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# Overview of State of OHIO Court System

## A. Trial Courts

1. Court of Common Pleas

a) The courts of Common Pleas which are established in each county in Ohio are the general trial courts for the state and may exercise jurisdiction over all justiciable matters that are not excluded by statute or placed in the exclusive jurisdiction of another court.

b) General Jurisdiction: (O.R.C. § 2305.01)

(1) Any claims in excess of $500.00 that are not within the exclusive jurisdiction of the court of claims (i.e., against the state).

(2) The court may transfer an action to an appropriate municipal court if:

(a) the amount does not exceed $1,000.00 and,

(b) the presiding judge of the municipal court concurs in the transfer.

c) The court of Common Pleas includes three specialized divisions:

(1) Probate

(a) Exclusive jurisdiction over probate, testamentary, and certain equitable matters.

(2) Juvenile

(a) Exclusive jurisdiction over child delinquency, abuse, neglect, paternity, child custody and support if brought in separate from a divorce, minors charged with adult offenses, etc.

(3) Domestic Relations

(a) Exclusive jurisdiction over divorce, alimony, marriage annulment, bastardy, child custody and child support.

2. Court of Claims (O.R.C. § 2743.03)

   a) The court of claims has exclusive jurisdiction over claims against the state that are permitted by the state's waiver of sovereign immunity.

3. Municipal Courts

   a) Municipal Courts have limited jurisdiction within their territory. A municipal territory may include a single municipality or an entire county.

   b) Municipal courts have original but not exclusive jurisdiction over civil actions in which:

      (1) The claim arose within the municipality's territory, or a single defendant resides or was served with process within the territory, and

      (2) The amount in controversy does not exceed $15,000.00 (excluding interest and costs).

4. County Courts (O.R.C. §§ 1907.01 & 1907.03)

   a) County courts exist in counties where the territorial jurisdiction of municipal courts does not cover the entire county. O.R.C. § 1907.01

   b) They have exclusive jurisdiction over civil actions to recover sums not exceeding $500.00.

   c) They have original jurisdiction concurrent with the court of common pleas over actions to recover sums in excess of $500.00 but not exceeding $15,000.00. O.R.C. § 1907.03

5. Small Claims Divisions of Municipal and County Courts (O.R.C. §§ 1925.01 & 1925.02)

   a) The Ohio Revised code establishes that each municipal county must establish a small claims division.

   b) Small claims has jurisdiction over civil actions for sums not to exceed $3,000.00, exclusive of interest and costs.

## B. Appellate Courts

1. O.R.C. 2501.01 establishes twelve judicial court of appeals districts

a) First District: Hamilton;

b) Second District: Darke, Miami, Montgomery, Champaign, Clark, and Greene;

c) Third District: Mercer, Van Wert, Paulding, Defiance, Henry, Putnam, Allen, Auglaize, Hancock, Hardin, Logan, Union, Seneca, Shelby, Marion, Wyandot, and Crawford;

d) Fourth District: Adams, Highland, Pickaway, Ross, Pike, Scioto, Lawrence, Gallia, Jackson, Meigs, Vinton, Hocking, Athens, and Washington;

e) Fifth District: Morrow, Richland, Ashland, Knox, Licking, Fairfield, Perry, Morgan, Muskingum, Guernsey, Coshocton, Holmes, Stark, Tuscarawas, and Delaware;

f) Sixth District: Williams, Fulton, Wood, Lucas, Ottawa, Sandusky, Erie, and Huron;

g) Seventh District: Mahoning, Columbiana, Carroll, Jefferson, Harrison, Belmont, Noble, and Monroe;

h) Eighth District: Cuyahoga;

i) Ninth District: Lorain, Medina, Wayne, and Summit;

j) Tenth District: Franklin;

k) Eleventh District: Lake, Ashtabula, Geauga, Trumbull, and Portage;

l) Twelfth District: Brown, Butler, Clermont, Clinton, Fayette, Madison, Preble, and Warren.

2. Article IV, Section 3 of the Ohio Constitution dictates that each Court of Appeals shall have at least three judges but grants the Ohio General Assembly the power to increase that number.

3. O.R.C. 2501.011 adds three additional judges in the fifth, sixth, and seventh districts

4. O.R.C. §2501.012 adds nines additional judges in the eight district, two in the ninth, five in the tenth, two in the eleventh, and two in the twelfth

5. O.R.C. §2501.013 adds three additional judges in the first district, two in the second, one in the third, and one in the Fourth

6. The Courts of Appeal have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death. Ohio Constitution §4.03(B)(2).

7. The Supreme Court of Ohio consists of seven justices. Ohio Constitution §4.02; O.R.C. §2503.01

8. Two judges of the Supreme Court shall be chosen in each even-numbered year. Each judge shall hold office for six years. The term of one of such judges shall commence on the first day of January next after his election and the term of the other judge shall commence on the second day of January next after his election. O.R.C. §2503.03

9. A chief justice of the Supreme Court shall be elected every six years and shall hold office for six years commencing on the first day of January next after his election. Vacancies occurring in the office of chief justice shall be filled in the manner prescribed for the filling of vacancies in the office of judge of the Supreme Court. O.R.C. §2503.02

10. An appeal does not operate as a stay of execution until a stay of execution has been obtained pursuant to the Rules of Appellate Procedure or in another applicable manner, and a supersedeas bond is executed by the appellant to the appellee, with sufficient sureties and in a sum that is not less than, if applicable, the cumulative total for all claims covered by the final order, judgment, or decree and interest involved, except that the bond shall not exceed fifty million dollars excluding interest and costs, as directed by the court that rendered the final order, judgment, or decree that is sought to be superseded or by the court to which the appeal is taken. That bond shall be conditioned as provided in section 2505.14 of the Revised Code. §2505.09

11. Before a supersedeas bond shall operate to stay execution of a final order, judgment, or decree, its execution and the sufficiency of its sureties shall be approved by the court in which the final order, judgment, or decree was rendered or by the court to which the appeal is taken. In the case of an appeal of a final order, judgment, or decree of a court, the approval shall be obtained pursuant to the Rules of Appellate Procedure or in another applicable manner.

    If a supersedeas bond is approved in connection with any appeal, the fact of approval shall be indorsed on the bond, and the bond shall be filed in the office of the clerk of the court in which the final order, judgment, or decree was rendered or, in the case of an administrative-related appeal, of

the court to which the appeal is taken, for the appellee. §2505.10

12. §2505.12: An appellant is not required to give a supersedeas bond in connection with any of the following:

a) An appeal by any of the following:

(1) An executor, administrator, guardian, receiver, trustee, or trustee in bankruptcy who is acting in that person's trust capacity and who has given bond in this state, with surety according to law;

(2) The state or any political subdivision of the state;

(3) Any public officer of the state or of any of its political subdivisions who is suing or issued solely in the public officer's representative capacity as that officer.

b) An administrative-related appeal of a final order that is not for the payment of money.

## Procedural

### A. Venue

Pursuant to Ohio Civ. R. 3(B), venue is proper in any of the following counties:

a) The county in which the defendant resides

b) The county in which the defendant has their principle place of business

c) A county in which the defendant conducted activity that gave rise to the claim for relief

d) A county in which all or part of the claim for relief arose.

Note that under Civ. R. 3(C), if an improper venue is chosen, the court is required to transfer the action to a proper venue upon the timely filing of a motion by the defendant.

In a case involving multiple defendants, venue is considered proper for all if it is proper for any one of the defendants.

Venue is not "jurisdictional" in nature, and therefore no order, judgment, or decree can be collaterally attacked on the basis that venue was improper.

