act as a counter weight. Eventually the skid loader fell onto Robinson’s feet. Robinson’s subrogated insurer Technology sued, dismissed, timely re-filed, and after the statute of limitations had expired moved to amend its complaint to name the correct defendant (Spurlock LLC instead of Bob Spurlock). The trial court overruled the motion but the Court of Appeals reversed. A CR 15 (C) amendment relates back not just to the re-filed complaint, but also the complaint in the previous action. This amendment would not add a new party; a new party adds a new claim. Here, the amendment would only re-name the defendant.

Robinson v. Spurlock, 2012-Ohio-1510 (4th Dist., Jackson)

Paul Muck caused an accident in 2008 which injured his passenger Curtis Smith. Muck died shortly after the collision and Smith later died from unrelated causes. In 2010 Smith’s estate sued Muck, the executor of Muck’s estate, and Doe. Muck’s widow notified the trial court that no estate had been opened. Smith’s estate moved to amend the complaint to name “Alison Pfiester administrator of the estate of Paul Muck” as the sole defendant. Pfiester moved to dismiss based on the statute of limitations, and argued that CR 15 (D) was not available to Smith’s estate, because it knew Muck had died before the statute of limitations expired but had not moved to appoint an administrator for Muck’s estate. Smith’s estate argued that it property amended the complaint under CR 15 (C). The trial court granted summary judgment to Pfiester and the Court of Appeals affirmed. In order for an amended pleading, which changes the party against whom a claim is asserted, to relate back to the date of the original pleading, a party must satisfy the following three requirements: (a) the amendment must not add a new claim not included in the original complaint, (b) the new party must receive notice of the complaint within the statute of limitation period such that it would not be prejudiced in presenting its case, and (c) the new party must have reason to believe that, but for the mistake, the notice was intended for it. Smith’s estate did not meet (c); it had ample time to seek administration of Muck’s estate.

DiFiore v. Pfiester, 2012-Ohio-2456 (5th Dist Richland)

SAVINGS STATUTE

The plaintiff filed an action for wrongful death within the statute of limitations but service was returned as unclaimed. After the statute of limitations had passed, the plaintiff dismissed without prejudice, then re-filed within one year. The defendant was served. The Savings Statute in the Wrongful Death Act, § 2125.04 ORC, requires that the plaintiff had “commenced” or “attempted” to commence the original action. The trial court ruled that the two phrases were synonymous, the plaintiff had not commenced or attempted to
commence the first action, and could not rely on the savings statute. The trial court granted summary judgment to the defendant but the Court of Appeals reversed. A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant, CR 3 (A). The mere filing of a complaint does not constitute an attempted commencement of an action for purposes of § 2125.04 ORC or under the general savings statute, § 2305.19 ORC. CR 3 (A) controls over the statute, and an unsuccessful attempt to serve comes within “commencement,” although the plaintiff does not actually obtain service of process.

Rossiter v. Smith, 2012-Ohio-4434 (9th Dist., Wayne)

MISJOINDER [CR 21]

Crystal Lake hired a tree company to remove some dead and dying trees in and around a wooded area next to Patrick and Karen Dubay's property. The Dubays sued Crystal Lake, alleging that the tree company (under Crystal Lake’s supervision) entered their property and cut down one tree and damaged several others. The Dubays did not sue the tree company. Crystal Lake moved to dismiss, CR 21, as a misjoined party, arguing that the tree company was an independent contractor. The Dubays argued that Crystal Lake negligently hired the tree company and directed it to return to the property to “clean up the mess they made.” The trial court dismissed Crystal Lake, CR 21, but the Court of Appeals reversed. When a party is mistakenly included or when no claim or cause of action is raised against that party, the party may be dismissed by its own motion or by the trial court sua sponte. But misjoinder is not a ground for dismissal of an action. Here, the Dubays asserted a claim against Crystal Lake (for negligently hiring the tree company and directing it to trespass on the Dubays’ property a second time to remove the tree). Crystal Lake did not file a motion to dismiss based on the failure to state a claim [CR. 12 (B)(6)], for a failure to join a necessary party [CR 12 (B)(7) and CR 19], or a motion for summary judgment [CR 56 (C)]. Crystal Lake’s motion to dismiss is a motion for summary judgment rather than demonstrating that no cause of action is asserted against it in the complaint or that it was somehow mistakenly joined.

Dubay v. Villas of Crystal Lake Homeowners Assn, 2012-Ohio-2779 (8th Dist., Cuyahoga)

WAIVER, EQUITABLE ESTOPPEL

Cincinnati issued an auto policy to Kevin Latona, then later required a named driver endorsement for Kyung Song. The endorsement stated that the insurance would not apply to any motor vehicle being operated by Song. Song drove the car, was involved in a collision. Cincinnati paid Latona’s collision loss. Cincinnati denied UM coverage to Song based on the endorsement. She argued
that by paying the collision claim, Cincinnati was estopped from later denying coverage. The trial court granted summary judgment to Cincinnati. The Court of Appeals reversed and remanded on other grounds, but in regard to waiver ruled that (in general) the doctrines of waiver and estoppel may not be used to expand insurance coverage, although there is an exception where the insured provides a defense without reserving its rights.

*Cincinnati Ins. v. Song, 2012-Ohio-1062 (8th Dist., Cuyahoga)*

**STATUTE OF REPOSE**

Steven and Jane Young had a pitched roof installed over their existing flat roof. Nine years later they sold their house “as is” to John and Victoria Tutolo. Four or five years later a tree damaged the roof and the Tutolos discovered that the pitched roof had been leaking, causing decay in the attic. The Tutolos’ expert testified that the pitched roof had been designed and constructed improperly by Brent McGarvey. They sued McGarvey. McGarvey moved for summary judgment based on the ten-year statute of repose, § 2305.131 ORC. The Tutolos responded that the statute was inapplicable because McGarvey was not a proper construction worker. (He was a retired industrial arts teacher who had done work on his own house, but not a carpenter or bonded roofer, and did this project without a building permit or inspection.) The trial court granted summary judgment to McGarvey and the Court of Appeals affirmed. There is no language in the statute that it applies only to a professional carpenter or a licensed architect; it refers to a person who provides services for an improvement on real property.

*Tutolo v. Young, 2012-Ohio-121 (11th Dist., Lake)*

Scott Jones lost parts of the fingers on his left hand while trying to clear a clogged collection chute on a running lawnmower that had been sold to his father by Emmett Equipment. The mower was built and first sold in 1994. In 2004 Emmett acquired it and sold it to Jones’ father. Jones alleged that he had been unaware that there were rotating blades in the chute because a warning label affixed to the mower had been partially worn away or obscured the word “danger.” He sued Emmett for product liability and negligence for failing to affix a new warning label to the mower both when it sold the mower to his father and when conducting routine service on the mower a few years later. The trial court granted summary judgment to Emmett based on the ten-year limitation in the statute of repose, § 2305.10 (C)(1) ORC, and the Court of Appeals affirmed. The statute applies to both manufacturers and suppliers, and Emmett was a supplier, § 2307.71 (A)(15)(a)(i) ORC. Emmett did not rebuild or recondition the mower before selling it to Jones’s father, nor did it incorporate any major new parts to the mower; it only performed a routine tune-up and sold the mower as “used.”

*Jones v. Walker Mfg Co, 2012-Ohio-1546 (8th Dist., Cuyahoga)*
Hallmark constructed the Oaktree condominiums in 1990. In 2003 a unit owner noticed a crack in his garage wall, and investigation revealed that the foundation footers were not set to city code or to the construction specifications. A structural engineer’s expert opinion was that the condition of the footers appeared to represent “intentional disregard for the building code requirement,” Oaktree sued Hallmark in 2005 and Hallmark moved for summary judgment based on the ten-year statute of repose, § 2305.131 ORC. The court denied the motion, finding the initial construction of the footers did not constitute “improvements to real property,” and therefore the statute of repose did not apply. The jury returned a verdict for Oaktree. The court of appeals reversed, and on remand the trial court ruled that the statute was not unconstitutional on its face or as applied in this case and, therefore, the plaintiff’s claims were time-barred under the statute. The Court of Appeals affirmed. [The court analyzed the successive Ohio statutes of repose and how the Supreme Court applied them.] The SB 80 amendment of the statute in 2005 added section (A)(2), providing that if an alleged defect was discovered during the ten-year period but less than two years before the expiration thereof, the plaintiff may still bring a claim within two years of discovery of the defect. [There are exceptions if the defendant engages in fraud, or if there is an express warranty.] Further, the statute was expressly retroactive to any action commenced after the effective date of the statute, subsection (F). The court ruled that the statute of repose cannot retroactively apply to a plaintiff in Oaktree’s situation, where the injury occurred and the cause of action accrued before the effective date of the current statute. Oaktree is entitled to a “reasonable time” after discovery to sue, and a two-year time period after meeting with the expert is a reasonable limitation. However, Oaktree failed to sue within two years after it was placed on notice of the likely cause of its injury.

_Oaktree Condominium Assn v. Hallmark Bldg Co, 2012-Ohio-3891 (11th Dist., Lake)_

The four-year medical malpractice statute of repose, § 2305.113 (C) ORC, does not extinguish a vested right and thus does not violate the open courts provision, Ohio Constitution, Article I, § 16. In some cases, an injury may not manifest itself within one year of a breach of a duty of care; the statute provides the general discovery period of four years. Within that boundary, when the patient discovers or should have discovered the injury, or when the relationship with the doctor terminates, whichever is later, the one-year statute of limitations begins to run. The statute does not bar a vested cause of action, but prevents a cause of action from vesting more than four years after the breach of the duty of care. A prospective medical malpractice plaintiff is typically granted one year to pursue a claim from the time it accrues, provided that the accrual itself happens within four years. The statute of repose grants a prospective plaintiff to whom it applies four years to discover a claim and one year to commence that action, or it is barred before it arises. (Opinion by Lanzinger; O’Connor, Stratton, O’Donnell, Cupp and McGee concur; Pfeifer dissent.)

_Ruther v. Kaiser, — Ohio St 3d —, 2012-Ohio-5686_
RETROACTIVE STATUTE

A statute is substantive if it impairs or takes away vested rights, affects an accruing substantive right, imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction, or creates a new right. Remedial laws are those affecting only the remedy provided, and include laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right. A purely remedial statute does not violate Article II § 28 of the Ohio Constitution, even if applied retroactively.

*Oaktree Condominium Assn v. Hallmark Bldg Co, 2012-Ohio-3891 (11th Dist., Lake)*

MUTUAL MISTAKE

The doctrine of mutual mistake is a ground for the rescission of a contract under certain circumstances. A mistake in a contract is material when it is a mistake as to a basic assumption on which the contract was based, that has a material effect on the agreed exchange of performances. The parties' intentions must have been frustrated by the mutual mistake. When determining whether there was a mutual mistake, the trial court must review the parol evidence to determine if there was a meeting of the minds as to a material part of the contract. Such extrinsic evidence may include (a) the circumstances surrounding the parties at the time the contract was made, (b) the objectives the parties intended to accomplish by entering into the contract, and (c) any acts by the parties that demonstrate the construction they gave to their agreement. It is the complaining party's burden to establish by clear and convincing evidence that a mutual mistake exists.

*Home S&L Co v. Norfolk So Ry, 2012-Ohio-1634 (8th Dist., Cuyahoga)*

DISCOVERY

The Nithiananthans sued their neighbors, the Toiracs, alleging a private nuisance. The Nithiananthans moved to inspect the Toiracs' property, including their home security system and security cameras, claiming that the Toiracs' cameras are pointed into the Nithiananthans' home. The Nithiananthans also requested forensic imaging of the Toiracs' home computer because they claim that the computer contains downloaded images from the Toiracs' cameras, which are subject to discovery. The trial court sustained the discovery motion but in an interlocutory appeal the Court of Appeals reversed and remanded, finding that the record did not show the threshold test had been met. Courts are reluctant to compel forensic imaging due to the risk of exposing privileged and personal information that may be stored on a hard drive. Courts must guard against undue intrusiveness in order to protect the party's privacy in her electronic information systems. Weighed against the party's privacy interest, a court must consider whether the responding party has withheld requested information, whether the responding party is unable or unwilling to search for the requested information, and the extent to which the responding party has complied with...
discovery requests. The balancing factors begin to weigh more heavily in favor of forensic imaging when a requesting party demonstrates either discrepancies in a response to a discovery request or the responding party's failure to produce requested information.

**Nithiananthan v. Toirac, 2012-Ohio-431 (12th Dist., Warren)**

Social Security numbers. In a negligence lawsuit, the plaintiff sought discovery of employees’ personnel files. The defendant objected but after an *in camera* review of the documents, the trial court allowed discovery. In an interlocutory appeal, the Court of Appeals reversed in part. The trial court abused its discretion in ordering the release of social security numbers contained in the personnel files.

**Dubson v. Montefiore Home, 2012-Ohio-2384 (8th Dist., Cuyahoga)**

A party may request production of electronically stored information from another party, CR 26 (B). Deleted computer files are discoverable. A court may allow mirror imaging where, despite the defendants' failed search for emails, deleted emails might have existed on the defendants' computers. A court may order a computer forensic analysis to recover critical emails purportedly deleted from a party’s computer.

**Townsend v. Ohio Dept Transp, 2012-Ohio-2945 (10th Dist., Franklin)**

The scope of discovery is broad. A party may be entitled to the discovery of information that would be inadmissible at trial as long as the information sought appears reasonably calculated to lead to the discovery of admissible evidence; CR 26 (B)(1). It is not unusual to find evidence of other causes for injuries the plaintiff claims are related to the defendant’s negligence in seemingly unrelated medical records. Nonetheless, a trial court may not grant an overly broad discovery request when there is a reasonable dispute as to whether some of the medical records are causally and historically related to the personal-injury action, thereby requiring an *in camera* review.

**Pinnix v. Marc Glassman Inc, 2012-Ohio-3263 (8th Dist., Cuyahoga)**

REQUESTS FOR ADMISSION

Nathan Green rear-ended Amy Fuline at a low speed. She sued him and submitted requests for admission. Green admitted some matters and denied others. Fuline was awarded a judgment, then requested attorney fees, CR 37 (C), asserting that Green did not respond properly to discovery under CR 36. The trial court awarded Fuline attorney fees but the court of appeals reversed and remanded. Where a party has denied a request for admission, but the proof at trial contradicts the denial, a court must award sanctions under CR 37 if requested, unless (a) the request for admission had been held objectionable, CR 36 (A), or (b) the court finds that there was good reason for the failure to admit, or (c) the admission sought was of no substantial importance. If Fuline proved...
matters denied by Green, the trial court will need to consider whether each matter denied was genuinely in issue, using an objective standard of reasonableness, or whether the issues denied were not of substantial importance. [The decision to impose sanctions under CR 37 is within the trial court’s discretion, but whether the trial court correctly applied the law to the facts of a case presents a question of law, which an appellate court will review de novo.]

Fuline v. Green, 2012-Ohio-2749 (9th Dist., Summit)

PRIVILEGE

Attorney-client. Cobb was awarded a medical malpractice judgment against Tara Shipman MD and moved for pre-judgment interest. He sought discovery of documents from Shipman’s attorney. After an in camera inspection, the trial court allowed discovery. In an interlocutory appeal, Shipman argued that while discovery of insurance files was allowed, this did not extend to attorney files. The Court of Appeals disagreed. Statements, memoranda, documents, etc. generated in an attorney-client relationship which tend to establish the failure of a party or an insurer to make a good faith effort to settle, are not protected from discovery in a proceeding for prejudgment interest; § 1343.03 (C) ORC. In certain cases, access to an attorney’s file may be the only way a prevailing plaintiff can demonstrate a lack of a good faith effort to settle by the defense. If a party demonstrates good cause, CR 26 (B), for the need to review opposing counsel’s file at the prejudgment interest proceeding stage, and the documents sought cannot be obtained from any other source, a trial court does not err in ordering discovery of those documents, so long as they do not go to the theory of the defense of the case. The 2007 amendment of § 2317.02(A)(2) ORC, including uncodified section 6, did not eliminate discovery of attorney-client communications; it required an in camera review, and noted that the attorney-client privilege is a “substantial right.” That is not an issue here (because there was an in camera inspection and a subsequent appeal); further, uncodified section 6 specifically referred to insurance bad faith claims.

Cobb v. Shipman, 2012-Ohio-1676 (11th Dist., Trumbull)

Attorney-client. In a negligence lawsuit, the plaintiff sought discovery of employees’ personnel files. The defendant objected and submitted a privilege log. After an in camera review of the documents, the trial court allowed discovery. In an interlocutory appeal, the Court of Appeals affirmed in part. Although the defendant broadly asserted the attorney-client privilege, § 2317.02 ORC, it failed to offer any argument in support of its claim that the documents were privileged. Instead, it solely identified the documents as either “attorney correspondence” or “attorney letter to employee” and objected to their production on the basis of “attorney-client privilege and irrelevant.” Even on appeal, the defendant failed to explain how these documents fall within the attorney-client privilege. It was
not even clear if the correspondence was between the employee and the employee’s personal attorney. The presence of these letters in the employees’ personnel files in and of itself raised a question as to whether the employees waived the privilege and published the information to their employer.

**Dubson v. Montefiore Home, 2012-Ohio-2384 (8th Dist., Cuyahoga)**

**Physician-patient.** In a post-divorce child visitation proceeding, the mother sought records of the father’s counseling sessions. There was no question that the records were privileged. The trial court concluded that the records were privileged physician-patient communications, § 2307.12 (B) ORC, but that because the father had filed a motion to modify visitation, he had placed his mental and physical health directly in issue and waived any privilege which might otherwise exist, § 2307.12 (B)(1)(a)(iii) ORC. The trial court allowed discovery but the Court of Appeals reversed and remanded. There is a question of whether they are physician-patient records at all, or are instead counselor-patients records, § 2317.02 (G) ORC, with a different privilege and different standards of waiver.

**McGregor v. McGregor, 2012-Ohio-3389 (2nd Dist., Clark)**

**VOLUNTARY DISMISSAL [CR 41 (A)]**

Renee Engelhart, through her attorney Deborah Carothers, sued the Brecksville-Broadview Board of Education. One afternoon the trial court granted BOE’s pending motion for summary judgment and recorded the decision on its electronic docket at 2:25 pm. Carothers noted this electronic entry and filed a notice to dismiss with the Clerk at 3:48 pm. The trial court’s actual prepared journal entry granting BOE’s summary judgment for the BOE indicates receipt by the clerk’s office at 4:05 pm. The trial court sustained BOE’s motion to strike the dismissal, and ruled that the summary judgment was the final judgment in the case. The court of appeals reversed, and the Supreme Court affirmed the reversal. A plaintiff may dismiss at any time before the commencement of trial, CR 41 (A)(1)(a). This is an absolute right, regardless of motives, and can be accomplished without order of the court and without giving notice to opposing counsel. The entry of a trial court’s judgment into an electronic docket does not equate to journalization of the decision; a judgment is effective only when entered by the clerk upon the journal. Journalization of a judgment entry requires that the judgment is reduced to writing, signed by a judge, and filed with the clerk so that it may become a part of the permanent record of the court’s record. CR 58 (A).

**In re Carothers, 2011-Ohio-6754 (8th Dist., Cuyahoga)**

**State ex rel Engelhart v. Russo, 131 Ohio St 3d 137, 2012-Ohio-47**

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SUMMARY JUDGMENT

CR 56 (C) places strict limitations upon the type of documentary evidence that may be used in support of or in opposition to summary judgment motions. Documents merely attached to a motion, even though allegedly certified as official records, are not cognizable. If a document does not fall within one of the categories of evidence listed in CR 56 (C), it can only be introduced as proper evidentiary material when it is incorporated by reference in a properly framed affidavit pursuant. Documents purportedly printed from a website do not meet the Rule’s limitations on documentary evidence.


ARBITRATION

Plaintiff waived right to arbitrate where he filed a third-party complaint, actively participated in the litigation by attending pre-trials, participated in two mediations, and engaged in discovery. Four factors considered in determining whether a party’s actions were inconsistent with arbitration: are (a) any delay in the requesting party’s demand to arbitrate by means of a motion to stay judicial proceedings and for an order compelling arbitration, (b) the extent of the requesting party’s participation in the litigation prior to the motion to stay the judicial proceeding, including discovery and dispositive motions, (c) whether the requesting party invoked the jurisdiction of the court by filing a counterclaim or third-party complaint without asking for a stay of proceedings, and (d) whether the non-requesting party has been prejudiced by the requesting party’s inconsistent acts.

Parks v. Burns, 2012-Ohio-3229 (5th Dist., Stark)

Judicial review of the arbitration award is limited. If an arbitrator’s decision were subject to reversal because a reviewing court disagreed with findings of fact or with an interpretation of the contract, arbitration would become only an added proceeding and expense prior to final judicial determination. § 2711.10 ORC limits judicial review of arbitration to claims of fraud, corruption, misconduct, an imperfect award, or that the arbitrator exceeded his authority. At common law, courts almost uniformly refused to vacate an arbitrator's award because of an error of law or fact. It has been held that the arbitrator is the final judge of both law and facts, and that an award will not be set aside except upon a clear showing of fraud, misconduct or some other irregularity rendering the award unjust, inequitable, or unconscionable. Even a grossly erroneous decision is binding in the absence of fraud.

Hogue v. Sadler, 2004-Ohio-6132 (5th Dist., Coshocton)

Massillon firefighter Ronald Sattler filed a grievance regarding calculation of sick leave. Under the collective bargaining agreement, an arbitrator ruled in favor of Sattler. Massillon filed an appeal of the award, § 2711.10 ORC, asserting that the claim was barred by res judicata, because an almost identical claim had
already been heard and decided. The trial court vacated the award but the Court of Appeals reversed. The arbitrator had authority to decide whether *res judicata* applied and in the absence of fraud, corruption, misconduct, an imperfect award, or the arbitrator exceeding his authority, the trial court had no authority to modify or vacate the award.

**Massillon Firefighters IAFF Loc 251 v. Massillon, 2012-Ohio-4729 (5th Dist., Stark)**

**MAGISTRATES**

Trevor Romano injured Linda Dalton in an auto accident. Dalton negotiated with Romano’s liability insurer Safe Auto, then sued Romano. The trial court sustained Dalton’s motion for default judgment and awarded damages. Dalton then filed a supplemental complaint, § 3929.06 ORC, against Safe Auto, which then filed a cross-claim against Romano disputing coverage. The trial court granted a default judgment to Safe Auto against Romano. Safe Auto then moved for summary judgment against Dalton, arguing that she was bound by the default judgment against Romano. The magistrate overruled the motion for summary judgment and ordered Safe Auto to pay Dalton its $12,500 per person liability limit. Safe Auto did not file an objection to the magistrate’s decision, which the trial court approved. The Court of Appeals affirmed. Safe Auto did not object to the magistrate’s ruling, and therefore may not as error on appeal the trial court’s adoption of the magistrate’s factual findings or legal conclusions, CR 53 (D).

