DAVIS & YOUNG OHIO LEGAL HANDBOOK 2019

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Davis & Young *provides the highest quality legal representation to the insurance industry, business community, private institutions, and to individuals on a regional and national level.*

INTRODUCTION

✯ **Rees Davis, Jr.** ✯ **Fred Young**

With a rich history since 1922 when a pair of law school classmates founded the Firm, Davis & Young is headquartered in Cleveland, Ohio, with an office in the Youngstown/Warren area.

Since 1922, Davis & Young has provided the highest quality legal representation to individuals and businesses throughout the region and nation. Over these many decades, our core emphasis has continued to be providing clients with superior litigation and appellate representation. As a result, our attorneys are widely recognized as some of the finest in these fields. While our expertise permits us to provide high quality litigation and appellate representation for any need, our experience is unparalleled in certain specialties, including general liability and personal injury, professional liability (including legal and medical malpractice), employer intentional tort, toxic tort, products liability, insurance coverage (including bad faith and extra-contractual exposure), construction defect, complex litigation and class actions.

Our success representing clients in litigation has caused many of them to ask us to protect their interests before litigation ever arises. In response to this demand, our attorneys bring their considerable talents, experience and energy to such areas as risk management counseling, insurance coverage and alternative dispute resolution ("ADR"). Today, our attorneys are leaders in these fields as well.

In addition to individuals and professionals, our clients include businesses and entities from throughout the region and nation, including insurers, manufacturers, retailers, hospitals, service providers, small businesses and local governments. Each client represents a valued relationship. Each client has come to know and appreciate our dedication to those relationships and the principles upon which we foster those relationships: integrity, tradition and responsiveness.

✯ INTEGRITY ✯

We take pride in providing our clients with the highest quality legal representation and cost efficient service.
We recognize that to do one without the other is a disservice to our clients and our profession.
We commit ourselves to the highest ethical standards, and our clients, the courts and our community recognize the difference.

✯ TRADITION ✯

Our long history is a proven resource.
For nearly a century, our services have been provided by carefully selected attorneys who are talented, dedicated and respected.
Our tradition of applying the sound values of fairness and hard work has earned us our respected positions in the legal community.

✯ RESPONSIVENESS ✯

We embrace the challenges presented by today's legal environment and provide a staff and resources to respond to our client's needs.

WE PRACTICE IN THE FOLLOWING AREAS:

GENERAL LIABILITY

This practice group has been a leader in the Cleveland legal community in providing the finest quality representation on all matters of general liability. Our focus since 1922 has been the resolution of civil disputes involving injuries occurring at home, at work or on the highway. This experience provides our clients with the most cost effective, timely and responsive representation during all aspects of the civil litigation process.

INSURANCE LAW

The Insurance Practice Group is composed of insurance law attorneys representing insurers and self-insurers in both first-party and third-party claims who provide both legal counseling and litigation expertise. The Insurance Practice Group provides insurance coverage analysis for all major products provided by the insurance industry including general liability, advertising injury, personal injury, automobile, uninsured motorists coverage, excess/umbrella, homeowners, contractor liability, employee benefits liability, workers compensation, errors & omissions, directors & officers, and others. Additionally, the Group's attorneys have unparalleled experience with bad faith and extra-contractual claims. The Group also provides legal advice with respect to the creation of coverage forms, claims handling and other ancillary issues.

APPELLATE LAW

The Appellate Practice Group is composed of lawyers with extensive trial and appellate experience who frequently handle cases throughout Ohio's state and federal appellate courts. The lawyers of the Appellate Practice Group work in tandem with Davis & Young's trial lawyers to identify, preserve and protect issues necessary to prevail on appeal and have been involved in some of the most significant cases in modern Ohio history. The success of the

Appellate Practice Group has been built not just upon knowing the facts and law of the particular case, but also upon being able to successfully articulate and develop what the law should be.

BUSINESS LAW

The Business Law Practice Group serves a wide variety of business enterprises on disputes arising in civil litigation from counseling through trial. Our business litigators have broad experience in litigation and all forms of alternative dispute resolution.

PROFESSIONAL LIABILITY

The Professional Liability Practice Group represents a broad range of professionals including physicians, hospitals, lawyers and their firms, insurance agents, dentists, directors and officers, engineers and architects. The group stands ready to defend these professionals for claims made against them. It also provides a full range of counseling services for risk management and loss prevention. The group consists of attorneys with extensive trial counseling experience.

The Specialized Litigation Practice Group is composed of lawyers with extensive trial and litigation experience in specialty areas, including:

- Products Liability
- Toxic Tort
- Large Loss Subrogation/Collection
- Construction Loss
- Employer Intentional Tort
- Employment Law

Each of these areas offers unique challenges and obstacles. The Group's attorneys have developed expertise in one or more areas to provide clients with the tools and options to navigate those challenges and obstacles to reach a successful conclusion.

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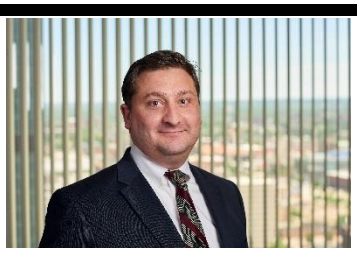

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PRETRIAL PROCEDURES

The Complaint: Service of the complaint must be perfected upon the defendant within one year of the date the complaint is filed. Civ.R. 3(A). However, if service is not made upon a defendant within six months after the filing of the complaint, and the plaintiff cannot show good cause why service was not made within that period, the action shall be dismissed as to that defendant, without prejudice upon the court's own initiative. Civ.R. 4(E).

The defendant has 28 days from the date of service to file an answer under Civ.R. 12(A)(1) or a motion to dismiss under Civ.R. 12(B).

In Federal Court, the defendant has 21 days from the date of service to file an answer to the complaint. Fed. R.Civ.P. 12(a)(1)(A).

Amending the Complaint to Add Previously Unknown Defendants: Civ.R. 15(D) sets forth the requirements for properly amending a complaint to add the name of a defendant previously sued under a fictitious name such as "John Doe Insurance Co.," when that defendant's true identity becomes known to a plaintiff. Among the requirements are: (1) the plaintiff must amend the complaint upon discovery of the defendant's true name; (2) the summons must contain the words "name unknown;" and (3) the defendant must be personally served. A pleading amended, according to Civ.R. 15(D), will then relate back to the date of the original pleading when "the claim…asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading...." Ohio Civ.R. 15(C). The privilege of the relation-back rule stated in Civ.R. 15(C) depends upon strict compliance with Civ.R. 15(D).

Civ.R. 15(D) does not authorize a claimant to designate defendants using fictitious names as placeholders in a complaint filed within the statute-of-limitations period and then later identify, name, and personally serve those defendants after the limitations period has elapsed. *Erwin v. Bryan*, 125 Ohio St.3d 519 (2010).

Ohio's Saving Statute and Rule 15: In *LaNeve v. Atlas Recycling*, 119 Ohio St.3d 324, 2008 Ohio 3921, the Court held that Ohio R.C. 2305.19(A), Ohio's saving statute, is inapplicable to an action that was not commenced pursuant to the specific requirements of Civ.R. 15(D), so as to allow an amendment of the complaint to relate back to the date of the original complaint under Civ.R. 15(C) and 13(A).

General Discovery: Parties are permitted to obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. It is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to discovery of admissible evidence. Civ.R. 26(B)(1).

Discovery of Insurance Agreements: A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure subject to comment or admissible in evidence at trial. Civ.R. 26(B)(2).

Discovery of Work Product Materials: A party may obtain discovery of documents, electronically stored information and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative only upon a showing of good cause therefor. Civ.R. 26(B)(3).

Electronic Discovery: A party need not provide dis-covery of electronically stored information when the production imposes undue burden or expense. The court may nonetheless order production if the requesting party shows good cause. Civ.R. 26(B)(4).

Expert Discovery: A party is not permitted to discover facts known or opinions held by an expert retained or specially employed by another party in anticipation of litigation or preparation for trial unless there is a showing that the party seeking discovery is unable without undue hardship, to obtain facts and opinions on the same subject by other means. Civ.R. 26(B)(5).

Expert Fees: The court may require that the party seeking expert discovery may require a party to pay another party a fair portion of the fees and expenses incurred by the latter party in obtaining facts and opinions from the expert. Civ.R. 26(B)(5)(e).
In Cuyahoga County, a party may take the discovery deposition of the opposing party's expert only after a mutual exchange of expert reports. Cuyahoga County Loc. R. 21.1(F).

Interrogatories: Any party may serve upon any other party up to 40 written interrogatories. Civ.R. 33.

An interrogatory may not be used to seek a narra-tive response since that is more appropriate for a deposition. *Penn Central Transportation v. Armco Steel Company* (1971), 27 Ohio Misc. 76.

Request for Admissions: A matter is deemed admitted unless the party to whom a request for admission is directed serves upon the requesting party a written answer or objection. Civ.R. 36(A)(2). The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. Any matter admitted through request for admissions is conclusively established unless the court on motion permits with-drawal or amendment of the admission. Civ.R. 36(B).

Motions to Compel: A party may move for an order compelling discovery upon reasonable notice to other parties. Civ.R. 37(A). The Civil Rules require a party to make a reasonable request from the party served the discovery to obtain the responses before a motion to compel is filed with the court.

The court may require the party to pay the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees. Civ.R. 37(A)(4).

If a party fails to comply with the court's order granting the Motion to Compel, the court may do any of the following :

(1) prepare an order that the matters set forth in discovery are taken to be established for the purposes of the action;
(2) prepare an order refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibiting him from introducing designated matters into evidence;
(3) prepare an order striking out pleadings or parts thereof or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; or
(4) prepare an order treating as a contempt of court the failure to obey any orders

except an order to submit to a physical or mental examination. Civ.R. 37(B).

Voluntary Dismissal Prior to Trial: A Plaintiff may voluntarily dismiss a case, without leave of court, one time at any time prior to trial pursuant to Civ.R. 41(A). Plaintiff may refile at any time within one year of the dismissal or within the period of the original applicable statute of limitations, whichever occurs later. R.C. 2305.19.

Motions for Summary Judgment: Generally, a motion for summary judgment is appropriate where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Civ.R. 56. Full or partial judgment can be rendered upon Civ.R. 56(C) evidence which consists of pleadings, depositions, affidavits, discovery responses, and written stipulations of fact.

Consolidation and Bifurcation: A court may consolidate cases involving a common question of law or fact. It may also order separate trials of any claim in the furtherance of convenience, to avoid prejudice or when separate trials will be conducive to expedition and economy. Civ.R.42
.
In *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235 (2012), the Supreme Court of Ohio ruled that R.C.2315.21(B), which mandates bifurcation of punitive damages from compensatory upon motion of any party, is a part of Ohio substantive law. Accordingly, the statute controls over Ohio Civ.R. 42. Civ.R. 42 generally leaves the decision as to bifurcation to the sound discretion of the trial court. As a result of the Court's decision in *Havel*, a trial court does not have discretion in whether to bifurcate punitive damages upon proper motion made by any party.

EVIDENTIARY ISSUES AT TRIAL

Compromise and Offers to Compromise: Under Evidence Rule 408, a court may not admit evidence tending to prove liability for, invalidity of, or the amount of, a claim unless evidence of a compromise or offer to compromise is offered for some other purpose. *Tucker v. McQuery*, 107 Ohio Misc.2d 38 (1999).

Payment of Medical and Similar Expenses: Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses is not admissible to prove liability for the injury. Evidence Rule 409.

A defendant may introduce evidence of collateral benefits payable to the plaintiff, except, if the source of the collateral benefits has a mandatory self-effectuating federal right of subrogation (Medicare/Medicaid), a contractual right of subrogation (Medpay or medical insurance with an enforceable subrogation right), or a statutory right of subrogation (Workers Compensation), or if the source pays the plaintiff a benefit that is in the form of a life insurance payment or a disability payment. However, evidence of the life insurance payment or disability payment may be introduced if the plaintiff's employer paid for the life insurance or disability policy, and the employer is a defendant in the tort action. R.C. 2323.41.

If the defendant elects to introduce evidence of collateral benefits, the plaintiff may introduce evidence of any amount that the plaintiff has paid or contributed to secure the plaintiff's right to receive the benefits of which the defendant has introduced evidence.

Liability Insurance: Evidence that a person was or was not insured against liability is not admissible upon the issue of whether he acted negligently or otherwise wrongfully. Exclusion of such evidence is not required when offered for another purpose, such as proof of agency, ownership or control, if controverted, or bias or prejudice of a witness. Evidence Rule 411.

Impeachment by Evidence of Conviction of Crime: Prior felony convictions and prior convictions for crimes involving dishonesty or false statement are admissible if:

Not more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement, or the termination of community control sanctions, post-release control, or probation, shock probation, parole or shock parole imposed for that conviction, whichever is the later date; and

The probative value of the conviction substantially outweighs its prejudicial effect. Evidence Rule 609.

Testimony by Experts: A witness may testify as an expert if all of the following apply:

(1) the testimony either relates to matters beyond the knowledge or experience possessed by laypersons or dispels a misconception common among laypersons;

(2) the witness is qualified as an expert by specialized knowledge, skill, experience, training or education;
(3) the witness' testimony is based on reliable scientific, technical or other specialized information.

Valentine v. Conrad, 110 Ohio St.3d 42, 2006-Ohio- 3561. Evidence Rule 702.

Expert testimony is required to present evidence that a plaintiff's damages were enhanced by his or her failure to wear a seat belt. *Woods v. City of Columbus*, 23 Ohio App.3d 163 (10th Dist. 1986). Likely experts include a bio-mechanical engineer, a mechanical engineer or possibly an emergency room physician.

DAMAGES AND LIABILITY ISSUES

Nominal Damages: If the plaintiff suffered an injury but the plaintiff failed to prove by the greater weight of the evidence any amount of damages, a jury may award the plaintiff nominal damages. "Nominal" means trifling or small. Nominal damages are generally $10 or less.

Failure to instruct on nominal damages has been held error in assault and battery, malpractice, breach of contract and fraud cases. *Lacey v. Laird*, 166 Ohio St. 12 (1956). On the other hand, *Younce v. Baker*, 9 Ohio App.2d 259 (1966), held that nominal damages are not recoverable when a personal injury is caused by negligence, because actual injury is a necessary element of the cause of action.

Failure to Mitigate Damages: If the defendant proves by the greater weight of the evidence that the plaintiff did not use reasonable diligence or make reasonable efforts under the facts and circumstances in evidence to avoid the loss or lessen damages, a jury should not allow damages that could have been avoided by the exercise of reasonable diligence or reasonable efforts to avoid the loss. *Hines v Riley*, 129 Ohio App.3d 379 (4th Dist. 1998)

Punitive Damages After April 7, 2005: R.C. 2315.21 mandates that a plaintiff must establish entitlement to punitive damages by clear and convincing evidence. R.C. 2315.21(D)(4).

Subject to certain exceptions, punitive damages awarded against a particular defendant may not exceed two times the compensatory damages (economic and noneconomic loss combined) awarded against that defendant. R.C. 2315.21(D)(2)(a). Additional provisions permit a defendant to further reduce a punitive damage award if the same act or course of conduct has already resulted in a punitive damage award that would exceed the statutory caps.

Section 2315.21 does not control recovery of punitive damages in a tort action to the extent that any other R.C. section:
(1) requires a different showing of a plaintiff (e.g., R.C. 2307.80 product liability claims);
(2) permits recovery of punitive damages based on other than clear and convincing evidence or permits a jury to determine the amount of punitive damages; or
(3) precludes the award of punitive damages against a particular defendant. R.C. 2315.21(E).

A jury may decide that the defendant is liable for punitive damages if the defendant's acts or failures to act demonstrated malice, aggravated or egregious fraud.

"Malice" includes either (1) that state of mind under which a person's conduct is characterized by hatred, ill will, or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. *Romp v. Haig*, 110 Ohio App.3d 643 (1st Dist. 1995).

Fraud is "aggravated" if it is accompanied by the existence of malice or ill will. Fraud is "egregious" if the fraudulent wrongdoing is particularly gross. *Austintown Ambulatory Emergency Room v. Mansour*, 2011-Ohio-4559 (7th Dist.).

In *Neal-Pettit v. Lahman*, 125 Ohio St.3d 327, 2010Ohio- 1829, the Court found that attorneys fees awarded in a punitive damages case may be recovered under an insurance policy, holding:

Attorney fees are distinct from punitive damages. Public policy does not prevent an insurance company from covering attorney fees on behalf of an insured, even when they are awarded solely as a result of an award for punitive damages.

Liens: Tort claims frequently involve liens asserted by health care providers, insurers, governmental entities, and attorneys which can impact damages and liability issues.

While these issues can be complex, there are some basic rules that should be kept in mind:

Make Whole Doctrine: Absent a contractual agreement to the contrary, Ohio applies the "make whole" doctrine in cases where a health insurer seeks subrogation against damages for payments made because of a tortfeasor's wrongdoing. The "make whole" doctrine provides that an insurance company may not enforce a right to subrogation until the insured has been fully compensated for his or her injuries, that is, has been "made whole." *Northern Buckeye Ed. Council Grp. Health Benefits Plan v. Lawson*, 103 Ohio St.3d 188, 2004-Ohio-4886. However, most health insurers have added contractual provisions that clearly and unambiguously avoid the "make whole" doctrine. Such provisions are valid and enforceable to allow the health insurer to seek first dollar subrogation recovery.

Notice of Liens: The prevailing Ohio rule is that a release executed by a claimant in favor of a tortfeasor is not effective against the claimant's subrogee where the tortfeasor has knowledge of the subrogee's interest before settling. *Hartford Acc. & Indem. Co. v. Elliott*, 32 Ohio App.2d 281 (1st. Dist. 1972). However, the same line of cases shields liability insurers from liability for the claimant's actions. The recourse is against the claimant, not the liability insurer. *Economy Fire & Cas. Co. v. Motorists Mut. Ins. Co.*,1995 WL 768015 (5th Dist.). Special rules apply when the lien is a government lien, such as workers compensation, Medicaid or Medicare. Such liens are generally held to be valid even without actual notice.

Workers Compensation Liens: After April 9, 2003, payment of compensation or benefits creates a "right of recovery" in a statutory subrogee against a third party, and the statutory subrogee is subrogated to the rights of a claimant against that third party. The "net amount recovered" is subject to a statutory subrogee's right of recovery. R.C. 4123.931.

"Subrogation interest" includes past, present, and estimated future payments of compensation, medical benefits, rehabilitation costs, or death benefits, and any other costs or expenses paid to or on behalf of the claimant by the statutory subrogee under the Workers' Compensation Law.

"Net amount recovered" means the amount of any award, settlement, compromise or recovery by a claimant against a third party, minus the attorney's fees, costs or other expenses incurred by the claimant in securing the award, settlement, compromise, or recovery. Net amount recovered does not include any punitive damages that may be awarded by a judge or jury.

"Uncompensated damages" means the claimant's demonstrated or proven damages minus the statutory subrogee's subrogated interest.

PRACTICE POINTER

JOINT AND SEVERAL LIABILITY: For all tort actions arising on or after April 9, 2003.

A defendant that is responsible for more than 50% of the tortious conduct that proximately caused plaintiff's injuries is jointly and severally liable for plaintiff's economic loss. R.C. 2307.22(A)(1).

A defendant that is legally responsible for plaintiff's injury but whose tortious conduct was less than 50%, is only responsible for his or her share of the plaintiff's economic loss. R.C. 2307.22(A)(2).

Each defendant is only responsible for his or her own share of non-economic loss. R.C. 2307.22(C).

"Economic Loss" means:

Wages, salaries or other compensation lost as a result of an injury, death, or loss to person or property, including future expected lost earnings;

Expenditures for medical care or treatment, rehabilitation services, or other care, treatment, services, products, or accommodations, including expenditures determined to be incurred in the future;

Damage to personal property; and

Expenditures incurred in relation to the actual preparation or presentation of the claim involved.

"Non-Economic Loss" means:

Non-pecuniary harm that results from an injury, death, or loss to person that is the subject of a tort action, including but not limited to, pain and suffering; loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training or education; mental anguish; and any other intangible loss.

Jurors must be told of the tax status of damage awards. Jurors must be told that compensatory damages for bodily injury are tax free.

PRACTICE POINTER

Damages for **non-economic loss** recoverable in a tort action are limited to the greater of $250,000, or three times the economic loss, up to a maximum of $350,000 per plaintiff, and $500,000 per occurrence, unless the non-economic loss is for: (1) permanent and substantial physical deformity, loss of use of a limb, loss of bodily organ system; or (2) permanent physical function injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities in which case there are no caps in general tort actions, but, in medical, dental, optometric and chiropractic negligence actions, caps remain but are increased to $500,000 for each plaintiff or $1,000,000 per occurrence in medical. R.C. 2315.18 (B); R.C. 2323.43(A)(2).

There are no caps in wrongful death cases. R.C. 2315.18(H).

There are no caps on compensatory damages representing economic loss. R.C. 2315.18(B) (1); R.C. 2323.43(A)(1).

Jurors shall delineate what parts of their verdict represent economic loss or non-economic loss. Where necessary, the court shall impose the damage caps on jury verdicts. Jurors shall not be informed about caps on damages.

In medical, dental, optometric and chiropractic negligence actions, if the attorneys' contingency fees exceed non-economic loss compensatory damage caps, they must be presented to the probate court where the settlement was entered with full disclosure of allocation of settlement, a breakdown of what figures represent economic versus non-economic losses, the terms of the contingency fee agreement, and the proposed distribution of the proceeds. All interested parties must receive notice from the attorney of the hearing and the fees are subject to probate court approval. R.C. 2323.43(F).