### B. Statute of Limitations

The following statutes of limitation are pertinent:

1. Injury to person or property: Two years from the accrual of the injury (R.C. 2305.10)

2. Contract in writing: Eight years from the accrual of the cause of action (Ohio Rev. Code § 2305.06, effective 9/28/2012)

3. Contract not in writing: Six years from the accrual of the cause of action

Tolling - These periods can be extended through one of Ohio's tolling provisions. R.C. 2305.15 provides that the limitations period is tolled during the time the defendant is absent from Ohio or imprisoned, and R.C. 2305.16 also provides a tolling period for any time in which the plaintiff is a minor or of unsound mind at the time of the accrual of the cause of action.

Savings Statute (R.C. 2305.19) - If a cause of action fails "other than on the merits" (usually a voluntary dismissal pursuant to Civ. R. 41(A)(1)), the action may be re-filed within one year from the date of such failure or within the original statute of limitations, whichever is later.

Borrowing Statute (R.C. 2305.03) - This statute applies when the cause of action accrues in another state. Ohio law is first applied to determine where the cause of action accrued. If it accrued in another state, the cause of action will be barred if the limitations period has already expired under that state's laws.

## C. Time for Filing an Answer

An Answer must be filed within 28 days of service. Many courts allow for an automatic leave to plead, however, and the local rules should be consulted in this regard.

1. Computing time -

   a) The actual date of service is NOT included

   b) Weekends and holidays must be included unless the prescribed period is seven (7) days or less

   c) If the last day falls on a weekend or holiday, the next day that the court is open shall be the due date.

2. Affirmative defenses - These are considered waived if not pled in the initial answer, with the following exceptions which can be made by motion:

   a) Lack of subject matter jurisdiction

   b) Lack of personal jurisdiction

c) Improper venue

d) Insufficient process

e) Insufficient service of process

f) failure to state a claim

g) failure to join a necessary party

## D. Dismissal Re-Filing of Suit

The plaintiff can dismiss the complaint voluntarily under Civ. R. 41(A)(1) one time. Plaintiff retains the right to re-file within one year of the dismissal, which is effective upon filing.

# Liability

## A. Negligence

1. Common Law Negligence

The elements of negligence are that (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty of care, and (3) the breach of duty proximately caused the plaintiff's injury or damages. *Chambers v. St. Mary's School*, 82 Ohio St. 3d 563, 697 N.E.2d 198 (1998). Whether a defendant owes a duty of care to a plaintiff "depends upon the relationship between the parties and the foreseeability of injury to someone in the plaintiff's position." *Simmers v. Bentley Constr. Co.*, 64 Ohio St. 3d 642, 597 N.E.2d 504 (1992). An injury is foreseeable if a defendant knows or should know that its act was likely result in harm. *Huston v. Konieczny*, 52 Ohio St. 3d 214, 556 N.E.2d 505 (1990).

A defendant breaches its duty of care to a plaintiff when the defendant fails to exercise the degree of care that an ordinarily reasonable and prudent person would exercise under the same or similar circumstances. *Mussivand v. David*, 45 Ohio St. 3d 314, 544 N.E.2d 265 (1989).

A defendant's negligence is the proximate cause of injury if the injury is the natural and probable consequence of the defendant's negligent act, and if the defendant should have foreseen the injury in light of attending circumstances. *Id.*

2. Comparative Negligence

Ohio Rev. Code § 2315.32 to Ohio Rev. Code § 2315.36 govern comparative negligence. The plaintiff's comparative fault is an affirmative defense to any tort claim, except a claim involving intentional torts. Ohio Rev. Code § 2315.32(B).

If the plaintiff's comparative fault is *greater than* the combined negligence of all defendants, the plaintiff's comparative fault bars the plaintiff from recovery. Ohio Rev. Code § 2315.33. If the plaintiff's comparative fault is *equal to* or *less than* the combined negligence of all defendants, the plaintiff's comparative fault is not a bar to recovery. *Id.* In such circumstances, however, the court will reduce the plaintiff's recovery by the percentage of fault attributable to the plaintiff. Ohio Rev. Code § 2315.35.

## B. Negligence Defenses

1. Assumption of Risk

Ohio law recognizes three types of assumption of risk – express, primary and secondary assumption of risk.

Express assumption of risk occurs when the parties expressly agree to release liability. *Crace v. Kent State Univ.*, 185 Ohio App. 3d 534, 924 N.E.2d 906 (2009).

Primary assumption of risk is an absolute defense to a negligence claim. A plaintiff's primary assumption of risk eliminates any duty of care that a defendant owed that plaintiff. As a result, a plaintiff is unable to establish the required elements of a negligence claim. *Gallagher v. Cleveland Browns Football Co.*, 74 Ohio St. 3d 427, 659 N.E.2d 1232 (1996). A plaintiff who voluntarily engages in an activity assumes the risks inherent with that activity. A plaintiff cannot recover for injuries resulting from such risks, unless the defendant acted recklessly or intentionally. *Gentry v. Craycraft*, 101 Ohio St. 3d 141, 802 N.E.2d 1116 (2004). Primary assumption of risk applies to those situations in which the danger at issue is ordinary to the activity, it is common knowledge that the danger exists, and the injury occurs as a result of the danger during the course of the actvitiy. *Santho v. Boy Scouts of Amer.*, 168 Ohio App. 3d 27, 857 N.E.2d 1255 (2006). If the activity involves dangers that cannot be eliminated, primary assumption of risk applies. *Main v. Gym X-Treme*, 2012-Ohio-1315 (2012).

Secondary assumption of risk may also be a defense to a negligence claim. Like primary assumption of risk, secondary (or implied) assumption of risk occurs when a plaintiff voluntarily consents to or acquiesces to an appreciated, known or obvious risk to his or her safety. *Reeves v. Healy*, 192 Ohio App. 3d 769, 950 N.E.2d 605 (2011). Secondary assumption of risk differs from primary assumption of risk because secondary assumption of risk merges with comparative negligence. Secondary assumption of risk is not an absolute bar to a negligence claim, but is a measure of comparative fault. *Gallagher*, 74 Ohio St. 3d 427. It may become an absolute bar, if the measure of the plaintiff's comparative fault,

through his or her assumption of risk, is greater than the fault attributed to the defendant.

2. Sudden Emergency

Ohio recognizes two types of sudden emergency defenses: sudden emergencies generally and sudden medical emergencies specifically.

When a driver of a motor vehicle is suddenly stricken by a period of unconsciousness, which renders it impossible for the driver to control the car, and which the drive had no reason to anticipate or foresee, the driver is not liable for negligence. *Lehman v. Heyman*, 164 Ohio St. 595, 133 N.E.2d 97 (1956). To establish the defense, the defendant bears the burden to prove that (1) he actually lost consciousness, (2) the loss of consciousness made it impossible for him to control the vehicle, and (3) the loss of consciousness was unforeseeable. Once the defendant establishes the elements of the defense, the burden shifts to the plaintiff to produce independent and substantial evidence to the contrary.

Other situations may present sudden emergencies which excuse liability. A person's negligence is excused when that person, in an emergency situation, acts without ordinary care but does so because of a lack of time to form a reasoned judgment. To establish the defense, the defendant bears the burden to prove that (1) compliance with a specific safety statute was impossible, (2) because of a sudden emergency, (3) that arose without fault of the defendant, (4) under circumstances over which the defendant had no control, and (5) the defendant nevertheless exercised such care as an ordinary person would. *Zehe v. Falkner*, 26 Ohio St. 2d 258, 271 N.E.2d 276 (1971).