**Dalton v. Romano, 2012-Ohio-5462 (5th Dist., Stark)**

**FINDINGS OF FACT, CONCLUSIONS OF LAW**

The plaintiff moved for findings of fact and conclusions of law eight days before the bench trial. At the end of the trial, the court ordered the parties to file proposed findings of fact and conclusions of law, which both parties did. The plaintiff complied with CR 52 and the trial court was obligated to issue its findings of fact and conclusions of law. The provisions of CR 52 are mandatory in any situation in which questions of fact are tried by the court without intervention of a jury. The purpose is to aid the appellate court in reviewing the record and determining the validity of the basis of the trial court’s judgment.


**NEW TRIAL**

Gregory Weber was in an auto collision in December 2004, than in a collision with Sheila Kinnen in July 2005. He sued Kinnen. Kinnen argued that much of Weber’s injury resulted from the prior collision. Weber asserted that the second collision caused new injury, and delay in recovery from the prior injury. The jury initially awarded Weber $5,670 for medical expenses, $24,295 for lost wages and benefits, but nothing for pain and suffering. The trial court instructed the jury to
award at least some amount for pain and suffering, because they had awarded economic loss. The jury returned minutes later to award an additional $10 for pain and suffering. The trial court sustained Weber’s motion for a new trial but the Court of Appeals reversed. A court may grant a new trial when the damages awarded are either excessive or inadequate, and appear to have been given under the influence of passion or prejudice, CR 59 (A). Here the trial court decided to grant a new trial because the jury’s $10 award for pain and suffering was “inadequate in the face of $5,600 in medical damages.” There is nothing in the record to show that the jury was swayed by improper sentiment. The initial awarded of nothing for pain and suffering does not change this fact. The trial court abused its discretion in granting a new trial under CR 59 (A)(4). CR 59 (A)(6) allows a new trial when a judgment is not supported by the weight of the evidence. A court must whether manifest injustice has been done and that the verdict is against the manifest weight of the evidence. The trial court may not set aside the jury’s verdict under CR 59 (A)(6) due to a difference of opinion, but only if there is insufficient credible evidence to sustain the verdict in light of the other evidence presented. This jury award was not so gross as to shock a sense of justice and fairness.

Weber v. Kinnen, 2011-Ohio-6718 (1st Dist., Hamilton)

Gregory Wolf was rear-ended by Randy Montgomery. Wolf sued and testified that he continued to have pain at a level between 7 and 10. Wolf submitted $46,000 in medical bills and $732,000 in wage loss. Montgomery testified that he was driving his tow-truck at only 5 mph when he rear-ended Wolf. The jury awarded Wolf $2,435 compensatory damages and nothing for non-economic loss. The trial court ordered the jury to deliberate further, instructing them to recalculate the compensatory damages and include non-economic damages. The jury then awarded $2,435 for economic loss and $250 for non-economic loss. The trial court granted Wolf’s motion for a new trial, CR 59 (A)(6), ruling that the verdict was not supported by the weight of the evidence. The Court of Appeals affirmed. The trial court’s stated rationale for granting a motion for a new trial did not accurately reflect the record on this issue and was therefore unreasonable. But it cannot grant a motion for a new trial simply because it disagrees with the jury’s verdict.

Wolf v. Interstate Wrecker Serv Inc, 2012-Ohio-1744 (8th Dist., Cuyahoga)

PREJUDGMENT INTEREST (TORT CASES)

The trial court overruled a motion for pre-judgment interest in a tort case, § 1343.03 (C) ORC, referring to the defendant not having acted in bad faith. The Court of Appeals reversed and remanded. While reversal is not required in every case, here the trial court used a standard of whether the defendant did not act in bad faith, rather than whether it did act in good faith.

ATTORNEY FEES, SANCTIONS

Sarah McCoy slipped and fell at a McDonald's restaurant. The manager refused to provide any information about ownership or management of that location to McCoy's lawyer. Two years and three weeks after the fall, McCoy sued the defendant and the employees who had been mopping the floor where she fell. The defendants moved to dismiss, based on the statute of limitations; McCoy responded that the statute of limitations may have been tolled against one of the employee defendants, § 2305.15 ORC. The trial court overruled the motion, but later did dismiss based on the statute of limitations. The trial court overruled the defendants' motion for attorney fees, based on frivolous conduct, § 2323.51 ORC, and the Court of Appeals affirmed. The defendants provided absolutely no information to McCoy despite the fact that she repeatedly asked for such information and such information was readily available to the defendant, McCoy had no way of knowing if any of the circumstances which might toll the statute of limitations were present.

McCoy v. Cicchini Ents Inc, 2012-Ohio-1182 (5th Dist., Stark)

Attorney Roger Bauer sued attorney Martin F. White regarding division of attorney fees in a successful medical malpractice lawsuit. The trial court dismissed the action and the Court of Appeals affirmed. The sole method for resolution of legal fee disputes between lawyers in different firms is mediation and/or arbitration by a local bar association or the Ohio State Bar Association. Prof Cond R 1.5 (f)

Bauer v. White, 2012-Ohio-1135 (11th Dist., Trumbull)

ACTION: DECLARATORY JUDGMENT

An appellate court reviewing a declaratory-judgment matter should apply an abuse-of-discretion standard in regard to the trial court’s holding concerning the appropriateness of the case for declaratory judgment, ie, the matter’s justiciability, and should apply a de novo standard of review in regard to the trial court’s determination of legal issues in the case. (Opinion by Pfeifer; O’Connor, Stratton, O’Donnell, Lanzinger, Cupp and McGee concur.)

Arnott v. Arnott, 132 Ohio St 3d 401, 2012-Ohio-3208

A judgment creditor may sue the judgment debtor's insurer where a final judgment is not paid within thirty days, § 3929.06 (A) and (B) ORC. The insurer may assert as an affirmative defense any coverage defenses it might have and could have made in a declaratory judgment action, § 3929.06 (C)(1) ORC. If the insurer files a declaratory judgment against against the judgment debtor prior to the judgment creditor filing a supplemental action against the insurer, a final judgment in that action is binding on the judgment creditor (notwithstanding res judicata or collateral estoppel), § 3929.06 (C)(2) ORC. A plaintiff may not sue the defendant’s insurer until the plaintiff has a judgment against the defendants, § 2721.02 (B) ORC. In a declaratory judgment against against an insurer, the
insurer may raise as an affirmative defense against the judgment creditor any coverage defense it has against the judgment debtor, § 2721.02 (C) ORC. If prior to the plaintiff-judgment creditor filing a supplemental action or declaratory judgment action, an insured files a declaratory judgment action regarding coverage, a final judgment in that action is binding on the judgment creditor (notwithstanding res judicata or collateral estoppel), § 2721.02 (C) ORC. If an interested party is not joined in a declaratory judgment action, that party is not bound by the judgment, § 2721.12 (A) ORC. A declaratory judgment between an insurer and an insured (resolving insurance coverage for bodily injury or property damage) is binding on any person who is an assignee of the insured, regardless of whether the assignee was a party, § 2721.12 (B) ORC. Where the judgment creditor was not joined a a party in the declaratory judgment action she is not bound by it.

_Dalton v. Romano, 2012-Ohio-5462 (5th Dist., Stark)_

**ACTION FOR DISCOVERY**

Actions for discovery are used only to uncover facts necessary for pleading, not to gather proof to support a claim or to determine whether a cause of action exists. § 2317.48 ORC occupies a small niche between an unacceptable fishing expedition and a short and plain statement of a complaint or defense filed pursuant to the Civil Rules. CR 34 (D)(3) requires that pre-filing discovery be used to ascertain the identity of a potential adverse party. The statute and the Rule limit pre-filing discovery to uncover facts necessary for pleading, not to gather information to support claims.

_Riverview Health Inst LLC v. Kral, 2012-Ohio-3502 (2nd Dist., Montgomery) accord_

_Sizemore v. Esis Inc, 2012-Ohio-4004 (9th Dist., Medina)_

**ACTION: CLAIM AGAINST ESTATE**

Creditors of an estate may present claims against the estate in several ways, depending upon whether the final account or certificate of termination has been filed, § 2117.06 ORC. If the final account or certificate of termination has not yet been filed, a creditor may present a claim in a writing to the executor, or in a writing to the executor that the creditor also copies and files with the probate court, or in a writing the creditor addresses and mails to the decedent, but that the executor actually receives. Once a creditor submits a claim, the executor shall allow or reject it within thirty days after presentation, but failure of the executor to allow or reject within that time shall not prevent the executor from doing so after that time and shall not prejudice the rights of any claimant. § 2117.11 ORC (also related to claims against an estate) requires notice of disallowance to the creditor in compliance with CR 73; but § 2117.06 ORC does not have this notice requirement.

_In re Piesciuk, 2012-Ohio-2481 (9th Dist., Summit)_

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ACTION: FRAUD

Ohio is a notice-pleading state and does not ordinarily require a plaintiff to plead operative facts with particularity. CR 8 (A) requires a complaint to include only a short and plain statement showing that the party is entitled to relief and a demand for judgment. The exceptions to CR 8 (A) are outlined in CR 9 (B), which provides when a complainant alleges a claim for fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. The complaint must include the circumstances constituting fraud which include the time, place and content of the false representation; the fact represented; the identification of the individual giving the false representation; and the nature of what was obtained or given as a consequence of the fraud.

Whelan v. Vanderwist of Cincinnati, 2011-Ohio-6844 (11th Dist., Geauga)

ACTION: WRONGFUL DEATH

Beneficiaries. A wrongful death claim is brought for the exclusive benefit of (a) the surviving spouse, the children, and the parents of the decedent (all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death), and also (b) the other next of kin of the decedent; § 2125.02 (A)(1) ORC. In its common and ordinary meaning, the phrase “next of kin” is a person’s nearest relative or relatives. Under the Act, the term “other next of kin” refers to the nearest surviving relatives to the decedent after accounting for parents, children, or spouse, in addition to the parents, spouse and children. The time of the decedent’s death fixes the status of beneficiaries to a wrongful death action; § 2125.02 (A)(3) ORC. The decedent’s siblings who predeceased her were not eligible beneficiaries, and as a result, their children cannot recover in their places.

In re Estate of Harrison, 2012-Ohio-2169 (9th Dist., Summit)

EVIDENCE

EXPERT TESTIMONY

To qualify as an expert, a witness must demonstrate some knowledge on a particular subject superior to that possessed by an ordinary fact finder. In this case, Officer Krejsa testified he has (a) specialized training in accident reconstruction and occupant kinematics from Northwestern University and IPTM (the Institute of Police Technology and Management), (b) 632 additional accident training hours specifically related to motor vehicle accident reconstruction, and (c) he is regarded as an expert in accident reconstruction in his profession. The Court of Appeals held the officer's specialized training as an accident reconstructionist, particularly his background in occupant kinematics,
can be reasonably viewed as specialized knowledge beyond the general experience and knowledge of a lay person. Evid R 702. Moreover, by applying basic physics to both the vehicle’s observable damage as well as the defendant’s injuries, Krejsa was able to formulate an opinion, supported by objective evidence, that the defendant was driving the vehicle, without a passenger, at the time of the accident. The officer met the requisite criteria for testifying as an expert.


Where subjective, soft-tissue injuries are alleged, the causal connection between such injuries and the auto accident alleged to have caused them is beyond the scope of common knowledge, and that such causal connection must be established by expert testimony.

**Argie v. Three Little Pigs Ltd, 2012-Ohio-667 (10th Dist., Franklin)**

**POLICE OFFICER AS EXPERT**

Accident investigation involves the collection and recording of information, while accident reconstruction involves the use of scientific methodology to draw inferences from investigative data. Police officers who have not been qualified as accident-reconstruction experts may not give opinions on the cause of an accident, but rather, may testify only about their collection of data and observations at the accident scene.

**Roy v. Gray, 2011-Ohio-6768 (1st Dist., Hamilton)**

Deputy Sheriff Mike Tarr arrived at an auto accident scene about an hour after the collision, after the vehicles were moved. At trial, the court allowed Tarr to testify about how the accident occurred. The Court of Appeals reversed a jury verdict for the plaintiff. The trial court erred in allowing Tarr to offer expert opinion concerning legal interpretation of the traffic statute and whether the defendant had violated the statute and caused the collision. A witness who testifies about the cause of an accident must have some knowledge concerning, or experience in determining the cause of, accidents. Accident investigation involves the collection and recording of information, while accident reconstruction involves the use of scientific methodology to draw inferences from investigative data. Police officers who have not been qualified as accident-reconstruction experts may not give opinions on the cause of an accident, but rather, may testify only about their collection of data and observations at the accident scene.


Jessica Reavis was cited for speeding. At trial, the state’s evidence consisted of the testimony of OSHP Trooper Striker regarding (a) his visual estimate of her speed and (b) his use of device to measure it. The trial court ruled that without expert testimony or judicial notice, it could not admit evidence of the
construction, reliability, accuracy and mode of operation of the device. The court found only the evidence of Reavis’ speed Striker’s visual estimate. The Court of Appeals reversed Reavis’ conviction. No person shall be arrested, charged, or convicted of speeding based on a peace officer’s unaided visual estimation of the speed; § 4511.091 (C) ORC (effective 09-30-2011). The violation occurred before the effective date but the trial occurred after the effective date, and the statute was retroactive.

**State v. Reavis, 2012-Ohio-4675 (5th Dist., Morrow)**

After a collision, OSHP Trooper Mark Masters examined the two vehicles and concluded that Elbert Ferguson had improperly changed lanes too closely in front of the other vehicle and caused the impact. This was consistent with the second driver’s statement and contrary to Ferguson’s account. The trial court allowed Masters to testify, and the Court of Appeals affirmed Ferguson’s traffic conviction. Masters worked in the area of accident reconstruction with OSHP and taught classes in crash investigation at the Patrol Academy, and the trial court properly allowed him to testify as to how the accident occurred.

**State v. Ferguson, 2012-Ohio-4778 (5th Dist., Guernsey)**

**NON-EXPERT OPINION TESTIMONY**

Celeste Stark contracted with Martin Schneble to remodel part of her bed-and-breakfast. As work progressed she was dissatisfied and discharged him. He sued. At trial the court admitted testimony from Schneble’s expert witness Kimberly Zech, another contractor, that he had performed in a workmanlike manner. The Court of Appeals affirmed a verdict for Schneble. Zech qualified as an expert witness under Evid R 702. However, even if Zech testified as a non-expert witness, Evid R 701 permits opinion testimony if it is rationally based on the perception of the witness and helpful to a clear understanding of her testimony or the determination of a fact in issue. The trial court has discretion in allowing or controlling lay witness opinion testimony. The party challenging the testimony must demonstrate that, if the trial court did abuse its discretion, such abuse materially prejudiced the objecting party. Here, it appears that Zech’s opinion was rationally based on her personal observations of Schneble’s work and that her testimony was helpful in determining a fact in issue, namely, the quality of that work.

**Schneble v. Stark, 2012-Ohio-3130 (12th Dist., Warren)**

Rebecca Gourley testified that she rearended Jarrick Davidson and Nikki Jacobs, but blacked out before rearending them a second time. She testified that she had blacked out from anger (she was pregnant with Davidson’s child, and he had left her for Jacobs). The Court of Appeals affirmed that Gourley could testify the cause of her blackout. Evid R 701 permits lay witnesses to express opinions that are (a) rationally based on the witness's first-hand perception or knowledge of the subject and (b) helpful to a clear understanding of the testimony or the determination of a fact in issue. The admission of lay witness
opinion testimony rests within the sound discretion of the trial court. A lay witness may testify about another’s emotional state or physical condition if the testimony is based upon personal observations and first-hand perception.

**State Farm Mut v. Gourley, 2012-Ohio-4909 (10th Dist., Franklin)**

**RES IPSA LOQUITUR**

Ryan Moore took his Toyota Celica to Grismer for an oil change. He drove 3,870 miles over two months after the oil change without incident. Then the car’s oil light illuminated while he was on the interstate. The oil drain plug was missing, the oil drained out, and the loss of oil ruined the engine. Moore sued Grismer, alleging the service technician did not properly tighten the oil drain plug after the oil change. Moore’s expert witness, a mechanic, testified that an oil drain plug should not ever fall out if tightened properly; it can come out for two reasons: someone removes the plug or it falls out after improper installation. A second mechanic also testified for Moore, and also recognized the same two possible reasons. After a hearing, the magistrate recommended judgment for Grismer and the trial court agreed. Neither applied *res ipsa loquitur* as requested by Moore. Moore appealed, arguing Grismer had exclusive control over the drain plug and it must not have tightened the plug enough and its failure to do so was the proximate cause of the engine failure. The appellate court affirmed, noting that when Moore’s engine lost its oil, the drain plug had not been under Grismer’s control for two months.


**WITNESS CREDIBILITY**

A witness’s state of intoxication may raise a credibility issue. The question is not whether the witness had been drinking, but whether, given some level of intoxication and the inconsistencies, the testimony was sufficiently consistent and believable so that it was reasonable for the finder of fact to accept. Although the witness was highly intoxicated, his version of events, except for one point, was largely consistent with the other witness’s testimony.

**State v. Masci, 2012-Ohio-359 (8th Dist., Cuyahoga)**

Antwan Dillard was charged with drive-by shooting felonious assault. The victim identified Robert White as the shooter during a call to a 911 operator following the shooting, and she later identified Dillard to police as the driver of the car (not the shooter). At trial she admitted that she had lied about her name during the 911 call because she had a warrant out for her arrest. She also admitted that she had an earlier criminal conviction stemming from an incident where she had lied to police. Moreover, she had served prison time for assault after shooting into the home of Dillard and his mother, and in the days before
the drive-by shooting, her sister had allegedly shot and killed a friend of Dillard and White. The Court of Appeals affirmed Dillard’s conviction. Dillard’s main argument attacking his convictions goes to the witness’s credibility, and witness credibility is primarily for the trier of fact.

*State v. Dillard, 2012-Ohio-4018 (1st Dist., Hamilton)*

**HEARSAY**

After State Farm paid a collision claim, it sued the other driver. State Farm’s claims adjuster Thomas Showalter testified that the repair estimate prepared by Tansky Toyota (a State Farm preferred shop) was appropriate. He also testified that the repair estimate and photos were received by State Farm in the normal course of business. The trial court admitted this under the business records exception to hearsay, Evid R 803 (6) and the Court of Appeals affirmed.

*State Farm Mut v. Anders, 197 Ohio App 3d 22, 2012-Ohio-824 (10th Dist., Franklin)*

Robert Taylor was making a left turn in his tractor-trailer when Donna Dickerson approached him and they collided. Dickerson sued. At deposition Taylor testified he believed Dickerson was about 150 feet when he began his left-hand turn. At trial Taylor testified that he believed Dickerson was 250-300 feet away when he began his turn. He explained that after the deposition he visited the scene and used the measurement tools in Google Maps application (GMA) on his personal cell phone. The jury found Dickerson 50% at fault and the Court of Appeals affirmed, disagreeing with Dickerson’s argument that Taylor’s testimony about information he received from GMA was hearsay. GMA is a measuring tool using computer-generated satellite images to calculate the distance between two points. Taylor’s trial testimony about the measurements constituted a declaration, made under oath at trial, of the physical observation he made from GMA; therefore, his testimony was not hearsay. Further, by its very nature, a calculation of distance, weight, volume, speed, etc, is impossible without use of a tool that has been calibrated to show a relevant unit of measure, eg, a ruler, a tape measure, a wheel, a scale, or, at a more sophisticated level, a radar gun, a breathalyzer, or a blood test. When used to measure something, none of those tools makes a statement in violation of the Rule Against Hearsay, Evid R 801. The only statement is the testimony of a witness about observations of measurements he made as a result of using the tool.

*Dickerson v. Miller’s TLC, Inc., 2012-Ohio-2493 (8th Dist., Cuyahoga)*

**PHOTOGRAPHS OF VEHICLE**

Luis Torres rearended Roland Constant. Constant had a repair estimate for his car for $1,073.19 from Domestic & Foreign Auto Body, and told Torres’ insurer that he had the work done by DFAB and had paid DFAB in cash. Constant sued for injury and property damage. At trial PJ Auto Body testified it
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• 1. Did the repair work for $230. Torres moved to introduce two photos of Constant’s car showing only a minor defect in the bumper cover. The trial court admitted the photos over Constant’s objection that Torres failed to authenticate them, and that they were improperly used to establish that Constant’s injuries could not have occurred in light of the minor impact. The jury returned a defense verdict on Constant’s injury claim, and $230 for damage to his car. The Court of Appeals affirmed. Since Constant’s claim for damages included property damage to his car, this made damage to his car an issue to be resolved at trial. The purpose of Torres’ photographs of Constant’s car was to demonstrate the extent of the property damage. The photographs were relevant, authenticated and properly admitted for the purposes of the trial.

  
  Constant v. Torres, 2012-Ohio-2926 (8th Dist., Cuyahoga)

“ACCIDENT” AND “OCCURRENCE”

Dan Sheely allowed his daughter Ivy (age 16) to drink alcohol during her visits with him. He bought a large bottle of vodka at her request and she took this to a party that evening, where she drank most of it and died. Ivy’s estate sued Dan for wrongful death, and the trial court entered judgment on a consent agreement that Dan was liable and the damages were $300,000. The estate then sued Dan’s homeowners insurer Lightning Rod. Lightning Rod denied coverage, arguing that the policy only covered bodily injury (including death) caused as a result of an “occurrence,” defined in the policy language as an accident, and that Ivy’s death was not caused by an accident. The trial court granted summary judgment to Lightning Rod and the Court of Appeals affirmed. Although a parent who furnishes alcohol to a minor child on several occasions without causing bodily injury or death might not be found to have intentionally caused a death, this does not mean that bodily injury or death is an unexpected or unforeseeable result of such conduct within the meaning of an accidental “occurrence” provision. Ivy’s death from acute alcohol toxicity as a result of consuming liquor furnished to her by Dan cannot be classified as an accident within the meaning of the policy; Ivy’s death is not an insurable “occurrence” under the policy.