The Act specifies that if a claimant, statutory subrogee, and a third party settle or attempt to settle a claimant's claim against a third party, the claimant must receive an amount equal to the "uncompensated damages" divided by the sum of the subrogation interest plus the uncompensated damages, multiplied by the net amount recovered. The statutory subrogee must 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. However, the Act allows the net amount recovered to instead be divided and paid on a more fair and reasonable basis that is agreed to by the claimant and the statutory subrogee. These required calculations are expressed in the formulas below where:

NAR (Net Amount Recovered) UD (Uncompensated Damages) SI (Subrogation Interest)

The claimant receives an amount equal to: UD/(SI + UD) x NAR.

The statutory subrogee receives an amount equal to: SI/ (SI + UD) x NAR.

For example, if the Net Amount Recovered is $70,000, the Subrogation Interest is $60,000, and the Uncompensated Damages equals $50,000, the claimant would receive $31,818.18 [$50,000/($60,000 +$50,000) x $70,000]. The statutory subrogee would receive $38,181.82 [$60,000/$60,000 + $50,000) x $70,000]. The claimant's and statutory subrogee's amount total $70,000, which is the Net Amount Recovered. These formulas apply both to settlements and to cases that proceed to trial.

Alternative dispute resolution is permitted to resolve disputes over the equations.

When a claimant's action against a third party proceeds to trial and damages are awarded, the claimant and statutory subrogee must receive amounts calculated using the formulas described above. The court in a non-jury action must make findings of fact, and the jury in a jury action must return a general verdict accompanied by answers to interrogatories that specify the total amount of the compensatory damages and the portion of those compensatory damages that represents economic and non-economic loss.4123.931(D).

Under the prior law, a claimant was required to notify a statutory subrogee of the identity of all third parties against whom the claimant had or may have had a right of recovery. Now, a claimant must also notify the Attorney General when the statutory subrogee is a state fund employer. If the statutory subrogee is a self-insuring employer, the claimant need not notify the Attorney General. Also, under continuing law, no settlement, compromise, judgment, award, or other recovery in any action or claim is final unless the claimant provides the statutory subrogee with the required prior notice and a reasonable opportunity to assert its subrogation rights.

This limitation applies even when the Attorney General is not required to be notified. If the claimant fails to give the statutory subrogee the required notice, the third party and the claimant are jointly and severally liable to pay the statutory subrogee the full amount of the subrogation interest. 4123.931(G).

This right of subrogation is automatic, regardless of whether a statutory subrogee is joined as a party in an action by a claimant against a third party. A statutory subrogee may assert its subrogation rights through correspondence with the claimant, the third party or their legal representatives. A statutory subrogee must institute and pursue legal proceedings against a third party either by itself or in conjunction with the claimant. If a statutory subrogee institutes legal proceedings against a third party, the statutory subrogee shall provide notice of that

fact to the claimant. If the statutory subrogee joins the claimant as a necessary party, or if the claimant elects to participate in the proceedings as a party, the claimant may present the claimant's case first, if the matter proceeds to trial. If a claimant disputes the validity or amount of an asserted subrogation interest, the claimant shall join the statutory subrogee as a necessary party to the action against the third party. 4123.931(H).

The Act provides that the statutory subrogation right of recovery applies to, but is not limited to, all of the following:

1. Amounts recoverable from a claimant's insurer in connection with UM/UIM coverage;
2. Amounts that a claimant would be entitled to recover from a political subdivision, notwithstanding any limitations contained in Chapter R.C.2744;
3. Amounts recoverable from an intentional tort action. 4123.931(I)

If a claimant's action against a third party is for wrongful death or a claim that involves any minor beneficiaries, amounts allocated under this section are subject to the approval of the probate court. 4123.931(J) The Supreme Court of Ohio has held that "R.C. 4123.93 and 4123.931 do not violate the Takings Clause the Due Process and Remedies Clauses, or the Equal Protection Clause of the Ohio Constitution and are therefore facially constitutional. *Groch v. General Motors Corporation*, 117 Ohio St.3d 192, 2008-Ohio-546.

SPECIAL TOPICS AT TRIAL

Nuisance: There are different measures of damages depending upon whether the nuisance is permanent or continuing. Regardless of which measure of those damages is available, a plaintiff may also be entitled to additional damages involving annoyance and discomfort. The annoyance and discomfort damages may be awarded provided that the plaintiff is an occupant of the land. *Widmer v. Fretti*, 95 Ohio App. 7 (1952).

Wrongful Death: *See Statutory Torts, Wrongful Death.*

Loss of Consortium: Consortium includes services, society, companionship, comfort, sexual relations, love and solace. Husband and wife have equal rights to consortium. *Clouston v. Remlinger Oldsmobile Cadillac, Inc.*, 22 Ohio St.2d 65 (1970). A parent may recover for loss of the minor child's consortium. *Grindell v. Huber*, 28 Ohio St.2d 71 (1971). A minor child may seek recovery for loss of parental consortium. *Gallimore v. Children's Hosp. Med. Ctr.*, 67 Ohio St.3d 244 (1993). In some cases, emancipated children may recover for loss of parental consortium. *Rolf v. Tri State Motor Transit Co.*, 91 Ohio St.3d 380 (2001).

Contract Claims: The "expectation" measure of damages is the usual measure of damages for breach of contract, and seeks to put the injured party in the same position as if the breaching party had performed the contract. *Nilavar v. Osborn*, 137 Ohio App.3d 469 (2nd Dist.) Generally, courts have not permitted a party to recover damages for emotional distress suffered as a result of a breach of contract. However, in *Kishmarton v. William Bailey Constr. Co.*, 93 Ohio St.3d 226 (2001), the Court adopted Re-statement of the Law 2d, Contracts (1981) 353 and held that when a vendee's claim for breach of an implied duty to construct a house in a workmanlike manner is successful, emotional distress damages are barred, unless the breach also caused bodily harm, or the breach is of such a kind that serious emotional distress is a particularly likely result.

An injured party, however, may elect to recover damages measured by his/her reliance interest, which seeks to put the injured party in the same position that he/ she would have been in had the contract not been made. Also, the reliance interest may be protected by the court as an alternative measure of damages in other instances such as where the contract is formed by promissory

estoppel, or where expectation damages are unforeseeable or too speculative. *See Restatement of the Law 2d, Contracts (1981) 90.*

In addition, a plaintiff has the right to disregard the contract and sue in restitution. *Cleveland Co. v. Standard Amusement Co.*, 103 Ohio St. 382 (1921). Often called "quantum meruit," or "unjust enrichment," this measure is determined by the reasonable value of the benefit that the injured party has conveyed on the contract breacher. Restitution may be recovered even in absence of an enforceable contract if the necessary requirements are met.

A party may only be awarded those damages that were the natural and probable result of the breach of the contract or that were reasonably within the contemplation of the parties as the probable result of the breach of the contract. This does not require that the defendant actually be aware of the damages that will result from the breach of contract so long as the damages were reasonably foreseeable at the time the parties entered into the contract as a probable result of the breach.

Defamation: In defamation *per se* cases only, damages are presumed (provided the requisite degree of fault has been proved). *Becker v. Toulmin*, 165 Ohio St. 549 (1956), paragraphs one and two of the syllabus. This includes injury to reputation, loss of society and friendship, loss of income and any other injury. While no proof is necessary, the plaintiff may offer evidence about the amount of damages.

In defamation *per quod* cases, the plaintiff is required to prove some special harm (injury caused by third parties). *Moore v. P. W. Publishing Co., Inc.*, 3 Ohio St.2d183 (1965), paragraphs one and two of the syllabus. If the plaintiff's evidence meets that requirement, all other types of general damages may be awarded.

Ohio Supreme Court Snapshot

On October 24, 2013, the Ohio Supreme Court issued an important decision in *Moretz, et al. vs. Muakkassa, et al.*, 137 Ohio St. 3d 171, and held in its third syllabus that, "R.C. 2317.421 obviates the necessity of expert testimony for the admission of evidence of write-offs, reflected on medical bills and statements, as prima facie evidence of the reasonable value of medical services." The decision is a clear victory for the defense in personal injury cases.

The Court reversed a decision from the Ninth District Court of Appeals and reaffirmed its holdings in *Robinson v. Bates*, 112 Ohio St.3d 17 and *Jaques v. Manton*, 125 Ohio St.3d 342. The Court reasoned, "There is no basis for requiring expert witness testimony that the actual amounts charged for medical services are reasonable, when the initial charges for the services are admissible into evidence without such testimony. Eliminating the need for expert testimony allows both parties to avoid the expense and 'the usually empty ceremonial' of expert testimony on reasonableness." *Moretz* at ¶ 92.

One cautionary note, for write-offs to be admissible, they must be on "a written bill or statement, or relevant portion thereof" as required by R.C. 2317.421.

LOSS OF EARNINGS

Past Earnings: A jury may consider whatever loss of earnings the evidence shows that the plaintiff sustained as a proximate result of the injury.

Future Earnings: A jury will also consider whatever loss (if any) of earnings the plaintiff will, with reasonable certainty, sustain in the future as a proximate cause of the injury. The measure of such damage is what the evidence shows with reasonable certainty to be the difference between the amount he was capable of earning before he was injured and the amount he is capable of earning in the future in his injured condition.

Generally a minor may not recover for loss of earnings during his minority because parents are entitled to the earnings of a child. However, parents may release their right to their minor children's services and earnings. When they do, this waiver of the parental right is called emancipation.

Loss of Use of Property: A jury may consider as an element of damage the reasonable value of the use of the property, automobile, etc. during the period reasonably necessary for making repairs or restoring it to a usable condition. *Insley v. Mitchell*, 118 Ohio App. 104 (1963). A jury will consider as an element of damage the reasonable cost of the rental of a substitute property, automobile, etc. during the period reasonably necessary to repair the damage.

POST-TRIAL ISSUES

Motion for New Trial, Civ.R. 59(B): Must be served not later than 28 days after the entry of judgment. This motion also tolls the time for filing an appeal until the motion is decided. App.R. 4(B)(2)(b).

Motion for Relief from Judgment, Civ.R. 60(B): A party may be relieved from judgment for the following reasons:

(1) mistake, inadvertence, surprise or excusable negligence;
(2) newly discovered evidence (which by due diligence could not have been discovered in time to move for a new trial);
(3) fraud, misrepresentation or other misconduct of an adverse party;
(4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective applications; or,
(5) any other reason justifying relief from the judgment.

A motion shall be made within a reasonable time, and for reasons (1), (2), and (3) *not more than* one year after the judgment. A motion under 60(B) does not affect the finality of a judgment or suspend its operation.

PRACTICE POINTER

Ohio Civil Rule 60(B)(5) has been commonly referred to as the "catchall" provision. *Antonopoulos v. Eisner*, 30 Ohio App.2d 187 (8th Dist.1972). Although the Civil Rules do not state what would constitute other reasons justifying relief from judgment, the staff note accompanying this rule states that the ground for invoking this catchall provision should be substantial. Thus, it appears that Ohio Civil Rule 60(B)(5) should only be used in those cases involving unusual or extraordinary circumstances. *Adomeit v. Baltimore*, 39 Ohio App. 2d 97, 105 (8th Dist. 1974); *Guardian Alarm Co. v. Mahmoud*, 166 Ohio App. 3d 51, 2006-Ohio-1227 (6th Dist.) (holding that defendant was entitled to relief pursuant to Civ. R. 60(B)(5) because the defendant never received service of the complaint or other court documents and the defendant did not have an ownership interest in the company being sued for unpaid services).

App.R. 4(A): Notice of Appeal must be filed within 30 days after entry of judgment.

App.R. 18 - Filing and Service of Briefs: Generally, the appellant shall serve and file the appellant's brief within 20 days after the date on which the clerk has mailed the notice as required by App.R.11(B).

The appellee shall serve and file the appellee's brief within 20 days after service of the brief of the appellant. The appellant may serve and file a reply brief within ten days after service of the brief of the appellee.

Motion to Certify a Conflict, App.R. 25: A motion to certify a conflict to the Ohio Supreme Court shall be made within ten days after the clerk has both (1) mailed to the parties the conflicting judgment and (2) made note on the docket of the mailing. The filing of a motion to certify a conflict does not extend the time to appeal from the judgment of the court of appeals to the Ohio Supreme Court.

Application for Reconsideration, App. R.26: Application for reconsideration shall be made within 10 days after the clerk has both (1) mailed to the parties the judgment in question and (2) made a note on the docket of the mailing. The filing of an application for reconsideration does extend the time for filing a notice of appeal to the Ohio Supreme Court.

Resolving Intra-District Conflicts: In *McFadden v. Cleveland State University*, 120 Ohio St.3d 54, 2008- Ohio-4914, the Supreme Court of Ohio issued a decision which held: (1) En banc proceedings do not violate the Ohio Constitution, and (2) courts of appeals have discretion to determine whether an intra-district conflict exists. If the judges of a court of appeals determine that two or more decisions of the court on which they sit are in conflict, they must convene en banc to resolve the conflict. This decision is of great importance in the 8th Appellate District which tends to issue decisions

subject to intra-district conflicts with increasing frequency.

Creating a Final Appealable Order: In *Pattison v. W. W. Grainger, Inc.*, 120 Ohio St.3d 142, 2008-Ohio- 5276, the Supreme Court of Ohio held that when a plaintiff has asserted multiple claims against a defendant, and some of those claims have been ruled upon but not converted into a final appealable

order through Ohio Civil Rule 54(B), the plaintiff

may not create a final appealable order by voluntarily dismissing the remaining claims pursuant to Civ.R. 41(A).

NEGLIGENCE

GENERAL PRINCIPLES

Elements: A negligence claim is based on the following three elements. (1) duty owed; (2) duty breached; (3) damages proximately resulting therefrom. *Di Gildo v. Caponi*, 18 Ohio St. 2d 125(1969).

Foreseeability: The test for foreseeability is whethera reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act. *Commerce and Indus. Ins. Co. v. Toledo*, 45 Ohio St.3d 96 (1989). The issue of foreseeability generally goes to the issue of whether a duty is owed.

Negligence Per Se: Violation of a statute enacted specifically for the safety of others is "negligence per se." Violation of a statute that is a general rule of conduct is not negligence per se, but should be considered by the jury when determining whether a party has used ordinary care. Negligence per se does not equal liability per se. The plaintiff must still prove that the injury was proximately caused by the defendant's negligence.

Examples of negligence per se are failure to stop at a stop sign, or driving left of center within 100 feet of an intersection.

An example of a statute that describes a rule of conduct, but is not negligence per se, is that a person may travel at a speed not greater or less than is proper having due regard for traffic, and other situational factors.

Unavoidable Accidents: An accident, not caused by the negligence of any person but a pure accident, is an unavoidable accident. Examples of unavoidable accidents are unforeseen behavior of animals or small children, or unexpected maladies such as a heart attack or stroke. *Schwarzbek v. City of Wauseon*, 113Ohio App. 3d 631 (6th Dist.1996).

Sudden Emergency: A sudden and unexpected occurrence of a transitory nature which demanded immediate action without time for reflection and was not created by the defendant. *Hatala v. Craft*, 165 Ohio App.3d 602, 2006-Ohio-789 (7th Dist.).

Sudden Medical Emergency or Blackout: A sudden period of unconsciousness which the defendant had no reason to foresee or anticipate. *Roman v. Estate of Gobbo*, 99 Ohio St.3d 260, 2003-Ohio-3655.

Negligence of Minors: Children under 7 are conclusively presumed to be incapable of negligence. *Hunter v. City of Cleveland*, 46 Ohio St.2d 91 (1976). A child between 7 and 14 years of age is rebuttaly presumed to be incapable of negligence. *Foulke v. Boegher*, 166 Ohio App.3d 435 (3rd Dist. 2006).

Willful and Wanton Misconduct: Willful misconduct implies an intentional deviation from a clear duty with knowledge or appreciation of the likelihood of resulting injury. 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. *Anderson v. Massillon*, 134 Ohio St.3d 380 (2012).

By statute, parents are liable for up to $10,000 in damages resulting from a child's willful misconduct towards another's property or theft. R.C. 3109.09.

ASSUMPTION OF THE RISK

Primary Assumption of the Risk: An affirmative defense which will bar a plaintiff's claim based on ordinary negligence. This is the risk that is inherent in the activity, and as a result, the defendant owes no duty to the plaintiff. Primary assumption of the risk is a question of law for a court to decide, rather than for a jury and

accordingly, is best decided on a motion for summary judgment. *Gallagher v. Cleveland Browns Football Co.*, 74 Ohio St. 3d 427 (1996); *Blankenship v. CRT Tree*, 2002-Ohio-5354 (8th Dist.).

The classic example is the risk of a spectator being hit by a foul ball at a baseball game, or the ordinary risk associated with participation in sporting activities. *Cincinnati Baseball Club v. Eno*, 112 Ohio St. 175 (1925).

IMPLIED ASSUMPTION OF THE RISK IS MERGED WITH COMPARATIVE FAULT

Comparative Fault: The concept of comparative negligence (or, contributory fault) has been replacedby comparative fault, and the statutory schemes set forth in S.B. 120, effective April 9, 2003.

R.C. 2315.32 codifies comparative fault as an affirmative defense to a negligence claim or other tort claim except for an intentional tort claim.

A plaintiff's comparative fault does not bar the plaintiff from recovering damages as long as the plaintiff's comparative fault was not greater than the combined fault of the defendant and all other persons. R.C. 2315.33

Summary judgment for the defendant is appropriate if compelling evidence indicates that the only conclusion a reasonable trier of fact could reach is that the plaintiff was over fifty percent negligent. *Alvarado v. Cinemark USA, Inc.*, 2003-Ohio-881 (8th Dist.). A big change made pursuant to S.B. 120 is that the plaintiff's comparative fault is not just compared to the fault of the defendants named in the lawsuit, but to that of all other individuals whose tortious conduct proximately caused plaintiff's injury.

Primary assumption of the risk is not a defense to a claim based on willful or wanton misconduct. *Anderson v. Ceccardi*, 6 Ohio St.3d 110 (1983).

PREMISES LIABILITY

The duty owed to persons in premises liability cases is generally determined by their classification. Ohio law recognizes four classifications of visitors: Trespassers, licensees, social guests, and invitees. *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312 (1996).

Trespassers: Ordinarily, landowners owe no duty to undiscovered trespassers except to refrain from willful, wanton, or reckless conduct which is likely to injure the trespasser. A trespasser discovered in a position of peril is owed a duty of ordinary care by the premises owner. *Gladon, supra.*

Licensees: A licensee is a person who enters the premises of another by permission or acquiescence, for his own pleasure or benefit, but not by invitation. *Light v. Ohio University*, 28 Ohio St.3d 66 (1986). A licensor is not liable for ordinary negligence and owes the licensee no duty except to refrain from willful and wanton conduct and to warn him of hidden dangers. *Steiner v. Deschant*, 114 Ohio App.3d 209 (9th Dist. 1996). If a hidden danger does exist, and when there is a reason to believe the licensee does not know or will not discover the dangerous condition, then the possessor of the premises must warn the licensee. *Wieber v. Rollins*, 55 Ohio App.3d 106 (6th Dist. 1988).

Social Guests: A social guest is one who is invited to the premises of a host. A host who invites a social guest to his premises owes the guest the duty to exercise ordinary care not to cause injury to his guest by any act of the host or by any activities carried on by the host while the guest is on the premises. *Di Gildo v. Caponi*, 18 Ohio St.2d 125 (1969). The host also must warn the guest of any dangerous condition known to the host if the host has reason to believe that the guest does not know and will not discover the dangerous condition. *Di Gildo, supra.*

Social hosts are generally not liable for injuries to third persons caused by those who have become intoxicated as a guest. *Morrison v. Fleck*, 120 Ohio App.3d 307 (9th Dist.1997). However, where a social host provides alcohol to an underage person liability may attach. *Mitseff v. Wheeler*, 38 Ohio St.3d 112 (1988).

Invitees: Invitees are persons who enter upon the premises of another by invitation, express or implied, for some purpose beneficial to the owner. The landowner owes a duty to exercise ordinary care and to protect the invitee by maintaining the premises in a safe condition. *Light, supra.*

A shopkeeper is not an insurer of the customer's safety. *Paschal v. Rite Aid Pharmacy, Inc.*, 18 Ohio St.3d 203 (1985). Shopkeepers are under no duty to protect business invitees from dangers which are known to such invitees or are so obvious and apparent to be reasonably discoverable. *Sidle v. Humphrey*, 13 Ohio St.2d 45 (1968).

DEFENSES AND EXCEPTIONS TO DUTY

Open and Obvious Doctrine: The Open and Obvious Doctrine in Ohio concerns a premises owner's duty to persons upon the premises. Since no duty is owed to persons lawfully upon premises to protect against open and obvious hazards, an analysis of breach, proximate causation and damages is not warranted. *Armstrong v. Best Buy Co.*, 99 Ohio St. 3d 79, 2003- Ohio-2573.

The open and obvious doctrine cannot eliminate a landlord's statutory duty to keep a leased residential premises in a fit and habitable condition. *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 .

Ice and Snow: The general rule is that a premises owner has no duty to remove, or make less hazardous, a natural accumulation of ice and snow or to warn those who enter upon the premises of the inherent dangers presented by natural accumulations of ice and snow. *Brinkman v. Ross*, 68 Ohio St.3d 82 (1993). Everyone is presumed to know and appreciate the risk associated with ice and snow and changing weather. *Brinkman, supra*.

Exceptions: An premises owner or occupier may be liable for natural accumulations of ice and snow where there is evidence of some intervening act by the owner/occupier that perpetuates or aggravates the pre-existing hazardous presence of ice and snow. *Bittinger v. Klotzman*, 113 Ohio App.3d 847 (8th Dist.1996). The duty to remove natural accumulations of snow or ice can arise when (1) the landowner has superior knowledge of the dangerous circumstances created by the snow or ice or (2) the duty is created by express contract. *Chatelain v. Portage View Condominiums*, 151 Ohio App.3d 98 (9th Dist. 2002).