An sudden emergency is a sudden and unexpected occurrence which demands prompt action without time for reflection or deliberation. *Miller v. McAllister*, 169 Ohio St. 487 (1959).

3. Last Clear Chance Doctrine

The last clear chance doctrine is not so much a defense to negligence as it is a defense to a plaintiff's comparative fault. Under the last clear chance doctrine, a plaintiff who has placed himself or herself in a perilous situation may still recover, despite his or her own negligence. The last clear chance doctrine allows a plaintiff to recover in these circumstances if a defendant, after becoming aware of the plaintiff's peril, failed to exercise ordinary care to avoid injuring the plaintiff. The last clear chance doctrine applies only if the plaintiff can demonstrate that the defendant became aware of the perilous situation at a time a distance when, in the exercise of ordinary care, the defendant could have avoided injury to the plaintiff.

*Sech v. Rogers*, 6 Ohio St. 3d 462, 453 N.E.2d 705 (1983).

## C. Gross Negligence, Recklessness, Willful and Wanton Conduct

The concepts of gross negligence, recklessness and willful and wanton misconduct are generally inapplicable to basic tort cases. These concepts, however, do come into play when a plaintiff seeks punitive damages. In order to recover punitive damages, a plaintiff must demonstrate, in part, that the defendant's conduct demonstrates malice, or aggravated or egregious fraud. Ohio Rev. Code § 2315.21(C)(1). Actual malice is present where a defendant's conduct is characterized by hatred, ill will or a spirit of revenge. *Cabe v. Lunich*, 70 Ohio St. 3d 598, 640 N.E.2d 159 (1994). Actual malice is also present where a defendant exhibits a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. *Id.* This includes extremely reckless behavior. *Id.*

## D. Negligent Hiring and Retention

Ohio law recognizes a separate and distinct tort claim of negligent hiring and retention. *Byrd v. Faber*, 57 Ohio St. 3d 56, 565 N.E.2d 584 (1991). Thus, an admission of liability will not automatically result in the dismissal of a negligent hiring, entrustment, or retention claim.

To establish a negligent hiring claim, a plaintiff must establish (1) the existence of an employment relationship, (2) the employee's incompetence, (3) the employer's actual or constructive knowledge of the employee's incompetence, (4) the employee's act or omission as a proximate cause of the plaintiff's injury or damage, and (5) the employer's negligence in hiring or retaining the employee as a proximate cause of the plaintiff's injury or damage. *Evans v. Ohio State Univ.*, 112 Ohio App. 3d 724, 680 N.E.2d 161 (1996).

An employee's incompetence may stem from a number of behaviors, including prior alcoholism, a history of mental illness, a history of assaults or combative behavior or a prior criminal record. *Ruta v. Breckenridge-Remy Co.*, 1980 Ohio App. LEXIS 12410 (1980). If the employer knew or could have discovered this incompetence through reasonable investigation, the employer may be liable for negligent hiring and retention. *Abrams v. Worthington*, 169 Ohio App. 3d 94, 861 N.E.2d 920 (2006).

## E. Negligent Entrustment

Ohio law recognizes a separate and distinct tort claim of negligent entrustment.

The owner of a motor vehicle may be held liable for injury to a third person resulting from the operation of the vehicle by an inexperienced or incompetent driver if the owner knowingly entrusts the operation of the vehicle to such a driver. *Gulla v. Strauss*, 154 Ohio St. 193, 93 N.E.2d 662 (1950). In order to recovery under a theory of negligent entrustment, the plaintiff must demonstrate

that (1) the vehicle was driven with the owner's permission, (2) the driver was incompetent or unqualified, (3) the owner knew at the time he or she entrusted the vehicle to the driver that the driver was incompetent or unqualified. *Id.*

Permission to use a vehicle may be express or implied. *Keeley v. Hough*, 2005-Ohio-3771 (2005). Mere access to a vehicle, however, is insufficient to establish permissive use of the vehicle. *Shapiro v. Barden*, 2001 Ohio App. LEXIS 5535 (2001).

Incompetence is ordinarily a fact-specific inquiry. Possession of a driver's license, prior accidents and prior violations are all relevant to determining whether a driver is incompetent or unqualified. Additionally, Ohio has enacted a statute that addresses wrongful entrustment. *See* Ohio Rev. Code 4511.203. Under the statute, wrongful entrustment of a commercial motor vehicle occurs when the owner of the vehicle knows or reasonably should know that:

a) The driver does not have a valid license;
b) The driver's driving privileges have been suspended;
c) Allowing the driver to drive would violate financial responsibility requirements;
d) Allowing the driver to drive would violate prohibitions against operating a motor vehicle intoxicated; or
e) The vehicle is the subject of an immobilization order.

*Id.*

The owner of the vehicle must know that he or she entrusted the vehicle to an incompetent or unqualified driver. In order to establish liability, a plaintiff must demonstrate an owner's actual knowledge of incompetency, or knowledge of such facts and circumstances that would imply knowledge on the part of the owner. *Curtis v. Schmid*, 2008-Ohio-5239.

## F. Dram Shop

Dram Shop liability under Ohio law consists of two statutory causes of action. One action imposes liability upon liquor permit holders for injuries to persons on the liquor permit holders' premises. The other action imposes liability upon liquor permit holders for injuries to persons away from the premises.

Ohio Rev. Code § 4399.18 states that no person may bring a cause of action against a liquor permit holder for personal injury or property damage caused by the acts of an intoxicated patron, unless the injury or damage occurred on the liquor permit holder's premises or parking lot. Ohio Rev. Code § 4399.18. The Ohio Revised Code further provides that a person may bring a cause of action for injury or damage that occurs away from the premises only if (1) the liquor permit holder or its employee *knowingly* sold an intoxicating beverage to a noticeably intoxicated person, to a minor, or to a person in violation of Sunday liquor sales

laws, *and* (2) the person's intoxication was the proximate cause of the injury or damage. *Id.*

Whether injury or damage occurs on or away from the premises, Dram Shop liability only exists if the liquor permit holder has *actual* knowledge that a person was intoxicated at the time the liquor permit holder sold the intoxicating beverage. *Greesman v. McClain*, 40 Ohio St. 3d 359 (1988). Actual knowledge may be proven by direct or circumstantial evidence.

Most Ohio appellate courts hold that the statutory remedies against liquor permit holders for injury or damage caused by intoxicated patrons are exclusive. As a result, statutory Dram Shop liability precludes common law causes of action against a liquor permit holder. *Aubin v. Metzger*, 2002-Ohio-5130 (2002).

Ohio Dram Shop laws provide protection only for innocent third parties. If the injured party is also intoxicated, he or she cannot recover against the liquor permit holder. *Smith v. The 10th Inning, Inc.*, 49 Ohio St. 3d 289 (1990).

## G. Joint and Several Liability

1. Generally

Ohio law imposes joint and several liability upon two or more tortfeasors whose conduct was the proximate cause of injury or damage. Ohio Rev. Code § 2307.22.

If a jury determines that two or more tortfeasors are jointly and severally liable, the jury must apportion a degree of fault between all such persons. Ohio Rev. Code § 2307.23. The jury may apportion fault between all persons whose conduct was the proximate cause of injury, including the plaintiff and persons not party to the case.

With respect to economic loss, a defendant's joint and several liability depends on each defendants' respective share of comparative fault. Defendants whose share of comparative fault is *greater than* 50% are jointly and severally liable for all economic damages. Defendants whose share of comparative fault is *equal to or less than* 50% are liable for their proportionate share of economic damages. Economic damages include past wage loss, future wage loss, medical expenses and property damage expenditures.