“INTENDED OR EXPECTED” INJURY

Barbara Lachman set fire to her bed so that her husband could extinguish it and seem to be a hero. This did not work out and the house sustained substantial damage. Barbara pleaded guilty to arson. The Lachmans’ insurer Farmers denied coverage based on the intentional act exclusion and the guilty plea. The trial court granted summary judgment to Farmers and the Court of

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Appeals affirmed. The doctrine of inferred intent invokes an insurance policy's intentional action exclusion when the intentional act of an insured and the resulting harm are intrinsically tied together. When intent may be inferred as a matter of law (i.e., the act necessitates the harm) an insurer's motion for summary judgment may be granted. The intentional act of setting fire to a bed can only result in harm. Whether Barbara intended the fire to spread is irrelevant; the damage caused by a fire cannot be separated from the act of intentionally setting that fire.

**Lachman v. Farmers Ins of Columbus, 2012-Ohio-85 (8th Dist., Cuyahoga)**

Evid R 410 (A)(2) prohibits the use of a no contest plea as evidence. The prohibition against admitting evidence of no contest pleas is intended generally to apply to a civil suit by the victim of the crime against the defendant for injuries resulting from the criminal acts underlying the plea. To find otherwise would thwart the underlying purpose of the rule and fail to preserve the essential nature of the no contest plea.


Sexual molestation. Chloe Crow, a child, was at Carolyn Dooley’s home daycare operations, when Carolyn’s adult son Joshua raped and photographed Chloe. [Joshua pled guilty to two counts of rape and was sentenced to fifty years to life.] Chloe and her parents sued Joshua for intentional actions of rape, sexual battery, sexual assault, and sexual molestation of Chloe and for taking photographs of her while she was naked and posting them on the internet. They sued Carolyn for breach of fiduciary duty, negligence, negligent supervision/failure to protect, respondeat superior, intentional infliction of emotional distress, loss of consortium, corrupt activities, and libel for her failure to properly supervise Joshua and protect Chloe, as well as her alleged attempts to conceal the criminal activity. Carolyn’s insurer United Ohio intervened regarding coverage, asserting it had no duty to defend or indemnify Carolyn or Joshua because the policy did not cover emotional injury or alleged physical injury arising from emotional distress, intentional acts, non-accidental behavior, expected or intended injuries, and/or injury arising out of sexual molestation. The trial court ruled that United Ohio was not required to defend or indemnify Joshua for any claims, but was required to defend and indemnify Carolyn for the negligence claims only; Safeco v. White. The Court of Appeals reversed, ruling that while the claims of negligence against Carolyn were not precluded from coverage by the Expected/Intentional Injury exclusion (because the claims against her were for negligence), they were excluded under the Sexual Molestation exclusion.

**Crow v. United Ohio Ins, 2012-Ohio-2565 (3rd Dist., Allen)**

Because it is always in the interest of an insured to establish coverage and avoid policy exclusions, an insured's self-serving statements denying intent to injure are often of negligible value in demonstrating intent or expectation.

**State Farm Mut v. Gourley, 2012-Ohio-4909 (10th Dist., Franklin)**
Kalob Ditto and her mother Lorie lived with Jerry Burgei at his home. Jerry had homeowners insurance from United. Kalob was driving an ATV owned by Lorie and Jerry, when she injured Kasey Brooks. United denied coverage to Kalob, arguing that she was not an “insured” because she was not a “family member” related to Jerry by blood, marriage or adoption. Kasey disagreed, producing records indicating that Lorie and Jerry were actually fourth cousins, sharing common great-great-great-grandparents. The trial court found that the familial relationship between Jerry and Kalob, which amounted to eleven degrees of separation of kinship, was too remote to be considered “related” as that term was used in the homeowner’s policy and granted summary judgment to United. The Court of Appeals reversed. The term “related” is not defined in the insurance policy. The term is defined in Merriam-Webster’s Collegiate Dictionary as “connected by common ancestry or sometimes by marriage,” and in Black’s Law Dictionary as a “person connected with another by blood or affinity; a person who is kin with another,” and “blood relative” is defined as one “who shares an ancestor with another.” United failed to provide any other reasonable interpretation of the term “related.” While United contends that the blood relationship between Jerry and Kalob is so remote that it would lead to a manifestly absurd result because some remote relation might be found to exist among most of the people in a particular community and that this was not the intent of the parties to the insurance contract, nonetheless the language of the written contract is clear, and courts may not look any further than the writing itself to find the intent of the parties.


Robert Schill was driving his car when he collided with bicyclist Miles Coburn. Coburn’s estate sued Robert for wrongful death. Robert’s father James had an umbrella policy from Cincinnati Insurance with an Ohio address, and James also had a homeowner’s policy from Cincinnati at the same Ohio address (where Robert lived). Robert would be an “insured” if he was resident of James’ household and his legal residence of domicile was the same as James’. James resided at his Florida home and claimed a homestead exemption on it. But James owned a business in Ohio and stayed at the Ohio house about two weeks a month. The trial court granted summary judgment to Cincinnati, ruling the two had separate households, but the Court of Appeals reversed. A person may have multiple residences but only one domicile at any one time. One is presumed to continue his old domicile until it is clearly shown that he has acquired a new one. Acquisition of a new domicile requires both residence there and an intention to remain. James did not abandon Ohio as his domicile, and Robert was his relative who resided with him at his domicile.

Spaeth v. State Auto Mut, 2012-Ohio-3813 (8th Dist., Cuyahoga)
TERMINATION OF POLICY

Nationwide Mutual issued an auto policy to Misty Black. She failed to pay the premium due on May 9, Nationwide mailed a notice of cancellation to her on May 14, and cancelled the policy on May 26. She was injured in a collision on July 4 and made a UM claim to Nationwide. Nationwide denied coverage. Black argued that Nationwide did not properly cancel her policy because it failed to provide notice of cancellation to Black’s daughter, Tiffany (age 16), who had been added as an “insured driver” on the policy on May 1. The trial court granted summary judgment to Black but the Court of Appeals reversed. There are three separate grounds supporting a determination that Black was not covered under her Nationwide policy at the time of the accident. First, the language of § 3937.33 ORC supports a finding that only the policyholder must be given notice of cancellation. [Both § 3937.32 ORC and § 3937.33 ORC state that notice of cancellation must be sent to “the insured,” which implies the “policyholder.”] Second, the notice statute provides that minors who were members of a household and listed as additional insureds are not persons intended to be recipients of a notice of cancellation. Third, even if the notice statute was construed to include Tiffany as an “insured” entitled to notice of cancellation, failure to provide such notice to Tiffany did not deem the notice provided to Misty ineffective.

Black v. Ryan, 2012-Ohio-866 (11th Dist., Lake)

INSURANCE COVERAGE: EMOTIONAL DISTRESS

Lillian Johnson had auto insurance from Progressive, with her son Lavelle Randall listed as an excluded driver. While Randall was operating a motorcycle not listed in Lillian’s declarations, he was struck and killed by an uninsured-underinsured motorist. Johnson sued Progressive for UM-UI coverage, alleging that she suffered bodily injury in the form of post-traumatic stress disorder. Progressive asserted that Johnson had not suffered bodily injury. The trial court granted summary judgment to Progressive and the Court of Appeals affirmed. While Johnson may have suffered post-traumatic stress disorder and other emotional distress, this does not constitute “bodily injury.”

Johnson v. Progressive Ins, 2011-Ohio-6448 (8th Dist., Cuyahoga)

Jurgenson’s employee Shawn Armstrong was operating a fully-loaded dump truck when a van travelling at a high rate of speed rearended him. Armstrong saw that the van’s driver was severely injured (and died). Armstrong was injured and began to have nightmares about the incident and suffered panic attacks. The Industrial Commission allowed an amended workers compensation claim for PTSD. In an administrative appeal, Armstrong’s treating psychologist diagnosed post-traumatic stress disorder, and testified that his physical injuries contributed to and were causal factors in his PTSD. Jurgenson’s psychologist agreed that Armstrong suffered from PTSD, but concluded that the PTSD was not caused by the impact or Armstrong’s physical injuries, but that it was caused by being a visual witness of the incident; the trauma causing the PTSD was the
mental observation of the severity of the van driver’s injury. The trial court reversed this part of the BWC award, ruling that the injury did not arise out of the physical injury, as required by § 4123.01 (C) ORC. The Court of Appeals affirmed the reversal. The psychological injury must not only be contemporaneous with the physical injury, it must arise out of the physical injury. The term “contemporaneous” connotes a temporal nexus, not a causative nexus. Two things are contemporaneous when they arise, exist, or occur at the same time.

Armstrong v. John R Jurgenson Co, 2011-Ohio-6708 (2nd Dist., Clark)

Bradley Sawmiller collided with pedestrian Nancy Hertenstein, who died from her injuries. Nancy had been walking with her sister Sandra. Although Sawmiller did not strike Sandra, she witnessed the accident and suffered significant emotional distress. Sandra sued her UM-UI insurer Motorists Mutual. Motorists argued that Sandra’s injuries were not within the definition of bodily injury (bodily harm, sickness or disease, including death that results) covered by the policy. Sandra argued that her posttraumatic stress disorder caused physical injuries, bringing her injuries within the coverage. Her expert psychiatrist testified that Sandra had PTSD, and that PTSD (a) causes brain cell damage and objectively verifiable physical injury to the human brain, (b) shortens the life expectancy of persons who suffer from it, (c) causes atrophy of the memory circuits (hippocampal gyrus), and (d) is associated with the development of a number of other somatic (bodily) problems, such as the premature development of coronary artery disease and other conditions. The trial court granted summary judgment to Motorists, ruling that PTSD is not “bodily injury,” and the Court of Appeals affirmed. Although Sandra presented evidence that PTSD has the potential to cause physical injuries, she failed to present evidence that she herself was suffering from PTSD-related physical injuries; there is evidence only that Sandra has a disorder that could have caused physical injuries. The medical testimony is quite compelling in establishing that PTSD may lead to physical injuries that are covered under the policy’s definition of bodily injury. But, the testimony does not suggest that physical injuries are certain to follow from a PTSD diagnosis. Sandra’s expert concluded that (a) Sandra suffered from PTSD, and (b) she therefore has suffered physical injuries that are covered by the policy. However, there is no evidence in the record from which the expert could reach the second conclusion. There are scans capable of showing the type of physical injuries that PTSD is alleged to cause, but Sandra did not undergo any of these scans. Nor is there evidence that Sandra has suffered any of the other possible physical effects from PTSD.

Dieringer v. Sawmiller, 2012-Ohio-4880 (3rd Dist., Auglaize)

AUTO INSURANCE

Permitted user. Elwood and Esther Patrick own a farm and a four-wheeler with a small bed to transport loads. Their son William operates the property as a tobacco farm. William’s son Logan (age 15), and his friends Michael Gloff (age
15) and Corey Parker (age 14) were working for William on the farm. When the finished they decided to drive the vehicle around the farm, taking turns. While Gloff was driving, he made a sharp turn to avoid driving into a field; Corey was injured and sued Gloff. Elwood and Esther’s farm liability insurer Grange Mutual sued regarding coverage for Gloff, asserting that he was not a permitted user of the vehicle. The trial court granted summary judgment to Grange and the Court of Appeals affirmed. The fact that the boys were permitted to enter the farm, and permitted to engage in recreational activities, does not mean that Gloff and Corey had permission to operate the vehicle. Elwood and Esther gave Patrick permission, but did not authorize him to allow Gloff to drive. A person to whom permission is actually given cannot delegate that permission to a second permittee, so as to bring that person within the protection of the insurance coverage, where the initial permission by the insured owner is silent on the issue of delegation of authority.

**Parker v. Patrick, 2012-Ohio-3312 (12th Dist., Brown)**

“Hired or leased” vehicle. Matthew Brenton was driving his own pickup in the course of his employment with Roberts Construction, towing an equipment trailer owned by Roberts. He was reimbursed $300 monthly plus gasoline expenses. Brenton rearended a car, causing the death of Isabella Doubrava. Roberts’ insurer 21st Century filed this declaratory judgment action. The trial court granted summary judgment to 21st and the Court of Appeals affirmed. The policy stated that “insured” did not include Roberts’ employees while operating a vehicle owned by that employee or his family or household members. Nor was the pickup a “temporary substitute vehicle.” The “hired liability only” coverage applied to vehicles hired or leased for up to thirty days, and that vehicles hired or leased with a driver did not qualify. This vehicle was not “leased,” § 5739.01 (UU)(1) ORC, because the pickup was not handed over to Roberts’ control.

**21st Century Ins v. Estate of Doubrava, 2012-Ohio-3374 (8th Dist., Cuyahoga)**

Intra-family liability exclusion. William Michaels drove his motorcycle off the road, injuring his wife Debbie, who was his passenger. His, insurer, Markel American, denied liability, the trial court granted summary judgment to Markel and the Court of Appeals affirmed. (Markel also denied UM benefits.) The policy excluded liability coverage for any person who was a passenger on any insured motorcycle (unless passenger liability coverage was shown in the declarations, as it was here), or for injury sustained by an “insured person” (which included Debbie, as the resident spouse of the policyholder). Debbie asserted that the passenger coverage overrode the spousal exclusion, but the court disagreed.

**Michaels v. Michaels, 197 Ohio App 3d 643, 2012-Ohio-118 (9th Dist., Lorain)**

Named driver exclusion. Lillian Johnson had auto insurance from Progressive, with her son Lavelle Randall listed as an excluded driver. The policy stated that UM-UI coverage did not apply to “bodily injury sustained by
an insured person if the bodily injury is caused by a motor vehicle operated by any person who is specifically excluded for bodily injury liability coverage under this policy as an excluded driver or under any other provision of this policy.”

While Randall was operating a motorcycle not listed in Lillian’s declarations, he was struck and killed by an uninsured-underinsured motorist. Johnson sued Progressive for UM-UI coverage, alleging that Randall was an insured under the policy. The trial court granted summary judgment to Progressive and the Court of Appeals affirmed. Although the policy defines an “insured” to include Johnson’s relatives who live with her, the named driver exclusion applies. According to Johnson, because Randall did not cause the accident, he should not be precluded from coverage. The Court disagreed. The provision relates to “an insured person.” Randall was not an insured person, and therefore it is irrelevant whether he was at fault in causing the accident. Further, because Randall is not an insured, Johnson is precluded from making a UM-UI claim for her own loss derivative from his wrongful death.

**Johnson v. Progressive Ins, 2011-Ohio-6448 (8th Dist., Cuyahoga)**

**UNINSURED AND UNDERINSURED MOTORIST INSURANCE**

“Legally entitled to recover.” Perkins Township police officer James Greenham stopped his cruiser behind Tracy Thom’s car in her driveway. He got out but left the engine running and it rolled forward and struck Thom. Thom sued Perkins Township (which was self-insured) and Greenham, and also made a UM claim under her own policy from Western Reserve. The trial court granted summary judgment to Thom against Western Reserve and the Court of Appeals affirmed on this issue (but reversed on other grounds). Snyder argued that the clause providing UM coverage for losses caused by vehicles with political subdivision statutory immunity would be made pointless by this application of the “legally entitled to recover” clause. The Court agreed that there was an ambiguity and ruled that the “legally entitled to recover” clause did not bar a UM claim based on a government vehicle.

**Thom v. Perkins Twp, 2012-Ohio-1568 (6th Dist., Erie)**

**Independent corroborative evidence.** Ronald Fuller stopped at a gas station and went inside while his wife Clotte and their daughter Ra’Lysha waited in the car. A truck driver struck their car and when Ronald came out, he and Ra’Lysha went over to the truck driver, who sped away unidentified. They made a UM claim to their insurer Allstate. The policy stated that the testimony of any insured person seeking recovery from Allstate shall not constitute independent corroborative evidence unless the testimony is supported by additional evidence; § 3937.18 (B)(3) ORC. Ronald testified that there was no damage when he went into the gas station, but there was a big dent when he came out, and he had the only keys. Allstate denied the claim based on lack of independent corroborative evidence, the trial court granted summary judgment to Allstate but the Court of Appeals reversed. Ronald’s testimony constitutes independent corroborative evidence because is is not a named party in the case nor is he seeking recovery.

**Fuller v. Allstate Ins, 2012-Ohio-3705 (10th Dist., Franklin)**
Mold exclusion. Perry Miller contracted to build an addition on Charles Myers’ house. Myers complained of interior mold due to water infiltration resulting from improper construction. Miller’s CGL insurer United denied coverage, the trial court entered judgment against United, but the Court of Appeals reversed. The policy excluded coverage for property damage which would not have occurred but for the existence or presence of any ‘fungi’ on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage. The policy excluded any loss arising out of fungi or bacteria.

*Myers v. United Ohio Ins, 2012-Ohio-240 (5th Dist., Guernsey)*

“Occurrence.” Younglove Construction contracted to build a feed-manufacturing plant for PSD Development. PSD withheld payment, Younglove sued in federal court, and alleged it sustained damages as a result of defects in a steel grain bin. The bin had been constructed by Younglove’s subcontractor Custom Agri. Younglove filed a third-party complaint against Custom for contribution and indemnity. Custom’s CGL insurer intervened regarding coverage. Custom was being sued under two general theories, defective construction and consequential damages resulting from the defective construction. Westfield argued that none of the claims against Custom sought compensation for “property damage” caused by an “occurrence” and therefore that none of the claims were covered under the CGL policy. In the alternative, Westfield argued that even if the claims were for property damage caused by an occurrence, policy exclusions applied. Ohio law applied, and the federal trial court noted Ohio law had not decided whether defective-construction claims fall under a CGL policy. In its evaluation, the trial court assumed that Custom’s policy covered defective construction, but ruled that exclusion applied. The trial court granted summary judgment to Westfield. On appeal, the federal court of appeals certified a question to the Ohio Supreme Court: are claims of defective construction/workmanship brought by a property owner claims for “property damage” caused by an “occurrence” under a CGL policy? The Supreme Court answered that claims of defective construction or workmanship brought by a property owner are not claims for “property damage” caused by an “occurrence” under a CGL policy. All of the claims against which Westfield is being asked to defend and indemnify Custom relate to Custom’s work itself, ie, the alleged defective construction of and workmanship on the grain bin. Claims for faulty workmanship are not fortuitous in the context of a CGL policy, and fortuity is fundamental to insurance coverage. The CGL policy does not provide coverage to Custom for its alleged defective construction of and workmanship on the grain bin. (Opinion by O’Connor; Stratton, O’Donnell, Lanzinger, Cupp and McGee concur; Pfeifer dissents.)

*Westfield Ins v. Custom Agri Sys Inc, 133 Ohio St 3d 166, 2012-Ohio-4712*
“Mobile equipment” coverage. Stinson Crews Paving used its flatbed trailer and dump truck to haul an asphalt paver and skid loader to a job site. The trailer was parked at the side of a city street in a no-parking zone. The front of SCP's truck extended partly into the street as it loaded the paver in the driveway with asphalt. At about 5:20 am in late November Julia Augenstein approached the scene, SCP's flagger waved her away from the truck cab (and in the direction of the trailer). Augenstein apparently did not see the trailer, drove into it, and died from her injuries. Augenstein’s estate sued SCP, and SCP’s CGL insurer Century Surety intervened regarding coverage. [SCP also sued its commercial auto insurer Progressive for coverage; the trial court granted summary judgment to Progressive, ruling that the trailer was not covered by the auto policy.] The trial court ruled that the trailer was “mobile equipment” and not an “auto,” and the claim against SCP came within Century’s coverage. The Court of Appeals affirmed. Century's policy defined “auto” to include a trailer designed for travel on public roads, but excluded “mobile equipment.” The policy defined “mobile equipment” to include vehicles maintained primarily for purposes other than the transportation of cargo. If the trailer falls under the definition of an “auto,” the issue is whether the flatbed trailer is covered under the policy as an exemption from the “auto” exclusion. The issue here is not whether SCP's paving equipment falls within the meaning of the term “cargo” under one of its definitions, but whether the policy is ambiguous as to that term. Because the policy did not define "cargo," the term’s use creates an ambiguity and its meaning is open to interpretation. One possible definition is a very general term for items being transported; another limits the term to describing items in the stream of commerce. The policy provides no indication that it is using the term in the broader sense. Given the competing but valid interpretations, the trial court properly concluded the term is ambiguous and construed it against Century. Century's second assignment of error asserts, even if SCP's flatbed trailer is mobile equipment, the policy excludes coverage for claims arising out of the transport of “mobile equipment” by an auto owned or operated by or rented or loaned to any insured. “Transport” means to transfer or convey; at the time of the loss, the trailer was not attached to any motor vehicle. Because the loss did not arise out of transporting by the flatbed trailer, the exclusion does not apply.

Sauer v. Crews, 2012-Ohio-6257 (10th Dist., Franklin)

HEALTH INSURANCE

Medicaid. Under Medicaid the federal government provides financial assistance to states that reimburse needy persons for the cost of medical care. To participate in Medicaid, a state must adopt a medical assistance plan (eg, § 5111.01 et seq ORC and OAC § 5101:1-39 et seq), approved by HHS, that complies with rules concerning trusts created with an individual's assets. Eligible persons must have income and resources below a threshold set by HSS. As a general rule, a person’s resources include assets placed in a trust, and a
state must consider trust assets in determining whether the person is eligible for Medicaid. Congress provided an exception to this general rule for special-needs trusts, which include pooled trusts (where a non-profit organization serves as trustee to manage assets belonging to many disabled individuals).

**Kormanik v. Cooper**, 195 Ohio App 3d 790, 2011-Ohio-5617 (10th Dist., Franklin)

**PROPERTY INSURANCE**

“Theft.” When the term “theft” was not defined in the insurance policy, the trial court defined it to mean any wrongful deprivation of the property of another without claim or color of right.

**Magolan v. Shellhouse** 2012-Ohio-2144 (5th Dist., Richland)

**Replacement cost.** Thomas Jenkins had a fire loss to a house. His property insurance from State Farm provided for payment of the actual cash value of the loss, and for payment of (supplemental) replacement value costs for actual repair or replacement done within two years after the date of loss. State Farm paid the ACV. Jenkins later sued for the RV balance after State Farm denied coverage based on the two-year limitation. Jenkins alleged that State Farm’s refusal to pay the RV made it impossible to make the repairs within the two years. The trial court granted summary judgment to State Farm and the Court of Appeals affirmed. Impossibility of performance occurs where an unforeseen event arises rendering it impossible for one of the parties to perform contractual duties. Performance may be impracticable because it will involve a risk of injury to person or property that is disproportionate to the ends to be attained by performance. “Impracticability” means more than “impracticality.” A mere change in the degree of difficulty or expense does not amount to impracticability. A party is expected to use reasonable efforts to surmount obstacles to performance. Jenkins failed to show impossibility or prevention of performance. There were no unforeseeable events that prevented him from complying with the policy terms. Lack of finances does not excuse performance upon a contract by establishing impossibility of performance.