Criminal Acts of Third Persons: Generally, there is no duty to control the conduct of a third person, such as preventing him from causing harm to another, except in cases where there is a special relationship giving rise to a duty to control or protect. *Fed. Steel & Wire Corp. v. Ruhlin Constr. Co.*, 45 Ohio St.3d (1989). However, a business owner has a duty to warn or protect its business invitees from criminal acts of third parties when the business owner knows or should know of a substantial risk of harm to its invitees on the premises. *Simpson v. Big Bear Stores Co.*, 73 Ohio St. 3d 130 (1995).

The key issue is whether the violent acts were reasonably foreseeable. Foreseeability may be evidenced by a history of prior crimes on the premises or in the neighborhood. If a property owner is not in possession and control, then liability may not be imposed. *Simpson, supra.*

Ohio Supreme Court Snapshot

RUTHER V. KAISER

On April 25, 2012, in *Ruther v. Kaiser*, 134 Ohio St. 3d 408, the Supreme Court of Ohio confirmed that the medical malpractice statute of repose does not violate the Ohio Constitution and the Ohio General Assembly properly exercised its right to limit to the amount of time plaintiffs have to file malpractice lawsuits. R.C. 2305.113(C) requires that, (except for minors or those of unsound mind), "a person must file a medical claim no later than four years after the alleged act of malpractice occurs or the claim will be barred." There is a special provision for those claims discovered during the fourth year after treatment.

The Supreme Court of Ohio concluded that Ruther's claim did not accrue until after the statute of repose had expired and therefore had not vested. According to the Court, "the right-to-remedy applies only to existing, vested rights and that the legislature determines what injuries are recognized and what remedies are available." The Court further clarified that R.C. 2305.113(C) "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." As a result, there was no violation of the right-to-remedy provision. In summary, the statute of repose "grants a prospective plaintiff four years to discover a claim and one year to commence that action, or it is barred before it arises."

Attractive Nuisance: The "Attractive Nuisance Doctrine" provides that a possessor of land is subject to liability for physical harm to children trespassing thereon, caused by an artificial condition upon the land, if:

(1) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass;
(2) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children;
(3) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it;
(4) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved; and,
(5) the possessor fails to exercise reasonable care to eliminate the danger or to otherwise protect the children.

Bennett v. Stanley, 92 Ohio St.3d 35 (2001).

The Attractive Nuisance Doctrine is not ordinarily applicable to adults, but it may be successfully invoked by an adult seeking damages for his or her own injury if the injury was suffered in an attempt to rescue a child from a danger created by an attractive nuisance. *Bennett, supra.*

NEGLIGENT MISREPRESENTATION

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. *Delman v. City of Cleveland Heights*, 41 Ohio St.3d 1 (1989).

To be actionable, the negligent misrepresentation must result in the plaintiff's pecuniary loss caused by justifiable reliance on the information. *Leal v. Holtvogt*, 123 Ohio App.3d 51 (2nd Dist.1998).

NEGLIGENCE IN EMPLOYMENT

See Employment Related Torts.

NEGLIGENT ENTRUSTMENT

Typically, these claims arise in the context of motor vehicle accidents. Under certain circumstances, the owner of a vehicle may be held liable in negligence for injuries to a third person resulting from the operation of the vehicle.

Elements:

(1) The motor vehicle was driven with the permission of the owner;
(2) The entrustee was in fact an incompetent driver;
(3) The owner knew at the time of the entrustment that the entrustee had no drivers license or was incompetent or unqualified to operate the vehicle, or had knowledge of facts that would imply knowledge of that incompetence.

Gulla v. Straus, 154 Ohio St. 193 (1950).

Negligent entrustment claims can arise in other situations where the owner of a dangerous instrumentality entrusts it to an incompetent or unqualified person. For example, liability in negligence may attach to a gun owner who knowingly entrusts a gun to a noticeably intoxicated person.

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

A claim for negligent infliction of emotional distress is limited to instances where a plaintiff has either witnessed or experienced a dangerous accident or appreciated an actual physical peril. In some circumstances actual physical injury is not required.

The negligent injury must be reasonably foreseeable. The elements for reasonable foreseeability are:

(1) whether the plaintiff was located near the scene of the accident
(2) whether the shock resulted from a direct emotional impact upon the plaintiff from sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence, and
(3) whether the plaintiff and victim (if any) were closely related.

Paugh v. Hanks, 6 Ohio St.3d 72 (1983).

This claim survives the death of the person upon whom the injury or distress was inflicted.

Expert medical testimony may not be required to establish proximate cause.

A claim for negligent infliction of emotional distress does not exist where the distress is caused only by plaintiff's fear of a non-existent peril. In *Heiner v. Moretuzzo*, 73 Ohio St.3d 80 (1995), a claim for negligent infliction of emotional distress was not recognized where plaintiff was falsely diagnosed as HIV positive.

PROFESSIONAL NEGLIGENCE (MALPRACTICE)

Medical Negligence: A hospital may be vicariously liable for the acts of its independent medical practitioners where it holds itself out as a

provider of medical services and the patient, without contrary knowledge, looks to the hospital to provide competent care, as opposed to an individual practitioner. *Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio St.3d 435 (1994).

Where a tortfeasor can prove that a medical provider's negligence resulted in further injury or aggravation of the original injury caused by the tortfeasor, he may seek contribution from the medical providerfor the damages. *Motorists Mut. Ins. Co. v. Huron Rd. Hosp*., 73 Ohio St.3d 391 (1995).

Where a plaintiff fails to file an affidavit in support of his claim, as required by Civil Rule 10(D)(2), the proper response by the defendant is a motion to dismiss pursuant to Civil Rule 12(B)(6). Where such a motion is granted, the plaintiff's case is dismissed without prejudice. *Fletcher v. University Hospitals of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379.

Nursing Homes: Inspection results or investigations including statements of deficiencies shall not be admissible in a civil tort action against the home. R.C. 3721.02(F).

If a nursing home resident is unable to commence the action, it may be brought by the resident's spouse, parent or adult child, guardian (where resident is a minor), brother or sister, or by the resident's niece, nephew, aunt, or uncle. R.C. 3721.17(I)

In awarding punitive damages, jurors shall consider whether the facility has the financial wherewithal to pay the award; whether the home is viable to provide continuing care; and whether punitive damages awarded will deter such future conduct. R.C. 2315.21(G).

Insurance Agent Negligence: The most frequent negligence claim brought against an insurance coverage agent is for the negligent failure to procure insurance coverage, which has two basic elements:

(1) An insurance agent with a view to compensation undertakes to procure insurance for another

(2) as a result of the agent's negligent failure to perform that obligation, the other party to the insurance contract suffers a loss because of a want of the insurance coverage contemplated by the agent's undertaking. *Munn v. Rudy Stapleton & Son*, 2003-Ohio-5606 (6th Dist.).

An insurance agent owes a duty to the customer to exercise good faith and reasonable diligence when undertaking to acquire the insurance requested by the customer. C*raggett v. Adell Ins. Agency*, 92 Ohio App.3d 443 (8th Dist.1993).

When discussing insurance matters with a customer, an insurance agent does not have a duty to anticipate what coverage the customer should have, nor does an agent have a duty to advise the customer as to the extent of coverage needed. *Rose v. Landen*, 2005-Ohio-1623 (12th Dist.).

The relationship between a customer and the agent that sells the insurance is merely an ordinary business relationship and not a fiduciary one. The agent requires only good faith in obtaining the insurance requested by the customer. *Craggett*, supra. However, a fiduciary relationship can arise from such an informal relationship when both parties understand that a special trust or confidence has been reposed. *Ed Shory & Sons, Inc. v. Francis*, 75 Ohio St.3d 433 (1996)

The customer has a corresponding duty to advise the insurance agent of the insurance desired, and if the customer fails to do so, Ohio courts have held that an insurance agent has no duty to procure coverage that, although expected by the customer, was notrequested. *Bailey v. Progressive Ins. Co.*, 2004-Ohio- 4853 (6th Dist.).

A customer is deemed to have knowledge of the coverage provided, to have understood the coverage provided and to have agreed to the coverage provided, where the customer has had the opportunity to review the policy and ask

questions regarding the policy. If a customer is deemed to have knowledge and understanding of the coverage provided, and has agreed to same, the customer may not claim that he did not receive the coverage that he requested. *First Catholic Slovak Union v. Buckeye Union Ins. Co.*, 27 Ohio App.3d 169 (8th Dist.1986).

Some Ohio decisions hold that a customer's failure to read his policy of insurance was not a complete bar to a claim against an insurance agent, because his failure creates a question of contributory negligence that must be decided by the trier of fact. See *Nichols v. Progressive Ins. Co.*, 2002-Ohio-3058 (10th Dist.); *Wanner Metal Worx, Inc. v. Hylant-Maclean, Inc.*, 2003-Ohio-1814 (5th Dist.); *Flick v. Westfield Nat. Ins. Co.*, 2002-Ohio-5222 (7th Dist.).

Several Ohio courts have held that expert testimony is required to establish the standard of care of an insurance agent. This expert must be qualified to express an opinion concerning the specific standard of care that prevails in the community in which the alleged negligence or breach of duty took place. *Mbe Collection v. Westfield Cos.* 2002-Ohio-1789 (8th Dist.).

INTENTIONAL TORTS AGAINST PERSONS AND PROPERTY

ASSAULT

Elements: Assault is defined as "the willful threat or attempt to harm or touch another offensively, which threat or attempt reasonably places the other in fear of such contact." The threat or attempt must be coupled with a definitive act by one who has the apparent ability to do the harm or to commit the offensive touching. An essential element of the tort of assault is that the actor knew with substantial certainty that his or her act would bring about harmful or offensive contact. *Smith v. John* Deere Co., 83 Ohio App.3d 398 (1st Dist.1993).

Assault is the beginning of an act which, if consummated, would constitute battery. *Matlock v. Ohio Dept. of Liquor Contro*l, 77 Ohio Misc. 2d 13, 665 N.E.2d 771 (Ct. of Cl. 1996). Therefore, words alone are not sufficient to constitute an assault, but must be coupled with some definite act by one with apparent ability to carry out the offensive act.

The essence of civil assault is the plaintiff's apprehension of harm, whether the actor actually has the ability to inflict the physical contact or threatened bodily harm. There can be no liability for assault without the actual apprehension of harm. The determination of "apprehension" necessary for assault is subjective in nature, meaning from the plaintiff's point of view.

Defenses Include: Self-defense, defense of third persons or property, regaining of property, and aggression of plaintiff by threats, abuse or hostile attitude. Provocation may be shown to mitigate punitive damages.

Statute of Limitations: The statute of limitations on assault is one year after the cause of action accrues. If the plaintiff did not know the identity of the person who committed the assault on the day on which it occurs, the cause of action accrues upon the earlier of the following:

(1) the date on which the alleged assault or battery occurred;
(2) the date on which by the exercise of reasonable diligence, the plaintiff should have learned the identity of that person.

An action for assault or battery brought by a victim of childhood sexual abuse, or an action brought by a victim of childhood sexual abuse asserting any claim resulting from such abuse, shall be brought within twelve (12) years after the cause of action accrues. This change was brought when S.B. 17 was passed in 2006. R.C. 2305.111.

BATTERY

Elements: A person is subject to liability for battery when he or she acts in a manner intending to cause a harmful or offensive contact and when a harmful contact results. *Love v. Port Clinton*, 37 Ohio St. 3d 98 (1988). Contact that is offensive to a reasonable sense of personal dignity is offensive contact. A battery may occur without actual physical harm.

Defenses: An action for battery will not lie if the plaintiff expressly or impliedly consents to a lawful act resulting in the bodily contact, unless the act is different in nature or degree from the consented to intrusion. Consent means acquiescence to the touching, with sufficient knowledge and understanding. One cannot, however, consent to an unlawful act, i.e., statutory rape. Consent means acquiescence to

the touching with sufficient knowledge and understanding. *Belcher v. Cartern*, 13 Ohio App. 2d 113 (10th Dist. 1967).

Defenses again include self-defense, defense of third persons or property and regaining of property of another, however where a person could have escaped, Ohio law imposes upon the person a general duty to retreat, unless an assault occurs in one's home or business.

The statute of limitations for battery is one year. R.C. 2305.111. Often a party may attempt to plead a battery as an act of negligence to apply a longer statute of limitations or trigger coverage. However, a battery cannot, by clever pleading or use of another theory of law, be transformed into another type of action subject to a longer statute of limitations. *Love*, 37 Ohio St. 3d 98. Where the essential character of the alleged tort is an intentional, offensive touching, the statute of limitations for battery governs even if the touching is pled as an act of negligence.

DEFAMATION

Elements: Defamation is a false publication that injures a person's reputation, exposes him to public hatred, contempt, ridicule, shame, or disgrace, or affects him adversely in his trade or business. *Kanjuka v. Metrohealth Med. Ctr.*, 151 Ohio App.3d 183, 2002- Ohio-6803 (8th Dist.); *Matalka v. Lagemann*, 21 Ohio App.3d 134 (10th Dist.1985).

The essential elements of a defamation action are:

(1) a false statement;
(2) that the false statement was defamatory;
(3) that the false defamatory statement was published;
(4) the plaintiff was injured; and
(5) the defendant acted with the required degree of fault.

Celebrezze v. Dayton Newspapers, Inc., 41 Ohio App.3d 343 (8th Dist.1988).

There are two types of defamation:

Libel: Libel refers to written defamatory words.

Slander: Slander refers to spoken defamatory words. *Retterer v. Whirlpool Corp.*, 111 Ohio App. 3d 847 (3rd Dist.1996).

Distinction Between *Per Se* and *Per Quod*: Defamation "*per se*" means that the defamation "is accomplished by the very words spoken." Defamation "*per quod*" means that a statement with an apparently innocent meaning becomes defamatory through interpretation or innuendo.

In order for a statement to be defamatory *per se*, it must "consist of words which import an indictable criminal offense involving moral turpitude or infamous punishment, impute some loathsome or contagious disease which excludes one from society, or tends to injure one in his trade or occupation." With defamation *per se*,, damages and actual malice are presumed. With defamation *per quod*, the plaintiff must plead and prove special damages resulting from the defamatory statements. *Darby v. Ciraso*, 4th Dist. No. 99CA2657, 2000 Ohio App. LEXIS 4372 (Sept. 19, 2000); *McCartney v. Oblates of St. Francis de Sales*, 80 Ohio App.3d 345 (6th Dist.1992).

Private vs. Public Figure: The plaintiff's burden of proof in a defamation case differs according to the plaintiff's status as either a private or public official. Whether a person is a private figure or a public figure/official is a matter of law for the court to decide. *Waterson v. Cleveland State Univ.*, 93 Ohio App.3d 792 (10th Dist. 1994); *Condit v. Clermont Cty. Review*, 93 Ohio App.3d 166 (12th Dist.1994).

A publisher is liable to a private figure when a false statement or publication is negligently made which proximately causes actual injury to the individual. Dale v. A publisher is only liable for monetary damages to a public figure or official if the false statement is made with "actual malice." *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed. 2d 686 (1964); *Wampler v. Higgins*, 93 Ohio St.3d 111 (2001). Actual malice is never presumed, nor may it be inferred from evidence of personal spite, ill will, or deliberate

intention to injure, as the defendant's motives are irrelevant. *Varanese v. Gall*, 35 Ohio St.3d 78 (1988). Actual malice must be proven by clear and convincing evidence. *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L.Ed. 2d 789 (1974).

Public figures are divided into two categories: public figures for all purposes and public figures for a limited purpose. It is well settled that "absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life." *Knowles v. Ohio State Univ.*, Ct. of Cl. No. 2001-03780, 2005-Ohio-3330. To become a limited purpose public figure, an individual must voluntarily inject himself or be drawn into a "particular public controversy." *Id.*

In an action for defamation, either type of public figure must prove with "convincing clarity" or clear and convincing evidence that the defendant had actual knowledge of the falsity of the statements or acted with reckless disregard for the truth. *Varanese*, 35 Ohio St. 3d 78 (1988). The mere fact that an uttered or published statement is false is insufficient to prove "actual malice." *Wampler*, 93 Ohio St.3d 111 (2001).

Damages: Include impairment of reputation, personal humiliation, shame, mental anguish, and suffering. *Rogers v. Buckel*, 83 Ohio App.3d 653 (8th Dist.1992); *Thomas H. Maloney & Sons, Inc. v. E.W. Scripps Co.*, 43 Ohio App.2d 105 (8th Dist.1974). Juries must be limited by appropriate instructions and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury. *Lansdowne v. Beacon Journal Publ'g Co.*, 32 Ohio St.3d 176 (1987).

Defenses: There are a number of absolute or qualified privileges which originate from the common law and statutes.

"Absolute privilege" provides complete protection from liability for defamation, but is limited to communications made in the course of: legislative proceedings, judicial proceedings, or other acts of the state including the discharge of a duty of the governor or the head of an executive department of the state. *Costanzo v. Gaul*, 62 Ohio St. 2d 106 (1980).

"Qualified privilege" on the other hand, applies in a variety of situations where society's interest in compensating a person for loss of reputation is outweighed by a competing interest that demands protection. Accordingly, the privilege does not attach to the communication, but to the occasion on which it is made. It does not change the actionable quality of the publication, but heightens the required degree of fault. This affords some latitude for error, thereby promoting the free flow of information on an occasion worthy of protection. *A&B - Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St. 3d 1 (1995).

The essential elements necessary to establish a qualified privilege are good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only. Such a qualified privilege may be overcome by "actual malice." *Id.*

Ohio employs the "innocent construction rule" which provides that if allegedly defamatory words are susceptible to two meanings, one defamatory and one innocent, the defamatory meaning should be rejected, and the innocent meaning adopted. *Mendise v. Plain Dealer Publ'g Co.*, 69 Ohio App.3d 721 (8th Dist. 1990), citing *Yeager v. Local Union 20*, 6 Ohio St.3d 369 (1983); *Sheppard v. Stevenson*, 1 Ohio App.2d 6 (9th Dist.1964).

Other potential defenses in a case of defamation include truth, substantial truth, expression of opinion, and the non-actionability of implied statements.

Truth is a complete defense to a claim for

defamation. R.C. 2739.02. Further, in all such actions, any mitigating circumstances may be proved to reduce damages. *See 2 O.J.I. (2003*), 264.07.

INVASION OF PRIVACY/ RIGHT TO PRIVACY

Definition and Elements: The right of privacy is the right of a person to be left alone, to be free from unwarranted publicity, and to live without unwarranted interference by the public in matters which the public is not necessarily concerned. *Housh v. Peth*, 165 Ohio St. 35 (1956), paragraph one of the syllabus.

The tort of invasion of privacy consists of three different types of wrongs:

(1) the unwarranted appropriation or exploitation of one's personality;
(2) the publicizing of one's private affairs with which the public has no legitimate concern; or
(3) the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.

Housh; *Salupo v. Fox, Inc*., 8th Dist. No. 82761, 2004-Ohio-149; S*croggins v. Bill Furst Florist and Greenhouse*, 2nd Dist. No. 19519, 2004-Ohio-79.

The interest protected in the right of privacy is primarily a mental one rather than economic or pecuniary. Invasion of privacy is an intentional tort analogous to trespass and battery in protection of personal integrity. Actual damage is not necessary. Proof of the unjustified invasion entitles the plaintiff to at least nominal damages and the jury may award substantial damages. Special pecuniary loss as well as punitive damages may be recovered if pled and proved. *LeCrone v. Ohio Bell Tel. Co*., 120 Ohio App. 129 (10th Dist.1963).

The tort of invasion of privacy includes four separate torts:

(1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;
(2) public disclosure of embarrassing private facts about the plaintiff;
(3) publicity which places the plaintiff in a false light in the public eye; and
(4) appropriation, for the defendant's advantage, ofthe plaintiff's name or likeness.

Henson v. Henson, 9th Dist. No. 22772, 2005-Ohio- 6321, 2005 Ohio App. LEXIS 5675; *Piro v. Franklin Twp*., 102 Ohio App.3d 130 (9th Dist.1995); *Killilea v. Sears, Roebuck & Co*., 27 Ohio App.3d 163 (10th Dist.1985); *Peterman v. Stewart*, 5th Dist. No. 05- CAE-12-0082, 2006-Ohio-4671, 2006 Ohio App. LEXIS 4611.

To establish an invasion of privacy claim of the "intrusion upon seclusion" type, the plaintiff is required to produce evidence that the area intruded upon was private, and that the intrusion was unwarranted and offensive or objectionable to a reasonable person. *Kohler v. City of Wapakoneta*, 381 F.Supp.2d 692 (N.D.Ohio 2005).

To prevail on a "public disclosure of private facts" invasion of privacy claim, a plaintiff must prove:

(1) the disclosure was public in nature;
(2) the facts disclosed concerned the plaintiff's private life, not his public life;
(3) the matter publicized would be highly offensive and objectionable to a reasonable person of ordinary sensibilities;
(4) the publication was made intentionally, not negligently; and
(5) the matter publicized was not of legitimate concern to the public. *Peterman; Early v. The Toledo Blade*, 130 Ohio App.3d 302 (6th Dist.1998); *Wilson v. Harvey*, 164 Ohio App. 3d 278, 2005- Ohio-5722 (8th Dist.). "Publicity" requires a communication "to the public

at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."

FALSE LIGHT

Ohio has also recognized a claim for false light. To recover for false light, a plaintiff must prove (1) that the complained of statement is factually untrue, (2) that the untruth is "such a major misrepresentation of his character, history, activities or believes that serious offense may reasonably be expected to be taken by a reasonable man in his position," (3) that the untruth was publicized, and (4) that the statement was made with constitutional actual malice – that is, that the Defendant knew the statement was false or acted with reckless disregard as to its truth or falsity, and knew of the false light in which the plaintiff would be placed. *Welling v. Weinfeld*, 113 Ohio St. 3d 464, 2007- Ohio-2451; *Patrick v. Cleveland Scene Publ'g LLC*, 582 F. Supp. 2d 939 (N.D. Ohio, 2008).