With respect to non-economic loss, including pain and suffering, loss of consortium, and mental anguish, each defendant owes only his or her proportionate share of non-economic damages, regardless of the degree of comparative fault.

2. Contribution

A tortfeasor who has paid more than his or her share of damages may have a right of contribution against others who are responsible for the damages. Ohio Rev. Code § 2307.25.

A tortfeasor may enforce contribution rights against a co-defendant by way of post-trial motion. Ohio Rev. Code § 2307.26. A tortfeasor may also enforce contribution rights by separate action within one year after the judgment becomes final. *Id.*

A tortfeasor who has committed an intentional tort cannot seek contribution.

A tortfeasor who has entered into a settlement is not entitled to contribution from other tortfeasors unless the settlement agreement specifically extinguishes the liability of the other tortfeasors against whom contribution is sought.

A release and covenant not to sue does not discharge other tortfeasors from liability, but reduces the claim against other tortfeaors to the greater of any amount stipulated or the amount paid in consideration for the release. Ohio Rev. Code § 2307.28. The reduction does not apply if the plaintiff recovers less than the amount of compensatory damages found by the jury.

A release and covenant not to sue discharges the person to whom it is given from all liability for contribution.

## H. Wrongful Death and/or Survival Actions

Ohio law recognizes separate actions for wrongful death and survivorship claims.

Causes of action for injuries to person or property survive the death of the person entitled to bring such an action. Ohio Rev. Code § 2305.21. A representative of the decedent may bring such an action in the name of the decedent, as if the decedent had lived.

Ohio law also recognizes a statutory cause of action for wrongful death. Ohio Rev. Code 2125.01. The administrator or executor of the estate of the decedent is permitted to bring a claim for wrongful death against any person who would have been liable to the decedent.

To recover for wrongful death, a plaintiff must demonstrate that (1) the defendant owed the decedent a duty of care, (2) the defendant breached that duty, and (3) the breach of duty was the proximate cause of the decedent's death. *Garcia v. Pukas Family Flowers, Inc.*, 108 Ohio App. 3d 683, 671 N.E.2d 607 (1996).

A claim for wrongful death is brought for the exclusive benefit of the surviving spouse, children, parents of the decedent and other next of kin. Ohio Rev. Code § 2125.02(A). The surviving spouse, children and parents are rebuttably presumed to have suffered damages by reason of the wrongful death. They may recover compensatory damages for funeral and burial expenses, loss of support from the decedent's earning capacity, loss of the decedent's services, loss of the decedent's consortium, loss of prospective inheritance, and mental anguish of the surviving kin.

Other next of kin, including siblings and other relatives are also properly considered next of kin. They may also recover damages, but do not enjoy the same rebuttable presumption as other kin. These next of kin must prove damages, and may only recover for loss of consortium and mental anguish. *Ramage v. Central Ohio Emer. Servs., Inc.*, 64 Ohio St. 3d 97, 592 N.E.2d 828.

## I. Vicarious Liability

1. Respondeat Superior

An employer may be held liable for the acts and omissions of its employees committed in the course and scope of their employment. *Byrd v. Faber*, 57 Ohio St. 3d 56, 565 N.E.2d 584 (1991).

Ohio law recognizes a number of exceptions to vicarious liability. Acts committed outside the course and scope of employment do not subject employers to vicarious liability. *Posin v. ABC Motor Court Hotel, Inc.*, 45 Ohio St. 2d 271, 344 N.E.2d 334 (1976). An employee who departs from his employment to engage in his own affairs relieves his employer from liability. Not every deviation eliminates liability however. Incidental tasks are insufficient. Instead, the action must be so divergent from employment duties such that it would sever the employment relationship. *Id.* Whether conduct is undertaken in the course and scope of employment is ordinarily a question of fact. Moreover, intentional misconduct does not give rise to vicarious liability unless the intentional conduct is calculated to facilitate or promote the business of the employer. *Byrd*, 57 Ohio St. 3d 56.

2. Liability for Acts of Independent Contractors

Generally, an employer is not liable for the conduct of an independent contractor.

Whether an actor is an employee or an independent contractor depends upon the employer's right to control the manner of the actor's work. *Bobik v. Indus. Comm'n*, 146 Ohio St. 187, 64 N.E.2d 829 (1946). If the employer retains the right to control the work, the relationship is one of employer-employee. If the right to control the work rests with the actor,

the relationship is one of principal-independent contractor.

The nondelegable duty rule creates an exception to vicarious liability for the acts of an independent contractor. An employer subject to a nondelegable duty may be held vicariously liable for the conduct of an independent contractor. An employer may be subject to a nondelegable duty affirmatively imposed by statute, contract or common law, or because the work involved is inherently dangerous. *Pusey v. Bator*, 94 Ohio St. 3d 275, 762 N.E.2d 968 (2002). In such situations, an employer may delegate the work to an independent contractor, but must retain liability for the conduct of the independent contractor.

An issue separate from vicarious liability, an employer may nevertheless be held primarily liable for the negligent selection, hiring and retention of an independent contractor.

3. Placard Liability

The Supreme Court of Ohio holds that, in tort actions involving leased vehicles of interstate motor carriers, federal regulations determine liability, rather than the common-law doctrine of vicarious liability. *Wyckoff Trucking, Inc. v. Marsh Bros. Trucking Serv., Inc.*, 58 Ohio St. 3d 261, 569 N.E.2d 1049 (1991). Under federal regulations, liability exists if a lease is in effect and the leased vehicle displays the motor carrier's placard listing ICC numbers. Additionally, federal regulations create an irrebutable presumption that the driver of a leased vehicle is an employee of the motor carrier if the driver displays the motor carrier's placard. 49 C.F.R. § 1057.12.

Under Ohio Rev. Code § 2307.34, no motor carrier is liable in a civil action for any injury, death or damage caused by a motor vehicle not owned by the motor carrier, or caused by an operator not employed by the motor carrier, unless the motor vehicle is being operated in service of the motor carrier pursuant to a valid lease agreement. The only court to address the interaction between Ohio Rev. Code § 2307.34 and the *Wyckoff* decision holds that the statute essentially does not change the *Wyckoff* holding so long as (1) a motor carrier placard is displayed and (2) a valid lease is in effect. *Cincinnati Ins. Co. v. Haack*, 125 Ohio App. 3d 183, 708 N.E.2d 214 (1997).However, a motor carrier or insurer can seek recovery non-trucking ("deadhead") insurer.

## J. Exclusivity of Workers' Compensation

The Ohio worker's compensation system generally provides the exclusive remedy against employers for injuries sustained in the course and scope of employment.

An employer who complies with the requirements of the worker's compensation system is not liable for damages caused by any injury, occupational disease or bodily condition received or contracted by an employee in the course and scope of employment. Ohio Rev. Code § 4123.74. Workers compensation immunity also shields fellow employees from suit, provided that the injury, occupational disease or bodily condition at issue is found to be compensable under the worker's compensation system. Ohio Rev. Code § 4123.741.

The statutory immunity under the worker's compensation system does not apply in cases involving intentional torts. *Blankenship v. Cincinnati Milacron Chems., Inc.*, 69 Ohio St. 2d 603, 433 N.E.2d 572 (1982). Instead, Ohio statute provides a separate remedy for claims of employer intentional torts. Ohio Rev. Code § 2745.01(A). To establish an employer intentional tort, an injured employee must establish that the employer acted with the deliberate intent to injure the employee, or with the belief that injury was substantially certain to occur. *Id.*

The statute defines substantial certainty as deliberate intent to injure. Ohio Rev. Code § 2745.01(B). The statute does set forth certain conduct that the law rebuttably presumes rises to the level of deliberate intent to injure. Deliberate removal of a safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the employer acted with the deliberate intent to injure. Ohio Rev. Code § 2745.01(C).