**Jenkins v. State Farm Mut.,** 2012-Ohio-6076 (5th Dist., Perry)

**SETTLEMENT PROCEDURES AND REQUIREMENTS**

**SETTLEMENT BY ESTATE**

Emmet Boyd’s estate sued for wrongful death. The estate’s attorney notified the court that there was a settlement, but a week later notified the court that the estate had withdrawn its consent to settle; the estate asserted that there had been no authority to settle. The defendant moved to enforce the settlement, the
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trial court sustained the motion. The trial court then overruled the estate’s CR 60 (B) motion for relief, but the Court of Appeals reversed. Where the trial court has jurisdiction, a ruling is voidable upon a showing of abuse of discretion. However, a judgment rendered without proper jurisdiction over the action or the defendant is void rather than voidable. If the judgment is void, the trial court has inherent power to vacate the judgment and a party need not seek relief under CR 60 (B). The personal representative appointed by the Probate Court may settle a wrongful death action with the consent of the probate court, § 2125.02 (C) ORC. The personal representative must obtain Probate approval, and wrongful death settlements are void when Probate approval is not sought or obtained. Therefore, this purported settlement was void, not voidable, and the estate did not need to meet CR 60 (B) requirements.

**Boyd v. Cleveland Clinic Found, 2012-Ohio-2513 (8th Dist., Cuyahoga)**

**VOIDING A SETTLEMENT**

In a divorce case, the parties read into the record a settlement agreement. The wife then filed objections to the proposed judgment entry and moved to set aside the settlement agreement, alleging that effects of her medications limited her capacity to contract. The court issued a judgment entry of divorce without specifically addressing the wife's objections and without ruling on the wife's motions. The Court of Appeals reversed. The trial court erred in failing to hold an evidentiary hearing on the wife's motion to set aside the settlement agreement. The essential elements of a contract include an offer, acceptance, contractual capacity, consideration the bargained for legal benefit and/or detriment, a manifestation of mutual assent and legality of object and of consideration. Where the meaning of terms of a settlement agreement is disputed, or where there is a dispute that contests the existence of a settlement agreement, a trial court must conduct an evidentiary hearing prior to entering judgment. In order to legitimately dispute a settlement agreement, the movant must clearly and specifically state the basis her challenge.

**Rojas v. Rojas, 2012-Ohio-2978 (9th Dist., Medina)**

Carla Feathers sued Thomas Tasker for auto accident injuries. The trial court referred the case to mediation, and the mediator reported that the matter had been settled, and Feathers signed the status report. Feathers then moved to void the settlement agreement, alleging that the mediation was unfair and one sided, that the amount was not reasonable in that it would not cover her medical bills, and that she felt pressured to enter into the settlement agreement. The trial court ruled that the case was settled and dismissed it, and the Court of Appeals affirmed. Although mediation is a nonbinding process, a settlement agreement reached through a mediation process is as enforceable as any contractual agreement. As long as a settlement agreement reached by the parties was not procured by fraud, duress, overreaching, or undue influence, the court has the discretion to accept it. To avoid a contract on the basis of duress, a party must prove coercion by the other party to the contract. It is not enough to show that one assented merely because of difficult circumstances that are not
the fault of the other party. Three common elements of duress include (a) the involuntary acceptance of terms by one party, (b) no alternative to acceptance under the circumstances, and (c) coercive acts by the other party gave rise to those circumstances. Feathers did not allege duress. Feathers further argues that the trial court erred by failing to hold a hearing prior to ruling on her motion. Only when a party disputes the meaning of terms or the existence of the agreement must the trial court conduct an evidentiary hearing, and Feathers alleged neither.

**Feathers v. Tasker, 2012-Ohio-4917 (9th Dist., Summit)**

**CONTRACTUAL REQUIREMENTS**

ABS sued Hamid Sarkis, who had signed as guarantor, on a cognovit note. The trial court entered judgment. Sarkis appeared and asserted that he did not sign the document at issue, and that he cannot speak, read, write or otherwise understand English and the statutorily required warning was essentially useless as he could not have possibly understood it. The trial court overruled his motion to vacate, but the Court of Appeals reversed and remanded. Sarkis was entitled to a CR 60 (B) hearing.

**ABL Wholesale Distrib Inc v. Quick Shop, 2012-Ohio-3576 (8th Dist., Cuyahoga)**

**SUBROGATION AND LIENS**

**“MAKE-WHOLE” RULE**

Vickie Callihan was injured in an auto accident caused by her husband. She had health insurance coverage through a plan from her husband’s employer, the city of Niles. The plan administrator, Enterprise Group Planning, paid $18,563. The policy included a subrogation clause giving Niles priority. Vickie recovered the $25,000 per-person UM limit from her policy (intra-family liability claims were excluded), and netted $16,480 after attorney fees. Vickie filed this declaratory judgment action to determine Niles’ recovery rights. The trial court found the clause ambiguous and granted summary judgment to Vickie. The Court of Appeals reversed and remanded. The issue in this case is a contractual subrogation agreement controlled by contract principles. The focus of conventional subrogation is the agreement of the parties. In order to avoid the make-whole doctrine, the agreement must clearly and unambiguously establish both (a) that the insurer has a right to a full or partial recovery of amounts paid by it on the insured’s behalf, and (b) that the insurer will be accorded priority over the insured as to any funds recovered. The plain language of the EGP Plan clearly and unambiguously contains provisions that purport to contractually eliminate the make-whole doctrine.

**Callihan v. Niles, 2012-Ohio-38 (11th Dist., Trumbull)**
John Davala was injured in an auto accident caused by Karen Ferraro. He received $83,117 medical benefits through his wife's self-insured employer Stark County Schools. He sued Ferraro, whose insurer offered its $100,000 liability limits. Davala argued that because "Plan Member" is not defined in the contract, the contract is ambiguous and therefore the right to reimbursement/subrogation is negated by the make-whole doctrine. The trial court ruled that Stark's subrogation language was ambiguous, and applied the make-whole doctrine, precluding Stark's right of recovery. The Court of Appeals reversed. A reimbursement agreement clearly and unambiguously avoids the make-whole doctrine if the agreement establishes both that the insurer (a) has a right to a full or partial recovery of amounts paid by it on the insured's behalf, and also (b) will be accorded priority over the insured as to any funds recovery. Insurance contracts are to be read and interpreted in the context of the entire policy. From a straightforward reading of the contract, a "Plan Member" is a covered person or a dependant.

_Davala v. Ferraro, 2012-Ohio-446 (5th Dist., Stark)_

LIENS

An attorney of record who has obtained a judgment has a security interest in the judgment, as security for his fees and expenses. This security interest, or "charging lien," is a lien on a judgment or other money awarded to a client or former client. This is an equitable claim based on the theory that his services and skill created the fund. Courts usually apply a "but for" test, to avoid a minimal or remote contribution to justify a charging lien. Counsel retained earlier in the litigation may claim a charging lien even if discharged as of the date of the judgment, if he can demonstrate the significance his contribution has to that judgment. Charging liens are generally superior to the claims of the client’s other creditors and even to federal tax liens. An attorney who was assigned an interest in the proceeds of a judgment may enforce his interest against the judgment debtor if he has notified the judgment debtor of his interest. A party’s former attorney is permitted to intervene in an action in order to pursue a charging lien.


SUBROGATION BY MEDICAID

The plaintiffs were injured by tortfeasors, and Medicaid, through ODJFS, paid part of their medical expenses. The plaintiffs paid their attorneys one-third of the settlements as legal fees, and also reimbursed the attorneys for legal expenses. ODJFS claimed 100% of its payments. The plaintiffs filed this declaratory judgment action, arguing that ODJFS should pay a pro rata share of the legal fees and expenses. The plaintiffs raised four arguments. First, failing to reduce ODJFS's recovery pro rata violates federal law, _Arkansas Dept of Health & Human Servs v. Ahlborn_, 547 U.S. 268 (2006). Second, under general
subrogation principles, ODJFS cannot attain greater rights in recovery than the rights held by the plaintiffs themselves. Third, ODJFS would be unjustly enriched unless its recovery is reduced pro rata. Fourth, failing to reduce ODJFS’s recovery pro rata creates an unconstitutional taking of the plaintiffs’ property. The trial court granted summary judgment to ODJFS and the court of appeals affirmed. § 5101.58 ORC stipulates that acceptance of public assistance gives the state or county department of job and family services an automatic right of recovery. Under *Ahlborn*, ODJFS was prohibited from asserting a lien only on any portion of the settlement beyond the amount representing payments for medical care. Further, Ohio law provides for the payment of attorney’s fees and costs before calculating ODJFS’s recovery. Finally, the statutory subrogation right did not grant any right to deduct attorney fees and costs from the subrogated amount payable to the public agency. In regards to unjust enrichment, this is a scenario where the injured party is reimbursing ODJFS for a benefit that ODJFS conferred, not where ODJFS is retaining a benefit conferred by the injured party. Moreover, § 5101.58 (G)(2) ORC limits ODJFS’s recovery to the lesser of the actual medical expenses paid or 50% of the recovery after payment of attorney fees and costs, to ensure that ODJFS does not receive an excess recovery. There has been no taking of the plaintiffs’ property without just compensation because this assignment is made before any recovery is obtained from a third party and the beneficiary has no property interest in this portion of the recovery.

*Mulk v. Ohio Dept Job & Family Servs*, 2011-Ohio-5850 (10th Dist., Franklin)

Brian Bates was injured in an auto accident caused by Tim D’Angelo. D’Angelo’s liability insurer Encompass offered its $100,000 limit in full settlement and Bates accepted; after attorney fees and expenses, $62,000 remained. Bates had incurred $185,000 in medical expenses, of which $67,245 was paid under Medicaid by ODJFS. ODJFS asserted it had a right to be reimbursed either (a) the full amount it paid [$67,245], or (b) half of the settlement after the deduction of attorney’s fees, expenses and costs [$31,000]; whichever is less. § 5101.58 (A) ORC and § 5101.58 (G)(2) ORC. Bates argued that his claim had a value of $500,000 and the $100,000 settlement meant the recovery was 20%, therefore ODJFS should recover only 20% of its payments [$13,449]. Encompass interplead the settlement amount, the trial court ruled that ODJFS was entitled to $30,503, and the Court of Appeals affirmed. *Arkansas Dept Health & Human Sers v. Ahlborn*, 547 US 268 (2006), in a case similar to this, prohibited Medicaid from asserting a lien on any portion of the settlement beyond the amounts representing payments for medical care. § 5101.58 (G)(2) ORC provides a balance, by first deducting attorney fees, then limiting Medicaid’s recovery to one-half of the balance.

*Encompass Indem v. Bates*, 2012-Ohio-4503 (10th Dist., Franklin)
The acceptance of public assistance gives an automatic right of recovery to ODJFS against the liability of a third party for the cost of medical assistance paid on behalf of the public assistance recipient or participant. A public assistance recipient's settlement is subject to ODJFS' automatic recovery right. The statute, § 5101.58 (A) ORC expressly creates an independent right of recovery against the settlement proceeds, not a subrogation interest.

*Encompass Indem v. Bates, 2012-Ohio-4503 (10th Dist., Franklin)*

**TORTS**

**DUTY OF CARE: WORKMANLIKE MANNER**

The plaintiffs contracted with Centex to sell them new homes. They asserted that metal floor members were magnetized, causing interference with televisions, radios and computers. They sued Centex, alleging breach of contract, breach of express and implied warranties, negligence, and failure to perform in a workmanlike manner. Centex noted that the contract had a limited warranty restricting claims for defects in materials and workmanship, and an express waiver of all implied warranties of habitability and fitness. The trial court granted summary judgment to Centex, the court of appeals affirmed, but the Supreme Court reversed. A home builder's duty to construct a house in a workmanlike manner using ordinary care is a duty imposed by law, and a home buyer's right to enforce that duty cannot be waived. (Opinion by Pfeifer; O'Connor, Stratton, O'Donnell, Lanzinger, Cupp and McGee concur.)

*Jones v. Centex Homes, 132 Ohio St 3d 1, 2012-Ohio-1001*

**WILLFUL, WANTON, RECKLESS**

Syllabus. 1. “Willful,” “wanton,” and “reckless” describe different and distinct degrees of care and are not interchangeable. (Thompson v. McNeill (1990), 53 Ohio St 3d 102, modified.) 2. Willful misconduct implies an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposefully doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury. 3. Wanton misconduct is the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great probability that harm will result. 4. Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct. (2 Restatement of the Law 2d, Torts, § 500 (1965), adopted.) 5. The violation of a statute, ordinance, or departmental policy enacted for the safety of the public is not per se willful, wanton, or reckless conduct, but may be relevant to determining the culpability of a course of conduct. (Opinion by O'Donnell; O'Connor, Stratton, Cupp and McGee concur; Pfeifer and Lanzinger dissent.)

*Anderson v. Massilon, — Ohio St 3d —, 2012-Ohio-5711*
Ferance Schmidt was driving his brand new Dodge Charger at 124 mph in a 60 mph zone. Testimony indicated he was racing with an acquaintance in a Camaro, and had nearly struck other vehicles. He slowed for several seconds but struck a minivan at 75 mph, killing Lawrence and Betty Erb. Schmidt was found guilty of aggravated vehicular homicide, which includes the element of “recklessness.” Schmidt argued that evidence of excessive speed alone was not sufficient to demonstrate recklessness. The Court of Appeals affirmed his conviction. Recklessness may be inferred from a combination of excessive speed and the surrounding circumstances.

*State v. Schmidt, 2012-Ohio-537 (9th Dist., Medina)*

**General Torts**

**Traffic laws: Pedestrians.** Sheriss Wallace was crossing a five lane street, pushing a stroller with a child in it, not in an intersection or crosswalk area. Cars swerve to avoid her, and as she entered the far lane, she was struck by Nancy Hipp. Hipp was driving at 30-40 mph in a 45 mph zone. Wallace was thrown fifty feet; the stroller and child were unscathed. Wallace sued. The trial court granted summary judgment to Hipp, ruling that Wallace was negligent *per se*. The Court of Appeals affirmed. Pedestrians crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles on the roadway, § 4511.48 (A) ORC. Although this does not relieve a driver from exercising due care to avoid colliding with any pedestrian upon any roadway, § 4511.48 (E) ORC, a driver need not look for pedestrians or vehicles violating his right of way, nor has a duty to look for danger unless there is reason to expect it.


**Conversion and motor vehicle titles.** Mark’s Akron-Medina Truck Sales bought a 2000 Mack truck and arranged financing from Western. A few weeks later La Gar bought the truck from Mark’s but never received the certificate of title. Although La Gar made monthly payments to Mark’s, Mark’s did not pay Western, and Western repossessed the truck. La Gar sued Western for conversion. The trial court concluded that La Gar lacked standing to pursue its claims because it did not have a certificate of title, § 4505.04 ORC, and dismissed the action for failure to state a claim upon which relief could be granted. § 4505.04 ORC applies where parties assert competing rights or competing interests in a motor vehicle, and § 4505.04 ORC governs over the UCC.

*La Gar Marketing Inc v. W Finance & Lease Inc, 2012-Ohio-4800 (9th Dist., Summit)*

**Conversion and motor vehicle titles.** A plaintiff need not present a certificate of title to prove ownership in an action seeking recovery for damage to a vehicle, unless there is a genuine dispute about the ownership of the vehicle. § 4505.04 ORC.

*Paldino v. Champion Quick Lube Plus, 2012-Ohio-4008 (11th Dist., Trumbull)*
**Insurance bad faith: Inadequate offer.** Leslie Daniel (insured by Grange with 100/300 liability limits) was intoxicated and drove into Darlene Stephens. Stephens sued. Stephens demanded $60,000 and increased that to $75,000. Grange offered $28,000 and increased that to $30,000, denying coverage for punitive damages. The jury awarded Stephens $31,478 compensatory damages and $20,000 punitive damages. Grange paid Stephens $31,478. Daniel assigned his rights against Grange to Stephens, who sued Grange for bad faith, demanding payment of the jury’s punitive award, and compensatory and punitive damages for bad faith. The trial court granted summary judgment to Grange and the Court of Appeals affirmed. Compensatory damages were awarded by the jury in an amount only $1,478 more than Grange’s final offer. Punitive damages are not insurable, and the use of insurance proceeds to satisfy an award of punitive damages is against public policy, § 3937.182 ORC.

**Stephens v. Grange Mut, 2012-Ohio-4980 (2nd Dist., Clark)**

**Breach of confidentiality.** Ohio Health sued James Ryan on an unpaid medical account. He filed a counterclaim, alleging violation of HIPAA and *Biddle*, asserting that Ohio Health disclosed to a third party that Ryan was uninsured. Ohio Health argued that HIPAA did not create a private cause of action. The trial court granted Ohio Health’s motion to dismiss, CR 12 (B)(6), finding that, although Ohio law does provide a cause of action for the unauthorized or unprivileged release of medical information, this disclosure was privileged; HIPAA allows for the release of medical information for payment. The Court of Appeals affirmed. HIPAA governs the confidentiality of medical records and regulates how covered entities can use or disclose individually identifiable health-medical information. HIPAA’s privacy rule, 45 CFR § 160 and 164, prohibits covered entities (generally health care providers who transmit health information in electronic form, 45 CFR § 160.103) from using or disclosing an individual’s protected health information except where there is patient consent, or the use is for treatment, payment, or health care operations. Even if *Biddle* allows a claim for an independent tort against a health care provider for the unauthorized, unprivileged disclosure to a third party of nonpublic medical information learned via a physician-patient relationship, where that information involved account information (rather than actual medical records, as in *Biddle*), Ryan’s claim still fails. First, the disclosure here was not unauthorized, because HIPAA permits the use of the information to obtain payment. Second, HIPAA preempts contrary state law, unless there is an exception; 45 CFR § 160.203. Further, HIPAA does not allow a private cause of action, according to Ohio law.

**Ohio Health Corp v. Ryan, 2012-Ohio-60 (10th Dist., Franklin)**

**Day care negligence.** Centerville Child Development Center, a licensed child care center, has a room for children ages 9-18 months. The room is approximately 15 feet square and includes a play area covered in thick, padded carpeting. Kenny Okocha (age 10 months) had not been feeling well and after his afternoon nap the teacher sat him upright on the floor. (There was one teacher and three children.) A moment later Kenny cried out, the teacher found him on his back; he quieted down, but he was lethargic, his skin was clammy, and his
eyes were open but not focused. Just then his father arrived and tried to revive Kenny, who seemed to be unconscious. Paramedics arrived within minutes, Kenny regained consciousness, and at a hospital was diagnosed with an acute left frontal temporoparietal subdural hematoma requiring emergency brain surgery. Kenny responded well to the surgery, was discharged from the hospital after a few days, and after physical therapy he recovered fully. Kenny and his parents sued, alleging common law negligence, negligence under § 5104.01 et seq ORC, assault, battery, loss of consortium, child endangerment, negligent and intentional infliction of emotional distress, negligent hiring, retention and supervision, and demanded punitive damages. The trial court granted summary judgment to the defendants on all claims and the Court of Appeals affirmed. The plaintiffs submitted no evidence showing the defendants breached any duty under common law or OAC § 5101:2-12-21(A). The defendants showed that CCDC complied with all ODJFS standards for operation of a licensed child care center; the teachers met all ODJFS qualifications and standards established by ODJFS, and the child-teacher ration was 3:1, better than the 5:1 standard. Kenny was seated on a well-cushioned, carpeted floor within a few steps of the teacher, who immediately attended to him, and CCDC reacted quickly and appropriately in assessing Kenny's condition. There is no evidence establishes that he fell or was struck or pushed by another child; even if there was, supervisors of a day nursery are charged with the highest degree of care toward the children placed in their custody but are not insurers of their safety and cannot be expected or required to prevent children from falling or striking each other during the course of normal childhood play.


PREMISES TORTS AND LIABILITY

_Ice and snow_. Peter Luft slipped and fell on ice on the city sidewalk adjacent to the defendant’s storefront. The trial court granted summary judgment to the business and the Court of Appeals affirmed. Business owners owe invitees the duty to warn of latent or hidden dangers, but not open and obvious dangers. An owner or occupier of land generally owes neither a duty to remove nor a duty to warn business invitees of the dangers associated with the natural accumulation of ice and snow (the “no-duty winter rule”); this rule applies even when municipal ordinances require landowners to keep sidewalks free of ice and snow. There are two exceptions, for unnatural accumulation (where the owner either permits or creates unnatural accumulations of ice and snow) and for improper accumulation (when a natural accumulation conceals a hazardous condition, which is substantially more dangerous than conditions normally associated with ice and snow, and about which the owner or occupier has actual or constructive knowledge.).

_Luft v. Ravemor Inc, 2011-Ohio-6765 (10th Dist., Franklin)_
Landlords. Emily Butler and her children leased an apartment from Wyndtree. Two years later the complex was in foreclosure and United Apartment Group was appointed receiver. The smoke detectors in the children's bedrooms operated, but the detectors in the hallway, living room and Emily's bedroom were either not connected to the 120 volt power lines or had batteries installed backwards. A fire started in the living room, possibly from a candle Emily left burning, and the three children died. Their estates sued, alleging violation of the Landlord-Tenant Act, § 5321.01 et seq ORC. The trial court granted summary judgment to UAG, finding UAG had no notice of the defect, and the Court of Appeals affirmed. A landlord shall comply with the requirements of all applicable building, housing, health, and safety codes that materially affect health and safety, keep the premises in a fit and habitable condition, and maintain all electrical fixtures and appliances supplied or required to be supplied by him, § 5321.04 (A) ORC. A landlord's violation of the duties imposed by the Act constitutes negligence per se. However, negligence per se does not equate to liability per se; the plaintiff must prove (a) the landlord's breach was the proximate cause of the injury, and (b) the landlord received actual or constructive notice of the condition causing the statutory violation. Even if UAG had a statutory duty to test, inspect, and maintain the smoke alarms, there was no evidence showing UAG knew or should have known of the defect causing the violation. Receivers (such as UAG) and landlords have a common law duty to tenants to exercise ordinary care, but there is no common law duty to inspect or maintain smoke detectors.