A right of publicity in an individual's "persona" is protected by statute. R.C. 2741.01, *et seq*. However, the enactment of Chapter 2741 of the Revised Code does not abrogate the common law right of privacy. Except as otherwise provided in the statute, "a person shall not use any aspect of an individual's persona for a commercial purpose during the individual's lifetime or for a period of sixty years after the date of the individual's death; or for a period of ten years after the date of death of a deceased member of the Ohio national guard or the armed forces of the United States." R.C. 2741.02(A) (amended 2009). "Persona" means "an individual's name, voice, signature, photograph, image, likeness, or distinctive appearance, if any of these aspects have commercial value." R.C. 2741.01(A). A person who violates R.C. 2741.02 may be liable for actual or statutory damages, punitive or exemplary damages, and/or treble damages. See R.C. 2741.07.

UNAUTHORIZED DISCLOSURE OF MEDICAL INFORMATION

The Ohio Supreme Court recognizes third party liability against attorneys who make unauthorized disclosure of an opposing party's medical information that was obtained through litigation. In *Hageman v. South-West General Health Center*, 119 Ohio St.3d 185, 2008-Ohio-3343, the Court stated, "...when the cloak of confidentiality that applies to medical records is waived for the purpose of litigation, the waiver is limited to that case." In *Hageman*, the attorney representing a wife in a divorce action against a husband who had a contemporaneous criminal case pending shared the husband's psychological records with the local prosecutor's office, in an effort to gain some leverage in the divorce case. The Court held, "We recognize that waiver of medical confidentiality is limited to the specific case for which the records are sought, and that an attorney who violates this limited waiver by disclosing the records to a third party unconnected to the litigation may be held liable for these actions."

MALICIOUS PROSECUTION

Elements: To establish the tort of malicious prosecution, a plaintiff must prove the following elements:

(1) malice in instituting or continuing the prosecution;
(2) lack of probable cause;
(3) termination of the prosecution in favor of the accused; and
(4) seizure of the plaintiff's person or property during the course of the prior proceedings.

Robb v. Chagrin Lagoons Yacht Club, 75 Ohio St.3d 264 (1996).

The lack of probable cause is the gist of the action. *Melonowski v. Judy*, 102 Ohio St. 153 (1921). Probable cause does not depend on whether the claimant was guilty of the crime charged. *Waller v. Foxx*, 1st Dist. No. 810568, 1982 Ohio App. LEXIS 12857 (Oct. 6, 1982). Rather, the question is whether the accuser had probable cause to believe that the claimant was guilty. The person instituting the criminal

proceedingis not bound to have evidence sufficient to insure a conviction but is required only to have evidence sufficient to justify an honest belief of the guilt of the accused. *Epling v. Pacific Intermountain Exp. Co.*, 55 Ohio App.2d 59 (9th Dist.1977).

An indictment creates a rebuttable presumption of probable cause which is only overcome by the plaintiff's production of substantial evidence "to the effect that the return of the indictment resulted from perjured testimony or that the Grand Jury proceedings were otherwise significantly irregular." *Deoma v. City of Shaker Heights*, 68 Ohio App.3d 72 (1990). However, Grand Jury evidence is usually secret and beyond the reach of a plaintiff. Therefore, "if one party relies on a presumption and his adversary introduces evidence of a substantial nature which counterbalances the presumption, it disappears. Absent a controlling presumption, conflicting evidence about the defendant's probable cause to believe the plaintiff had committed an offense presents a factual issue that should be resolved by the jury." *Adamson v. May Co.*, 8 Ohio App. 3d 266 (8th Dist.1982).

Ordinarily, a person reporting a crime does not initiate a criminal proceeding where law enforcement officials are invested with discretion to charge. Rather, in order to charge a private person with the responsibility for the initiation of proceedings by a public official, it must appear that his desire to have the proceedings initiated expressed by direction, request or pressure of any kind was the determining factor in the official's decision to commence the prosecution or that the information furnished by him upon which the official acted was known to be false. *Archer v. Cachat*, 165 Ohio St. 286 (1956).

ABUSE OF PROCESS

Elements: The elements of a claim of abuse of process are:

(1) that a legal proceeding has been set in motion in proper form and with probable cause;
(2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and
(3) that direct damage has resulted from the wrongful use of process.

Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A., 68 Ohio St.3d 294 (1994).

"Abuse of process differs from "malicious prosecution" in that the former connotes the use of process properly initiated for improper purposes, while the latter relates to the malicious initiation of a lawsuit which one has no reasonable chance of winning." *Clermont Envtl. Reclamation Co. v. Hancock*, 16 Ohio App.3d 9 (12th Dist.1984).

In an abuse of process case, "[t]he improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club." *Prosser*, Law of Torts, (4 Ed. 1971) 898, Section 121. Simply, abuse of process occurs where someone attempts to achieve through use of the court that which the court is itself powerless to order. *Robb*, 75 Ohio St.3d 264.

FALSE IMPRISONMENT

Elements: The common law tort of false imprisonment "occurs when a person confines another intentionally 'without lawful privilege and against his consent within a limited area for any appreciable time, however short.'" *Bennett v. Ohio Dep't of Rehab. and Corr.*, 60 Ohio St.3d 107 (1991).

Merchant's Privilege: A merchant, or an employee or agent of a merchant, who has probable cause to believe that items offered for sale by a mercantile establishment have been unlawfully taken by a person, may detain the person in a reasonable manner for a reasonable length of time within the mercantile establishment or its immediate vicinity. R.C. 2935.041(A)

However, "[b]ecause of the continuing nature of the false imprisonment tort, it is clear that a person who intentionally confines another cannot escape liability by arguing that he or she was initially privileged to impose the confinement. Once the initial privilege expires, the justification for continued confinement expires and possible liability for false imprisonment begins." *Bennett*, 60 Ohio St. 3d 107.

"An action for false imprisonment cannot be maintained where the wrong complained of is imprisonment in accordance with the judgment or order of a court, unless it appears that such judgment or order is void." *Id*. Furthermore, the order or judgment must be void on its face. No liability for false imprisonment can be had even where a person was kept confined pursuant to an invalid order, where determining such invalidity would have required consideration of extrinsic information or the application of case law. *Fisk v. Ohio Dep't of Rehab. & Corr.*, 10th Dist. No. 11AP-432, 2011-Ohio-5889.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Elements: One who by extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm. *Yeager v. Local Union 20*, 6 Ohio St.3d 369 (1983)

Elements include:

(1) the Defendant either intended to cause serious emotional distress or knew or should have known that actions taken would result in serious emotional distress;
(2) the Defendant's conduct was so extreme and outrageous as to go beyond all possible bounds of decency and was utterly intolerable in a civilized society;
(3) the actions were the proximate cause of plaintiff's psychic injury;
(4) the mental anguish suffered was serious and of a nature that no reasonable person could be expected to endure it.

Rine v. Sabo, 113 Ohio App.3d 109 (6th Dist.1996) (citing *Pyle v. Pyle*, 11 Ohio App. 3d 31 (8th Dist. 1983)).

TRESPASS AND WRONGFUL ENTRY TRESPASS

Elements: Under Ohio law, "trespass" is defined as "an unlawful entry upon the property of another." C*hance v. BP Chem., Inc.*, 77 Ohio St.3d 17 (1996).

Damages: In order to recover compensatory damages for trespass, the property owner must prove the amount of damages suffered. *Allstate Fire Ins. Co. v. Singler*, 14 Ohio St. 2d 27 (1968). The measure of damages can be generally gauged by the reasonable rental value of the property of which the plaintiff was deprived due to the trespass. *Pearl v. Pic Walsh Freight Co.*, 112 Ohio App. 11 (1st Dist.1960).

Defenses: A trespasser is not excused from liability on the grounds that he possessed a good faith belief that he was entitled to be on another's land. *W.U. Tel. Co. v. Smith*, 64 Ohio St. 106 (1901). Ohio allows trespass claims whether the entry is intentional or negligent. However, public necessity can potentially serve as a defense to otherwise actionable trespass. *Chalker v. Howland Twp. Trustees*, 74 Ohio Misc. 2d 5 (C.P.1995).

INTENTIONAL MISREPRESENTATION AND FRAUD

Elements: The elements of fraud are:

(1) a representation or, where there is a duty to disclose, a concealment of fact;
(2) which is material to the transaction at hand;
(3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred;
(4) with the intent of misleading another into relying upon it;

(5) justifiable reliance upon the representation or concealment, and
(6) a resulting injury proximately caused by the reliance.

Cohen v. Lamko, Inc., 10 Ohio St.3d 167 (1984).

Fraud is never presumed but must instead be affirmatively proved. *Watkins v. Cleveland Clinic Found.*, 130 Ohio App.3d 262 (8th Dist.1998).

Fraud claims generally cannot be predicated upon promises or representations relating to future actions or conduct. However, an exception, or extended application, of this rule is the instance of the actor who makes a promise of future action, occurrence or conduct, and who, at the time he or she makes it, has no intention of keeping the promise. "In such case, the requisite misrepresentation of an existing fact is said to be found in the lie as to his existing mental attitude and present intent." *Tibbs v. Nat'l Homes Constr. Corp.*, 52 Ohio App.2d 281 (12th Dist.1977).

A fraud claim may be subject to the discovery rule which tolls the statute of limitations until the party discovers or, in the exercise of reasonable care, should have discovered the injury. *Investors REIT One v. Jacobs*, 46 Ohio St.3d 176 (1989).

SPOLIATION OF EVIDENCE AND INTENTIONAL INTERFERENCE WITH DESTRUCTION OF EVIDENCE

Elements: A cause of action exists in tort for intentional interference with or destruction of evidence. The elements for a claim for interference with or destruction of evidence are:
(1) pending or probable litigation involving the plaintiff;
(2) knowledge on the part of defendant that litigation exists or is probable;
(3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case;
(4) disruption of the plaintiff's case; and
(5) damages proximately caused by the defendant's acts.

Smith v. Howard Johnson Co., 67 Ohio St.3d 28 (1993).

Ohio does not recognize a cause of action for negligent spoliation of evidence. "To state a claim for spoliation of evidence, the plaintiff must allege willful destruction of evidence by defendant designed to disrupt the plaintiff's case. Willful reflects an intentional and wrongful commission of the act and contemplates more than mere negligence." *Barker v. Wal-Mart Stores, Inc.*, 10th Dist. No. 01AP-658, 2001- Ohio-8854.

Ohio courts have also declined to extend liability beyond those acts which constitute a destruction of physical evidence. *Fehrenbach v. O'Malley*, 2011- Ohio-5481.

Other Remedies: A party who has been deprived of evidence due to either intentional or negligent spoliation may seek discovery sanctions in the litigation so affected. The party who is affected by the spoliation must bring a claim for spoliation of evidence against the party that committed the spoliation.

"The party who spoils or destroys evidence has the burden of persuading the trial court that there was no reasonable possibility that the opposing party was deprived of favorable evidence. The trial court has broad discretion to determine the appropriate sanction for spoliation." *Travelers Ins. Co. v. Knight Elec. Co.*, 5th Dist. No. CA-8979, 1992 Ohio App. LEXIS 6664 (Dec. 21, 1992). Those sanctions can range from excluding testimony at trial about the spoliated evidence to granting a motion to dismiss or a motion for summary judgment.

STATUTORY TORTS AND DEFENSES

COMMON STATUTORY TORTS

DRAM SHOP ACTIONS

Ohio law historically prohibited causes of action against a liquor permit holder for injury caused by an intoxicated person. *Lesnau v. Andate Enterprises, Inc.*, 93 Ohio St.3d 467, 2001-Ohio-1591.

However, under R.C. 4399.18, a liquor permit holder can be held liable for action of intoxicated patrons to third parties if their injury, death or property damage occurred on the permit holder's premises or in a parking lot under the control of the permit holder and was proximately caused by the negligence of the permit holder or an employee of the permit holder.

Additionally, a liquor permit holder can be held liable for action of intoxicated patrons to third parties off premises if the liquor permit holder knowingly sold an intoxicating beverage to: (1) a noticeably intoxicated person or (2) to an underage person; provided the person's intoxication proximately caused the personal injury, death or property damage claimed.

In Ohio, there is no cause of action against a liquor permit holder by a voluntarily intoxicated patron (or his representative) who is "underage" (meaning under 21) pursuant to R.C. 4301.22(A)(1) and 4301.69, but who has attained the age of majority, for self-inflicted injury or death due to being intoxicated. *Klever v. Canton Sachsenheim, Inc.*, 86 Ohio St. 3d 419 (1999).

SOCIAL HOST

A social host is not held to the same duty of care as a commercial proprietor, thus a social host who served alcohol to a guest, rather than selling it to him or her, generally cannot be held liable under the civil damages statute. *Settlemyer v. Wilmington Veterans Post*, 11 Ohio St.3d 123, 127 (1984).

However, a social host can be held liable for injuries to a third person caused by the negligence of a minor to whom the social host furnished alcohol. R.C. 4301.69 creates a duty requiring social hosts to refrain from furnishing alcohol to a person under the legal drinking age. Violation of that duty is negligence per se. *Gressman v. McClain*, 40 Ohio St.3d 359 (1988).

Further, R.C. 4301.69(A) provides, in part, that no person shall sell beer or other intoxicating liquor for, or furnish it to, an underage person unless the underage person is accompanied by a parent, spouse who is not an underage person, or legal guardian. R.C. 4301.69(A) is a strict liability offense.

DOG BITE LIABILITY

Plaintiffs may pursue both common law and statutory relief for dog bite injuries in Ohio. *Beckett, et al., v. Warren*, 124 Ohio St.3d 256 (2010). To recover in a common law action for bodily injuries caused by a dog, a plaintiff must show that: "(1) the defendant owned or harbored the dog, (2) the dog was vicious, (3) the defendant knew of the dog's viciousness, and (4) the dog was kept in a negligent manner after the keeper knew of its viciousness." Id. (quoting *Hayes v. Smith*, 62 Ohio St. 161 (1900), at paragraph one of the syllabus).

A plaintiff may receive statutory damages under R.C. 955.28, which imposes absolute liability upon the owner, keeper, or harborer of a dog for any injury, death, or loss to person or property that is caused by the dog unless the injured individual was trespassing or committing a criminal offense other than a minor misdemeanor on the property or was teasing, tormenting, or abusing the dog on the owner's, keeper's, or harborer's property. R.C. 955.28(B).

In order to recover damages under R.C. 955.28, a plaintiff must prove that a defendant is an owner,

a keeper, or a harborer, the dog proximately caused the plaintiff's injuries, and the amount of damages. Several persons simultaneously may be owners, keepers, or harborers of a dog and jointly liable for the injuries or damage caused by the dog. It is well established that R.C. 955.28 is to be strictly construed. *Godsey v. Franz*, 1992 WL 48532.

While punitive damages are available when an action is brought under common law, they are not available for a statutory action. *Darfus v. Clark*, 2013-Ohio 563.

WRONGFUL DEATH

Statutory Creation: The right to sue for wrongful death in Ohio is a statutorily created right. *Rubeck v. Huffman*, 54 Ohio St.2d 20 (1978); R.C. 2125.01. An action for wrongful death must be commenced within two years after the decedent's death. R.C. 2125.02(D) (1) If a judgment for the plaintiff is reversed or the plaintiff fails otherwise than upon the merits and if the time limited by division (D)(1) for the commencement of the action (two years) has expired at the date of the reversal or failure, the plaintiff, or if the plaintiff dies and the cause of action survives, the personal representative of the plaintiff, may commence a new civil action for wrongful death within one year after that date. R.C. 2125.04

Nature of the Action: R.C. 2125.02 States:

"[A] civil action for wrongful death shall be brought in the name of the personal representative of the decedent for the exclusive benefit of 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 for the exclusive benefit of the other next of kin of the decedent." R.C. 2125.02(A)(1).

"A parent who abandoned a minor child who is the decedent shall not receive any benefit in a wrongful death action brought under this division." R.C. 2125.02(A)(1).
"A person who is conceived prior to the decedent's death who is born alive after the decedent's death is a beneficiary of the action." R.C. 2125.02(A)(3)(a).

Important Factors in a Wrongful Death Action: Only the administrator or executor of the decedent's estate, properly appointed by the Probate Court, may bring a wrongful death action. The surviving spouse, children and parents are rebuttably presumed to have suffered damages. R.C. 2125.01(A)(1).

"Other next of kin," although not presumed to have sustained damages, may recover damages for mental anguish and loss of society upon proper proof thereof, even though there is a surviving parent, spouse, or minor children." *Wise v. Timmons*, 64 Ohio St.3d 113, 1992-Ohio-117.

The fact that the decedent's spouse has remarried is admissible and may be considered by the jury in awarding damages. R.C. 2125.02(A)(3)(b)(iii).

The cost of annuities are admissible and may be considered by the jury in determining damages. R.C. 2125.02(A)(3)(b)(ii).

A wrongful death action does not arise until the death of an injured person, and therefore, an injured person cannot defeat their beneficiaries' right to have a wrongful death action brought on their behalf, as the action has not yet arisen during the injured person's lifetime. Injured persons may release their own claims, but cannot release claims that are not yet in existence and that accrue in favor of persons other than themselves. A release in a personal injury claim does not prevent a subsequent lawsuit for wrongful death if the injured party dies as a result of his injuries. *Thompson v. Wing*, 70 Ohio St.3d 176, 1994-Ohio-358. However, it should be noted that beneficiaries in the wrongful death action are in

privity with the decedent and therefore collaterally estopped from litigating issues decided in the decedent's own action. *Id.*

Damages: In an action for wrongful death, the surviving statutory beneficiaries have the right to recover damages suffered by reason of the wrongful death of the decedent. Each statutory wrongful death beneficiaries' claim is considered separate and distinct from the claim of the estate and from each other. *Clark v. Scarpelli*, 91 Ohio St.3d 271, 744 N.E.2d 719 (2001).

Compensatory Damages: In an action for wrongful death, compensatory damages may be awarded and may include the following:

Loss of support from the reasonably expected earning capacity of the decedent;

Loss of services of the decedent;

Loss of society of the decedent, including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel, instruction, training and education, suffered by the surviving spouse, dependent children, parents, or next of kin of the decedent;

Loss of prospective inheritance to the decedent's heirs at law at the time of the decedent's death;
The mental anguish incurred by the surviving spouse, dependent children, parents or next of kin of the decedent.

There are no caps on damages in wrongful death actions. Const. Art. 1, § 19a.

Punitive Damages: Punitive damages are not recoverable for wrongful death. However, such damages can be awarded in an action that survives the decedent pursuant to R.C. 2305.21. *Rubeck v. Huffman* (1978), 54 Ohio St.2d 20. If the decedent has a personal injury claim arising out of the same tort, or had conscious pain and suffering, and the facts would support a claim for punitive damages, that claim survives the decedent's death and may be brought by the estate.

In *Barnes v. University Hospitals of Cleveland*, 119 Ohio St.3d 173, 893 N.E. 2d 142 (2008), the Supreme Court held that "a court reviewing an award of punitive damages for excessiveness must independently analyze (1) the degree of reprehensibility of the party's conduct, (2) the ratio of the punitive damages to the actual harm inflicted by the party, and (3) sanctions for the comparable conduct."

EMPLOYER INTENTIONAL TORTS

After April 7, 2005: The law involving employer intentional torts in Ohio was drastically changed by tort reform legislation which became effective April 7, 2005. The new law virtually eliminates such cases by defining "substantially certain" to mean that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition or death. 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 an intent to injure another if an injury or an occupational disease or condition occurs as a direct result. R.C. 2745.01.

Ohio Courts apply a strict standard with respect to deliberate intent under 2745.01, which standard was recently reinforced by the Ohio Supreme Court. Courts have held that 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. *Hubble v. Haviland Plastic Prods. Co.*, 2010 Ohio 6379. Also, 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. *McCarthy v. Sterling Chems., Inc.*, 193 Ohio App.3d 164 (2011); *Fickle v. Conversion Technologies*

Internatl., Inc., 2011-Ohio-2960. Alleged deficiencies in training, safety procedures, safety equipment, instructions, or warnings have been found to show recklessness, but are insufficient to create a genuine issue of material fact as to deliberate intent. *Roberts v. RMB Ents., Inc.*, 2011-Ohio-6223. Barring a showing of a rebuttable presumption under R.C. 2745.01(C) (deliberate removal of an equipment safety guard), a claim necessarily fails in the absence of evidence of a specific intent to injure.

The Ohio Supreme Court, in 2010, issued long-awaited opinions as to the constitutionality, scope and meaning of R.C. 2745.01. See *Kaminski v. Metal Wire Products Co., et al.*, 125 Ohio St.3d 250 (2010); *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280 (2010); and *Klaus v. United Equity, Inc.*, 125 Ohio St.3d 279 (2010).

Kaminski and *Stetter* are twin lead decisions and they collectively provide:

(1) that R.C. 2745.01 is constitutional;

(2) that R.C. 2745.01 controls employee injuries occurring on or after its effective date April 7, 2005; it does not overrule the common law employer intentional tort, but instead redefines it with respect to injuries occurring after its effective date. See *Ruther v. Kaiser*, 2012-Ohio-5686, ¶14. Accordingly, Blankenship/Fyffe remain the controlling legal authority for employee injuries occurring prior to April 7, 2005; for injuries occurring after April 7, 2005, the common law employer intentional tort is restricted to the relief provided by R.C. 2745.01;

(3) that R.C. 2745.01 "permit[s] recovery for employer intentional torts only when an employer acts with specific intent to cause injury." See eg. *Stetter*, at ¶26; *Kaminski*, at ¶104;

(4) due to their facts, neither case addressed the meaning or parameters of R.C. 2745.01(C) which provides that "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 the intent to injure another if an injury or an occupational disease or condition occurs as a direct result."