## Damages

### A. Statutory Caps on Damages

1. Caps on Non-Economic Damages

   a) Applies to all "tort actions"

      (1) Defined as "a civil action for damages for injury or loss to person or property".

      (2) Includes product liability and asbestos claims.

      (3) Specifically excludes any civil action based upon a medical, dental, optometric or chiropractic claim, or for breach of contract.

   b) R.C. 2315.18(B) - Non-economic damages are limited

      (1) to the greater of $250,000 or 3 times economic loss

      (2) to a maximum of $350,000 per person, or $500,000 per occurrence

   c) Caps only apply to "tort actions" for non-catastrophic claims; caps

do not apply to

(1) wrongful death actions;

(2) actions involving permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system, or permanent physical function injury;

(3) tort actions against the state in the Court of Claims; or

(4) tort actions against political subdivisions.

d) Determination of Caps

(1) Caps on non-economic damages can be determined by court prior to trial if any party files a motion for summary judgment.

(2) Jury is not to be informed of caps or limits on awards of non-economic damages.

e) Review of Awards of Non-Economic Compensatory Damages Challenged as Excessive (R.C. 2315.19).

(1) Trial court must set forth in writing its reasons for upholding an award challenged as excessive

(2) Appellate court employs a de novo standard of review

2. Evidence that the Trier of Fact is Not to Consider when Awarding Compensatory Damages for Non-Economic Loss in a Tort Action (R.C. 2315.18(C))

a) Evidence for a defendant's alleged wrongdoing, misconduct or guilt;

b) Evidence of the defendant's wealth or financial resources;

c) All other evidence that is offered for the purpose of punishing the defendant.

3. Jury Consideration

a) Jury Interrogatories (R.C. 2315.18(D))

(1) Requires the use of jury interrogatories in addition to a general verdict form to support an award of compensatory

damages in a “tort action”.

(2) Jury’s answers to interrogatories must specify:
(a) total compensatory damages, and
(b) portion of total compensatory damages that represent economic loss and non-economic loss.

b) Jury Instructions (R.C. 2315.01(B))

(1) Requires that the court instruct the jury on the tax consequences of compensatory and punitive damage awards for purposes of federal and state income taxes.

## B. Compensatory Damages for Bodily Injury

1. Differentiated from other types of damages in that compensatory damages are intended to make the plaintiff whole for the damages/suffering incurred through the defendant[s] actions.

2. Compensatory damages can take the form of direct monetary losses incurred by the plaintiff for medical expenses, lost wages due to injury, and physical/mental pain and suffering, including those losses already sustained as well as those which are reasonably certain to occur in the future.

3. Jury Instructions regarding compensatory damages (OJI 315.01):

a) Plaintiff is to be compensated for both “economic loss” and “non-economic loss” proximately caused by the defendants.

b) “Economic Loss” means any of the following types of financial harm:

all wages, salaries, or other compensation lost as a result of the plaintiff’s injury;

all expenditures for medical care or treatment, rehabilitation services, or other care, treatment, services, products, or accommodations incurred as a result of the plaintiff’s injury.

c) “Non-Economic Loss” means harm other than the economic loss that results from the plaintiff’s injury, including, but not limited to, pain and suffering, loss of society, loss of consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education; disfigurement, mental anguish, and any other intangible loss.

4. Loss of Enjoyment of Life

a) As stated in *Fantozzi v. Sandusky Cements Products Co.* (1992), 64 Ohio St. 3d 601, where an individual suffers personal injuries, the question of damages for loss of ability to perform the plaintiff's usual function may be submitted to the jury in an instruction, and set forth in a special interrogatory and separate finding of damages, provided that the Court instructs the jury it shall not award additional damages for that same loss.

5. Loss of Consortium/Loss of Affection

a) In *Gallimore v. Children's Hospital Medical Center* (1993), 67 Ohio St. 3d 244, the Supreme Court of Ohio held that a parent may recover damages for loss of filial (child's) consortium.

b) Consortium includes services, society, companionship, comfort, love and solace.

c) An action for loss of consortium occasioned by a spouse's injury is a separate and distinct cause of action. *Bowen v. Kil-Kare, Inc*. (1992), 63 Ohio St. 3d 84.

d) In *Rolf v. Tri State Motor Transit Co.* (2001), 91 Ohio St. 3d 380, the court held that adult emancipated children of an injured parent could recover for loss of parental consortium under Ohio law.

## C. Collateral Source

1. Can be admissible in any "tort action." (R.C. 2315.20).

a) Not admissible if the collateral source that was introduced into evidence has a mandatory federal, contractual or statutory right of subrogation.

b) Plaintiff allowed to introduce evidence of amounts paid to secure benefits from collateral source that was introduced into evidence.

c) The collateral-source rule does not bar evidence of the amount accepted by a medical care provider from an insurer as full payment. Both the amount originally billed and the amount accepted as payment in full are admissible to prove the reasonable value of the medical treatment in a personal injury action. *Robinson v. Bates* (2006), 112 Ohio St.3d 17, 2006-Ohio-6362.

(1) In *Jaques v. Manton*, Slip Opinion No. 2010-Ohio-1838 the Court determined that the defendant in a personal injury

lawsuit is not barred by Ohio's Collateral Source Statute, R.C. 2315.20, from introducing evidence at trial of "write offs" accepted by medical service providers that reduce the actual cost of the plaintiff's medical treatments to a lower amount than those providers originally billed for their services. The Court determined that the statute does not address evidence of such "write-offs" by medical providers, and, therefore, the Court's holding in the 2006 opinion in *Robinson v. Bates* still applies and controls.

(2) On July 25, 2012, the Supreme Court of Ohio agreed to hear defendant's appeal in *Moretz v. Muakkassa*, Summit App. No. 25602, 2012-Ohio-1177. In *Moretz* the trial court excluded evidence of medical write-offs because the defense had not presented supporting expert testimony to prove the reasonableness of the reduced charges. On appeal, the Ninth Appellate District Court affirmed. The Supreme Court of Ohio accepted jurisdiction; a decision is anticipated in the Spring of 2013.

4. Life or Disability Insurance Payments

(a) Not admissible, unless the plaintiff's employer paid for the life or disability policy and the employer is a defendant in the tort action.

## D. Pre-Judgment/Post-Judgment Interest

1. Amount Allowed By Statute

a) The amount of interest allowed by statute for both pre- and post-judgment interest is a variable rate based upon the federal short term rate published on Oct. 15 of the previous year. This is codified in O.R.C. 5703.47 and is published by the Ohio Tax Commissioner.

b) A table listing the interest rate back to 1983 can be found at: http://tax.ohio.gov/divisions/ohio_individual/individual/interest_rates.stm

2. Pre-Judgment Interest

a) Pre-judgment interest traditionally compensated a successful plaintiff in a tort action from the time his injury occurred rather than the time of judgment.

b) In 1982, the Ohio legislature codified pre-judgment interest with the specifics of when and how to apply the interest in a tort action.

c) In 1994, the Ohio Supreme Court, in *Moskovitz v. Mt. Sinai Medical Ctr.* (1994), 69 Ohio St. 3d 638, clarified the factors used in determining whether a good faith effort had been made to settle a case.

d) The Court held that memorandums and documents traditionally protected by the attorney-client privilege are discoverable during the post-trial hearing to help determine if the defendants acted in good faith.

e) Additionally, in 1998 the Court held in *Landis v. Grange Mutual Ins. Co.* (1998), 82 Ohio St. 3d 339, that claims for uninsured/underinsured motorist coverage were contractual claims and accordingly were subject to pre-judgment interest regardless of good faith settlement attempts.