Butler v. Wyndtree Housing LP, 2012-Ohio-49 (12th Dist., Butler)

Landlords. Michelina Markiewicz lived in an upstairs apartment; the interior stairwell lights did not work, despite complaints to the landlord. Her guests left one evening and at the bottom of the steps tumbled through the glass plates on one side of the front door. They sued and the trial court granted summary judgment to the landlord, based on an open-and-obvious defense, and ruling that Landlord-Tenant Act did not apply. The Court of Appeals reversed. Open-and-obvious is a defense in a common law claim, but not under a statutory liability claim, such as a Landlord-Tenant Act claim. The Act, § 5321.04 (A)(3) ORC, does apply to a claim by the social guest of a tenant for a loss arising in a common area.

Mann v. Northgate Investors LLC, 2012-Ohio-2871 (10th Dist., Franklin)

Roads. Piedad Gomez hit a pothole on a Cleveland public street and was injured and sustained property damage. She sued Cleveland, alleging negligent maintenance, actual or constructive notice and failure to warn. Cleveland submitted an affidavit from its street department documenting a lack of complaints for the roadway at that location; the trial court granted summary judgment to Cleveland and the Court of Appeals affirmed. Potholes are classic examples of nuisances against which political subdivisions have the duty to protect travelers from injury. § 2744.02 (B) ORC holds political subdivisions liable for negligently failing to (a) keep public roads in repair, or (b) remove

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obstructions from public roads. A plaintiff must show that the municipality created the faulty condition, or had actual or constructive notice of its existence. Constructive notice arises when the nuisance existed in such a way that it could or should have been discovered, that it existed for a sufficient length of time to have been discovered, and that if it had been discovered it would have created a reasonable apprehension of a potential danger. Gomez failed to demonstrate that the city had actual or constructive notice that road repairs were needed.

_Gomez v. City of Cleveland, 2012-Ohio-1642 (8th Dist., Cuyahoga)_

_Surface water._ An increase in the amount of surface water onto an adjoining property is not, in and of itself, actionable. An unreasonable increase in the amount of surface water runoff may result in liability. One may make reasonable use of his surface water, incurring liability only when his harmful interference with the flow of that surface water is unreasonable.

_Adams v. Pitorak & Coenen Invests Ltd, 2012-Ohio-3015 (11th Dist., Geauga)_

_Condominium repairs._ Ruth Koslowski bought an existing condominium townhouse. She noticed cracks forming in the walls and that some doorways were going out of plumb. Investigation showed that apparently, when the unit was constructed, the soil used as fill under the concrete slab contained a high percentage of organic material that was decomposing and causing settling of portions of the slab. The foundation of the unit was dug deeper than the problem soil, so the unit was not in any danger of collapse, but the sinking slab caused interior walls to shift and crack. The Association denied any liability. Koslowski sued for declaratory judgment, after a bench trial the court found the Association responsible to stabilize the concrete slab, and the Court of Appeals affirmed. The Association argued that the slab floor was not a part of the foundation (for which it was responsible, as part of the structure). But the slab floor is a supporting structure (for which the Association is responsible). The problem here is the soil, and the soil is not a limited common area or the responsibility of Koslowski to maintain or repair. The concrete slab itself is not within Koslowski’s unit, which ends at the interior surface of the floor. Therefore, all but the interior surface of the concrete slab is the responsibility of the Association. Koslowski’s expert report indicated that replacement of the slab alone will not resolve the problem since the problem lies within the supporting soil underneath, and that replacement of the apparent soft, highly compressible soil under the slab is also necessary to provide adequate slab subgrade support. It is clear from the evidence that the soil under the slab must be replaced and the slab either repaired, re-supported, or replaced in order to prevent further damage to Koslowski’s unit. That is the responsibility of the Association. If the settling problem can be corrected and the slab repaired without replacing it, Koslowski may then be obliged to repair the interior surface of the floor. In regard to caveat emptor and her purchase of the unit, the court noted that Koslowski was not asking for compensation for damages sustained to her unit, she sought declaratory judgment that the Association was required to make the repairs.

_Koslowski v. Co-Moor Condo Assn Inc, 2012-Ohio-3254 (8th Dist., Cuyahoga)_

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Employer’s intentional tort. Larry Hewitt, an apprentice lineman for Myers, was electrically shocked after he was instructed by his supervisor to work alone in an elevated bucket with energized high-voltage power equipment and without wearing his protective safety equipment. He alleged his superiors told him that he did not have to wear his protective rubber gloves and sleeves while replacing the high-voltage electrical line with a new line. He alleged Myers knew with a substantial certainty that he would be injured when working alone in an elevated lift machine with live high-voltage power transmission equipment and without proper safety equipment or training. Myers moved for directed verdict with respect to liability under § 2745.01 ORC. The trial court ruled that Hewitt failed to prove his case with respect to § 2745.01 (A) and (B) ORC, and limited Hewitt’s theory of recovery to § 2745.01 (C) ORC. § 2745.01 ORC, the employer intentional tort statute, provides that: (A) when an employee alleges an intentional tort committed by the employer, the employer shall not be liable unless 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; (B) “substantially certain” means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death, and (C) deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result. The jury awarded $597,585 and the Court of Appeals affirmed. Myers contended the phrase “equipment safety guard” applies to items that not only have as their object the safety of the employee, but are also a part of a piece of equipment. As a result, it claims that subsection (C) is limited to cases involving the deliberate removal of a safety guard from equipment. The Court ruled that the protective rubber gloves and sleeves are equipment safety guards under the statute. Further, OSHA regulations require employees working in areas where there are potential electrical hazards shall be provided with, and shall use, electrical protective equipment that is appropriate for the specific parts of the body to be protected and for the work to be performed, 29 CFR § 1910.335(a)(1)(i).

**Hewitt v. L E Myers Co, 2011-Ohio-5413 (8th Dist., Cuyahoga)**

Employer’s intentional tort. Even when an employer is aware of a dangerous condition and fails to take action to correct the situation, such conduct does not meet the statutory requirements without evidence of an actual intent to cause injury. The failure to provide protective equipment and the failure to adequately train and supervise do not rise to the level of a deliberate intent to cause injury. Alleged deficiencies in training, safety procedures, safety equipment, instructions, or warnings, may show recklessness, but are insufficient to create a genuine issue of material fact as to deliberate intent.

**Meadows v. Air Craft Wheels LLC, 2012-Ohio-269 (8th Dist., Cuyahoga)**
**Employer’s intentional tort.** For purposes of § 2745.01 ORC, a protective face mask which prevents exposure to toxic dust and chemicals is a “protective safeguard,” supporting a claim for intent to injure an employee.


**Employer’s intentional tort.** As used in § 2745.01 (C) ORC, “equipment safety guard” means a device designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment, and the “deliberate removal” of an equipment safety guard occurs when an employer makes a deliberate decision to lift, push aside, take off, or otherwise eliminate that guard. Protective rubber gloves and sleeves, used by electrical workers, are personal items that an employee controls and do not constitute “an equipment safety guard” for purposes of the statute. An employee’s failure to use them, or an employer’s failure to require an employee to use them, does not constitute the deliberate removal by an employer of an equipment safety guard. (Opinion by Stratton; O’Connor, O’Donnell, Lanzinger, Cupp and McGee concur; Pfeifer dissents.)

*Hewitt v. L E Myers Co, — Ohio St 3d —, 2012-Ohio-5317*

**Employment discrimination.** John Southworth, age 63, was discharged as a financial portfolio manager as part of a reduction in force. He sued, alleging age discrimination. The trial court granted summary judgment to the employer but the Court of Appeals reversed. Age-discrimination claims can be proven in one of two ways: with direct evidence of discrimination, or by establishing a *prima facie* case of discrimination. Direct evidence should be evidence that can be interpreted as an acknowledgment of discriminatory intent by an employer or its supervisors. Comments are evidence of discrimination only if they are (a) related to the protected class of persons of which the plaintiff is a member, (b) proximate in time to the complained-of adverse employment decision, (c) made by an individual with authority over the employment decision at issue, and (d) related to the employment decision. To show a *prima facie* case of age discrimination, the employee must demonstrate that he was (a) a member of the statutorily-protected class, (b) discharged, (c) qualified for the position, and (d) replaced by, or that his discharge permitted the retention of, a person not belonging to the protected class. Northern Trust concedes that Southworth meets the first three prongs of the *prima facie* test: he was a member of the protected class (over 40 years of age), was discharged, and was qualified for the position of portfolio manager. An employer’s decision to discharge a qualified, older employee should not be considered inherently suspicious because in a RIF, qualified employees are going to be discharged. Here, Southworth showed that he was a better performer than a younger co-worker who was retained.

LIABILITY FOR OTHERS

Negligent entrustment. Tyson Hale had a number of points against his license and it had been suspended five times. He had had four speeding tickets in less than five years, but was cited for only one prior motor vehicle collision. There was some suggestion his license was suspended at the time of this collision. He could not qualify for a car loan, even with a co-signer, so his girlfriend’s grandmother Mary Daugherty bought a car, titled in her name, with the agreement that he would repay her and she would then transfer title to him. Two days after the purchase, Hale wrecked the car, killing his passenger/half-brother Kyler Roysdon. Roysdon’s estate sued Daugherty, alleging negligent entrustment. Daugherty moved for summary judgment, arguing that there was no evidence that she knew or should have known that Hale was an incompetent, inexperienced, or reckless driver. Hale lived with his girlfriend Brittany Layton and her mother Janet Seabold, within a mile of Daugherty’s home. Hale testified that his poor driving record was a topic of conversation among his girlfriend’s family members, especially at holiday gatherings. He said that Daugherty was present at those events so she must have known about his record, but conceded that he never told her about his tickets or suspensions, and she never asked him. The trial court granted summary judgment to Daugherty and the Court of Appeals affirmed. There was no evidence that Daugherty knew of this history.

Maeder v. Hale, 2012-Ohio-2 (9th Dist., Lorain)

Negligent entrustment. Robert Tite allowed his non-resident son Anthony to drive his pickup, with Robert as a passenger. Anthony drove erratically, ignored a police officer’s signal to stop, struck the police car and drove away. Robert was cited for wrongful entrustment, § 4511.203 (A)(2) ORC. The police officer testified that she knew Anthony’s license was suspended, and she assumed Robert knew, too. The Court of Appeals reversed his conviction. Proof of a parent-child relationship alone does not create a presumption of a parent’s knowledge that their child’s driving privileges were under suspension. In order to establish a violation the state must prove that the defendant had actual knowledge or reasonable cause to know that the driver’s license was suspended. This generally requires proof that the operator resided with the vehicle owner.

State v. Tite, 195 Ohio App 3d 352, 2011-Ohio-5047 (6th Dist., Huron)

Negligent entrustment. Christopher Kanoza had primary use of his mother’s Ford Escort. He was at a party with other teenagers and played “beer pong” with Lindsay Duffy (age 15). Kanoza saw Duffy get into the driver’s seat of his Escort with the keys, but said nothing. Matthew Rice and another passenger were also in the car. Duffy had a collision, Rice was injured, and Rice sued Kanoza for negligent entrustment. Kanoza moved for summary judgment on the ground that he was not the owner of the Escort and therefore could not be sued for negligently entrusting it. The trial court granted summary judgment to Kanoza but the Court of Appeals reversed. In an action against a vehicle owner alleging negligent entrustment, the plaintiff must show that (a) the vehicle was driven with the permission and authority of the owner; (b) the entrustee was an
incompetent driver; and either (c) the owner knew at the time of the entrustment that the entrustee had no driver’s license, or (d) he was incompetent or unqualified to operate the vehicle, or (e) had knowledge of such facts and circumstances as would imply knowledge on the part of the owner of such incompetency. Ordinarily, there is no legal obligation to control the conduct of another person to prevent him or her from causing injury to a third party. But one is negligent in permitting another person to use a thing which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others. One in control of an automobile has a duty to third parties not to entrust that automobile to another where the entrustor knew or should have known that the entrustee was an incompetent driver.

*Rice v. Kanoza, 2012-Ohio-2581 (1st Dist., Hamilton)*

**Negligent entrustment.** Theresa Stomps was cited for wrongful entrustment, § 4511.203 (A)(1) ORC, after her husband Brian was stopped for driving without a license and was arrested on an outstanding warrant. The statute provides that no person shall permit a motor vehicle owned by the person or under the person’s control to be driven by another if she knows or has reasonable cause to believe that the other person does not have a valid driver’s or commercial driver’s license. Theresa testified that she believed that Brian had his license reinstated, or that it had not been suspended, and that she did not know he had taken the truck (although when she saw it was gone, she may have assumed he took it). Theresa was convicted, but on appeal the State conceded the evidence was insufficient and the Court of Appeals reversed.

*State v. Stomps, 2012-Ohio-3852 (2nd Dist., Montgomery)*

**Scope of employment and respondeat superior.** Gary Tisdale sued TH, alleging a medical claim involving its employee nurses. TH moved to dismiss on two interrelated grounds: first, that it could not be vicariously liable based on the acts of individual nurse employees who were never made party-defendants and, second, that Tisdale was barred from continuing his suit against TH because the statute of limitations had expired as to the nurses. For both grounds, the hospital cited *Wuerth*. The trial court dismissed but the Court of Appeals reversed. *Wuerth* does not apply to a hospital’s nurse-employees and, under respondeat superior, they do not need to be named in the complaint. *Wuerth* did not overrule or even modify the *respondeat superior* doctrine in *Losito* in negligence actions. Quite the opposite: *Wuerth* acknowledged and retained the *Losito* rule that the plaintiff can choose to sue the employer or the employee or both. Second, *Comer* does not apply here because agency by estoppel presupposes that the tortfeasor’s relationship to the hospital is that of an independent contractor.

*Tisdale v. Toledo Hosp, 197 Ohio App 3d 316, 2012-Ohio-1110 (6th Dist., Lucas)* accord

*Henik v. Robinson Mem Hosp, 2012-Ohio-1169 (9th Dist., Summit)*
**Scope of employment and respondeat superior.** Teresa Snyder was injured in a collision caused by Dennis Stevens, and she sued him and Stakers Service Drugs, alleging that Stevens was acting in the course of employment with Stakers. The trial court granted summary judgment to Stakers, ruling Stevens was not its employee, and the Court of Appeals affirmed. Snyder argued that Stevens used Stakers’ equipment, had no investment of his own in the business, was free to quit at any time, and would be considered an employee under the stricter workers’ compensation statute applying to a labor or construction contract, he was an employee. However, the undisputed evidence shows that Stevens retained the right to control the manner and means of performing his work, he alone was responsible for the hours he worked, the quality of his work, and the route he would travel at the time of the accident, and Stakers had no role at all deciding any of the aspects of his work; therefore, he was acting as an independent contractor.

*Snyder v. Stevens, 2012-Ohio-4120 (4th Dist., Scioto)*

**Scope of employment and respondeat superior.** Gregory Woodard was an interstate truck driver for Cassens, transporting cars. Under his union’s CBA, Cassens provides him with overnight hotel rooms as needed. Federal regulations required Woodard to keep a log of his time, including mandatory “off-duty” time when he is not on duty, is not required to be ready to work, or is not under any responsibility for performing work; 49 CFR § 395.8(h)(1). While staying at a hotel one night, Woodard slipped in the bathroom and injured his leg. His workers compensation claim was allowed, and on administrative appeal the trial court affirmed, but the Court of Appeals reversed. To be a compensable injury, it must occur both (a) in the course of and (b) arising out of the claimant’s employment, § 4123.01 (C) ORC. Generally, a traveling employee (one whose work entails travel away from the employer’s premises) is considered to be in the course of his employment continuously during an employment-related trip, except when a distinct departure on a personal errand is shown. Woodard slipped and fell in the bathroom of his hotel while he was off-duty away from the terminal and engaged in a highly personal act, not incidental to his employment; his injury did not “arise out of” his employment, as a matter of law.

*Woodard v. Cassens Transp Co, 2012-Ohio-4015 (3rd Dist., Union)*

**Animals.** The Hendersons owned a single-family home which they rented to Diane Huffman. Huffman owned a dog which she kept at the residence with the Hendersons’ knowledge. Jaretzy Diaz was playing with Huffman’s granddaughter when she was brutally attacked by Huffman’s dog in either Huffman’s front or side yard. Diaz sued the Hendersons. The trial court granted summary judgment to the Hendersons, ruling that they did not harbor the dog and thus were not liable for Jaretzy’s injuries under either a strict liability or common law negligence claim. The Court of Appeals affirmed. Diaz argued on appeal that while the Hendersons did not own or keep the dog, they did harbor the dog. The appellate court disagreed; in determining whether a defendant is a harborer of a dog, the central focus of the analysis shifts from possession and control over the dog to possession and control of the premises where the dog
lives. A “harborer” is one who is in possession and control of the premises where the dog lives, and silently acquiesces in the dog’s presence. In a situation involving a landlord and a tenant, a landlord cannot be a harborer of a dog that is kept on premises over which the tenant has sole control. Because Huffman had sole control and possession of the property where her dog lived, and because the dog was kept in areas on the property that were neither common areas nor shared by the Hendersons and Huffman, the Hendersons did not harbor the dog.

**Diaz v. Henderson, 2012-Ohio-1898 (12th Dist., Butler)**

**Animals.** The Elias Family Trust owns property including a pasture which it leased to Kenneth McGuire, who contracted with Ellen Meyer to board her horse. Meyer left her horse out in the pasture one day, and her horse (and five other horses) escaped onto the neighboring property. The neighbors saw horses grazing in their yard and called their neighbor Evelyn White. White, who was familiar with the horses, came over to see if she could lead the horses back. Meyer’s horse kicked back, hitting White in the face. White sued the Trust, the trial court granted summary judgment to the Trust on White’s strict liability claim, and the Court of Appeals affirmed. There is a difference between animal liability cases based on negligence (where an animal owner’s negligent conduct caused damage) and those based on trespass (based on injuries resulting from the animal’s entry upon another’s property). The Revised Code does not impose strict liability here, because White did not own the premises where her injuries occurred. Under § 951.10 ORC the owner or keeper of an animal described in section § 951.01 ORC or § 951.02 ORC (such as horses and cattle) who permits it to run at large in violation of either of section is liable for all damages caused by such animal upon the premises of another without reference to the fence which may enclose such premises. In cases where the escaped animal is found on a public road or highway, the action can only be brought in negligence. Strict liability is available only for trespass claims; § 951.02 ORC and § 951.10 ORC are designed for the purpose of preventing trespass and not for the benefit of an injured third party. Under common law, trespass quare clausum fregit awarded damages on the basis of strict liability for damages to real estate only, and this was expanded under Ohio common law to include damages to personal property and for personal injuries. The nature of the offense was the breaking into the close of another, completely distinct from the running at large of animals. Neither the General Assembly nor the Supreme Court has expressly held that violation of § 951.02 ORC creates strict liability in favor of a claimant in cases of the animal’s presence on a separate third party’s private property. In order for the Trust to be held strictly liable, White would have to show that the trustee was a “keeper” of Meyer’s horse (eg, had control over it, cared for it, fed it, received part of the boarding fees), and that was not the case here.

**White v. Elias, 2012-Ohio-3814 (8th Dist., Cuyahoga)**

**Animals.** Lisa Riegel was cited for permitting her horses to run at large in violation of § 951.02 ORC (under the 1978 amendment of the statute, not the 2011 version) when they were loose in a highway. One week later she was cited for the same offense when her horses were found grazing on a neighbor’s
property, unconfined and next to the highway. She was found guilty of both misdemeanor occurrences, and the Court of Appeals affirmed. The 1978 statute provided that “the running at large of any such animal in or upon any of the places mentioned in this section is prima-facie evidence that it is running at large in violation of this section.” The 2011 statute deleted this sentence and inserted it into § 951.10 ORC (pertaining to civil responsibility for damages resulting from escaped animals). § 951.12 ORC was essentially unchanged in 2011 and provided that if an animal running at large in violation of § 951.02 ORC escaped without the owner’s or keeper’s knowledge or fault, the animal shall be returned upon payment of compensation under § 951.13 ORC for its taking, advertising, and keeping. Here, the 1978 version of the statute was in effect; and under either version of the statute, the evidence showed that Riegel was reckless in allowing them to escape, and therefore she was not without “fault” under § 951.02 ORC and § 951.12 ORC.

**State v. Riegel, 2012-Ohio-3rd Dist., Union**

**Animals.** The determination of whether a landlord is a harborer of a dog does not depend upon whether the landlord knew about the existence of the dog, but on whether the landlord permitted or acquiesced in the tenant’s dog being kept in common areas or in an area shared by both the landlord and the tenant. A lease transfers both possession and control of the leased premises to the tenant.

**Burgess v. Tackas, 125 Ohio App 3d 294 (8th Dist., Cuyahoga, 1998)**

**Lopiccolo v. Vidal, 2012-Ohio-4048 (8th Dist., Cuyahoga)**

**Parental.** Mary Gurry’s car was stolen. When police located it, the driver jumped out and fled (allowing the stolen car to run into a parked car) but minors CP and TE were passengers and arrested. CP entered a plea agreement to unauthorized use of a motor vehicle, a theft offense. Gurry’s subrogated insurer State Farm sued CP, TE for joint venture to commit theft, and their mothers Tameeka Sheron and Latonya Edwards for parental liability, § 3109.09 ORC. The trial court entered judgment against them jointly and severally. Sheron appealed, arguing that parental liability was error, because there was no private cause of action under § 2913.03 ORC. The Court of Appeals affirmed. The claim against Sheron is based on § 3109.09 (B) ORC, which grants a private right of action against a parent whose minor child committed a theft offense; it is not based on § 2913.03 ORC. It is a statutory claim, not a common law tort claim, although it is within the broad definition of a “tort action, § 2307.011 (J) ORC.

**Gurry v. CP, 2012-Ohio-2640 (8th Dist., Cuyahoga)**

**Joint-and-several.** Mary Gurry’s car was stolen. When police located it, the driver jumped out and fled (allowing the stolen car to run into a parked car) but minors CP and TE were passengers and arrested. CP entered a plea agreement to unauthorized use of a motor vehicle, a theft offense. Gurry’s subrogated insurer State Farm sued CP, TE for joint venture to commit theft, and their
mothers Tameeka Sheron and Latonya Edwards for parental liability, § 3109.09 ORC. The trial court entered judgment against them jointly and severally. CP and Sheron appealed, arguing that joint and several liability was error, and liability should have been apportioned, § 2307.22 et seq ORC. The Court of Appeals affirmed. In a tort action where more than one tortfeasor has proximately caused a person’s property damage, any tortfeasor who has caused fifty percent or less of the tortious conduct is responsible for only his or her proportional share of the economic loss, § 2307.22 (A)(2) ORC. However, in a tort action where the tortfeasors have engaged in an intentional tort, joint and several liability applies regardless of the percentage of any tortfeasor’s liability, § 2307.22 (A)(3) ORC. The trial court was incorrect in ruling that § 2307.22 ORC does not apply to an action under § 3109.09 ORC. But conversion is an intentional tort, and intentional torts are subject to joint-and-several liability under § 2307.22 ORC.