Before April 7, 2005: The prior standard for an employer intentional tort required the plaintiff to prove: (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer, under such circumstances, andwith such knowledge, did act to require the employee to continue to perform the dangerous task." *Fyffe v. Jeno's Inc.*, 59 Ohio St.3d 115 (1991).

PRODUCTS LIABILITY

Elements: The Ohio Product Liability Act, R.C. 2307.71-2307.801, creates a cause of action for strict liability against a manufacturer of products for injury caused by the product upon a showing that the product was defective:

(1) by manufacture or construction (R.C. 2307.74);

(2) by design or formulation (R.C. 2307.75);

(3) due to inadequate warning or instruction (R.C. 2307.76); or

(4) due to non-conformance to a representation of the manufacturer (R.C. 2307.77).

Defective Manufacture or Construction: To prove defective manufacture or construction, a plaintiff must prove:

(1) that when the product left the control of the manufacturer;

(2) it deviated in some material way from the design specifications, formula, performance standards or otherwise

identical units manufactured by the same design specifications, formula or performance standards;

(3) the defective manufacture or construction proximately caused;

(4) injury to the plaintiff.

Defective Design Before April 7, 2005: To prove defective design, a plaintiff has to prove:

(1) that when the product left the control of the manufacturer,

(2) it was more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner ("Consumer Expectation Test") or that the foreseeable risks associated with the design of the product exceeded the benefits of that design ("Risk-Benefit Test");

(3) the defective design proximately caused;

(4) injury to the plaintiff.

The Consumer Expectation Test and the Risk-Benefit Test are not mutually exclusive, but instead constitute a "single, two-pronged test" for determining whether a product is defectively designed. *Cremeans v. Int'l Harvester Co.*, 6 Ohio St.3d 232 (1983); *Knitz v. Minster Mach. Co.*, 69 Ohio St.2d 460 (1982). A product may be found defective in design even if it satisfies ordinary consumer expectations, if the jury determines that the design embodies excessive preventable danger. *Eldridge v. Firestone Tire & Rubber Co.*, 24 Ohio App.3d 94 (1985).

The mere occurrence of an unexpected accident does not satisfy the Consumer Expectation Test because Ohio does not require manufacturers to be guarantor or insurers of their products. *Sutowski v. Eli Lilly & Co.*, 82 Ohio St.3d 347, 1998-Ohio-388 (1998); *Pruitt v. General Motors Corp.*, 74 Ohio App.3d 520 (1991).

The Consumer Expectation Test may be wholly inapplicable where the product is a non-consumer product that is not marketed to the general public, or where the person injured by the product does not have the ordinary knowledge of the characteristics of the product common to the community in which the product is sold, because to do so would not produce a defect because the injured person could not have any performance expectation. *Hisrich v. Volvo Cars of North America, Inc.*, 226 F.3d 445 (6th Cir. (Oh) 2000). Accordingly, Ohio has retained the Risk- Benefit Test for cases where the Consumer Expectation Test is wholly inapplicable or would produce no defect because of the claimant's lack of performance expectations. *Perkins v. Wilkinson Sword, Inc.*, 83 Ohio St.3d 507, 1998-Ohio-16. R.C. 2307.75 sets forth a non-exclusive list of factors to be considered in using the Risk-Benefit Test, which generally requires the use of expert testimony. *Dent v. Ford Motor Co.*, 83 Ohio App.3d 283 (1992); *Francis v. Clark Equip. Co.*, 993 F.2d 545 (6th Cir. (Oh) 1993).

Defective Design After April 7, 2005: The 2005 amendment changed the standard for design defect by eliminating the "Consumer Expectation" test and redefining the Risk-Benefit test. Now, a product is defective only if "at the time it left the control of its manufacturer, the foreseeable risks associated with its design or formulation exceeded the benefits associated…with that design or formulation." Also, an additional factor was created in the risk-benefit test requiring a reasonable alternative design analysis, to be considered. R.C. 2305.03.

Failure to Warn: To prove failure to warn, a plaintiff must prove:

(1) that at the time the product left the manufacturer's control or at some relevant time after the product left the control of the manufacturer;

(2) the manufacturer knew or should have known about a risk associated with the product;

(3) that the risk allegedly caused the harm for which the plaintiff seeks to recover damages;

(4) the manufacturer failed to provide warning or instruction that a reasonable manufacturer would have provided concerning that risk in light of the likelihood that the product would cause the type and seriousness of harm alleged by the plaintiff;

(5) the failure to warn or instruct proximately caused;
(6) injury to the plaintiff. R.C. 2307.76.

Ohio Jury Instructions set forth the following instruction with respect to the general standard for failure to warn:
"One who manufactures a product for sale and use by others is held to the skill of an expert in that business and to an expert's knowledge of the arts, materials, and processes involved in the development, production, and marketing of the product. The manufacturer has the duty to remain reasonably current with scientific knowledge, development, research and discoveries concerning the product. The manufacturer must communicate its superior knowledge to those who, because of their own limited knowledge and information, would otherwise be unable to protect themselves." 1-CV 451 OJI CV 451.07(2).

A manufacturer has no duty to warn consumers about open and obvious dangers. R.C. 2307.76(B). Moreover, a manufacturer may not have a duty to warn sophisticated users who specifically seek out the product for specialized use. *Midwest Specialities, Inc. v. Crown Indus. Prods. Co.*, 940 F.Supp. 1160 (1996).

Some products are unavoidably unsafe. Drugs, properly prepared, and accompanied by proper directions and warnings, are neither defective nor unreasonably dangerous. See *Seley v. G.D. Searle & Co.*, 67 Ohio St.2d 192 (1981). In a case involving prescription drugs, the warning must be given to the physician by the manufacturer. The Products Liability Act, R.C. 2307.71, *et seq.*, does not expressly state that prescription medical device manufacturers must give warnings directly to the patient/device recipient.

The learned-intermediary doctrine is an exception to the rule that a manufacturer has a duty to warn the ultimate consumer. The doctrine precludes manufacturer liability for failure to warn the consumer when an adequate warning has been given to a "learned intermediary," e.g., the consumer's physician. *Howland v. Purdue Pharma L.P.*, 104 Ohio St.3d 584 (2004).

Failure to Meet Representation: a plaintiff "seeking to recover for injuries incurred through the use of a product that does not conform to a manufacturer's representation [pursuant to R.C. 2307.77] must prove:
(1) that the product failed to meet a representation of the manufacturer;
(2) regardless of whether such representation was fraudulent, reckless or negligent;
(3) and that reliance upon the representation proximately caused;
(4) injury to the plaintiff.
Gawloski v. Miller Brewing Co., 96 Ohio App.3d 160 (1994).

Failure to Meet Representation: Common Law Claims Before April 7, 2005: For product liability actions arising prior to April 7, 2005, common law claims, including negligence, breach of warranty, and breach of implied warranty, may be pled in addition to, and as alternatives to, causes of action under the Ohio Products Liability Act. *White v. DePuy, Inc.*, 129 Ohio App.3d 472 (1998); *Carrel v. Allied Prods. Corp.*, 78 Ohio St.3d 284, 1997-Ohio-12.

Failure to Meet Representation: After April 7, 2005: Common law claims are abrogated by the Act.

Market-Share Liability Not a Viable Theory of Recovery: Currently, Ohio does not recognize market share liability as an available theory of recovery in a products liability action. Under the market-share theory, the plaintiff is discharged from proving that a particular defendant caused the plaintiff's injuries.

Qualified Immunity to Firearms Industry from Civil Liability and Injunctive Relief: R.C. 2305.401, effective Oct. 8, 2001, grants limited immunity to members of the firearm industry from civil liability and injunctive relief. The statute appears to limit only certain claims of

vicarious liability against a firearms industry member. Members of the firearms industry are not immune from product liability claims authorized by R.C. Chapter 2307. The statute defines "member of the firearms industry" as any manufacturer, dealer or importer of firearms, firearms components, or firearms ammunition or any trade association and the members of which, in whole or in part, are manufacturers, dealers, or importers of firearms, firearms components, or firearms ammunition.

Except as set forth in the statute, a member of the firearms industry is not liable in damages and is not subject to a grant of injunctive relief in a tort or other civil action for harm allegedly sustained by any person as a result of the operation or discharge of a firearm. However, a member of the firearms industry forfeits this immunity if the member operates or discharges the firearm that results in the harm that is the basis of the claim for relief in a manner that constitutes negligence, willful or wanton misconduct, intentional tortious conduct or a criminal violationof law. A member of the firearms industry also can forfeit this immunity if they sell, lend, give or furnish to any person, in violation of R.C.2923.20 (Unlawful Transaction of Weapons) or R.C. 2923.21 (Improperly Furnishing Firearms to a Minor) or another section of the Revised Code or in violation of federal law, a firearm that results in the harm that is the basis for the claim for relief.

This statute does not create a new cause of action or substantive legal right against a member of the firearms industry. Moreover, this section does not limit the availability against a member of the firearms industry of a civil action that seeks damages for harm and that is based on a product liability claim authorized by R.C. 2307.

Lastly, this section does not limit the availability of a breach of contract or breach of warranty claim against a member of the firearms industry. R.C. 2305.401(A)(6).

Damages: Under the Products Liability Act, a claimant (including a governmental entity) cannot recover economic damages alone. Instead, in order to fall within the purview of the act, and to be considered a "product liability claim" under R.C. 2307.71(13), the complaint must allege damages other than economic ones.

A cause of action concerning a product that only alleges economic loss damages is not a "products liability claim" within the purview of the Ohio products liability statute. Claims of this type can be brought under Ohio's common law. See *LaPuma v. Collinwood Concrete*, 75 Ohio St. 3d 64 (1996).

After April 7, 2005, a plaintiff cannot seek punitive damages against a manufacturer of a drug or medical device if any drug or device "was manufactured and labeled in relevant and material respects in accordance with the terms of an approval or license" issued by the FDA, or if an over-the-counter drug "marketed pursuant to federal regulations, was generally recognized as safe and effective." R.C. 2307.80.

STATUTE OF REPOSE

In *Groch v. General Motors Corp.*, 2008-Ohio-546, the Supreme Court held that R.C. 2305.10(C), the statute of repose applicable to products liability actions, does not, on its face violate the Ohio Constitution and does not impinge upon fundamental rights. The Supreme Court found that the statute of repose bears a real and substantial relation to the public health, safety, morals, or general welfare of the public and was not unreasonable or arbitrary. R.C. 2305.10(C) prevents a cause of action from accruing if a product that caused an injury was delivered to the first purchaser or lessee more than ten years before the injury occurred. Because the injured party's cause of action never accrues, it never becomes a vested right. For that reason, for most plaintiffs, there is no "substantive right" affected by R.C. 2305.10(C), and that statute on its face does not violate the Ohio Constitution barring retroactive legislation.

However, when a plaintiff alleged an injury that occurred prior to the effective date of an amendment to R.C. 2305.10(C), former R.C.

2305.10(F) (now R.C. 2305.10(G)) operates as a true statute of limitations that restricts the time for filing a cause of action that has validly accrued. As with any statute of limitations, R.C. 2305.10(F) prevents a plaintiff from recovering on a cause of action if the limitations period expires before the plaintiff files suit and if the defendant interposes the statute of limitations as a defense.

OBESITY SUITS

Food manufacturers, sellers, and trade associations are immune from claims resulting from a person's obesity or weight gain or any health condition related to obesity, weight gain, or cumulative consumption. R.C. 2305.36.

IDENTITY THEFT

R.C. 1349.18, which applies only to receipts that are electronically printed, provides that no person or limited liability company that accepts credit or debit cards in transacting business shall print more than the last five digits of a credit or debit card account number, or print the expiration date of a credit or debit card, on any receipt it provides to the cardholder. R.C. 1349.18(A), (B). A violation of the section is deemed an unfair or deceptive act or practice in violation of R.C. 1345.02, giving a person injured by a violation a cause of action and entitlement to the same relief available to a consumer under R.C. 1345.09. R.C. 1349.18 (C).

UNSOLICITED PHONE CALLS AND FACSIMILES

The Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227(b)(1)(B), states that it is unlawful for any person to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party. This does not include callsthat are not made for commercial purposes and any other commercial calls that are determined to not adversely affect privacy nights or do not contain an unsolicited advertisement.

The statue creates a private right of action to recover for actual monetary loss from a violation thereof or to enjoin such a violation. 47 U.S.C. § 227(b)(3). An "unsolicited advertisement" is defined as any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission. 47 C.F.R. § 64.1200 *et seq*.

The TCPA provides for a private right of action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater. 47 U.S.C. § 227(b)(3)(B). Anyone who receives a prerecorded telemarketing call at home, without first consenting to the call, may sue and recover damages. A residential customer may also sue for treble damages under 47 U.S.C. § 227(b)(3)(C), which provides for a private right of action. For an award of treble damages under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, the term "knowingly," requires that liability be imposed even without a defendant's knowledge that his or her conduct violated the statute. To establish a "knowing" violation of the TCPA for an award of treble damages, a plaintiff must prove only that the defendant knew of the facts that constituted the offense.

The "knowing" commission of an act that violates R.C. 1345 does not mandate imposition of attorney fees. A trial court has the discretion to determine whether attorney fees are warranted under the facts of each case. To establish a knowing violation of R.C. 1345.09, for an award of attorney fees, a plaintiff need prove only that the defendant acted in a manner that violated the Consumer Sales Practices Act, R.C. 1345.01 *et seq*., and need not prove that the defendant knew that the conduct violated the law.

In September 2011, the House of Representatives proposed changes to 47 U.S.C.S. § 227, called the Mobile Informational Call Act of 2011. That bill was never enacted.

CIVIL LIABILITY FOR CRIMINAL CONDUCT

R.C. 2307.60 provides that anyone who suffers personal or property loss by a criminal act may recover compensatory damages, punitive damages and attorneys' fees against the offender. The offender's conviction is conclusive proof of the criminality of the conduct, absent extraordinary circumstances.
Recovery is barred to any person who has been convicted of a felony or an offense of violence that arises out of the criminal conduct that was a proximate cause of the injury loss for which relief is claimed.

FREQUENTERS STATUTE

When a premises owner hires an independent contractor to perform work on the premises, the duty owed to the employees of the independent contractor is established by statute, R.C. 4101.11, the "Frequenters" statute. A "frequenter" is any person, other than an employee, who may be in a place of employment, and who is not a trespasser. Independent contractors are the most notable type of "frequenter."

Key Concept: The duty which a landowner owes to a frequenter is no more than the codification of the common law duty owed by an owner or occupier of the premises to an invitee; requiring that the premises be kept in a reasonably safe condition and that warning be given of dangers of which he has knowledge. *Daniels v. Thistledown Racing Club*, 103 Ohio App.3d 281 (1995). However, the duty owed to the frequenter does not extend to hazardous work that frequenters undertake knowingly and appreciating the danger surrounding its performance. *Wellman v. East Ohio Gas Co.*, 160 Ohio St. 103 (1953).

COMMON STATUTORY DEFENSES/ GOVERNMENTAL IMMUNITY

Constitutional Limitation: Article I, 16 of the Ohio Constitution provides in part:

"Suits may be brought against the State, in such courts and in such manner, as may be provided by law."

The state legislature must enact legislation which allows individuals to sue the state. This consent, generally, was granted by the legislature pursuant to R.C. 2743.02. The Court of Claims has exclusive original jurisdiction over actions involving the State of Ohio. Actions against the state must be brought within two years after the cause of action accrues, or within any applicable shorter period of time for bringing the action provided by the Revised Code. Actions against political subdivisions of the state must also be commenced within two years after the cause of action accrues. R.C. 2744.04(A).

Political Subdivision Immunity: As a general rule, a political subdivision is not liable in damages for personal injury, death or loss to a person or property. R.C. 2744.02(A). This immunity, however, is subject to five exceptions:

(1) injuries caused by the negligent operation of a motor vehicle (R.C. 744.02(B)(1));
(2) the negligent performance of acts of an employee with respect to a proprietary function (R.C. 2744.02(B)(2));
(3) the negligent failure to keep public roads in repair (R.C. 2744.02(B)(3));
(4) the negligence of municipal employees for losses occurring with or on the grounds of public buildings (R.C. 2744.02(B)(4)); and
(5) when liability is expressly imposed upon the political subdivision by a section of the Revised Code. R.C. 2744.02(B)(5). Even when an exception exists, immunity can be restored under R.C. 2744.03.

"Proprietary functions" are defined as falling into one of five general categories (R.C. 2744.01 (G)(2) (a)-(e)).

In contrast, "governmental functions" covers 23 broad classifications, as defined in R.C. 2744.01(C) (1)(a)(w). These "governmental functions" include virtually every recreational activity one can imagine.

Furthermore, the beneficial collateral source set-offs exist across all claims that squeeze past the immunity arguments.

A political subdivision can be sued for intentional infliction of emotional distress, negligent infliction of emotional distress, abuse of process, and negligent misidentification if those torts arose out of the plaintiff's employment with the subdivision. *Sampson v. CMHA*, 131 Ohio St. 3d 418, 2012-Ohio-570.

Employees of a political subdivision are immune from liability unless the employee's acts or omissions were manifestly outside the scope of his or her employment or official responsibilities; the employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; or liability is expressly imposed upon the employee by section of the Revised Code. R.C. 2744.03(A)(6).

Political subdivisions are to provide for the defense of an employee in any court in any civil action or proceeding to recover for damages for injury, death, or loss to persons or property allegedly caused by an act or omission of the employee, if the act or omission is alleged to have occurred while the employee was acting in good faith and not manifestly outside the scope of his or her employment or official responsibilities. R.C. 2744.07(A). The duty to provide for the defense of an employee does not apply in a civil action or proceeding that is commenced by or on behalf of a political subdivision. R.C. 2744.07(A). A political subdivision is required to indemnify and hold harmless an employee in the amount of any judgment other than a judgment for punitive or exemplary damages obtained against the employee in a court for damages for injury, death or loss to persons or property caused by an act or omission that occurred while the employee was acting in good faith and within the scope of his or her employment or official responsibilities. R.C. 2744.07(A)(2). R.C. 2744.07(C) provides that upon motion, a court shall determine "whether the employee was acting both in good faith and not manifestly outside the scope of employment or official responsibilities."

Under R.C. 2744.02(C), a court's determination of immunity is a final appealable order.

Prohibition Against Subrogation Claims: The Ohio Supreme Court has repeatedly interpreted R.C. 2744.05 to prohibit insurers from asserting claims against both the State of Ohio and political subdivisions under subrogation provisions of insurance contracts with respect to benefits paid to a tort claimant. *Menefee v. Queen City Metro*, 49 Ohio St.3d 27 (1990); *Cmty. Ins. Co. v. Dep't of Transp.*, 92 Ohio St.3d 376, 2001-Ohio-208. Political subdivisions and the State of Ohio are entitled to a set-off against any payments to an injured party received from a collateral source. R.C. 2743.02(D); R.C. 2744.05(B). Collateral benefits include social security and medicare benefits. *Buchman v. Wayne Trace Local School Dist. Bd. of Educ.*, 73 Ohio St.3d 260, 1995-Ohio-136. However, in *Heritage Ins. Co. v. Ohio Dep't of Transp.*,104 Ohio St.3d 513, 2004-Ohio-6766, the Supreme Court of Ohio held that R.C. 2743.02(D) does not apply to a joint tortfeasor seeking contribution and indemnity from the State. This case severely restricts the State's claim that co-defendants' insurers must exhaust all coverage before a claimant could pursue a claim against the State. It also permits the joint tortfeasor to seek contribution from the State, regardless of whether the joint tortfeasor is insured.

Ohio Supreme Court Snapshot

On February 26, 2013, The Ohio Supreme Court recently determined that intentional tort

claims asserted by employees of political subdivisions are not barred by the Ohio Political Subdivision Tort Liability Act. Upon review of cases applying the Political Subdivision Tort Liability Act, the Court reasoned that because intentional torts "arise" out of an employment relationship, immunity for intentional torts may not exist. This decision therefore increases potential liability exposure for political subdivisions. *Vacha v. City of North Ridgeville*, 136 Ohio St. 3d 199 (2013).

EMPLOYER AND FELLOW EMPLOYEE IMMUNITY

Under Ohio Const. Art. II, 35 and R.C. 4123.74, no employer who complies with Ohio's Workers Compensation statutes is liable in damages for negligent injury to its employee.

Under R.C. 4123.741, no employee of an employer who complies with Ohio's Workers Compensation statutes is liable in damages for negligent injury to a co-employee.

The obvious exception to the foregoing is when the employer or fellow employee commits an intentional tort against the injured employee. R.C. 2745.01.

OTHER STATUTORY DEFENSES

Self-Service Farms: R.C. 901.52(B) grants protections for farmers with self-service farms for premises liability suits in the absence of willful and wanton or intentionally tortious misconduct. It specifically provides that, in the absence of willful, wanton or intentional misconduct, no owner, lessee, renter, or operator of premises open to the public for agricultural produce shall be imputed to do either (1) extend any assurance to a person that the premises are safe from naturally occurring hazards by the act of giving permission to the person to enter the premises or by receiving consideration for the produce picked by the person; (2) assume responsibility or liability for injury, death, or loss to person or property allegedly from the natural condition of the terrain of the premises or from condition of the terrain resulting from cultivation of the soil.