## E. Damages for Emotional Distress

1. Non-Physical Injury:

a) In *Paugh v. Hanks* (1983), 6 Ohio St. 3d 72, the Ohio Supreme Court held that a claim for negligent infliction of serious emotional distress may be maintained without proof of a contemporaneous physical injury where:

(1) the plaintiff was a bystander;

(2) the plaintiff reasonably appreciated the peril which took place, whether or not the victim suffered actual physical harm; and

(3) the plaintiff suffered serious emotional distress as a result of this cognizance or fear of peril.

b) Emotional injury sustained must be found to be both serious and reasonably foreseeable in order to allow a recovery.

c) Serious emotional distress describes emotional injury which is both severe and debilitating. Thus, serious emotional distress may be found where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case.

(1) A plaintiff must present some “guarantee of genuineness” in support of his or her claim to avoid summary judgment

(2) Expert medical testimony will help establish the validity of

the claim of serious emotional distress, though expert medical testimony concerning the plaintiff's mental distress is not always required. *Foster v. McDevitt* (1986), 31 Ohio App.3d 237, 239

(3) As an alternative to expert testimony, a plaintiff may offer the testimony of lay witnesses acquainted with the plaintiff to show significant changes that they have observed in the emotional or habitual makeup of the plaintiff.

d) The facts to be considered in order to determine whether a negligently inflicted emotional distress injury was reasonably foreseeable include:

(1) Whether the plaintiff was located near the scene of the accident, as contrast with one who was a distance away;

(2) Whether the shock resulted from a direct emotional impact upon plaintiff from sensory and contemporaneous observance of the accident, as contrast with learning of the accident from others after its occurrence; and,

(3) Whether the plaintiff and victim (if any) were closely related, is contrasted with an absence of any relationship on a presence of only a distance relationship.

e) Ohio does not recognize a claim for negligent infliction of serious emotional distress where the distress is caused by the plaintiff's fear of a nonexistent physical peril. *Heiner v. Moretuzzo* (1995), 73 Ohio St.3d 80, at syllabus.

2. Physical Injury:

a) In *Binns v. Fredendall* (1987), 32 Ohio St. 3d 244, the Ohio Supreme Court held that negligently inflicted emotional and psychiatric injury sustained by a plaintiff who also suffers contemporaneous physical injury in a motor vehicle accident need not be severe and debilitating

b) Recovery may include damages for Mental anguish, emotional distress, anxiety, grief or loss of enjoyment of life caused by the death or injury of another, provided the plaintiff is directly involved and contemporaneously injured in the same motor vehicle accident with the deceased or other injured person.

3. Limited Recovery

a) Ohio courts have limited recovery for negligent infliction of emotional distress in such instances as where one was a bystander to an accident or was in fear of physical consequences to his own person. See *High v. Howard* (1992), 64 Ohio St. 3d 82.

4. Statute of Limitations

a) Negligent infliction of emotional distress is governed by a two-year statute of limitations. R.C. 2305.10; *Lawyer's Cooperative Publishing Co. v. Muething* (1992), 65 Ohio St.3d 273.

## F. Wrongful Death and/or Survival Action Damages

1. Who can recover

a) 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.

b) The date of the decedent's death fixes the status of all beneficiaries of the civil action for wrongful death for purposes of determining the damages suffered by them and the amount of damages to be awarded. A person who is conceived prior to the decedent's death and who is born alive after the decedent's death is a beneficiary of the action.

2. What can be recovered

a) Compensatory damages may be awarded in a civil action for wrongful death and may include damages for the following:

(1) Loss of support from the reasonably expected earning capacity of the decedent;

(2) Loss of services of the decedent;

(3) Loss of the 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;

(4) Loss of prospective inheritance to the decedent's heirs at law

at the time of the decedent's death;

(5) The mental anguish incurred by the surviving spouse, dependent children, parents, or next of kin of the decedent.

b) a party to a civil action for wrongful death may present evidence of the cost of an annuity in connection with an issue of recoverable future damages. If that evidence is presented, then the jury or court may consider that evidence in determining the future damages suffered by reason of the wrongful death. If that evidence is presented, the present value in dollars of an annuity is its cost.

## G. Punitive Damages

1. Generally

a) A claim for punitive damages gives rise to a right to a bifurcated trial. Liability for punitive damages in a tort action shall be, upon motion of any party, bifurcated. The trial then has two parts. The first establishes liability and compensatory damages only. If the jury or trier of fact determines that the plaintiff is entitled to recover compensatory damages, only then is evidence permitted on whether plaintiff is entitled to punitive damages. (R.C. § 2315.21(C))

b) Punitive damages are not recoverable unless both of the following apply, which are the plaintiff's burden to prove:

(1) The actions or omissions of that defendant demonstrate malice or aggravated or egregious fraud, or that defendant as principal or master knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate.

(2) The trier of fact has returned a verdict or has made a determination of the total compensatory damages recoverable by the plaintiff from that defendant.

c) Recent Case Law

(1) *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552. In *Havel,* the Supreme Court of Ohio upheld the constitutionality of R.C. 2315.21(B), a statute which makes bifurcation of tort actions involving both compensatory and punitive damage claims mandatory upon request. The Court held that R.C. 2315.21(B) creates, defines, and regulates a substantive, enforceable right to separate stages of trial

relating to the presentation of evidence for compensatory and punitive damages in tort actions. The Court explained that because it is a substantive statute, it takes precedence over Civ.R. 42(B) which gives a trial court discretion to bifurcate claims for trial purposes, as compared to R.C. 2315.21(B) which requires bifurcation when a motion requesting it is filed. The Court determined that because R.C. 2315.21(B) is a substantive law, it prevails over the procedural bifurcation rule promulgated by the Ohio Supreme Court in Civ. R. 42(B), and thus, does not violate the separation of powers required by Article IV, Section 5(B) of the Ohio Constitution.

(2) *Flynn v. Fairview Village Retirement Community, Ltd.*¸ *132* Ohio St.3d 199, 2012-Ohio-2582. In *Flynn,* the Supreme Court of Ohio held that a trial court's denial of a motion filed pursuant to R.C. 2315.21(B) to bifurcate a jury trial of a tort case seeking an award of punitive damages is final and immediately appealable pursuant to R.C. 2505.02(B)(6). The appellate court had dismissed a defendant's appeal from the trial court's denial of a pretrial motion to bifurcate the punitive damage claim in a nursing home tort case. In reversing the court of appeals, the Supreme Court stated that, by denying the motion to bifurcate under R.C. 2315.21(B), the trial court "implicitly" determined that the amendment in 2004 to R.C. 2315.21(B) making bifurcation mandatory was unconstitutional on the grounds that the statute conflicts with the bifurcation rule found in the Ohio Rules of Civil Procedure. While Civ.R. 42(B) gives trial court's the discretion to bifurcate trials generally, the statutory provision makes bifurcation of a jury trial involving a punitive damage claim in a tort action mandatory upon the filing of a motion. The appellate court's rationale for dismissing the appeal was rejected earlier this year in *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552, where the Supreme Court held that the bifurcation mandated by R.C. 2315.21(B) is constitutional and does not conflict with Civ.R. 42(B).