**Gurry v. CP, 2012-Ohio-2640 (8th Dist., Cuyahoga)**

**Criminal acts.** Johnny Boyd, age 22, was employed by US Security as a guard at an assisted living facility owned by Lourexis and managed by Millennia Housing. During his night shift, a van with four people in it parked in a handicapped space. Boyd came out and asked why they were parked there, he was told they were waiting for someone, and Boyd went back inside. When Boyd finished his shift and was walking to his car, the van drove toward him and shots were fired from the side door; Boyd ran but was fatally shot in the head. The assailants took his car keys and car. His estate sued Lourexis, Millennia, and USSA for wrongful death, alleging that the defendants knew or should have known about the violent criminal activity in the area, and owed a duty to protect and warn Boyd. The trial court granted summary judgment to the defendants and the Court of Appeals affirmed. There is no duty to protect invitees from the criminal acts of third parties unless the business in the exercise of ordinary care, knew or should have known of the danger. The foreseeability of criminal acts depends upon the knowledge of the defendant-business based on the totality of the circumstances. Although the estate argues that the facility was in a high crime area and attempted to have an expert report admitted to support that argument, no evidence was presented of prior similar criminal acts in the vicinity of the complex; the crimes were limited to breaking into cars, the homeless trying to get into the lobby during winters, and an isolated incident of purse snatching.

**Boyd v. Lourexis Inc, 2012-Ohio-4595 (8th Dist., Cuyahoga)**

**TORT DEFENSES**

**Prior contractual release.** Stanley Augsburger took his boat to BLM for repair work. Augsburger signed a service order which stated that BLM would not be held responsible for loss or damage to the boat in case of fire, theft, accident, inclement weather conditions or any other cause beyond BLM’s control. The boat was stolen from BLM’s premises and never recovered. Grange paid its insured Augsburger for his loss and filed this subrogation action against BLM.
This action involved a bailment, and when BLM accepted Augsburger’s boat, it undertook a duty to safeguard the property through the exercise of ordinary care, and to return the property undamaged. The elements of a claim against a bailee are (a) the existence of a bailment contract, (b) the delivery of the bailed property to the bailee, and (c) failure of the bailee to redeliver the bailed property undamaged at the termination of the bailment. The trial court found that Grange proved the elements of a bailment claim. But the trial court granted summary judgment to BLM based on the waiver and the Court of Appeals affirmed. Valid exculpatory clauses or releases constitute express assumptions of risk, and strictly construed against the drafter unless the language is clear and unambiguous. The exculpatory provision specifically sets out various potential causes of loss or damage, including fire, theft, accident, and inclement weather, or any other cause beyond BLM’s control. While these were beyond BLM’s control, it could have taken precautions to prevent or diminish damages caused by any of the stated factors. But the exculpatory clause excused BLM from liability for negligence in failing to take precautions to prevent damage or loss to the property.

**Grange Mut v. Buckeye Lake Marina, 2011-Ohio-6465 (5th Dist., Fairfield)**

**Prior contractual release.** While Jodi Geczi was using a treadmill at Lifetime Fitness Center she increased the speed, and the incline function engaged on its own and the machine began jerking violently. Geczi suffered an injury to her left arm. Geczi reported the incident to an employee, who told her that this particular treadmill had issues. A manager allegedly told Geczi that he knew the night before that the machine had been malfunctioning. But Lifetime neither warned Geczi nor put a sign on the machine. Geczi sued Lifetime, alleging both negligence and willful-wanton misconduct. Lifetime moved for summary judgment, arguing that Geczi had signed a membership application and a separate new member policy checklist, which contained three exculpatory provisions that barred her claim. The trial court granted summary judgment to Lifetime on the negligence claim and the Court of Appeals affirmed. [The trial court denied summary judgment on the willful-wanton claim because the waiver would not apply to such claims, but the jury returned a defense verdict on that claim.] Clear and unambiguous contract clauses relieving a party from liability for its own negligence are generally upheld. This release is not ambiguous; its only reasonable interpretation is to release Lifetime from negligence claims of the kind made by Geczi.

**Geczi v. Lifetime Fitness, 2012-Ohio-2948 (10th Dist., Franklin)**

**Self-defense.** Brandon Harris was a reputed drug dealer, and Eric Bundy was his bodyguard. Brandon left Eric home without money, so Eric took Brandon’s gun and some cocaine and Percocet to sell, to get money. Brandon and his brother Richard returned home, concluded Eric had taken the items and went to look for him. Eric contacted Shawn Fyffe about buying the gun and drugs. Brandon and Richard contacted Shawn, and asked him to lure Eric to an ambush. Eric and his brother Charles arrived at an abandoned parking lot, and
Shawn, Richard, Brandon (and Brandon’s girlfriend Lauren Smith) arrived. There was an altercation, car windows broken in, gun shots, with one or more bullets killing Shawn. Eric was charged with murder, the trial court allowed Eric to raise the self-defense as a defense but overruled his motion for acquittal. The Court of Appeals affirmed his conviction. Under the Castle Doctrine, § 2091.05 (B) ORC, a defendant is rebuttably presumed to have acted in self-defense when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the defensive force is used is in the process of unlawfully and without privilege to do so entering, or has unlawfully and without privilege to do so entered, the residence or vehicle occupied by the person using the defensive force. The jury could decide that the evidence showed that Shawn was not in or entering Eric’s car. Therefore Eric was required to prove the elements of common law self-defense, which requires the defendant to show that he (a) was not at fault in creating the violent situation, (b) had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape was the use of force, and (c) that the defendant did not violate any duty to retreat or avoid the danger. If the defendant fails to prove any one of these elements by a preponderance of the evidence he has failed to demonstrate that he acted in self-defense.

*State v. Bundy, 2012-Ohio-3934 (4th Dist., Pike) accord*

*State v. Lampley, 2012-Ohio-4071 (5th Dist., Richland)*

**TORT IMMUNITIES**

**Workers compensation.** Robert Romig was a driver for Baker, assigned to transport propane canisters for Worthington Cylinder. Baker contractually agreed to indemnify Worthington for all claims arising out of the shipping. Worthington loaded the tanks on the truck in a way Romig approved. While they were being unloaded, the equipment fell on Romig and killed him. His estate sued Worthington for negligence. Worthington sued Baker for indemnification, Baker argued that its statutory immunity for workers compensation claims precluded the indemnification claim, and the trial court granted summary judgment to Baker. The “empty chair” rule, § 2307.23 ORC, allows the jury to award a proportion of fault against non-parties. There is no exception for parties immune under the Workers Compensation Act, § 4123.74 ORC. But the Act provides immunity for complying employers. The two statutes are not reconcilable. The Ohio Constitution, the Act and and case law mandate that workers’ compensation is the exclusive remedy for an employee’s workplace injury. There is no such thing as employer negligence, and a tortfeasor cannot raise the affirmative defense of the empty chair as to an employer for negligent acts. We find to include the employer’s negligence in the allocation of fault is completely inconsistent with the workers’ compensation system.

*Romig v. Baker Hi-Way Express Inc., 2012-Ohio-321 (5th Dist., Tuscarawas)*

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Workers compensation. The employee was injured when working at electric supply panels and was awarded an additional amount for violation of a specific safety standard (VSSR) based on protective equipment not being provided. The Supreme Court affirmed. A VSSR has been characterized as a penalty, thus the specific safety regulation must be strictly construed in the employer’s favor, and all reasonable doubts concerning its applicability must be resolved in the employer’s favor. (Per curiam; O’Connor, Pfeifer, Stratton, O’Donnell, Lanzinger, Cupp and McGee concur.)

State ex rel Glunt Indus Inc v. Indus Comm of Ohio, 132 Ohio St 3d 78, 2012-Ohio-2125

Emergency vehicle. Tivanni Taylor (who had a flashing yellow light) collided in an intersection with Cleveland police officer Roger Prettyman (who had a flashing red light). Prettyman did not stop at the intersection nor did he activate his lights or sirens as he drove through the intersection. Prettyman was transporting a prisoner to the hospital for medical treatment in response to orders received from police dispatch. Taylor sued Cleveland, alleging willful and wanton misconduct. The trial court overruled Cleveland’s motion for summary judgment based on statutory immunity and in an interlocutory appeal, the Court of Appeals affirmed. Prettyman was responding to an emergency call. While this relieved him of the duty to stop at the flashing red light, he still was required to slow down as necessary for safety to traffic, and proceed cautiously. § 4511.03 (A) ORC. There is a fact question for the jury.

Taylor v. Cleveland, 2012-Ohio-3369 (8th Dist., Cuyahoga)

Emergency vehicle. Kiante Williams was being transported in a Cleveland ambulance driven by Glen Burks. Burks was using the flashing lights but maybe not the siren. He was driving at about 43 mph in a 35 mph zone (within Cleveland EMS guidelines), slowing at intersections. Burks collided with a car that entered the intersection on a green light; that driver’s view of the ambulance was obstructed by a fence. Williams sued Cleveland, the trial court granted Cleveland’s motion for summary judgment based on political subdivision statutory immunity, but the Court of Appeals reversed. § 2744.02 (B)(1)(c) ORC provides a complete defense to a city for the negligent operation of an ambulance if (a) the employee, validly licensed to drive, is operating the vehicle in response to an emergency call, (b) the operation of that vehicle did not constitute willful or wanton misconduct, and (c) the operation complies with § 4511.03 ORC. § 4511.03 ORC requires an emergency vehicle driver to slow as needed for safety when going through a stop sign or red light, and there is a fact question whether Burks complied.

Williams v. Stefka, 2012-Ohio-353 (8th Dist., Cuyahoga)

Political subdivision: sewers. Springfield installed culverts and a drainage ditch adjacent to Greg Guenther’s property to alleviate flooding. The flooding still occurred and Guenther sued, alleging that Springfield was liable. The trial court denied Springfield’s motion for summary judgment, based on
statutory immunity, but the Court of Appeals reversed. An exception to political subdivision immunity is liability for negligent performance of a “proprietary” function, § 2744.02 (B)(2) ORC. Governmental functions related to sewer systems include the provision or non-provision, planning or design, construction, or reconstruction of a sewer system, § 2744.01 (C)(2)(l) ORC. Proprietary functions include maintenance, destruction, operation, and upkeep of a sewer system, § 2744.01 (G)(2)(d) ORC. But the drainage tiles and culvert here were not part of a “sewer system.”


**Political subdivision: proprietary functions.** Megan Frenz slipped and fell on North Olmsted’s ballroom floor at a wedding. She sued, alleging the floor had excessive wax on it. North Olmsted moved for summary judgment based on statutory immunity, the trial court overruled the motion and in an interlocutory appeal the Court of Appeals affirmed. Frenz mistakenly argues that because the operation of the club is not a governmental function, it is proprietary and therefore not subject to immunity. However, § 2744.02 (A)(1) ORC specifically absolves a political subdivision from liability for injury allegedly caused by any act or omission involving a governmental or proprietary function. If the analysis ended here, North Olmsted would clearly prevail. Even if the operation of the club is a proprietary function, the plain wording of the statute grants the city immunity. However, under the second tier of the analysis, if the operation of the club or ballroom is deemed to be a proprietary function, § 2744.02 (B)(2) ORC provides an exception to immunity, and states that: political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions. Here, the hall rental is a proprietary, not a governmental, function.

_Frenz v. Springvale Golf Course & Ballroom, 2012-Ohio-3568 (8th Dist., Cuyahoga)_

**Political subdivision: proprietary functions.** Cleveland’s water department repaired a leaking water pipe under a parking lot; after making the repairs the workers tamped down the soil and compressed it with a dump truck. Christopher Mingle drove over the site, his truck’s tires sank in, and he alleged the jolt injured him. He sued Cleveland, the trial court overruled Cleveland’s motion for summary judgment based on statutory immunity, and in an interlocutory appeal the Court of Appeals affirmed. Cleveland is liable for failure to maintain public roads, § 2744.02 (B)(3) ORC, and Cleveland correctly pointed out that the parking lot is not a public road. But Cleveland is also liable for negligence in performing proprietary functions, § 2744/02 (B)(2) ORC, and repairing water pipes and their excavations is a proprietary function.
**Mingle v. Cleveland, 2012-Ohio-4388 (9th Dist., Summit)**

**Political subdivision: sidewalks.** The plaintiff was injured when he stepped on a loose manhole cover set in a city sidewalk. Cleveland moved for summary judgment based on statutory immunity, the trial court overruled the motion but in an interlocutory appeal the Court of Appeals reversed. Prior to the 2002 amendment of § 2744.02 (B)(3) ORC [effective 04-09-2003] the statute provided that political subdivisions were liable for damages “caused by their negligent failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, and free from nuisance and other negligent failure to remove obstruction.” However, after the amendment, the statute provides that political subdivisions are liable for damages “caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads.” The amendment removed, among other things, “sidewalks” from this exception to the political subdivision immunity. Furthermore, the statute defines public roads to include public roads, highways, streets, avenues, alleys, and bridges, within a political subdivision; this does not include berms, shoulders, rights-of-way, or traffic control devices; § 2744.01 (H) ORC. The sidewalk is an area of a public road beyond that of a berm or shoulder.

**Wilson v. Cleveland, 2012-Ohio-4289 (8th Dist., Cuyahoga)**

**Political subdivision: discretionary actions.** After the Akron sewer department backfilled an excavation on a Friday, a water main break occurred at 4 pm. The water department reduced the water flow, but left it on so local residents would have water, put up barriers, and decided to fix the damage on Monday. Less than 24-hours later, Haley Shepherd and Dorothy Johnson, were injured when their car fell into the excavation site; the large hole was obscured by water and no barricades were present. They sued, Akron moved for summary judgment based on statutory immunity, but the trial court overruled the motion. The Court of Appeals affirmed on two points, but found a fact question on the third point and reversed. § 2744.02 (B)(3) ORC provides that political subdivisions are liable for loss caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads. The evidence does not support the conclusion that Akron (a) was negligent in its road repairs, or (b) in waiting until Monday to repair the water main break; however, there was evidence that (c) Akron may not have placed barricades adequately. Because this involves a non-discretionary decision, Akron would not be entitled to immunity, § 2744.03 (A) ORC.

**Shepard v. Akron, 2012-Ohio-4695 (9th Dist., Summit)**
INSUFFICIENT AWARD FOR PLAINTIFF

Where the record failed to disclose the plaintiff experienced pain-and-suffering as a result of the defendant’s negligence, the jury’s award for medical bills but not pain-and-suffering, is not grounds for a new trial. But a jury may not ignore undisputed evidence of the pain-and-suffering the plaintiff sustained as a result of the defendant’s negligence.

Cooper v. Moran, 2011-Ohio-6847 (11th Dist., Lake) comparing

Mensch v. Fisher, 2003-Ohio-5701 (11th Dist., Portage), and

Vieira v. Addison, 1999 Ohio App LEXIS 3984 (11th Dist., Lake)

Virginia Gabbard rearended Laura Sanders. Sanders went to the ER the next day and was diagnosed with soft-tissue injury. A year later she began seeing a pain specialist who diagnosed radiculopathy, and then a surgeon. At trial Sanders testified she still had tingling and significant loss of feeling in her right hand, restricted range of motion in her neck, and requires daily pain medication in order to function. She claimed $53,597 medical expenses and $9,460 lost wages. Gabbard argued that Sanders’ medical records showed three years of neck problems prior to the collision. The jury awarded Sanders $2,894 in medical expenses and nothing for pain and suffering, and nothing for her husband’s consortium claim. The trial court overruled Sanders motion for a new trial and the Court of Appeals affirmed. A trial court’s decision regarding a new trial is in its sound discretion. A new trial may be based on inadequacy of damages when it appears that the jury must have omitted to take into consideration some of the elements of damage properly involved in the plaintiff’s claim. The jury did not ignore an element of Sanders’ claim in arriving at its award. The jury instructions were correct in describing damages for pain and suffering, and the jury forms set forth past and future economic and non-economic damages, including pain and suffering and mental anguish. The jury did not forget or ignore these elements of damages; it clearly wished to award her only a small amount of the medical expenses she claimed because it did not believe that she was significantly injured in the accident.

Sanders v. Gabbard, 2012-Ohio-176 (8th Dist., Cuyahoga)

Jennifer Cheeseman was driving in the course of her employment with Three Little Pigs Ltd and Hoggies Restaurant & Catering, when she rearended George Argie. The defendants conceded negligence, but disputed the proximate causation of the damages Argie claimed. The jury returned a defense verdict. Argie moved for a new trial, arguing that, while the jury was free to believe that the collision did not cause his herniated disc, there was uncontroverted evidence that he suffered "some injury" as a result of the collision. The trial court ruled that Argie presented only evidence of subjective pain and suffering and that there was conflicting evidence regarding the cause of appellant’s claimed
injuries. The trial court overruled the motion and the Court of Appeals affirmed. Where subjective, soft-tissue injuries are alleged, the causal connection between such injuries and the auto accident alleged to have caused must be established by expert testimony. Argie did not present expert testimony to establish a causal link between the collision and his alleged soft-tissue injuries within a reasonable degree of medical probability.

**Argie v. Three Little Pigs Ltd, 2012-Ohio-667 (10th Dist., Franklin)**

Rebecca Titus caused a collision which fractured two of Joyce Cole’s ribs; the impact knocked the rear axle off Cole’s car and the air bags deployed. At trial, Cole presented $6,034 in wage loss and $6,866 (the providers accepted $1,652) in medical bills. The jury awarded $3,000 for past economic damages, and nothing for pain-and-suffering or loss of consortium. The trial court sustained Cole’s motion for a new trial, finding the jury’s verdict was so inadequate that it denied Cole justice, the jury’s assessment of damages shocked reasonable sensibilities, and the verdict was so clearly against the manifest weight of the evidence as to show a misconception by the jury of its sworn duties. The Court of Appeals affirmed.

**Cole v. Titus, 2012-Ohio-2311 (8th Dist., Cuyahoga)**

**CAP ON DAMAGES**

Lawrence Aubrey sued UTMC and Mark Seal MD for medical malpractice. (Seal was not employed by UTMC.) He settled with Seal for $295,000. The Court of Claims magistrate ruled Seal was 50% at fault, and that Aubrey had $400,000 in non-economic damages [capped at $250,000 by § 3345.40 (B)(3) ORC], $136,000 in economic damages, and $150,000 in consortium damages for his wife. The magistrate reduced the award by 50% [§ 2307.23 ORC] to account for the negligence attributable to Seal, then set off from UTMC’s exposure the $295,000 paid by Seal, § 3345.40 (B)(2) ORC. The magistrate thus found that Aubry was entitled to a net award of $0. The Court of Claims adopted the magistrate’s award (with some changes in arithmetic) but the Court of Appeals reversed. Seal and UTMC are each liable for only their own share of the award. The non-economic award was $400,000, and UTMC was liable for $200,000. The $250,000 cap on non-economic compensatory damages pertains only to actions against a state university. The cap should have been applied to only UTMC’s share, not to the entire award. Further, § 3345.40 (B)(2) ORC provides that “benefits” a plaintiff receives from insurance or other sources shall be set off from an award against a state university. The settlement with Seal is not a “benefit” to be set off from UTMC’s liability.

**Aubry v. Univ Toledo Med Ctr, 2012-Ohio-1313 (10th Dist., Franklin)**
SPECULATIVE DAMAGES

As a general rule, speculative damages are not recoverable. Damages must be shown with a reasonable degree of certainty. Damages are not speculative when they can be computed to a fair degree of probability. If a party shows a right to damages, that right will not be denied because the damages cannot be calculated with mathematical certainty.

*Tinney v. Tite, 2012-Ohio-2347 (6th Dist., Huron)*

DAMAGES: UNJUST ENRICHMENT

In unjust enrichment cases, damages are based on the amount the defendant benefitted, as opposed to *quantum meruit* cases, where damages are the measure of the value of the plaintiff's services. Claims for unjust enrichment are quasi-contractual, not tortious. Where damages are based on unjust enrichment only (without a finding of an intentional tort), the plaintiff is not entitled to punitive damages.

*Dodson v. Maines, 2012-Ohio-2548 (6th Dist., Sandusky)*

MITIGATION OF DAMAGES

While that the burden is on the breaching party to prove that the injured party did not avoid or minimize the damages experienced, the duty to mitigate arises only where the non-breaching party has knowledge that the he has actually sustained damages. As a general rule, an injured party has a duty to mitigate and may not recover for damages that could reasonably have been avoided. However, the obligation to mitigate is not unlimited; the party is not expected to incur extraordinary expenses or to do what is unreasonable or impracticable. In mitigating damages, an injured party must use only ordinary and reasonable effort to avoid or lessen the damages. A defendant will not be held responsible for those damages that plaintiff could have avoided reasonable effort and without undue risk or expense.

*Baird v. Crop Prod Servs Inc, 2012-Ohio-4022 (12th Dist., Fayette)*

CONTRACT BREACH DAMAGES

Lost profits may be recovered by the plaintiff in a breach of contract action if (a) profits were within the contemplation of the parties at the time the contract was made, (b) the loss of profits is the probable result of the breach of contract, and (c) the profits are not remote and speculative and may be shown with reasonable certainty. In order for a plaintiff to recover lost profits in a breach of contract action, the amounts of lost profits, as well as their existence, must be demonstrated with reasonable certainty. The difficulty of proving lost profits varies greatly with the nature of the transaction. Damages suffered by an established business can often be proved with sufficient certainty, based on past performance. If the business is new or if it is a speculative and subject to great
fluctuations in volume, costs or prices, proof will be more difficult; but a new business may establish lost profits with reasonable certainty through the use of such evidence as expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and any other relevant facts.