Equine Activities: Ohio provides immunity from liability based on an equine activity, subject to certain exceptions. R.C. 2305.321. An equine activity sponsor or participant, equine professional, veterinarian, farrier, or other person is not liable in damages for a harm that an equine activity participant sustains during an equine activity and that results from an inherent risk of equine activity. The statute enumerates several categories of persons and activities that fall within the definition of "equine activity." Being a spectator at an event is included. Immunity may be forfeited for such things as faulty tack or equipment, failing to ascertain one's ability to engage in the equine activity, dangerous latent condition upon the property or willful and wanton conduct. There is also a separate provision for immunity regarding specifically drafted waivers.

Recreational Trails: R.C.1519.07 provides that an owner, lessee, or occupant of premises does not owe any duty to a user of a recreational trail to keep the premises safe for entry or use by a user of a recreational trail. The statute also provides that an owner, lessee or occupant of premises does not assume, has no responsibility for, does not incur liability for and is not liable to any injury to person or property caused by any act of a user of a recreational trail. "Recreational trail" is specifically defined as a public trail used for hiking, bicycling, horseback riding, ski touring, canoeing and other non-motorized forms of recreational travel and that interconnects state parks, forests, wildlife areas, nature preserves, scenic rivers or other places of scenic or historic interest. The statute's protections do not apply to an intentional tort.

Ski Activities: R.C. 4169.08 declares that snow skiing is a recreational sport that is hazardous to skiers regardless of feasible safety measures, and that skiers expressly assume the risk of and legal responsibility for injury, death, or loss to person or property that results from the inherent risks of skiing, which include, but are not limited to,

injury, death, or loss to person or property caused by a long list of agents. The statute goes on to state specific duties imposed upon ski area operators and skiers.

Medical Volunteer: R.C. 2305.234 provides limited immunity for health care workers for the treatment of the indigent and uninsured in free clinics. Immunity is not extended to include those which require deep sedation or general anesthesia or those which are not typically performed in a physician's office.

In other words, these sections clarify the meaning of the word "operation" and would provide immunity for medical personnel who volunteer in free clinics so they could perform routine procedures normally performed in physician's offices, such as wart and mole removal, skin biopsies, and other very minor procedures. Effective March 21, 2013, the definition of "health care professional" is expanded to include professional clinical counselors, professional counselors, social workers, and marriage/family therapists; psychologists; and chemical dependency specialists.

STATUTORY INTEREST

Ordinarily, interest on a judgment for the payment of money in a civil action, including but not limited to a civil action that has been settled by agreement of the parties, is computed from the date of the judgment, decree, or order until to the date on which the money is paid. R.C. 1343.03(B). However, R.C. 1343.03(C) provides: "If, upon motion of any party to a civil action that is based on tortious conduct, that has not been settled by agreement of the parties, and in which the court has rendered a judgment, decree, or order for the payment of money, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case, interest on the judgment, decree, or order shall be computed as follows:

(a) In an action in which the party required to pay the money has admitted liability in a pleading, from the date the cause of action accrued to the date on which the order, judgment, or decree was rendered;

(b) In an action in which the party required to pay the money engaged in the conduct resulting in liability with the deliberate purpose of causing harm to the party to whom the money is to be paid, from the date the cause of action accrued to the date on which the order, judgment, or decree was rendered;

(c) In all other actions, for the longer of the following periods:

(i) from the date on which the party to whom the money is to be paid gave the first notice described in division (C)(1)(c)(I) of this section to the date on which the judgment, order, or decree was rendered. The period described in division (C)(1)(c)(I) of this section shall apply only if the party to whom the money is to be paid made a reasonable attempt to determine if the party required to pay had insurance coverage for liability for the tortious conduct and gave to the party required to pay and to any identified insurer, as nearly simultaneously as practicable, written notice in person or by certified mail that the cause of action had accrued.

(ii) From the date on which the party to whom the money is to be paid filed the pleading on which the judgment, decree, or order was based to the date on which the judgment, decree, or order was rendered."

As of June 1, 2004, the rate of pre and post-judgment interest on civil judgments changed. The rate is now calculated by adding three percent to the federal short-term rate established on October 15 of each year, pursuant to R.C. 5703.47. Prior to June 2004, the pre and post-judgment interest rate was ten percent.

As of June 2004, prejudgment interest accrues from the date on which the defendant first received notice of the claim or the complaint was

filed, whichever is earlier. This general rule has two exceptions: in cases where the defendant has (1) admitted liability in a pleading, or (2) acted with the deliberate purpose of causing harm, prejudgment interest begins to accrue from the date the cause of action arose.

To award prejudgment interest, a trial court must find that the party required to pay the judgment failed to make a good faith effort to settle the case and that the party to whom the judgment is to be paid did not fail to make a good faith effort to settle the case. *Evans v. The Dayton Power and Light Co.*, 4th Dist. No. 05CA800, 2006-Ohio-319.

"Good faith" requires that a party:

(1) fully cooperate in discovery proceedings;
(2) rationally evaluate his risks and potential liability;
(3) not attempt to unnecessarily delay any of the proceedings; and
(4) make a good faith monetary settlement offer or respond in good faith to an opponent's offer.

Kalain v. Smith, 25 Ohio St.3d 157 (1986).

The party seeking prejudgment interest bears the burden of demonstrating that the other party failed to make a good faith effort to settle the case. *Szitas v. Hill*, 8th Dist. No. 85839, 2006-Ohio-687. The decision as to whether a party's settlement efforts indicate good faith is within the sound discretion of the trial court.

EMPLOYER'S LIABILITY TO THIRD PERSONS FOR HIRING, SUPERVISION, TRAINING OR RETENTION OF EMPLOYEE

Negligence-based action, not predicated on employer's vicarious liability.

Elements for all claims:

(1) Existence of employment relationship;
(2) Employee's incompetence, action or inaction;
(3) Employer's actual or constructive knowledge of employee's incompetence, action or inaction;
(4) Employee's conduct proximately causes injury; and
(5) Employer's act/omission in hiring, supervision, training or retention proximately causes injury.

Steppe v. Kmart Stores, 136 Ohio App.3d 454 (1999).

In order to maintain a claim for negligent hiring, supervision and retention, the threshold issue of whether the employee was "on the clock" when the criminal or tortious act was committed must be established. *Saleh v. Marc Glassman, Inc.*, 8th Dist. No. 86010, 2005-Ohio-6127.

Additional elements for specific claims:

Retention

(1) Actual or constructive knowledge by employer of employee's propensity to commit tortious act;
(2) Tortious act by employee proximately causes injury; and
(3) Employer's retention proximately causes injury – i.e., despite knowledge/notice employer fails to act or intervene.

Payton v. Receivables Outsourcing, Inc., 163 Ohio App.3d 722, 2005-Ohio-4978.

Supervision

(1) Employee propensity for misconduct must be foreseeable to employer; and
(2) Foreseeability evaluated by totality of the circumstances, though no general duty to foresee criminal conduct.

Armbruster v. Hampton, 9th Dist. 05CA008716, 2006- Ohio-4530.

Hiring

Negligent hiring is a tort recognized in Ohio. It is separate and distinct from other theories of recovery such as negligent entrustment and respondeat superior. An employer may be held liable for negligent hiring if it knew or should have known of the employee's criminal or tortious propensities. The primary inquiry in a negligent hiring case is whether facts existed that the employer should have known about which would have prevented the employee relationship. The elements of negligent hiring are:

(1) Existence of an employment relationship;
(2) The employee's incompetence;
(3) The employer's actual or constructive knowledge of such incompetence;
(4) The employee's acts or omissions causing plaintiff's injuries; and
(5) The employer's negligence in hiring and retaining the employee proximately caused the plaintiff's injuries.

Anderson v. Toeppe, 116 Ohio App.3d 429 (1996).

Defenses: The following are defenses to the foregoing claims.

An employer does not have a duty to conduct criminal background checks on its employees, unless the employment application or other indication in the hiring or retention process would cause a prudent employer to investigate. *Steppe v. Kmart Stores*, 136 Ohio App.3d 454 (1999).

The negligent actor was an independent contractor. The test is who has the right to control the manner or means of performing the work. If this right belongs to the employer, the relationship is that of employer/ employee. If the manner or means of performing the work is left to one responsible to the employer for the result alone, an independent contractor relationship is created. *Bobik v. Indus. Comm.*, 146 Ohio St. 187 (1946).

Non-delegable duties are an exception to the independent contractor rule. Non-delegable duties are (1) affirmative duties that are imposed upon the employer by statute, contract, franchise, charter or common law; and (2) duties imposed upon the employer that arise out of inherently dangerous work. *Pusey v. Bator*, 94 Ohio St.3d 275 (2002).

There is no liability for the employer once the employment relationship terminates, unless the employee's contact with the third person originated due to or during the term of employment. *Abrams v. Worthington*, 169 Ohio App.3d 194, 2006-Ohio-5516.

BREACH OF FIDUCIARY DUTY

A claim of breach of fiduciary duty is essentially a claim of negligence that involves a higher standard of care. *Stock v. Pressnell*, 38 Ohio St.3d 207 (1988).

Elements include:

(1) The existence of duty arising from a fiduciary relationship;
(2) A failure to observe the duty; and
(3) An injury resulting proximately therefrom.

Harwood v. Pappas & Associates, Inc., 8th Dist. No. 84761, 2005-Ohio-2442.

Existence of a Fiduciary Relationship:

It is not always a simple matter to determine whether a fiduciary relationship exists.

A fiduciary relationship is one in which "special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust." *Stone v. Davis*, 66 Ohio St.2d 74 (1981).

A fiduciary duty may arise from an informal relationship only if both parties understand that a special trust or confidence has been reposed. *Ed Schory & Son, Inc. v. Society Natl. Bank*, 75 Ohio St.3d 433 (1996). There are certain relationships, such as the attorney-client relationship, partnerships, and trustee-cestui que trust, which, as a matter of law, are fiduciary in nature. Others, such as the relationship of an accountant to the entity employing him or her, are less easily defined and fact-driven.

Where the relationship of the parties is not as a matter of law fiduciary in nature, the burden is on the party asserting the relationship to prove its existence. *Culbertson v. Wigley Title Agency, Inc.*, 9th Dist. No. 20659, 2002-Ohio-714; In re *Termination of Employment of Pratt*, 40 Ohio St.2d 107 (1974).

The question of whether a fiduciary relationship exists is generally determined as a question of fact. See, e.g., *Lippy v. Soc. Natl. Bank*, 100 Ohio App.3d 37 (1995).

Nature of the Fiduciary Duty:

Once the relationship is created, a fiduciary owes the duty of good faith to the person reposing the trust or confidence, and must act in accordance with this highest standard of integrity and good faith. *Thompson v. Cent. Ohio Cellular, Inc.*, 93 Ohio App.3d 530 (1994). A fiduciary owes a duty of undivided loyalty, and cannot act on behalf of a party whose interests conflict with those of the person to whom the fiduciary duties are owed without full disclosure. *Id.*

TORTIOUS INTERFERENCE WITH BUSINESS OR CONTRACTUAL RELATIONS

Elements: The elements necessary for recovery under a claim for tortious interference with a business relationship are:

(1) A business relationship;
(2) The wrongdoer's knowledge thereof;
(3) An intentional interference causing a breach or termination of the relationship;
(4) A lack of privilege; and
(5) Damages resulting therefrom.

Elite Designer Homes, Inc. v. Landmark Partners, 9th Dist. No. 22975, 2006-Ohio-4079

Tortious interference with a contractual relationship which, although similar in form, is distinguishable from the substantive law of tortious interference with a business relationship. *Accord Haller v. Borror Corp.*, 50 Ohio St.3d 10 (1990). The primary distinction between tortious interference with a business relationship and tortious interference with a contractual relationship is that interference with a business relationship applies to intentional interference with prospective contractual relations that are not yet reduced to contract. *Miller v. J.B. Hunt Transport, Inc.*, 10th Dist. No. 13AP-162, 2013-Ohio-3892.

Tortious interference with a contractual relationship occurs when a person, without privilege, induces or otherwise purposely causes a third party not to enter into or continue or perform a contract with another.

Elements include:

(1) The existence of a contract;
(2) The wrongdoer's knowledge of the contract;
(3) The wrongdoer's intentional procurement of the contract's breach;
(4) The lack of justification; and
(5) Resulting damages.

Kenty v. Transamerica Premium Ins. Co., 72 Ohio St.3d 415 (1995).

The wrongdoer must be a non-party to the contract. The tort does not require a showing of actual malice. With regard to the element of lack of justification, a person is privileged to interfere in a contract if he or she legitimately asserts a legally protected interest that the person believes will be impaired by the performance of the contract. Officers, directors, and creditors of a corporation have a privilege to interfere with contracts in furtherance of their legitimate business interests.

A recent 8th District opinion offered additional clarity to what claims do not fall within these causes of action. In *Coventry Group, Inc. v. Gottleib*, 8th Dist. No. 100056, 2014 WL 265572, the Court held that Ohio does not recognize the tort of wrongful interference with a business expectancy that is separate from tortious interference with a business relationship. Additionally, the Court in *Gottleib* held that the tort of tortious interference with a business expectancy/relationship does not include tortious interference with the collection of a judgment.

Factors to Determine Whether the Interference is Improper or Privileged:

(1) The nature of the actor's conduct;
(2) The actor's motive;
(3) The interests interfered with;
(4) The interests sought to be advanced by the actor;
(5) The societal interests in protecting the freedom of action and the contractual interests of the plaintiff;
(6) The proximity or remoteness of the interference; and
(7) The relationship of the parties.

Section 767 of the Restatement of the Law of Torts.

WRONGFUL DISCHARGE

Employment at Will: Ohio is an "at-will" state, which means that a general or indefinite hiring is terminable at the will of either party, for any cause, no cause or even in gross or reckless disregard of any employee's rights, and a discharge without cause does not give rise to an action for damages. *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240 (2002); *Collins v. Rizkana*, 73 Ohio St.3d 65 (1995).

A public policy exception to the at-will doctrine exists where an employee is discharged or

disciplined in violation of statute. *Tulloh v. Goodyear Atomic Corp.*, 62 Ohio St.3d 541 (1992), overruled in part on other grounds.

Other exceptions to the at-will doctrine are implied contract of employment and promissory estoppel. *Mers v. Dispatch Printing Co.*, 19 Ohio St.3d 100 (1985).

Grounds for Wrongful Discharge Claim:

To state a claim for wrongful discharge in violation of public policy, a plaintiff must demonstrate:

(1) A clear public policy exists and is manifested in a state or federal constitution, statute, administrative regulation, or common law ("clarity" element);

(2) The dismissal of the plaintiff under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy ("jeopardy" element);

(3) The plaintiff's dismissal was motivated by conduct related to the public policy ("causation" element); and

(4) The employer lacked overriding legitimate justification for the dismissal ("overriding justification" element).

Rizkana, supra.

The clarity and jeopardy elements are questions of law to be determined by the court. The jury decides factual questions relating to causation and overriding justification. *Id.*

A plaintiff may bring a statutory claim and a common law claim at the same time and based upon the same conduct by the employer. *Marino v. Advantage Mgmt., Inc.*, 5th Dist. No. 2005CA00149, 2006-Ohio- 1853; *Limbacher v. Penn-Ohio Coal Co.*, 5th Dist. No. 2001AP070065, 2002-Ohio-2870.

Damages available in statutory claims are generally provided for within the regulation or statute allegedly violated and include, but are not limited to, lost wages, back pay, and attorney fees. Damages available in common law claims include full monetary compensation and punitive damages.

Implied Contract of Employment:

(1) A plaintiff asserting the existence of an implied contract of employment must demonstrate:

(2) Oral and written assurances that his or her work performance is linked to job security;

(3) His or her subjective belief of an expectation of continued employment; and

(4) An indication that his or her employer also had a belief as manifested by policies, past practices, and representations that the employee possessed an expectation of continued employment.

Walton v. Greater Cleveland Reg'l Transit Auth., 8th Dist. No. 76274, 2000 Ohio App. LEXIS 2920.

While an implied contract may take a case outside of the employment at-will doctrine, this does not hold true where there is an unambiguous written contract to the contrary. *Vickers v. Wren Indus., Inc.*, 2nd Dist. No. Civ.A.20914, 2005-Ohio-3656.

Promissory Estoppel:

For an employee to prevail on a promissory estoppel claim, it must be shown that:

(1) The employer made a specific promise of continued employment to an employee;

(2) The employee actually relied upon the employer's promise or representation;

(3) The employee's reliance was reasonable and foreseeable; and

(4) The employee was actually injured by his reliance.

Buren v. Karrington Health, Inc., 10th Dist. No. 00AP- 1414, 2002-Ohio-206.

The test in such cases is whether the employer should have reasonably expected its representation to be relied upon by the employee and, if so, whether the expected action or forbearance actually resulted and was detrimental

to the employee. *Kelly v. Georgia- Pacific Corp.*, 46 Ohio St.3d 134 (1989)

The promise will be held to be binding if injustice can be avoided only by its performance. If the promise is not performed, the promisee is entitled to specific performance and/or damages. *Mers, supra.*

A promise of future benefits or opportunities without a specific promise of continued employment does not support a promissory estoppel exception to the at-will doctrine. *Helmick v. Cincinnati Word Processing, Inc.*, 45 Ohio St.3d 131 (1989).

An unambiguous written contract to the contrary renders a wrongful discharge claim based on promissory estoppel invalid. *Vickers, supra.*

UNFAIR COMPETITION

The doctrine of fraudulent or unfair competition generally consists of representations by one person, for the purpose of deceiving the public, that his goods are those of another. *Molten Metal Equip. v. Mataullics Systems Co., L.P.*, 8th Dist. No. 76407, 2000 WL 739470 (June 8, 2000); *Drake Medicine Co. v. Glessner*, 68 Ohio St. 337 (1903); *Water Mgt., Inc. v. Stayanchi*, 15 Ohio St.3d 83 (1984); *Buob v. Brown CarriageCo.*, 11 Ohio App. 266 (1919). The concept of unfair competition may also extend to unfair commercial practices such as malicious litigation, circulation of false rumors, or publication of statements, all designed to harm the business of another. *Id.*

Nevertheless, deception to the public remains a key element, as Ohio courts have dismissed actions for unfair competition where a plaintiff fails to allege that the defendant misrepresented its services to be those of plaintiff's or that the defendant made other false representations about the plaintiff to clients so as to cause plaintiff harm. See, e.g., *Landskroner v. Landskroner*, 154 Ohio App.3d 471, 2003-Ohio-4945, ¶ 53.

Ultimately, the purpose of the doctrine of unfair competition is to prevent fraud upon the public and upon the plaintiff. *Glessner*, 68 Ohio St. at 358. While the intent to deceive or defraud need no longer be proven, if the natural and probable consequences of the defendant's conduct would be to mislead, deceive or confuse the public, the presence or absence of actual intent to deceive is immaterial. *Guild & Landis, Inc. v. Liles & Landis Liquidators, Inc.*, 2 Ohio Misc. 169, 173, 207 N.E.2d 798, 801 (C.P.1959).

COMMON INSURANCE COVERAGE ISSUES

UNINSURED/UNDERINSURED MOTORIST COVERAGE ISSUES

Statutory Regulation: Ohio uninsured/ underinsured motorists ("UM/UIM") coverage is governed by R.C. 3937.18.

Choice of Law Issues: Temporal & Geographic: R.C. 3937.18 regulates policies "delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state." Consequently, Ohio law will usually govern personal auto policies issued to Ohio residents providing UM/ UIM coverage to vehicles registered and principally garaged in Ohio.

More complicated choice of law issues will be resolved under the most significant relationship test set forth in *Ohayon v. Safeco Ins. Co. of Illinois*, 91 Ohio St.3d 474, 2001-Ohio-100.

If Ohio law governs, the number of previous amendments to R.C. 3937.18 also require a determination of what version of R.C. 3937.18 governs the UM/UIM coverage. Generally, the version of R.C. 3937.18 in effect at the time of issuing the policy governs UM/ UIM coverage under the policy. *Ross v. Farmers Ins. Group of Cos.*, 82 Ohio St.3d 281, 1998-Ohio-381.

Setoff & Determining "Underinsured" Status: Setoff is only relevant to "underinsured" motorist claims. Determining setoff and determining "underinsured" status essentially use the same analysis. See *Clark v. Scarpelli*, 91 Ohio St.3d 271, 2001-Ohio-39; *Littrell v. Wigglesworth*, 91 Ohio St.3d 425, 2001-Ohio-87.

Controlling Issue: The insured should receive the same amount of UM/UIM coverage from his or her policy that would have been available if the insured was injured by an "uninsured" motorist – no more, no less.

Factors that can influence the controlling issue include:

(1) the provisions of the policies under which liability and UM/UIM coverages are sought (setoff provisions, consolidation clauses, policy limits);
(2) the applicable version of R.C. 3937.18;
(3) the number of claimants;
(4) the nature of the claims (direct or derivative).

Determining Who Is An Insured: R.C. 3937.18 does not define classes of insureds. *Holliman v. Allstate Ins. Co.*, 86 Ohio St.3d 414, 1999-Ohio-116. Therefore, the issue of who is an insured is generally resolved by reference to policy definitions. A policy that defines "an insured" as excluding an individual who has uninsured motor vehicle coverage under another vehicle policy is unambiguous. It precludes an individual from claiming UM/UIM benefits under the policy of the vehicle they are driving, when UM/UIM coverage is available under his/her own policy. *Johns. v. Hopkins*, 8th Dist. No.99218, 2013-Ohio-2099.

In *Wohl v. Swinney*, 118 Ohio St.3d 277, 2008-Ohio- 2334, the Supreme Court of Ohio held that where an "insured" for UM/UIM coverage is defined as "any other person occupying your covered auto who is not a named insured or insured family member for uninsured motorist's coverage under another policy," the definition is not ambiguous and will be enforced to preclude UM/UIM coverage on automobiles for passengers who have their own UM/UIM coverage.