(3) *Neal-Pettit v. Lahman*, 125 Ohio St.3d 327, 2010-Ohio-1829. In *Neal-Pettit*, the Supreme Court of Ohio held that public policy does not prohibit an insurance policy from providing coverage for an award of attorney fees in a civil lawsuit when that award is incident to recovery of punitive damages. Although Ohio, R.C. 3937.182(B) prohibits insurance coverage of punitive damages, unless policy language clearly excludes coverage for an attorney fees award, an

insurer is liable to pay for such an award. The Court noted that because an exclusion for "punitive or exemplary damages, fines or penalties" does not refer in any way to attorney fees or litigation expenses, coverage for attorney fees is not clearly and unambiguously excluded from coverage and that the drafter of the policy language is responsible for ensuring that the policy states clearly what it does and does not cover.

2. Required Elements for a punitive damages claim

a) The Supreme Court of Ohio held in *Cabe v. Lunich* (1994), 70 Ohio St. 3d 598: "where liability is determined and compensatory damages are awarded, punitive damages may be awarded upon a showing of actual malice."

b) "Actual malice" has been defined as "that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge," or "a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." (*Preston v. Murty* (1987), 32 Ohio St. 3d 334, approved and followed).

3. Caps on punitive damages

a) Punitive damages are capped at:

(1) two times compensatory damages, or

(2) if the defendant is a "small employer" or an individual, the lesser of two times compensatory damages, or 10% of the employer's or individual's net worth when the tort was committed, up to a maximum of $350,000.(R.C. 2315.21)

b) "Small employer" is defined as employing not more than 100 persons on a full time permanent basis, or if a manufacturer not employing more than 500 persons on a full-time permanent basis.

c) Any attorneys fees awarded as a result of a claim for punitive or exemplary damages shall not be considered for purposes of determining the cap on punitive damages.

d) Caps on punitive damages do not apply if the defendant has been convicted of or plead guilty to a felony involving intent or knowledge as an element of the criminal offense.

## H. Diminution in Value of Damaged Vehicle

1. Measure of damages

    a) The owner of a damaged motor vehicle may recover the difference between its market value immediately before and immediately after the collision. When a vehicle cannot be repaired, the general rule is that the owner may recover the difference between the market value of the vehicle immediately before the damage and the salvage value of the wreckage. See, *Rakich v. Anthem Blue Cross & Blue Shield*, 172 Ohio App.3d 523, 2007 Ohio 3739, 875 N.E.2d 993.

## I. Loss of Use of Motor Vehicle

1. Measure of damages

    a) One who recovers the full value of a motor vehicle completely destroyed by the negligent acts of another, or the full value thereof less wreckage or salvage value where the vehicle is damaged beyond repair, may not also recover for the loss of the use of the vehicle.

    b) Where a motor vehicle has been damaged through the negligent acts of another only to such extent that it is reasonably capable of being repaired within a reasonable period of time after its damage, the owner may recover not only the difference in value of the vehicle immediately before and immediately after the damage, but may also recover the loss of the use of the vehicle for such reasonable period of time as is necessary to make the repairs.

    c) Where the owner of a motor vehicle seeks to recover the loss of the use of such vehicle damaged through the negligent acts of another, he must allege and there must be proof that his damaged vehicle is reasonably capable of being repaired within a reasonable period of time after its damage, and the burden of proving such fact rests upon him.

# Evidentiary Issues

## A. Preventability Determination

1. There is no Ohio case law directly addressing whether a motor carrier's preventability determination is admissible evidence

2. The most likely method of excluding Evidence of a Preventability Determination is under Evid. R. 403. Using this rule, courts of other states have held preventability determinations inadmissible.

    a) *Villalba v. Consol. Freightways Corp.* (N.D. Ill. 2000), 2000 U.S.

Dist. LEXIS 11773, involved a truck-automobile collision. The driver of the automobile, Elsa Villalba, sued the owner of the truck, Consolidated Freightways, and its driver for negligence. After the accident, Consolidated Freightways conducted a post-accident review. Ms. Villalba sought to introduce evidence of Consolidated Freightways' internal investigation as a means of inferring negligence. The *Villalba* court excluded the evidence, explaining, "The problem with that inference is that the standard for determining preventability and the standard for determining negligence...are not necessarily the same." *Id.* The *Villalba* court concluded that the standard for negligence and the standard for preventability were not the same. The danger that these disparate benchmarks would confuse the jury in its obligation to determine legal liability constitutes unfair prejudice. Consequently, the Villalba court excluded the evidence of the accident preventability analysis.

b) New York courts similarly disfavor this evidence: "The contention that an accident is "preventable" in an accident report adds little or nothing to the liability analysis at hand." *Beaumont v. Smyth* (Onondaga Cty. (N.Y.) Sup. Ct. 2004), 781 N.Y.S.2d 622, fn 3

c) Georgia courts have held that a company's internal definition of preventability is too different from the legal standard for liability that admission of a preventability analysis would be unfairly prejudicial. *Tyson v. Old Dominion Freight Line, Inc.* (Ga. Ct. App. 2004), 270 Ga. App. 897, 900-01, 608 S.E.2d 266. In *Tyson*, the plaintiff, while driving a truck, struck the front of a second truck belonging to Old Dominion. The Tyson plaintiff sued Old Dominion and its driver for negligence. The Old Dominion Accident Review Committee – an internal review board charged with investigating accidents involving its drivers – conducted an accident preventability analysis of the incident. Old Dominion moved in limine to exclude evidence of the committee's findings. The trial court granted Old Dominion's motion in limine. The Georgia Court of Appeals upheld the trial court's decision, noting that the Old Dominion's internal definition of preventable accident differed from the legal standard for liability in tort. Given the difference, evidence of the committee's accident preventability analysis was properly excluded as unfairly prejudicial.

3. It is recommended that a motor carrier clearly state in a preamble to its preventability policies, that preventability is used for internal safety and discipline purposes and is not a civil or tort standard.

## B. Traffic Citation from Accident

1. A Traffic Citation is not admissible as an admission by party-opponent under Evid. R. 801(D)(2). *Baker v. Bunger*, 12 Dist. No. CA88-02-020,

1989 Ohio App. LEXIS 372 (Feb. 6, 1989)

2. Evid. R. 410(A)(3) provides that evidence of a plea of guilty in a violations bureau is not admissible in any civil proceeding against the defendant who made the plea:

   a) In *Forbus v. Davis*, 5t Dist. No. 1999-CA-0382, 2000 Ohio App. LEXIS 4516 (Ohio Ct. App., Stark County Sept. 25, 2000), Appellant and appellee were involved in a motor vehicle accident. Appellee was issued a citation that she subsequently signed and mailed to the municipal court. Appellant filed a negligence action against appellee. Appellee filed a motion in limine to exclude evidence of her traffic citation. The trial court sustained the motion and the jury returned a verdict in favor of appellee. Appellant filed a motion for judgment notwithstanding the verdict, or in the alternative, a motion for new trial, alleging error in the trial court's refusal to allow evidence of the traffic citation. Both motions were overruled. The court affirmed. The court held that a grant or denial of a motion in limine did not preserve error for appellate review. Additionally, appellee's remittance by mail of a fine to the traffic violations bureau constituted a guilty plea. However, evidence of a plea of guilty in a violations bureau was not admissible in any civil or criminal proceeding against appellee.

   b) In *Goodenow v. Carbone*, 11th Dist. No. 93-L-061, 1993 Ohio App. LEXIS 6064 (Dec. 17, 1993), the court found that the trial court did not err in prohibiting questioning of the defendant regarding his plea of guilty to the charge of left of center because Evid. R. 410(A)(3) evidence of his guilty plea was not admissible.