**Advance Travel Nurses LLC v. Watson, 2012-Ohio-3107 (2nd Dist., Montgomery)**

**AID FROM FAMILY**

HHDL provided home health care to Barbara St Pierre while she was dying from multiple sclerosis. Her husband John stopped paying HHDL’s invoices and left Barbara. After her death, HHDL sued John for payment, the trial court entered judgment for HHDL, § 3103.03 ORC. The Court of Appeals affirmed. Each married person must support himself and his spouse out of his property or by his labor. If a married person is unable to do so, the spouse of the married person must assist in the support so far as the spouse is able. If a married person neglects to support the person’s spouse in accordance with this section, any other person, in good faith, may supply the spouse with necessaries for the support of the spouse and recover the reasonable value of the necessaries supplied from the married person who neglected to support the spouse unless the spouse abandons that person without cause. The term necessaries means such food, medicines, clothing, shelter, or personal services as are usually considered reasonably essential for the preservation and enjoyment of life.


**MEDICAL BILLS, COLLATERAL SOURCE**

Linzie Evans suffered a detached retina while participating in a sports-training program at University of Dayton. Evans sued UD. The trial court sustained Evans’ motion in limine to exclude evidence of health insurance benefits. UD moved for a new trial, arguing that Robinson and § 2315.20 ORC permitted introduction of evidence of both the amount of an original medical bill and any lesser amount the provider accepted in full payment, but not evidence of a write-off. The trial court, noting the post-trial decision in Jaques, allowed a new trial. *The Court of Appeals reversed. UD should have filed an appeal of the judgment, based on the trial court’s exclusion of the evidence, rather than a CR 59 (A) motion for a new trial. This was not an error of fact by the jury; it may have been an error of law by the court.*


Donald Campbell, who did not have health insurance, was treated at UH. He did not pay and UH sued him for $2,729. Campbell sought in discovery production of UH’s contracts with insurers, to demonstrate that UH routinely
allowed write-offs to patients with medical insurance. UH refused to produce the contracts and the trial court overruled Campbell’s motion to compel. UH subsequently conceded that its standard practice was to allow a 40% discount to insured patients. The trial court entered summary judgment in favor of UH for the full amount and the Court of Appeals affirmed. Campbell argued that UH’s write-offs for insured patients indicated his charges were unreasonable. But the amount UH charged insured patients was irrelevant to the value of the services rendered to Campbell, who was uninsured. Although the value of medical services was a question of fact, UH was entitled to a presumption that its customary charge was the value of the services rendered. Campbell received the specified treatment, and he presented no competent evidence to demonstrate that the charges were excessive.

_ Univ. Hosp v. Campbell, 2012-Ohio-1733 (1st Dist., Hamilton)_

**ECONOMIC DAMAGES**

The economic-loss rule generally prevents recovery in tort of damages for purely economic loss. A plaintiff who has suffered only economic loss due to another’s negligence has not been injured in a manner which is legally cognizable or compensable. The rule stems from a balance between tort law (designed to redress losses suffered by breach of a duty imposed by law to protect societal interests) and contract law (which holds that parties to a commercial transaction should remain free to govern their own affairs). Tort law is not designed to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement. Where a plaintiff has suffered only economic harm as a result of a defendant’s breach of duty, the economic-loss rule will bar the tort claim if the duty arose only by contract. The plaintiff’s remedy would be in contract law, which requires privity of contract between the parties. In contrast, the economic-loss rule does not apply (and the plaintiff who suffered only economic damages can proceed in tort) if the defendant breached a duty that did not arise solely from a contract.


**TREBLE DAMAGES**

Treble damages for cutting trees, § 901.51 ORC, are distinct from punitive damages.

_ Tinney v. Tite, 2012-Ohio-2347 (6th Dist., Huron)_

For treble damages to be awarded under the Consumer Sales Practices Act, § 1345.09 (B) ORC, either (a) an act or practice must have been declared to be deceptive or unconscionable by a regulation promulgated by the Attorney General of Ohio, or (b) an Ohio court must have previously determined that the act or practice violated § 1345.02 ORC, § 1345.03 ORC or § 1345.031 ORC and that court decision must have been made available for public inspection. When a
plaintiff has elected to seek actual damages and has met the requirements for treble damages under § 1345.09 (B) ORC, the trial court does not have discretion to award either actual damages or treble damages. Although there have been circumstances where a breach of contract or a breach of warranty has constituted a violation of the CSPA, not every such breach will constitute a CSPA violation. The statute clearly provides that a consumer is entitled to three times the amount of the consumer's actual economic damages or two hundred dollars, whichever is greater. An award of actual damages is a prerequisite to an award of treble damages.

_Nelson v. Pieratt, 2012-Ohio-2568 (12th Dist., Clermont)_

**PUNITIVE DAMAGES**

Treble damages for cutting trees, § 901.51 ORC, are distinct from punitive damages.

_Tinney v. Tite, 2012-Ohio-2347 (6th Dist., Huron)_

The injured employee was awarded an additional amount for violation of a specific safety standard (VSSR) based on protective equipment not being provided, and the Supreme Court affirmed. A VSSR has been characterized as a penalty, thus the specific safety regulation must be strictly construed in the employer's favor, and all reasonable doubts concerning its applicability must be resolved in the employer's favor. (Per curiam; O'Connor, Pfeifer, Stratton, O'Donnell, Lanzinger, Cupp and McGee concur.)

_State ex rel Glunt Indus Inc v. Indus Comm of Ohio, 132 Ohio St 3d 78, 2012-Ohio-2125_

When the trial court awarded punitive damages at ten per cent of the compensatory damages, and the Court of Appeals reduced the compensatory award, it also reduced the punitive award proportionally.

_Advance Travel Nurses LLC v. Watson, 2012-Ohio-3107 (2nd Dist., Montgomery)_
Initial Considerations for the Plaintiff from a Defense Attorney’s Point of View

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Cleveland, Ohio

I. LEAVE EMOTIONAL DISPUTES AT THE COURTHOUSE STEPS

A situation that comes across my desk too often is the plaintiff’s attorney who attempts to retaliate against the insurance company/adjuster for pre-suit failed negotiations. As a defense attorney, I can tell that this situation occurs immediately when I request a leave to plead to answer the complaint. Some attorney’s will deny that because they had a pre-suit history with the insurance company adjuster that was heated or argumentative or failed in some way. The plaintiff’s attorney attempts take it out on the defense counsel who has just been assigned the case and did not take part in that pre-suit negotiations. Setting a bad tone initially can only hurt plaintiff’s counsel or their client. Almost always, the adjuster who handled the case pre-suit is not the adjuster who was handling the case post-suit. The point of views or defense actions can be significantly different from those taken pre-suit. Many of the adjusters that I work for post-suit are attorney adjusters. Obviously more sophisticated and have different points of view because they may have actually tried cases for a living before working for the insurance company. Inevitably, when a plaintiff’s counsel plays “hardball” with me regarding discovery or deposition dates or expert issues, it comes back to haunt them because they will inevitably have to request something from me regarding discovery that will not be granted because of their aggressive or emotional actions which were the result of pre-suit bad negotiations.
II. PREPARE YOUR CASE

I cannot tell you how many times as a defense attorney that I have to subpoena plaintiff’s medical records which should have been obtained by plaintiff’s counsel sometimes years before the litigation was filed. I always am amazed that plaintiff’s attorney will file a case not knowing or having their client’s complete medical history or treatment from the accident to the time of litigation. This tells me that the plaintiff’s attorney is unprepared and will not be able to fully evaluate his client’s claim and perhaps is simply filing out of volume instead of a zealous knowledge of their client’s case.

In addition to having the medical records, many plaintiffs’ attorneys do not have the actual medical bills. Once again, not knowing the total amount of their client’s medical expenses, taking into consideration write-offs or what their client may have paid out-of-pocket, tells me that the lawyer is unprepared.

In addition, most plaintiffs’ attorneys who litigate should know that the defense attorney will be requesting past medical records concerning the same areas injured in the accident, going back at least five years. Not having these records tells me that the plaintiff’s attorney has no idea if this is an aggravation of a pre-existing condition, or if this is a totally separate injury. It also delays the discovery process. It is recommended that plaintiff’s attorneys have all medical bills, expenses, past medical records and/or information on prior accidents, prior to filing the lawsuit. Obviously, there are situations when plaintiff’s counsel cannot obtain all this information before protecting a statute of limitations. However, that should be more the exception than the rule.

III. DISCOVERY

From a defense attorney’s perspective, I interpret lack of discovery as a weakness in the case for the plaintiffs. Most lawsuits filed contain a police report wherein the defendant was cited for being at-fault or admitted fault. Just because there is a reasonable belief that liability rests with the defendant, does not mean plaintiff’s counsel should not submit interrogatories or request for production of documents to the defendant or take the defendant’s deposition. Many insurance adjusters do not take recorded statements of their insured’s when they are supplied a police report showing the insured was cited. There may be other factors in the case which can affect liability or damages which have not been revealed by a simple police report. The number of accidents the defendant was in as well as circumstances at the scene can greatly affect the defense evaluation of plaintiff’s claims. Plaintiff’s attorneys are making a mistake by not flushing out some of these factors.

In addition, insurance companies may have taken detailed photographs or have repair estimates concerning the damages to the respective vehicle. Plaintiff’s counsel should have this information. Many jurors decide a case on how hard of an impact was sustained. Photographs, if admitted by the judge without expert testimony, go a long way. Repair estimates can also be beneficial.
Lastly, plaintiff’s counsel should always see and hear what the defendant looks like. Everything from personal appearance, education and credibility can be flushed out with a simple deposition. It also will lead to a summary of that deposition going back to the adjuster handling the matter, which again could affect the evaluation on the case.

IV. AFTER DISCOVERY CLEAN UP PLEADINGS

Many filed lawsuits contain negligent entrustment claims against the owner; John Doe companies or persons, or incorrect corporate names. Plaintiffs should not be afraid to voluntarily dismiss without prejudice the owner of the vehicle where no alcohol or circumstances exist to show the owner knowingly entrusted the vehicle to an incompetent driver. In addition, requests from defendant’s counsel to “supplement the pleadings” should be done if discovery discloses that a different corporate name should be added or a John Doe can be eliminated. It also demonstrates that plaintiff’s counsel is moving his case along and giving proper attention to the details.

V. DEMANDS

When the time comes for plaintiff’s to make a demand on the case, be realistic. The old days of starting off extremely high in the hope of splitting the difference is over. Nothing looks more unprofessional than an extremely high demand in a soft tissue injury when it is unjustified. Extremely high demands also cause insurance adjusters to not negotiate. It actually has an adverse effect on the negotiation process. Many adjusters tell me “let me know if they get realistic”. To make an unjustified high demand actually works against plaintiff’s negotiation tactics.

You should also stay consistent with pre-suit demands. Often the demand will go up after suit is filed because the lawyer now has litigation expenses and more time in the file. This should not change the value of plaintiff’s injury. However, if additional facts or information has been obtained post-suit, that could change the value of the case and should be adjusted accordingly.

VI. DON’T BLUFF ABOUT TRYING THE CASE

Many attorneys attempt to “bluff” when it comes to actually trying the case. The decision should be made early on to try the case if you believe the defense has not properly evaluated the case. To huff and puff at the final pre-trial or mediation and then not take the proper steps to actually try the case, actually hurts plaintiff’s settlement tactics. Obvious signs that a bluff is taking place is that the plaintiff’s counsel does not file jury instructions and trial briefs in the court allotted time period. Deposition transcripts are also not filed with the court, nor are there any phone calls made between plaintiff’s counsel and defense counsel on trial stipulations such as whether or not a custodian of records will be necessary to present medical expenses and records to the jury; write-off issues are never discussed as well as other necessary trial issues.
In addition, plaintiff's counsel do not notice their doctors video perpetuation of testimony. When this has not been done a month or less before trial, the odds of actually obtaining the doctor for a deposition become greater and greater. Doctor's depositions should be set and in place in plenty of time before trial to indicate that the matter will be tried if the defense does not properly evaluate the value of plaintiff's case. Obviously, these expenses will want to be incurred at the very last second, but the setting of the deposition should at least be done timely.
I. CLIENT INTERVIEW

Perhaps the most important aspect of handling a personal injury case is the initial client meeting. We meet with the clients, hear their stories, all in an effort to determine whether or not their case is a case that we should pursue. At the end of the day, the goal is determine whether their story amounts to a case. We need to know who caused the client’s injury, how serious is the injury, did the client have a prior attorney and was the client in the course and scope of their employment.

It is extremely important to meet the potential client in person. You must evaluate the client’s credibility at the initial meeting. Because if you agree to take on his/her case, you have made a commitment to the client.

Below is a list of pertinent information that should be secured at the initial client meeting.

A. SSN.
B. DOB.
C. Address.
D. Place of employment.
E. Spouse and children.
H. Location of accident.
I. Police information.
J. Date of accident.
K. Accident description.
L. Names of witnesses.
M. Did client give oral statement.
N. List of injuries.
O. Medical injury history.
P. Work history.
Q. Lost wages.
R. Health care providers.
S. Insurance information.
T. Health insurance information.
U. Prior accidents.
V. Is client on SSI or SSD?
W. Photographs.

II. INVESTIGATING THE CASE

The initial investigation into the case is as important, possibly more important, as the client interview. This is your opportunity to evaluate whether the client's story adds up. Because what you find out about the case may or may not support what the client told you during the interview. A thorough investigation into the case will ultimately decide whether or not you can assist the client.

If the case involves an automobile accident, it is important to request and secure the entire police report, including witness statements and photographs.

Assess the damage to both vehicles and secure photographs of both vehicles as soon as possible.

Use an investigator to track down additional witnesses or secure photographs of the scene of the accident.

Request any statements that the opposing insurance company has secured the 911 tape.
Contact the paramedics who transported your client to the hospital.

Remember, slip and fall cases are governed under the law of negligence. To win a premises liability case an injured victim has to prove either that the defendant created the hazard that led to the accident or that the defendant knew or should have known about the danger and had it removed or repaired. The knowledge of the property owner can be actual or constructive. Make sure that you have read the *Armstrong v. Best Buy* case.

Here a few items to investigate when taking on a slip and fall case:

A. **If the case involves a slip and fall, request from the defendant property owner any video tapes depicting the client’s fall.**

B. **Seek out witnesses and contact them for statements.**

C. **Determine whether or not the property owner had actual knowledge or constructive knowledge of the defect.**

D. **Take photographs of the defect area.**

E. **Determine whether the defect was open and obvious.**

**III. DAMAGES**

Know your case and know it well. If the case has significant value make sure that you plan ahead on how to prosecute the case. Start thinking about what type of damages experts may be helpful to your case. For example, because my client may not return to work, should I send the client to a vocational rehab expert? Should I hire an economist? If the subject accident is in dispute, should I hire an accident reconstructionist? For larger loss cases, it is important that you have continuous contact with your client along with the client’s Dr. John Doe and/or medical providers.

When the medical records start flowing into your office, review them. Look for statements in the records that will either hurt or help your client. Then, discuss the records with the client. Make sure that the client understands that everything that is stated to the medical provider, both good and bad, will be contained in the records.

As we all know, damages are typically divided between economic and non-economic damages. Economic damages are damages associated with medical expenses, lost wages and other tangible loss. Non-Economic damages are damages associated with pain & suffering, loss of consortium, loss of life enjoyment and the inability to perform daily or routine activities.

In order to best prove your damages, it is important to keep an accurate and organized file for each case. Organization is critical in personal injury cases. Keep separate files for medical records, medical bills, lost wages, photographs etc.
When the client is done treating and it is appropriate to send the settlement package to the insurance adjuster, provide the insurance adjuster a detailed summary of the damages, both economic and non-economic. Provide the insurance adjuster with photographs of the scene of the accident and photographs of the client’s injuries. People like to SEE damages. If a fracture is involved, secure the x-ray from the hospital and send it to the insurance adjuster on disc.

Below is a sample cover letter that was sent to an insurance adjuster in a large loss case:

Date

Mr. Attorney

Re: Case Name

Dear Sir:

The purpose of this letter is to provide an overview of the issues in this claim, including the extensive permanent damages suffered by the Plaintiff in anticipation of mediation on August 11, 2011, and the subsequent trial in September of 2011. The claim involves an admitted liability automobile accident, which occurred on January 25, 2008.

- All credible medical evidence establishes these damages include:
- Severe immediate trauma requiring intubation
- Life flight
- Hospitalization for thirty-four days
- Ongoing care and treatment
- Exploratory laparotomy with removal of the spleen
- Treatment for 12 fractures, many of which were compound/multiple
- 10 Separate surgeries wherein 15 separate surgical corrections/interventions were performed
- Future surgeries for both (2-3) hip revisions, right foot (1-2), and additional orthopedic intervention in the left and right sacroiliac joints

Each injury is significant and subjected Plaintiff to pain, suffering and economic damages. The combination carries a cumulative affect that is overwhelming and tragic. Beyond the surgical injuries, Plaintiff requires counseling for post-traumatic stress disorder, nightmares, depression and coping with a multitude of scars, which remain, from head to toe, to remind her of this accident on a daily basis.

Unfortunately, our concern is the level of coverage ($4 million dollars), in light of these catastrophic injuries.
To assist in your review of this claim, I am providing some relevant information:

1. Medical report of Dr. John Doe, Associate Professor of Orthopaedics and Trauma at the Ohio State University Medical Center;

2. Report of Dr. John Doe, Chair of Physical Medicine and Rehabilitation at the Ohio State University;

3. Vocational report of Certified Vocational Specialist;

4. Future Care Plan of Dr. John Doe, Certified Life Care Planner;

5. Report of Dr. John Doe, Economist, Cleveland, Ohio, quantifying the future wage loss;

6. Medical Audit totaling $659,000.00;

7. Robinson information $260,000.00;

8. Discharge summary from the Ohio State University admissions 1/25/08 through 2/21/08; and 2/21/08 through 2/28/08;

9. Operative report of 1/25/08, exploratory laparotomy and splenectomy;

10. Operative report of 1/25/08, left humeral incision and drainage;

11. Operative report of 1/29/08, open reduction and internal fixation, left tibial plateau fracture;

12. Operative report of 1/31/08, open reduction and internal fixation humeral fracture;

13. Operative report of 1/31/08, open reduction and internal fixation of open right mandibular joint fracture;

14. Operative report of 2/12/08, open reduction and internal fixation of right calcaneus fracture;

15. Operative report of 4/1/08, surgical removal of hardware on the right tibial plateau with exchange of implants;

16. Operative report of 6/19/08, surgery, capsular incision and release, left elbow;

17. Operative report of 2/3/09, surgical removal of hardware, right proximal tibia;

18. Operative report of 9/30/09, surgical intervention, removal of ossification right proximal tibia;
19. Operative report of left total hip replacement surgery;
20. Medical Illustrations;
21. X-ray films; and
22. Life Care Reduction Report by Dr. John Doe, Ph.D.

In addition, per the report of Dr. John Doe, Plaintiff requires additional future surgeries in the form of three revisions of hip replacements and future surgery on her right foot (1-2), and chronic pain and interventions bilaterally (2-3) on her sacroiliac joints.

Throughout this period of time Plaintiff required the utilization of ongoing narcotics, suffered a diffuse axonal injury with small intraventricular hemorrhage within her brain, suffered from respiratory insufficiency, was maintained on a restrictive diet due to the jaw injury, underwent countless interventions for physical, occupational and speech therapy, required ambulatory assistance by way of crutches, walker and wheelchair at various points in time, as well as counseling.

PERMANENT INJURIES

Plaintiff suffers from ongoing chronic pain, weakness and limitations within multiple joints, including but not limited to, her elbow, shoulder, hip, back and right leg. These have left her with limitations in her ability to perform activities of daily living, secondary to an antalgic gait. While she is able to walk independently, she cannot walk safely for greater than ten minutes without requiring rest. She limps, secondary to the difficulties with her right leg and, consequently, struggles to bend, squat and climb stairs. She has no ability to crawl on hands and knees and utilizes a cane and/or manual wheelchair as backup for community access intermittently.

Plaintiff's activities of daily living within the home are further limited from simple tasks such as putting on her shoes and socks to maintenance or chores requiring heavy cleaning. She is on a lifting restriction and cannot lift more than twenty pounds. Secondary to her pain and reliance on narcotics, she suffers the foreseeable complications of constipation, headaches, mood changes, anxiety and memory challenges. She describes her ongoing permanent pain as follows:

- Daily stabbing pain in the hip and leg
- Persistent low back pain with activity and limitation in ability to rotate her trunk
- Ongoing pain and tenderness in the left shoulder and elbow
- Right knee pain and weakness
- Right foot pain
- Frequent and severe headaches
Initial Considerations for the Plaintiff

- Pain associated with scar on the groin
- Pain associated with scar on the left ear

Plaintiff has multiple scars as a result of this accident, including on her face, arm, abdomen, thigh, knee and foot.

ECONOMICS

The economics in this case approach the $4 million dollar policy limits. Specifically, I enumerate them as follows:

1. Past medicals billed $659,000.00
2. Future medical needs $1,599,695.00
3. Future wage loss $1,709,120.00

TOTAL $3,967,815.00

REDUCTION FOR ROBINSON [$407,000]

$3,560,815.00

It is clear from the economics alone the defendants are at risk for a verdict in excess of their policy limits of $4 million dollars. Furthermore, per the expert report of Dr., she suffered substantial impairment in her ability to perform activities of daily living and/or substantial permanent injury. Accordingly, under the Ohio Revised Code, there will be no caps on the pain and suffering claim. Based upon the 14 open surgeries this patient faces over the course of her life as a direct and proximate result of this accident, multiple exposures to general anesthesia, the pain, suffering, permanent scarring and emotional damages are astronomical. It is our belief the realistic jury value of this case is between $7 million and $8 million dollars when you factor the past and future economics with the non-economics both past and future. As good faith requires us to do so, we are making a demand and are willing to accept the policy limits, which we understand to be $4 million dollars up to and through the mediation of August 11, 2011. Please, however, forward this information provided herein directly to personal counsel so your insureds’ personal assets can be protected. I do believe, based upon the clear liability and the lack of any ability to contest these damages, a verdict in excess of policy limits is highly likely.

Obviously, we look forward to working with you in this matter through to its conclusion.

Very truly yours,

Kevin L. Lenson
Attorney at Law
IV. SUBROGATION

With each and every personal injury case it is extremely important that you identify all possible subrogation interests early in the case. Clearly, you don’t want any surprises from a potential subrogation carrier during the case and after it resolves. Subrogation interests can be first party or third party.

A. First party benefits.

The different kinds of First Party Subrogation Interests include, but are not limited to, personal injury protection; uninsured/underinsured motorists coverage, and medical payment coverage.

Uninsured motorist coverage protects an injured party in the event that the tortfeasor does not have any liability insurance at all. Underinsured motorist coverage protects an injured party in the event the tortfeasor has liability insurance, but the available limits are less than the value of the damages suffered.