Determining If The Insured Is Legally Entitled To Recover Damages from the Tortfeasor: Prior to 2001, R.C. 3937.18 limited UM/UIM coverage to insureds who were "legally entitled to recover damages" from an uninsured or

underinsured tortfeasor. After 2001, this remains a fundamental concept in every UM/ UIM coverage form.

Tortfeasor Statutory Immunity Precludes UM/UIM Coverage: R.C. 3937.18 does not prohibit enforcement of a policy that excludes claims for uninsured-motorist benefits when the tortfeasor is statutorily immune from liability. Policy language restricting uninsuredmotorist coverage to those amounts the insured is "legally entitled to recover" from the tortfeasor owner or operator of an uninsured motor vehicle unambiguously denies coverage for injuries caused by uninsured motorists who are immune from liability under R.C. Chapter 2744 or R.C. 4123.741. *Snyder v. Am. Family Ins. Co.*, 114 Ohio St. 3d 239 (2007).

The claimant must be able to prove liability and damages against the uninsured and underinsured tortfeasor, and the UM/UIM insurer may assert any defenseavailable to the uninsured or underinsured tortfeasor. *State Farm Mut. Auto. Ins. Co. v. Webb*, 54 Ohio St.3d 61 (1990).

However, while *Snyder* permits a policy provision that precludes recovery when a tortfeasor is immune, it does not prevent insurers from offering UM coverage because of a tortfeasor's liability. *Masura v. Erie Ins. Co.*, 136 Ohio St.3d 118, (2013). Hence, where the insuring agreement provides that an UM/ UIM vehicle does not include "any government" vehicle "unless" the owner operator has "an immunity under the Ohio Political Subdivision Tort Liability Law," UM/UIM coverage is provided. *Thom v. Perkins Twp.*, 2012 Ohio 1568, (6th Dist., Apr. 6, 2012). Further, UM/UIM coverage also exists when the insuring agreement provides "an 'uninsured motorist' does not include an owner or operator of a motor vehicle: (c) that is owned by any governmental unit or agency unless the operator of the motor vehicle has immunity under Chapter 2744 of the Ohio Revised Code." *Payton v. Peskins*, 2011-Ohio-3905 (12th Dist., Aug. 8, 2011).

LIMITATIONS ON EXCLUSIONS

R.C. 3937.18 permits virtually any unambiguous exclusion as a matter of contract law. However, an exclusion or reduction in amount because of any workers' compensation benefits payable as a result of the same injury or death is prohibited. R.C. 3937.18 (E).

Additionally, on March 22, 2013, R.C. 3937.18 became subject to new provisions set out in R.C. 3937.46. These changes apply to wrongful death claims arising out of accidents occurring after March 20, 2013. R.C. 3937.46 prohibits an insurance company from enforcing an intra-family immunity policy provisionwhen certain conditions are met. R.C. 3937.46 states: When a wrongful death claim is made, an intra-family liability exclusion shall not be enforced by an insurer against the owner of a motor vehicle unless both of the following are met: 1) the policy providing the liability coverage in question includes UM/UIM coverage; and 2) such an intra-family claim is not precluded by an intra-family exclusion in the UM/ UIM coverage in question. The intent behind R.C. 3937.46 is to prohibit an automobile insurer from enforcing an intra-family exclusion in an accident where a family member dies as a proximate result of the accident. An insurer can still enforce an intra-family exclusion against family members injured in an accident.

CONDITIONS

Notice: Coverage may only be denied for breach of notice provisions if the insurer was prejudiced by an unreasonable delay in providing notice. An unreason able delay is presumed prejudicial absent evidence to the contrary. *Ferrando v. Auto-Owners Mut. Ins. Co.*, 97 Ohio St.3d 176, 2002-Ohio-7217. Generally, a delay of more than two years is considered unreasonable. *Heller v. Standard Accident Ins. Co.*, 118 Ohio St. 237 (1928) (21-month delay in providing notice unreasonable as matter of law).

Subrogation and Consent to Settle: Coverage may only be denied for breach of subrogation or consent to settle provisions if the insurer was prejudiced by violation of the provision. Any

breach of such provision is considered prejudicial absent evidence to the contrary. *Ferrando v. Auto-Owners Mut. Ins. Co.*, 97 Ohio St.3d 176, 2002-Ohio-7217.

Exhaustion: Coverage may not generally be denied for failure to exhaust liability insurance because aninsured satisfies exhaustion requirements when the insured receives from the tortfeasor's liability insurer a commitment to pay any amount in settlement. The insured may then proceed against the UM/UIM insurer only for the amounts in excess of the limits of the tortfeasor's liability insurer. *Fulmer v. Insura Property & Cas. Co.*, 94 Ohio St.3d 85, 2002-Ohio-64.

No Double Recovery: R.C. 3937.18(I) permits an insurer to limit coverage so as to preclude payment pursuant to uninsured motorist/underinsured motorist coverage for medical expenses that have previously been paid or are payable under the medical payment coverage in the same policy. *State Farm Mut. Auto. Ins. Co. v. Grace*, 123 Ohio St. 3d 471, 2009-Ohio-5934.

Anti-Stacking: Since October 20, 1994, unambiguous anti-stacking provisions have been enforceable. "Stacking" is defined as when "one insured seeks coverage under more than one policy issued to himself or other family members." *Wallace v. Balint*, 94 Ohio St.3d 182, 2002-Ohio-480.

Time Limits on Suits: Contractual time limitations provisions are enforceable provided that the time limitation is no less than the two year statute of limitations for bodily injury claims in Ohio. *Sarmiento v. Grange Mut. Cas. Co.*, 106 Ohio St.3d 403, 2005-Ohio- 5410. R.C. 3937.18 (H) specifically permits insurers to include policy provisions limiting the time for bringing UM/UIM claims to three years from the date of the accident.

Prejudgment Interest: Prejudgment interest is available on every UM/UIM claim pursuant to R.C. 1343.03(A) because such claims are contractual. *Landis v. Grange Mut. Ins. Co.*, 82 Ohio St.3d 339, 1998-Ohio-387 (superseded on other grounds). However, the accrual date of such interest is left to the discretion of the trial court, and generally accrues from the date coverage was demanded, the date coverage was denied, the date of the accident, or the date of arbitration or trial. *Id*.

An award of prejudgment interest plus damages can exceed the policy limits of UM/UIM coverage because prejudgment interest compensates the insured for the time value of its money. *Miller v. Gunckle*, 96 Ohio St.3d 359, 2002-Ohio-4932.

Other-Owned-Auto Exclusion: In *Lager v. MillerGonzalez*, 120 Ohio St.3d 47, 2008-Ohio-4838, the Ohio Supreme Court held that "an other-owned-auto exclusion that excludes coverage 'for bodily injury'" is not ambiguous when used with a UM/UIM insuringagreement "that provides UM coverage 'because of bodily injury.'" Such exclusions unambiguously exclude all UM/UIM coverage in wrongful death cases, including derivative claims, where coverage for the decedent is excluded by the other-owned-auto exclusion. See also *King Estate v. Wachauf*, 1st Dist. No 2-12-10, 2013-Ohio-2498.

COMMERCIAL GENERAL LIABILITY COVERAGE ISSUES

The Insuring Agreement: Commercial General Liability ("CGL") coverage generally includes liability coverage under two insuring agreements. Coverage A provides liability coverage for "bodily injury" and "property damage." Coverage B provides liability coverage for "personal injury" and "advertising injury."

"Coverage" generally refers to the insurer's duty to defend as well as the insurer's duty to indemnify (to pay damages). Where a liability insurer has contracted to defend, as well as to indemnify its insured, the insurer's duty to defend is only triggered when there is at least a potential duty to indemnify based upon the plaintiff's

allegations against the insured. *Cincinnati Ins. Co. v. Anders*, 99 Ohio St.3d 156, 2003-Ohio-3048.

Duty to Defend: The scope of the allegations in the complaint against the insured determines whether an insurance company has a duty to defend. *Motorists Mut. Ins. Co. v. Trainor*, 33 Ohio St.2d 41 (1973). Where a complaint brings the action within the coverage of the policy, the insurer is required to make a defense, regardless of the ultimate outcome of the action or its liability to the insured. *Trainor*, supra.

Where the conduct which prompted the underlying suit is so undisputably outside coverage, there is no basis for requiring an insurance company to defend or indemnify its insured simply because the underlying complaint alleges conduct within coverage. *Preferred Risk Ins. Co. v. Gill*, 30 Ohio St.3d 108 (1987).

Waiver and Estoppel: Generally, the doctrine of waiver cannot be employed to expand the coverage of a policy. *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd* (1992), 64 Ohio St.3d 657. However, when the insurer provides a defense to the insured without reserving its rights under the policy for such a period of time, the insurer may be considered to have waived its rights as to have prejudiced the insured. See *Turner Liquidating Co. v. St. Paul Surplus Lines Ins. Co.*, 93 Ohio App.3d 292 (1994). The 3rd Districtrecently declined to extend the Turner waiver principle where the insurer's alleged misrepresentation concerning the extent of coverage under a policy involved a different policy owned by the insured than the one under which the insured was seeking coverage. *Allstate Fire and Cas. Ins. Co. v. Moore*, 3rd Dist. No. 13-12-50, 2013-Ohio-2262.

Distinction from Errors & Omissions ("E&O") Coverage: Professional liability policies issued to members of professions other than physicians and attorneys are commonly styled "errors and omissions" or "E&O" policies. However, there is no substantive difference in the coverage provided in E&O policies as opposed to malpractice policies.

All "professionals" are, by the very nature of their business, exposed to a wide variety of insurable risks. The mere fact that their skill, training, and judgment are used in the core activities of their occupation does not shield them from the purely "business" aspects of their profession, which might include maintaining a premises, use of automobiles, and the like. Coverage for occurrences arising out of such activity does not arise out of errors and omissions coverage.

E&O policies are distinct from property and CGL policies in that they cover purely economic loss to the thirdparty claimant resulting from the professional services error. Although the professional services insured under the policy vary with the professional in question, the policies commonly exclude coverage for bodily injury or property damage, which is normally insured under the CGL or other liability policy.

Coverage A: Coverage A generally provides coverage for "property damage" or "bodily injury" arising from an "occurrence" which is generally defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

"Property Damage" is defined in most commercial general liability policies to include physical injury to, destruction of, or the loss of use of tangible property. Pure economic loss or damage to intangible property, e.g., goodwill, reputation, lost profits, etc., are generally not the type of "property damage" contemplated under the typical policies.

The Supreme Court of Ohio has not yet addressed trigger issues with respect to property damage. However, there are four general theories as to how occurrence-based policies are triggered: manifestation, injury-infact, exposure and continuous. See *GenCorp., Inc. v. AIU Ins. Co.*, 104 F.Supp.2d 740 (N.D.Ohio 2000); *Westfield Ins. Co. v. Milwaukee Ins. Co.*, 12th Dist. No. CA2004-12-298, 2005-Ohio-4746.

At least two Ohio appellate districts hold that coverage for property damage is triggered when the property damage first manifests itself. See *Cleveland Bd. of Educ. v. R.J. Stickle Int'l*, 76 Ohio App.3d 432 (1991); *Reynolds v. Celina Mut. Ins. Co.*, 9th Dist. No. 98CA007268, 2000 WL 202107.

Several Ohio courts have adopted a continuous or triple-trigger analysis for continuous property damage claims. See *Plum v. Am. Ins. Co.*, 1st Dist. No. C-050115, 2006 Ohio-452; *Westfield Ins. Co. v. Milwaukee Ins. Co.*, 12th Dist. No. CA2004-12-298, 2005- Ohio-4746.

"Bodily injury" is usually defined as actual "bodily injury, sickness or disease, including death." The definition does not include emotional distress unless accompanied by an actual physical injury. *Bowman v. Holcomb*, 83Ohio App.3d 216 (1992); *Erie Ins. Co. v. Stalder*, 114 Ohio App.3d 1 (1996); *Bernard v. Cordle*, 116 Ohio App.3d 116 (1996); *Dickens v. General Acc. Ins.*, 119 Ohio App.3d 551 (1997).

Coverage B: More recent insurance coverage forms incorporate "personal injury" and "advertising injury" into "personal and advertising injury".

"Advertising injury" coverage is triggered (1) by an offense, (2) arising out of advertising. Not all policies define "advertising," but it generally is defined to mean "advertisement, publicity article, broadcast or telecast." The offenses to which advertising injury coverage applies generally include:

(1) Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
(2) Oral or written publication of material that violates a person's right of privacy;
(3) Misappropriation of advertising ideas or style of doing business; or
(4) Infringement of copyright, title or slogan.

"Personal injury" coverage arises by damages from injury, other than "bodily injury," arising out of one or more of the following offenses:

(1) False arrest, detention or imprisonment;
(2) Malicious prosecution (Note: a claim for abuse of process is not the same as a claim for malicious prosecution);
(3) The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, by or on behalf of its owner, landlord or lessor;
(4) Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services; or
(5) Oral or written publication of material that violates a person's right of privacy.

Modern exclusions typically include:

(1) knowing violation of rights of another;
(2) material published with knowledge of its falsity;
(3) material published prior to policy period; and
(4) criminal acts.

SPECIAL ISSUES FOR CGL COVERAGE

Coverage for Employer Intentional Torts: In *Ward v. United Foundries, Inc.* (2011), 129 Ohio St.3d 292, 2011-Ohio-3176, a unanimous judgment with a majority opinion joined by six Justices, the Supreme Court of Ohio addressed the issue of insurance coverage for employer intentional torts in a way that could have a substantial impact on Ohio law in this area for post-tort reform cases.

Ward involved a pre-tort reform (prior to 2005) employer intentional tort case. The employer was sued for an employer intentional tort under the *Fyffe* "substantial certainty" standard. While the employer had purchased a "stop gap" endorsement to provide some kind of employer liability coverage, the stop gap endorsement included an exclusion that purported to exclude

both deliberate intent torts and "substantial certainty torts." Based upon the exclusion, the employer's insurer denied coverage for the employer intentional tort suit.

The trial court found the exclusion rendered the coverage illusory and ordered the insurer to provide a defense to the employer. The Fifth Appellate District reversed, but certified its decision as being in conflict with a decision from the Third Appellate District.

On further appeal, the Supreme Court of Ohio found the insurer's exclusion to be "plain, unambiguous and not misleading." *Id*. at 296. The high court further held that the stop gap endorsement was not illusory because it provided "some benefit to the insured from the face of the endorsement." *Id*. If the coverage was not as broad as what the employer thought it was purchasing, then the high court reasoned "this is an argument for [the employer] to assert against the insurance agency and broker who procured the policy, not against the insurer." *Id*. Accordingly, the insurer did not have to defend or indemnify either deliberate intent or "substantial certainty" torts under the stop gap endorsement because "[t]here is no set of facts under which [the employer] would be covered…because all potential claims fall with [sic] the exclusion." *Id.*

Although the decision involves a pre-R.C. 2745.01 tort, it could have a substantial impact on post-R.C. 2745.01 torts because it suggests that: (1) the high court is disinclined to engage in the illusory coverage theories embraced by earlier courts (See *World Harvest Church v. Grange*,10th Dist. No. 13AP-290, 2013- Ohio-5707); (2) the high court will uphold exclusions excluding coverage for deliberate intent torts in post- R.C. 2745.01 cases even though such a finding would severely limit the benefit of coverage most employers will claim they intended to receive from purchasing such coverage; and (3) the high court will not be sharply fractured on such issues if or when they arise.

Coverage for Non-Employment Intentional Torts: Many of the same issues of concern that impact insurance coverage for employer intentional torts also impact coverage for non-employment intentional torts.

Special issues arise with respect to insurance coverage in sexual molestation cases. It is appropriate to infer an intent to harm as a matter of law from deliberate acts of sexual molestation of a child, and, thus sexual molestation did not amount to an "occurrence" where the policy defined it as an "accident." *Gearing v. Nationwide Ins. Co.*, 76 Ohio St.3d 34, 1996-Ohio-113.

In *Gearing, supra*, the Supreme Court of Ohio held that public policy prohibited the issuance of liability insurance which purported to provide liability coverage for child molesters. The Court held that the act of sexually molesting a child itself carried with it the "inferred intent" to cause the resultant injury. This "inferred intent" created a situation where the definition of "occurrence" was not met and coverage, therefore, would not be found.

However, although insurance coverage for claims against the putative molester are precluded, insurance coverage for those who may be vicariously liable for the insured's actions are not barred. *Doe v. Shaffer*, 90 Ohio St.3d 388, 2000-Ohio-186.

Importantly, in S*afeco Ins. Co v. White*, 122 Ohio St.3d 562, 2009-Ohio-3718, the Ohio Supreme Court held:

1. When a liability policy defines an "occurrence" as an "accident," a negligent act committed by an insured that is predicated on commission of an intentional tort by another person, e.g., negligent hiring or negligent supervision, qualifies as an "occurrence".
2. Insurance policy exclusions that preclude coverage for injuries expected or intended by an insured, or injuries arising out or caused by an insured's intentional or illegal acts, do not preclude coverage for the negligent actions of other insureds under the same policy that are predicated on the commission

of those intentional or illegalacts, e.g., negligent hiring or negligent supervision. *Safeco Ins. Co, supra.*

In 2012, the 3rd District declined to extend *Safeco v. White*, stating that the policy's sexual-molestation exclusion precluded claims against negligent tortfeasor, as well as the intentional tortfeasor, The plain language of the policy excluded coverage for all bodily injury arising out of sexual molestation, irrespective of the mental state of the tortfeasor. *Crow v. Dooley*, 3rd Dist. No. 1-11-59, 2012-Ohio-2565.
In *Allstate Ins. Co. v. Campbell*, 128 Ohio St.3d 186, 2010-Ohio-6312, the Supreme Court of Ohio held that, as applied to an intentional-act exclusion, the doctrine of inferred intent: (1) is not limited to cases of sexual molestation or homicide and (2) applies only in cases in which the insured's intentional act and the harm caused are intrinsically tied so that the act has necessarily resulted in the harm, further shaping the area of the application of insurance policy exclusions for expected or intended injury.

Coverage for Commercial and Construction Claims: The issue of whether a typical commercial general liability policy covers the defense and indemnification of construction related claims against an insured focuses upon whether the loss is a natural or predictable consequence of the insured's everyday business risks and operations or whether the loss is truly unanticipated. Commercial general liability policies do not warranty the work of the insured contractor.

Most construction claims are essentially contract claims and the mere alteration of a contract claim into a negligence claim does not bring forth a valid claim under a commercial liability policy. See *In Re. Arbitration Between Victoria's Secret Stores, Inc.*, 10th Dist. No. 01AP-896, 2002-Ohio-2009.

Importantly, the Ohio Supreme Court, in *Westfield Ins. Co. v. Custom Agri Systems, Inc.*, 133 Ohio St.3d, 476, 2012-Ohio-4712, held that, where there is only a dispute between the property owner and contractor as to the quality of the work and payments for the same, a claim for "defective construction or workmanship brought by a property owner are not claims for 'property damage' caused by an 'occurrence' under a commercial general liability policy."

In *Custom Agri Systems*, a dispute arose between the owner and general contractor over the quality of the work and payments, and the general contractor brought suit to collect. The owner counterclaimed with claims of defective construction. There was no claim for collateral damage but a mere failure to perform as required under the contract. The Ohio Supreme Court found that CGL policies were not designed to cover such risks. Specifically, the Court found that such losses were not fortuitous for purposes of insurance coverage because the contractor controls the process leading to the damages. The Court's held that "defective workmanship standing alone—resulting in damages only to the work product itself—is not an occurrence under a CGL policy."

This holding comports with Ohio's prevailing view that a breach of contract is not an "occurrence" under a commercial general liability coverage that defines an "occurrence" as an "accident." See *Royal Plastics, Inc. v. State Auto. Mut. Ins. Co.*, 99 Ohio App.3d 221 (1994); *Monarch Constr. Co. v. Great Am. Ins. Co.*, 1st Dist. No. C-960645, 1997 WL 346097, 1997 Ohio App. LEXIS 2716; *Lenning v. Commercial Union Ins. Co.*, 260 F.3d 574, 583 (6th Cir. (Oh.) 2001). But see *Acme Constr. Co., Inc. v. Cont'l Nat'l Indem. Co.*, 8th Dist. No. 81402, 2003-Ohio-434.

Accordingly, regardless if the claim is characterized as a contract or tort claim, claims of defective workmanship do not generally constitute an "occurrence." See also, *Heile v. State Auto. Mut. Ins. Co.*, 136 Ohio App.3d 351 (1999); *Erie Ins. Exchange v. Colony Dev. Corp.*, 136 Ohio App.3d 419 (2000); *Environmental Exploration Co. v. Bituminous Fire & Marine Ins. Co.*, 5th Dist. No. 1999CA00315, 2000 WL 1608908, 2000 Ohio App. LEXIS 4985. This

represents the national majority position. See *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233(1979).

Exception: The majority position recognizes that such claims are covered if they allege collateral or consequential damages stemming from the defective work. *Erie Ins. Exchange v. Colony Dev. Corp.*, 136 Ohio App.3d 419 (2000). An example of consequential damages is when work on a roof causes water leaks into the home, thereby damaging home furnishings and/or other portions of the home which were not contemplated by the homeowner as areas where work would be performed on his home.

Business Risk Exclusions: Most commercial general liability policies contain "business risk" exclusions that either preclude or limit coverage for an insured's construction related claim. The "work product" exclusion, the "work performed" exclusion, the "products-completed operations hazard" limitation, and the "faulty workmanship" exclusion may be applicable to construction related claims.

The Supreme Court of Ohio concluded that commercial general liability policies containing these typical "business risk" exclusions "were never intended to insure the integrity or quality of [the insured's] work." *Zanco, Inc. v. Michigan Mut. Ins. Co.*, 11 Ohio St.3d 114 (1984). The *Zanco* court concluded that allegations of faulty construction and use of defective materials, do not trigger coverage and the carrier is under no obligation to defend or indemnify an insured contractor against such claims. See also *Westfield Ins. Co. v. Riehle*, 113 Ohio App.3d 249 (1996).

EXCESS/UMBRELLA COVERAGE ISSUES

Distinction Between Excess and Umbrella Insurance: Excess insurance provides additional insurance coverage in the event that the limits of primary insurance prove inadequate to provide full coverage for a claim or claims. It is generally provided on a "follow form" basis. That is, with the exception of limits, the substantive scope of the coverage is generally identical to the primary coverage. *Sarka v. Love*, 8th Dist. No. 85960, 2005-Ohio-6362.

Umbrella insurance includes excess insurance but also generally provides some limited primary insurance not otherwise provided by the insured's primary policies. That is, it provides both excess insurance that has the same substantive scope as the insured's primary insurance and also provides additional primary insurance that has a broader substantive scope than the insured's primary insurance. *Sarka v. Love*, 8th Dist. No. 85960, 2005-Ohio-6362.

The difference between excess and umbrella insurance can be important for various reasons. Umbrella insurance may "drop down" to provide defense and/or indemnity before primary insuranceis exhausted. Excess insurance will not "drop down." *Sarka v. Love*, 8th Dist. No. 85960, 2005-Ohio-6362.

Primary Insurer's Duty to Excess Insurer: An excess insurer is subrogated to the insured's rights against a primary insurer and may maintain an action for breach of the primary carrier's good faith duty to settle and defend. To prevail in such a suit the excess insurer must demonstrate the primary insurer's bad faith. *Centennial Ins. Co. v. Liberty Mut. Ins. Co.*, 62 Ohio St.2d 221 (1980).

Failure to Maintain Underlying Insurance: While failure to maintain underlying insurance may not be a valid basis to deny excess or umbrella liability coverage, an excess or umbrella insurer is not liable to pay the difference between required underlying insurance and the amount of insurance actually carried by the insured. *Kelley v. Midwestern Indem. Co.*, 108 Ohio App.3d 207 (1995).

FIRST-PARTY PROPERTY COVERAGE ISSUES

Property insurance differs from liability insurance as it is first-party coverage, i.e., it compensates the insured for damage to the insured's own property. Liability insurance, however, is third-party coverage and reimburses

the insured for its liability to a third party for damages.

Case law for third-party liability is generally inapplicable to property coverage cases. See, *World Trade Center Prop., LLC v. Hartford Fire Ins. Co.*, 345 F.3d 154 (2nd Cir. 2003); *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226 (3rd Cir. 2002).

Generally, commercial property insurance can be divided into two categories: "all risk" or "named perils." "All risk" policies provide coverage for losses caused by any fortuitous peril not specifically excluded under the policy.
"Named perils" policies cover only those losses suffered from an enumerated peril. Named perils generally include: fire or lightning, internal explosion, windstorm orhail, explosion, riot or civil commotion, aircraft, vehicles, smoke, volcanic eruption, vandalism or malicious mischief.

For loss or damage to be covered, there must be a "direct physical loss" to covered property by a covered peril within the policy period. A "direct physical loss" often requires some physical alteration, no matter how small, to the covered property, but it can include more than tangible damage. Generally, a "loss of use" claim is not a direct physical loss.

For example, carbon monoxide contamination and the destruction of bacteria colony in a sewage treatment facility have been found to constitute a direct physical loss. See *Azalea, Ltd. v. Am. States Ins. Co.*, 656 So.2d 600 (Fla. Dist. Ct. App. 1995); *Matzner v. Seaco Ins. Co.*, 1998 Mass. Super. LEXIS 407 (Mass. Super. Ct. 1998).

The direct physical loss requirement also precludes coverage for the cost of repairing faulty construction. However, where the faulty design or construction has caused physical damage to covered property, the property insurance may provide coverage.

Efficient Proximate Cause Rule: Where a loss is caused by both covered and non-covered perils, there is coverage only if the covered peril is the predominant cause of the loss or damage.

For example, where a covered peril of frozen pipes caused water damage and the ensuing excluded peril of mold the "efficient proximate cause" rule may be applied.

Ensuing Loss Clauses: Ensuing loss clauses act as exceptions to property insurance exclusions and operate to provide coverage when, as a result of an excluded peril, a covered peril arises and causes damage. See *Blaine Constr. Corp. v. Insurance Co. of N. Am.*, 171 F.3d 343 (6th Cir. (Oh.) 1999). In order for the ensuing loss exception to apply, there must be a distinct, new, covered peril.

Declaratory Judgment Order Not Appealable Until Damages Issue Resolved: "An order that declares that an insured is entitled to coverage but does not address damages is not a final order as defined in R. C. 505.02(B)(2), because the order does not affect a substantial right even though made in special proceeding." *Walburn v. Dunlap*, 121 Ohio St. 3d 373, 2009-Ohio-1221 (2009).

INSURANCE BAD FAITH ISSUES

The Standard: An insurer fails to act in good faith where it refuses to pay a claim and the refusal is not predicated upon circumstances that furnish reasonable justification therefore. *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552 (1994).

Controlling Issue: In any insurer bad faith litigation, the controlling standard and issue is whether the insurer has based its refusal to pay a claim upon "reasonable justification," i.e., whether the claim is "fairly debatable" or there is a genuine dispute over the factsgiving rise to the claim or the status of the law at the time of the denial.

Common Bad Faith Triggers: The quintessential claim for bad faith involves the insurer's refusal to comply with its duty to indemnify or defend the insured for a covered

loss. Mere refusal to defend or indemnify is not bad faith. *Spremulli's Am. Service v. Cincinnati Ins. Co.*, 91 Ohio App.3d 317 (1992).

Where an insurer believes that it does not provide coverage for a claim, the insurer will initiate a declaratory judgment action against its insured in order to resolve the disputed coverage issues. Conventional wisdom states that the insurer is less likely to be found to be acting in bad faith where it affirmatively seeks to resolve disputed coverage issues by declaratory judgment. However, the initiation of a declaratory judgment action itself can be evidence of bad faith where the insurer has alternative methods to resolve the disputed coverage issues, and the declaratory judgment action puts the insured at a disadvantage. See *Nationwide Ins. Co. v. Harvey*, 50 Ohio App.2d 361 (1976); but see *Preferred Risk Ins. Co. v. Gill*, 30 Ohio St.3d 108 (1987) (holding that an insurer may bring a declaratory judgment action against its insured to resolve disputed coverage issues if done in good faith).

It is well established that an insurer has a duty of ood faith to protect its insured from an excess judgment and personal liability. *Centennial Ins. Co. v. Liberty Mut. Ins. Co.*, 62 Ohio St.2d 221 (1980). Where an insurer subjects its insured to liability in excess of the limits of the insurer's policy, without reasonable justification therefor, the insurer commits the tort of bad faith.

An insurer has an obligation to timely respond to an insured's claim for coverage. With respect to property and casualty claims, although the duty of good faith and fair dealing does not set a specific time frame for responsiveness, the Ohio Department of Insurance has promulgated regulations that can be evidence of bad faith and which do include specific time limits for responsiveness. OAC 3901-1-54. An insurer's failure to comply with such regulations can be evidence of bad faith. *Furr v. State Farm Mut. Auto. Ins. Co.*, 128 Ohio App.3d 607 (1998); *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 1998-Ohio-184.

Pursuant to OAC 3901-1-54(F), insurers are required to acknowledge receipt of a claim within fifteen days, unless the claim is in suit.

Pursuant to OAC 3901-1-54(G), insurers are required to accept or deny a claim within 21 days of the receipt of a properly executed proof of loss. If additional time is needed, the insurer must offer a written explanation and update the insured on the status of the investigation every 45 days.

COMMON BAD FAITH DEFENSES

Statute of Limitations/Doctrine of Laches: Although the statute of limitations for breach of a written con-tract in Ohio is 8 years, bad faith is a general tort that is subject to the four-year statute of limitations found in R.C. 2305.09. See *Bullet Trucking, Inc. v. Glen Fall Ins. Co.* (1992), 84 Ohio App.3d 327. The doctrine of laches, the equitable counterpart to the statute of limitations, will seldom come into play, but may also act to preclude the action where the insurer hasbeen prejudiced by an insured's unreasonable delay in bringing a bad faith cause of action. *Smith v. Smith*, 168 Ohio St.447 (1959), superseded on other grounds, *Feldmiller v. Feldmiller*, 2012 Ohio 4621.

Lack of Contractual Liability: Although bad faith is an independent tort, it is generally contingent upon coverage for the insured's underlying claim because in order to demonstrate bad faith it must be shown that the insurer withheld coverage without a reasonable justification therefor. Generally, where there is no contractual coverage ispo facto there can be no bad faith claim because the insurer's position on coverage was correct. *Bullet Trucking, supra.*

Advice of Counsel: Where a party, in good faith, undertakes legal action, such as filing a lawsuit, on the advice of counsel, after fully and fairly informing counsel of all of the material facts, a complete defense can arise to any claim that such action was wrongfully taken. *Reenan v. Klein*, 3 Ohio App.3d 142 (1st Dist. 1981).

Lack of Compensatory Damages: One of the most frequently overlooked defenses to bad faith is one of the most simple – did the act complained of actually result in damage to the insured? Whether an action sounds in tort or contract, a plaintiff seeking to recover compensatory damages must prove an injury and resulting damages – uncertainty as to the existence of damages (as opposed to the amount of damages) precludes recovery. *Cleveland Builders Supply Co. v. Farmers Ins. Grp. of Cos.*, 102 Ohio App.3d 708 (1995).

Evidence Issues – Production of Claim File Materials: In an action alleging bad faith denial of coverage, the insured is entitled to discover claims file materials containing attorney-client communications related to the issue of coverage that were created prior to the denial of coverage. *Boone v. Vanliner Ins. Co.*, 91 Ohio St.3d 209 (2001).

CHANGES TO THE JUDICIARY

2010

Eighth District Court of Appeals..... Judge Eileen A. Gallagher
Eighth District Court of Appeals..... Judge Kathleen Keough
Eleventh District Court of Appeals..... Judge Thomas Wright
Cuyahoga Co. Court of Common Pleas..... Judge Michael Astrab
Cuyahoga Co. Court of Common Pleas..... Judge Maureen E. Clancy
Cuyahoga Co. Court of Common Pleas..... Judge Lance T. Mason

2011

Supreme Court of Ohio..... Chief Justice Maureen O'Connor
Supreme Court of Ohio..... Justice Yvette McGee Brown
Cuyahoga Co. Court of Common Pleas..... Judge Annette G. Butler
Cuyahoga Co. Court of Common Pleas..... Judge Pamela A. Barker
Cuyahoga Co. Court of Common Pleas..... Judge Robert C. McClelland
Cleveland Municipal Court..... Judge Lynn McLaughlin Murray

2012

Supreme Court of Ohio..... Justice Sharon Kennedy
Supreme Court of Ohio..... Justice William O'Neill
Eighth District Court of Appeals..... Judge Tim McCormack
Cuyahoga Co. Court of Common Pleas..... Judge Michael Jackson

2013

Supreme Court of Ohio..... Justice Judith L. French
Second District Court of Appeals..... Judge Jeffrey M. Welbaum
Fourth District Court of Appeals..... Judge Marie Hoover
Eighth District Court of Appeals..... Judge Eileen Gallagher
Cuyahoga Co. Court of Common Pleas..... Judge Joan Synenberg
Cuyahoga Co. Court of Common Pleas..... Judge Cassandra Collier-Williams
Cuyahoga Co. Court of Common Pleas..... Judge Steve Gall
Lorain Co. Court of Common Pleas..... Judge John Miraldi
Stark Co. Court of Common Pleas..... Judge Kristen Farmer
Stark Co. Court of Common Pleas..... Judge Curtis Werren
Summit Co. Court of Common Pleas..... Judge Jane Davis
Summit Co. Court of Common Pleas..... Judge Christine Croce
Cleveland Municipal Court..... Judge Edward S. Wade, Jr.
Cleveland Municipal Court..... Judge Charles J. Bauernschmidt

2014

First District Court of Appeals	Judge R. Patrick DeWine
First District Court of Appeals	Judge Russell J. Mock
Seventh District Court of Appeals	Judge Carol Ann Robb
Eighth District Court of Appeals	Judge Anita Laster Mays
Summit County Court of Common Pleas	Judge Todd M. McKenney

2015

First District Court of Appeals	Judge Peter J. Stautberg
Ninth District Court of Appeals	Judge Julie A. Schafer
Tenth District Court of Appeals	Judge Betsy Luper Schuster
Tenth District Court of Appeals	Judge Jennifer Brunner
Cuyahoga County Court of Common Pleas	Judge Shannon M. Gallagher
Cuyahoga County Court of Common Pleas	Judge Matthew A. McMonagle
Stark County Court of Common Pleas	Judge Chryssa N. Hartnett

STATUTE OF LIMITATIONS AND REPOSE CHART

CAUSES OF ACTION	BEFORE TORT REFORM	AFTER TORT REFORM
Breach of written contract	16 years (R.C. 2305.06)	8 years—effective 2012
Breach of oral contract	6 years (R.C. 2305.07)	Unchanged
Trespassing, recovery of personal property, conversion, fraud and other torts not covered by R.C. 2305.10 to 2305.12	4 years (R.C. 2305.09)	Unchanged
Products liability	2 years (R.C. 2305.10)	**2 Year Statute of Limitations:** Generally, a plaintiff must file within 2 years after the cause of action accrues (date of injury or loss). Ohio law provides an exception in the form of a discovery rule for plaintiffs exposed to ethical drugs, medical devices, and nonspecified hazardous or toxic chemicals, chromium, asbestos, diethylstilbestrol, other nonsteroidal synthetic estrogens, and veteran's exposed to herbicides, defoliants, agent orange, and other causative agents. These causes of action accrue when either: (1) a competent medical authority informs the plaintiff that his injury is related to exposure to hazardous or toxic chemicals; or (2) the date that plaintiff should have known that injury is related to exposure. **10 Year Statute of Repose:** Ohio law prohibits a plaintiff from filing a products liability action against a manufacturer or supplier later than 10 years from the date the product was first placed into stream of commerce, fraud is involved or the manufacturer provided an express longer term warranty of safety in writing, which is unexpired at the time the claim accrues. If the cause of action accrues less than two years prior to the expiration of the 10-year period of repose, an action must be filed within 2 years after the cause of action accrues.
Defective and unsafe condition in improvements to real property	N/A	10 year statute of repose for improvements to real property, relative to designer professionals, construction contractors and subcontractors, unless fraud is involved. (R.C. 2305.131).

CAUSES OF ACTION	BEFORE TORT REFORM	AFTER TORT REFORM
Action for bodily injury or injury to personal property	2 years after the cause of action arose (R.C. 2305.10)	2 years after the cause of action accrues (date of injury) with exceptions. *See* product liability and wrongful death sections.
Wrongful death	2 years (R.C. 2125.02)	2 years after the cause of action accrues (date of injury) except when a product liability claim is brought. *See* product liability section.
Assault and battery	1 year (R.C. 2305.111)	Unchanged
Assault and battery by mental health professional; sexual contact or conduct	2 years (R.C. 2305.115)	Unchanged
Employer intentional tort	1 year (R.C. 2305.112)	Repealed. Statutes of limitation for bodily injury and wrongful death should apply.
Malpractice by psychologist, social worker or clinical counselor	1 year (R.C. 2305.11)	Unchanged
Malpractice for medical, dental, optometric or chiropractic claims	1 year from accrual, subject to 180 day extension (R.C. 2305.113)	Unchanged
Legal malpractice	1 year (R.C. 2305.11)	Unchanged
Libel, slander, malicious prosecution or false imprisonment; abuse of process	1 year (R.C. 2305.11)	Unchanged
Identity fraud	5 years (R.C. 2305.09)	Unchanged
Intentional sexual abuse or acts	1 year (R.C. 2305.111) Minors: 1 year from age of majority where victim is aware of the battery and knows the perpetrator's identity. Doe v. First United Methodist Church, 68 Ohio St.3d 531 (1994).	Unchanged
Consumer Sales Practices Act (CSPA)	2 years (R.C. 1345.10)	Unchanged

STATE AND FEDERAL PROCEDURE HIGHLIGHTS AT A GLANCE

Remember to always check actual rule and local rules of practice.

TOPIC	STATE RULE	FEDERAL RULE
Commencement of Action	A civil action is commenced by filing a complaint provided that service is obtained within one year. (Civ.R. 3)	A civil action is commenced by filing a complaint. (Fed.R.Civ.P. 3)
Pre-Answer Motions	Generally the same as federal rule. (Civ.R. 12).	A defendant may raise the following defensesthrough a motion prior to answering : (1) lack ofsubject matter jurisdiction, (2) lack of personal jurisdiction, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief may be granted, and (7) failure to join a party. A defendant generally waives (2), (3), (4) and (5) if not raised by pre-answer motion. Filing of a pre-answer motion generally delays the time to answer until 14 days after ruling. (Fed.R.Civ.P. 12).
Removal	N/A	Appropriate actions can be removed from state to federal court within 30 days of service of initial pleading or subsequent removable event that occurs within 1 year of commencement of action. (28 U.S.C.A. 1446)
Transfer of Venue	Upon timely assertion of the defense of improper venue as provided in Civ. R. 12, the court shall transfer the action to the proper county. (Civ.R. 3(C)). Proper venue sites are set forth in Civ.R. 3.	A party may file a motion to assert improper venue. (Fed.R.Civ.P. 12(b)(3)). Proper venue sites are set forth in 28 U.S.C.A 1391, et seq.
Answer to Complaint, Cross-Claim, Third-Party Complaint	Defendant must serve within 28 days after service of the summons and complaint upon him. (Civ.R. 12(A))	Defendant must serve within 21 days after service of the summons and complaint upon him. (Fed.R.Civ.P. 12(a))

TOPIC	STATE RULE	FEDERAL RULE
Reply to Counterclaim*	Plaintiff must serve his reply within 28 days after service of the answer. (Civ.R. 12(A))	Plaintiff must serve his reply within 21 days after service of the answer. (Fed R.Civ.P. 12(a)
Discovery Plans	Not Required	At least 21 days before a scheduling conference is held the parties must meet to develop a proposed discovery plan. (Fed.R.Civ.P. 26(f))
Initial Discovery Disclosures	Not Required	Required at or within 14 days after the parties Rule 26(f) conference unless a different time is set by stipulation or court order. (Fed.R.Civ.P. 26(a))
Interrogatories	Any party may serve 40 without leave of court. (Civ.R. 33(A))	Without leave of court or written stipulation, interrogatories may not be served before a discovery conference is held. Any party may serve 25 without leave of court, although this can vary by case track. (Fed.R.Civ.P. 33(a); Fed.R.Civ.P. 26(d)).
Requests for Admission	Request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. (Civ.R. 36)	Without leave of court or written stipulation, requests for admission may not be served before a discovery conference is held. (Fed.R.Civ.P. 36; Fed.R.Civ.P. 26(d))
Requests for Production	Without leave of court, the request may be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. (Civ.R. 34)	Without leave of court or written stipulation, requests for production may not be served before a discovery conference is held. (Fed. R. Civ. P. 34; Fed. R.Civ. P. 26(d))
Depositions	Any party may take the testimony of any person, including a party. The deposition of a prisoner requires leave of court. (Civ.R. 30(A))	Same as Ohio Civ.R. 30(A) (Fed.R.Civ.P. 30(a)); the number of depositions allowed can vary by case track.
Dispositive Motions	Unless local rule or the court orders differently, a party may file a motion for summary judgment "at any time after the expiration of the time permitted under [the	Unless local rule or the court orders differently, a party may file a motion for summary judgment "at any time until 30 days after the close of all discovery."

	Ohio Rules of Civil Procedure] for a responsive motion for pleading by the adverse party, or after service of a motion for summary judgment by the adverse party." If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.	
Dismissals	Party may dismiss claim once at any time without leave of court by filing notice. (Civ.R. 41(a))	Party may dismiss claim by filing notice prior to service of responsive pleading, otherwise all parties who have appeared in the action must agree to dismissal. (Fed.R.Civ.P. 41)
Jurors; Numbers of Verdicts	Generally 8 members. (Civ.R. 38(B)) Verdict must be made upon the concurrence of threefourths of the jurors. (Civ.R. 48)	Generally 6 members. The verdict must be unanimous. (Fed.R.Civ.P. 48)
Post-Judgment Motions	Civ.R. 50 and 59 have been amended to extend the time for filing a motion for judgment notwithstanding the verdict and/or for new trial from 14 days to 28 days. Both rules are now in line with the Federal Rules. Motions for reconsideration of judgment are construed as motions to alter or amend judgment under Civ.R. 59(e). *McConocha v. Blue Cross and Blue Shield Mut. of Ohio*, 930 F.Supp. 1182 (N.D.Ohio, 06-14-1996); *Moody v. Pepsi–Cola Metropolitan Bottling Co*., 915 F.2d 201, 206 (6th Cir.1990).	Fed.R.Civ.P. 50(c) Renewed motion for judgment must be filed no later than 28 days after the entry of judgment — or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged. Fed.R.Civ.P. 59(b) motion for a new trial must be filed no later than 28 days after the entry of judgment. Fed.R.Civ.P. 59(e) motion to alter or amend a judgment must be filed no later than 28 days after the entry of judgment. Motions for reconsideration of judgment are construed as motions to alter or amend judgment under Civ.R. 59(e). *McConocha v. Blue Cross and Blue Shield Mut. of Ohio*, 930 F.Supp. 1182 (N.D.Ohio, 06-14-1996); *Moody v. Pepsi–Cola Metropolitan Bottling Co*., 915 F.2d 201, 206 (6th Cir.1990).

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