Medical payment coverage acts like health insurance for accident related conditions. For any treatment that is reasonable and necessary as a direct and proximate result of an incident while occupying a covered auto, the first-party carrier must pay for or reimburse for the bill. The policy language still must be reviewed and understood. Many policies are written to authorize the carrier to negotiate bills, to allowed reductions to “usual and customary charges,” and to pay the medical provider directly. Medical payments coverage also usually contains a subrogation/reimbursement clause requiring the payments be returned from settlement or judgment proceeds collected from the at-fault party.

Personal Injury Protection (PIP), like medical payments coverage, is a no-fault policy. This usually only applies to insurance policies that were issued to residents of a qualified no-fault state (i.e. Michigan, New York, or Florida). PIP coverage often pays medical bills and lost earnings related to the injury. In some states, there is no limit to the coverage or the time for payment. Therefore, if your client has this coverage, you must research the law in their home state to determine mandatory coverage in addition to reviewing the declaration page. If your client is injured in another state, these coverages may apply as a matter of law. PIP policies may also have subrogation/reimbursement requirement.

B. Third-party subrogation/reimbursement liens.

1. Medicaid.

When payments are made by Medicaid health insurance, the Ohio Dept. of Jobs and Family Services has a statutory lien against any settlement or judgment proceeds, up to the total amount of payments made for accident related conditions. O.R.C §5101.58. This right of subrogation/reimbursement is self-effectuating, and there exists a duty of the recipient of benefits, and the recipient’s attorney, to cooperate with the Department. There is an affirmative duty under the statute to provide written notice to the Department of Jobs and Family Services.
In furtherance of this requirement, the recipient or participant, or the recipient's attorney, if any, shall, not later than 30 days after initiating informal recovery activity or filing a legal recovery action against a third party, provide written notice of the activity or action to the department of job and family services when medical assistance under Medicaid or the children’s buy-in program has been paid.” Ohio Rev. Code § 5101.58(C). The statute creates attorney liability if proper notice is not given prior to finalizing any recovery with sufficient time for the Department to perfect its recovery rights.

The statute does not give Medicaid the right to the entire recovery provided that proper notice is given. Reasonable attorney fees and costs are to be deducted from the total recovery prior to applying the right of subrogation/reimbursement. Reasonable legal fees shall not exceed one-third of the total recovery. Ohio Rev. Code § 5101.58(G)(2). In the event of inadequate recovery in the underlying claim, the Department will accept one-half of the net recovery (total recovery minus attorney fees and costs) or the actual amount of medical assistance paid, whichever is less. Thus, the injured party retains some economic benefit of any settlement or judgment.

2. Medicare.

When conditional payments are made under a Medicare contract, the federal government also has a statutory right of subrogation/reimbursement. However, the law requires that the lien be adjusted by “procurement costs.” Calculating procurement costs is a simple formula. The proportion of attorney fees and case expenses to the total recovery determines the percentage by which the reimbursement rights are reduced. By way of example, if the combined attorney fees and out of pocket expenses to secure the recovery total 35 percent of the total recovery, then the amount owed to Medicare will be reduced by 35 percent, giving Medicare a right to recoup 65 percent of its conditional payments. Additional information about conditional payments and the process of Medicare subrogation is available at http://msprc.info/processes/nghp%20flowchart.pdf.

3. Workers compensation.

Pursuant to Ohio Rev. Code § 4123.931, the Bureau of Workers’ Compensation has a statutory right of subrogation. The statutory subrogee includes the bureau, self-insuring employer, or an employer that contracts for direct payment of medical services. Ohio Rev. Code § 4123.93(B). The formula for amount of subrogation must be adhered to by a self-insured employer. The subrogation interest is defined by Ohio Rev. Code § 4123.93(D), and includes estimated future payments.

The claimant must receive, at a minimum, “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.’” § 4123.931(B). The statutory subrogee shall receive “an amount equal to the ‘subrogation interest’ divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered.” § 4123.931(B). The net amount may be divided on a more equitable basis as agreed between the subrogee and claimant.
Uncompensated damages is defined as “the claimants demonstrated or proven damages minus the subrogee’s subrogation interest.” § 4123.93 (F). Net amount recovered means “the amount of any award, settlement, compromise, or recovery by a claimant against a third party, minus attorney’s fees, costs, or other expenses incurred by the claimant in securing the award, settlement, compromise, or recovery.” § 4123.931(E). It does not include any award for punitive damages.

If a case goes to trial, and an award is rendered, it is easy to calculate the formula because the uncompensated damages have been determined by a trier of fact. In the case of a settlement, the amount of damages demonstrated is more difficult to determine, and subject to interpretation. Liability issues, available coverages for the loss, comparative negligence, and the costs of pursuing ongoing litigation or dispute resolution are among the many factors in agreeing to compromise a claim. Therefore, “uncompensated damages” can be an ambiguous term subject to factual interpretation, and reaching resolution can be complicated.

The statute was designed to overcome the Constitutional issues with the prior statute that was found unconstitutional by Holeton v. Crouse Cartage (2001), 92 Ohio St. 3d 115. The current statute has been held constitutional. See, Groch v. GMC, 117 Ohio St. 3d 192 (2008). Once a settlement is reached, the bureau issues a release that must be executed prior to payment of the negotiated lien becoming final resolution of the claim. The release usually includes a clause that it does not impact the claimant’s right to receive future or additional workers’ compensation benefits, and that the settlement survives any subsequent challenges to the constitutionality of the statute.

V. SPECIAL ISSUES

Each case is different. Each case presents us with the potential for special issues. When alcohol or drugs are involved in a motor vehicle accident, the dynamics of the case changes. Obviously, if the defendant was intoxicated at the time of the accident, the defense has a serious problem. Typically, if a lawsuit is filed, a claim for punitive damages is made. However, on the plaintiffs’ side, the problem with representing a “drunk driver”, is that the plaintiff doesn’t make a very sympathetic party. If you are presented with this situation, the focus should be on whether or not the drinking contributed to the accident.

Here are few tips in dealing with Alcohol consumption:

A. If the alcohol consumption was minimal, you should establish that point early on in the case. Take witness statements of parties who observed the plaintiff the day of the accident;

B. If a blood or breadth test administered, secure the results;

C. Confront the alcohol use head on with the jury (if in trial);
D. If the alcohol use is a significant factor in the case, discuss the matter frankly and completely and consider all settlement offers;

E. File motion in limine

Motions in limine should be used in these situations. See the attached sample.
Now comes Plaintiff by and through counsel, and hereby moves the Court for an Order in Limine referencing in opening statement, arguing in closing, or attempting to offer at trial the opinion that Plaintiff’s Whole Blood Alcohol Level was greater than .10 grams per deciliter and that he was in the “Excitement” stage of alcohol influence at the time Defendant struck Plaintiff - 6:43 a.m.

The basis for this motion is that it would be unfairly prejudicial to allow Defendant to argue that Plaintiff’s Blood Alcohol Level exceeded .10 at 6:43 a.m. when the undisputed expert testimony of Dr. John Doe John Doe is that it cannot be determined that at 6:43 a.m. Plaintiff’s Blood Alcohol Content was above .10. At the deposition of Dr. John Doe John Doe, Defendant’s Toxicologist, on Friday, September 17, 2004, Dr. John Doe John Doe testified as follows:
Q: Excuse me. With respect to 6:43 a.m. only – In other words, you did two separate assumptions. You did two different assumptions. You did one assumption based on the drinking ending at 7:45 p.m. and one at 9:00 p.m., and on both of those assumptions is it fair to say that you cannot state to a degree of toxicological certainty that at 6:43 a.m. he was over 0.10?

II: That’s correct.

[Deposition Transcript of Dr. John Doe John Doe, “John Doe,” relevant pages attached, at Pg. 47-48]

Despite the above confirmation Defendant will attempt to sidestep this opinion by providing a range of Blood Alcohol Content at 6:43 a.m which will exceed .10. [John Doe at Pg. 43]. Under Rule 403, It would be misleading to the jury to permit Dr. John Doe John Doe to include in his range any figure above .10 when he is unable to state to a degree of toxicological certainty that Plaintiff was above .10.

Further, it will be prejudicial under Rule 403 for Defendant to argue that Plaintiff, at the time he was struck by the Defendant, was in the “Excitement” stage of alcohol influence. Dr. John Doe John Doe will testify that there are seven recognized stages of alcohol influence. [John Doe at Pg. 24]. The relevant first three stages are the , at .01 to .05 is the “Sobriety” stage; at .03 to .12 is the “Euphoria” stage; and at .09 to .25 is the “Excitement” stage [John Doe at pg. 24-26].

The overlap in the various stages takes into account that people vary in their tolerance to alcohol. [John Doe at pg. 63-64]. Defendant will seek to have Dr. John Doe John

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Doe testify that Plaintiff was either in the “Euphoria” or “Excitement” stage at the
time he was struck by Defendant at 6:43 a.m. [John Doe at pg. 66]. However Dr.
John Doe goes on to testify as follows concerning the stage of impairment
Plaintiff was in at 6:43 a.m.:

Q: I know you’ve included both of them in your first opinion. But to a degree of
toxicological certainty or scientific certainty, can you tell me if Plaintiff was in
the excitement stage as of 6:43 a.m.?
A: He may or may not be. I can’t say.

Q: You can’t form the opinion he was just in the excitement stage?
A: No, I cannot.

[John Doe at pg. 68-69]. It would be unfairly prejudicial and misleading to the jury
under Rule 403 to allow Defendant to infer to the Jury that Plaintiff was in the
“Excitement” stage as of 6:43 a.m. when her own expert cannot state to a degree of
certainty that Plaintiff was in the “Excitement” stage.

For the above reasons, Plaintiff respectfully moves for an Order In Limine
precluding counsel from referencing in any manner before the jury the
unsupportable testimony that Plaintiff’s Blood Alcohol Level as of 6:43 a.m. was
above .10 or that he in the “Excitement” stage of alcohol influence at the time he
was struck by Defendant.

Respectfully Submitted,

Kevin L. Lenson (0066898)
Medicare Secondary Payer Act: Reporting Requirements, Medicare Set-Asides, and Third-Party Liability

Katherine M. Klingelhafer
Frost Brown Todd LLC
Columbus, Ohio
Medicare Secondary Payer Act: Reporting Requirements, Medicare Set-Asides and Third-Party Liability

May 9, 2013

Presented by Katy Klingelhafer
Medicare Secondary Payer Act (MSPA)

MSPA is a federal statute designed to ensure that Medicare would be the "secondary payer" in instances when a claimant is covered by another form of "primary insurance." (liability insurance, settlements from a tortfeasor).

How? Medicare has authority to recoup payment from the rightful primary payer (or the recipient of such payment). CMS may also pursue reimbursement from claimants and attorneys.

42 U.S.C. 1395y(b)(2).

MSPA Reporting Requirements

In 2007 the law was changed to require insurers, self-insure and others to report third-party liability claims and settlements involving Medicare beneficiaries to the Centers for Medicare & Medicaid Services (CMS).

42 USC 1395y(b)(8)
MSPA Reporting Requirements

Under the Medicare, Medicaid and SCHIP Extension Act (MMSEA) of 2007’s mandatory reporting obligations, liability insurers are required to provide detailed information regarding all liability settlements with ongoing responsibility for medical treatment with Medicare beneficiaries.

If not? Penalties of $1,000 per day, per claim for failure to comply.

MSPA Reporting Requirements: What Must be Reported?

- Information is submitted electronically to CMS through forms and CMS software.
- Data includes more than 100 fields:
  - Total Settlement Amount
  - Medicare Beneficiary’s name, gender, DOB
  - Social Security Number and Medicare Health Insurance Claim Number
  - Identification of claimant’s attorney
  - Identification of any applicable insurance policy
MSPA: Is this claimant a Medicare beneficiary?

Three groups of people may be:

2. End Stage Renal Disease.
3. Age 65 and older.

Query: Reporting entities can submit identifying information to find out if a claimant is a Medicare beneficiary (or is reasonably expected to be within 30 months).

Critical consideration during litigation and settlement negotiations.

MSPA Reporting Requirements: Practical Considerations

Medicare's reimbursement right takes priority:
- Claimant's claims for pain and suffering, loss of consortium

MSP Manual Chapter 7 50.4.4: Medicare recognizes allocations of liability payments to nonmedical losses only when payment is based on a court order.

Consider in Settlement Agreements:
- Medicare status
- Future Medicals
- Allocation of settlement
Strengthening Medicare and Repaying Taxpayers Act of 2012 (SMART)

Streamlines settlement negotiations and provides more certainty to settlements involving Medicare beneficiaries. New provisions:

- CMS must maintain secure website with information relating to payments made by Medicare which may be subject to reimbursement
- Claimants, insurers, and self-insureds may give notice to Medicare of a potential settlement, judgment, award, or other payment
  - Medicare has 65 days to provide a reimbursement amount, which can be relied upon if downloaded within 3 business days before the settlement or judgment

Strengthening Medicare and Repaying Taxpayers Act of 2012 (SMART)

- Noncompliance penalties no longer mandatory ($1,000/day)
  - CMS is to publish “specific practices” that will or will not result in sanctions.
  - “Good faith efforts to identify a beneficiary” will not result in sanctions
- Within 18 months of enactment, Medicare must modify reporting requirements so that SSNs are not required.
- New process to streamline challenges to CMS determinations, CMS to respond within 11 days of being provided documentation
- 3 year statute of limitations established for CMS to seek recovery of payments (if CMS was notified of settlement/judgment)
MSPA Future Medicals

Medicare requires that its interests be “taken into account” in any judgment or settlement including compensation for future health care costs.

Future medical costs present unique challenges.

Requirement to consider Medicare’s interests applies in workers’ compensation cases and in liability cases

MSPA Future Medicals:
Workers’ Compensation Medicare Set-Asides (MSA)

Workers’ Compensation: Practices for Medicare Recipients

• Protecting Medicare’s interest with respect to future medical costs
• MSA—account or trust set aside for payment of future medicals
• If a WC case involving a Medicare beneficiary meets the required threshold ($25,000 total settlement amount) a sum of money is "set aside" from the settlement proceeds to account for future medical costs that Medicare would otherwise pay
• For a WC case, the amounts put into the MSA can and should be approved by CMS
• CMS will provide written opinion on proposed MSA

4.6 • Insurance and Negligence Update
MSPA Future Medicals: Liability MSAs?

What about liability cases? In short, no clear answer.
• CMS has no formal policy.
• Hints that MSAs may be expected.

- A May 2011 memo from Sally Stalcup, Regional Coordinator for Region VI: "We are still asked for written confirmation that a Medicare set-aside is, or is not, required in liability cases, and we can say that "the Medicare Trust Fund must be protected."
- "There is no formal CMS review process in the liability arena as there is for Workers' Compensation. However, CMS does expect funds to be exhausted on otherwise Medicare covered... Services[,] CMS review is decided on a case by case basis."

- But, MSAs are not required in liability cases, and CMS may refuse to consider MSAs. See Sipler v. Trans Am Trucking, Inc., 2012 U.S. Dist. LEXIS 109278 (D. N.J. July 24, 2102)

MSPA Future Medicals: What to do in Liability Cases?

- Discovery Issues: Consider if this case is one that implicates Medicare's interests.
  - Is Plaintiff a Medicare beneficiary?
  - Does the settlement involve future medical expenses?
- If it does implicate Medicare's interest, considerations re type of case:
  - Large case?
  - Large component of future medical expenses?
  - Availability of other coverage for future medical expenses?
- Consider Medicare's Interest (even without specific rules, regulations or guidance from CMS)
MSPA Future Medicals: How to consider Medicare’s Interests

Medicare Set Aside: Some Medicare representatives have instructed regional offices that they "may review a proposed set aside amount for liability" if there are significant dollars at issue and the workload of the office permits.

Consider requesting a liability MSA if:
• Catastrophic injury
• Large settlement
• Clear component is for future medical care

MSPA Future Medicals: How to consider Medicare’s Interests

CMS appears to recognize that an MSA is not always appropriate (settlement size, workload of CMS).

Difficult to obtain jurisdiction over CMS for court-approval of a liability MSA. (42 USC 405(g) requires administrative remedies to be exhausted).

CMS director has stated that “you need to at least think about having a process in place where you’re documenting why or why not there are future medicals and how you took care of that.”
MSPA Future Medicals: How to consider Medicare's Interests

Documentation in Settlement Agreement

If there is Medicare eligibility and future medicals are a component:

- Identify and describe future medical compensation
- Set out allocation of the total settlement for future care (expert opinions)
- Physician Certifications, documentation in file
- Include acknowledgment of Medicare responsibility in the settlement agreement
- Confirm reporting to CMS
- If liability/future medicals are contested, consider reciting the nature of contested causation/cost of future care

MSPA Future Medicals: Implications for Reporting

Reporting Requirements: Initially a reporting entity may report a settlement based on ICD-9 codes.
- Medicare will then consider that any subsequent Medicare claim for reimbursement relating to that code was implicated in settlement.
- Medicare may wrongly consider post-settlement claims under those codes to be under settlement proceeds.
- Need for accurate reporting—failure to do so could alter intended settlements.
MSPA: Recent Case Law


- MSA submitted to CMS was met with a response that CMS would not have approval for quite some time.
- Parties sought declaratory judgment as to adequacy of MSA.
- Court heard evidence from physicians, an attorney who was an expert in the area of MSAs—but no representative of CMS.
- Court determined that the MSA was reasonable and entered declaratory judgment that Medicare’s interests were adequately protected.

*This case is the exception, not the rule.*

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MSPA: Recent Case Law


- Plaintiff was injured in workplace accident after being splashed with molten zinc.
- Plaintiff refused to provide SSN, Medicare Claim Number, information relating to Medicare benefits.
- Court ordered that Plaintiff was compelled to produce requested information.
MSPA: Recent Case Law


- Insurance company agreed to pay Plaintiff $50,000. Before issuing check, State Farm requested information to determine amount of Medicare lien OR to list Medicare as a beneficiary on the check. Plaintiff refused, filed a claim for bad faith.

- Court held that delay in payment to ascertain Medicare lien is not bad faith.

Where do we go from here?


There are seven options proposed: 1 – 4 applying to both beneficiaries and those with the "reasonable expectation," and 5 – 7 applying only to beneficiaries.

1. The beneficiary pays for future medicals out of the settlement funds, until exhausted, with random CMS audits.
2. Medicare does not pursue future medicals if certain conditions are met including relating to the amount of the settlement, the type of injury, persons Medicare status, etc.
3. The injured person provides certification regarding the Date of Care Completion from his/her treating physician.
4. The individual/beneficiary submits a Liability MSA for CMS' review and approval.
Where do we go from here?

5. The beneficiary participates in one of the three new Medicare recovery options regarding a $300 threshold, a fixed payment option or $25,000 or less self-payment option.
6. The beneficiary makes an upfront payment to Medicare.
7. The beneficiary obtains a compromise or waiver of recovery and Medicare would have the discretion to not pursue future medicare.

Questions?

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This checklist is provided to illustrate possible action items you may wish to review in the course of investigating and handling your particular accident, case, or event. Since each individual accident is different, there is no correct or complete list of investigation steps that will be appropriate for all situations. However, these specific steps are matters you should consider as possibly being necessary or required in your particular situation after carefully weighing the facts and the legal issues. In certain cases, other steps may be required depending on the circumstances.

I. PROVIDE FIRM TRUCKING ATTORNEYS WITH CONTACT INFORMATION

Assemble and complete a listing of all firm attorneys that are available on an emergency basis including office phone numbers, cell numbers, and home numbers.

II. PROVIDE ACCIDENT RECONSTRUCTIONIST WITH CONTACT INFORMATION

Assemble and complete a listing of one or more accident reconstructionists that may be used including office phone numbers, cell numbers, and home numbers.

III. PROVIDE CRIMINAL DEFENSE ATTORNEY WITH CONTACT INFORMATION

Assemble and complete a listing of one or more criminal attorneys that may be required in the case including office phone numbers, cell numbers, and home numbers.
IV. PHOTOGRAPHERS

A. Assemble and complete a listing of photographers that will be involved in the case, including office phone numbers, cell numbers, and home numbers.

B. Consider the need of the following:

1. Aerial photography;
2. Video photography; or

V. ADJUSTER/CLAIMS REPRESENTATIVE

A. Do you have a preference on the use of an adjuster?

B. Assemble and complete a listing of the adjusters that are available on an emergency basis, including office phone numbers, cell numbers, and home numbers.

VI. CHAIN OF COMMAND

Establish and communicate a chain of command regarding the investigation.

VII. CONTROL OF INVESTIGATION AND POSSIBLE ACTION STEPS, DETERMINE WHO WILL CONDUCT EACH STEP, CONSIDER THE ATTORNEY-CLIENT PRIVILEGE AND HOW IT MAY APPLY

A. Identify and interview all witnesses.

B. Identify and interview all police on the scene and obtain available accident reports.

C. Identify and interview all emergency medical personnel at scene and obtain available reports.

D. Identify possible conflicts.

E. Interview, control, and protect driver.

1. Get to know driver.
2. Do not intimidate.
3. Gain driver’s confidence.

F. Interview, control, and protect all ECM/black box/computers.
G. Photograph and/or control debris field.

H. Photograph and/or control roadway surface.

I. Photograph and control vehicles.

J. Identify and control all driver records, including logs, fuel receipts, toll receipts, trip envelopes and other travel documents.

K. Photograph all vehicles and accident scene.

L. Aerial photograph of scene.

M. Drug and alcohol testing.

   1. Mandatory requirements.

   2. Client policy.

   3. Manage process.

N. Identify all involved towing, storage and/or repair facilities.

O. Make plans with the client to secure cargo if necessary.

P. Ascertain if there are any environmental or hazardous materials issues/spills.

Q. Governmental notifications.

R. Containment, remediation, and clean up.

VIII. MEDIA RESPONSE ISSUES

A. Communicate company policy on media relations to all involved. Provide contact information to all involved on your public relations professional for referral and comment to the press.

B. Identify all media representatives at scene (consider who will do this)

IX. ON-SCENE RESPONSE EQUIPMENT AND SUPPLIES FOR RESPONDERS TO THE SCENE, IDENTIFY WHO WILL BE RESPONSIBLE

A. Draft witness forms.

B. Disposable camera.

C. Dictaphone.
D. Business cards.
E. Coveralls, boots, hard hat, and gloves.
F. Small umbrella.
G. Evidence log.
H. Reflective safety vest.
I. Tape measure (100' or longer is preferable).