3. A plea of “no contest” is similarly inadmissible. (Evid. R. 410(A)(2)

## C. Failure to Wear a Seat Belt

1. It is statutory law in Ohio that all drivers and front seat passengers of automobiles wear occupant restraining devices; However, by statute, evidence that a driver failed to wear a seatbelt is not admissible as evidence of contributory negligence.

2. Pursuant to O.R.C. § 4513.263, the failure to wear a restraining device shall not:

   a) Be considered as evidence of negligence or contributory negligence; Except: Where an in injury claim has been made against the manufacturer or seller of the car, where the injury or death was allegedly enhanced or aggravated by some design defect in the car or that the car was not crash worthy. *Gable v. Gates Mills*, 103 Ohio St 3d 449, 2004-Ohio-5719.

   b) Be used as basis for criminal prosecution (unless for violation of this section);

   c) Failure to wear a device is admissible to establish that the failure contributed to the harm alleged in the complaint.

   d) Failure to wear a seatbelt can diminish recovery of non-economic compensatory damages.

## D. Failure of Motorcyclist to Wear a Helmet

1. Ohio law does not require persons over 18 who do not bear the designation “novice” on their motorcycle operator’s license to wear helmets. O.R.C. §4511.53(B)

2. Ohio courts have denied requests for jury instructions regarding plaintiff’s failure to wear a helmet where there was no evidence presented that the use of a helmet would have reduced plaintiff’s injuries. See *Kiefer v. Emery*, 3rd Dist. No. 17-94-19, 1995 Ohio App. LEXIS 1517 (Apr. 5, 1995); *Smiley v. Leonard*, 2nd Dist. No. 14071, 1994 Ohio App. LEXIS 572 (Feb. 16, 1994)

3. However, Ohio’s comparative negligence statute, O.R. C. §2315.32, permits defendants to assert the negligence of the plaintiff as an affirmative defense

## E. Evidence of Alcohol or Drug Intoxication

1. Implied Consent - Any person who operates a vehicle, streetcar, or trackless trolley upon a highway or any public or private property used by the public for vehicular travel or parking within this state or who is in physical control of a vehicle, streetcar, or trackless trolley shall be deemed to have given consent to a chemical test or tests of the person's whole blood, blood serum or plasma, breath, or urine to determine the alcohol,

drug of abuse, controlled substance, metabolite of a controlled substance, or combination content of the person's whole blood, blood serum or plasma, breath, or urine if arrested for a violation of division (A) or (B) of section 4511.19 of the Revised Code, section 4511.194 of the Revised Code or a substantially equivalent municipal ordinance, or a municipal OVI ordinance. §4511.191(A)(2).

2. A blood-alcohol test result is relevant to the issue of comparative negligence. Thus, that result is admissible into evidence in a civil case only in conjunction with expert testimony that explains the significance of the percentage of alcohol found in the individual..

3. Evidence of a person's blood alcohol level is not admissible without expert testimony to explain the significance of the percentage of alcohol found in the person's blood because the evidence as to that percentage does not tend to prove that the person was under the influence of alcohol. A jury, without the guidance of expert testimony, should not be permitted to speculate as to the percentage's significance. *Clark v. Curnutte*, 9th Dist. No. 05CA008732, 2006-Ohio-1545; *Am. Select Ins. Co. v. Sunnycalb*, 12th Dist. No. CA2005-02-018, 2005-Ohio-6275 (" A blood-alcohol test result is relevant to the issue of comparative negligence.")

   a) For purposes of criminal prosecution, §4511.19 requires proof that the allegedly intoxicated persons' ability to drive was actually impaired by alcohol

## F. Testimony of Investigating Police Officer

Where a police officer witness was not present at the time of an accident and did not witness the accident and, therefore, he has no personal knowledge of the accident, and he is not an accident reconstruction expert who has the experience and knowledge to observe the scene and add some scientific, technical, or specialized knowledge to the evidence which would assist the trier of fact to understand the evidence and testimony, a trial court errs in permitting the witness to render either an expert or lay opinion as to who was the proximate cause of the accident and who was negligent, and in permitting the witness to give his opinion as to how the accident occurred. This testimony does not serve to enlighten the jury with respect to a matter outside its competence, but, rather, is a clear invasion of the jury's province on the precise ultimate fact and issue. *Hatfield v. Andermatt*, 54 Ohio App. 3d 188 (Franklin County 1988).

## G. Expert Testimony

1. In order for a witness to qualify as an expert, he must have some scientific, technical, or other specialized knowledge that assists the trier of fact to understand the evidence. Ohio R. Evid. 702.

2. The *Daubert* Standard (*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)

   a) The United States Supreme Court held in *Daubert* that Rule 702 vests the trail court with the role of gatekeeper. This gatekeeping function imposes an obligation upon a trial court to assess both the reliability of an expert's methodology and the relevance of any testimony offered before permitting the expert to testify. This standard was adopted by the Supreme Court of Ohio in *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607 (1998).

   b) Expert scientific testimony is admissible if it is reliable and relevant to the task at hand. To determine reliability a court must assess whether the reasoning or methodology underlying the testimony is scientifically valid. In evaluating the reliability of scientific evidence, several factors are to be considered: (1) whether the theory or technique has been tested, (2) whether it has been subjected to peer review, (3) whether there is a known or potential rate of error, and (4) whether the methodology has gained general acceptance. Although these factors may aid in determining reliability, the inquiry is flexible. The focus is solely on principles and methodology, not on the conclusions that they generate.

3. The Daubert standard is incorporated into Ohio Evid. R. 702.

4. Expert testimony as to ultimate facts

   a) Evid R. 704 - Testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact.

   b) "The rule must be read in conjunction with Rule 704 and Rule 702, each of which requires that opinion testimony be helpful to, or assist, the trier of the fact in the determination of a factual issue. Opinion testimony on an ultimate issue is admissible if it assists the trier of the fact, otherwise it is not admissible. The competency of the trier of the fact to resolve the factual issue determines whether or not the opinion testimony is of assistance." Staff Note to Evid. R. 704

   c) Generally, the question as to the point of impact or collision on the road in a motor vehicle accident cases is not one calling for skilled or expert opinion. The point of impact on the road of two colliding automobiles is a subject within the experience, knowledge or comprehension of the jury. Where there is conflicting eyewitness testimony upon a precise or ultimate fact in issue that is to be determined by a jury, an expert witness may not, in response to a

hypothetical question, express his opinion on such fact in issue. Where expert opinion evidence on the ultimate fact at issue does not serve to enlighten the jury with respect to a matter outside its competence, the evidence is a clear invasion of the jury's province to determine that ultimate fact. *Smith v. Freeman*, 4th Dist No. 962, 1983 Ohio App. LEXIS 14568 (Nov. 21, 1983)

## H. Collateral Source

1. Common law Collateral Source Rule

    a) Defendants cannot introduce any evidence of payments made to the benefit of the injured party from any source other than the defendant.

    b) Bars defendants from introducing evidence of insurance payments and medical write offs

2. R.C. §2317.421 (1970)

    a) Medical bills are prima facie evidence of the reasonableness of the charges stated therein.

        (1) Plaintiffs can submit their full medical bills as evidence of damages

    b) "Compliance with the statute creates a rebuttable presumption of the reasonableness of all charges reflected in the qualifying medical bills." Stiver v. Miami Valley Cable Council, 105 Ohio App. 3d 313, 320.

3. *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362 (2006)

    a) Evidence of medical write-offs is not a collateral source and is therefore admissible

    b) "Both an original medical bill rendered and the amount accepted as full payment Bare admissible to prove the reasonableness and necessity of charges rendered for medical and hospital care."

    c) Defendants may offer into evidence the amount accepted by the medical provider even if it is less than the amount billed because write offs are not a collateral source.

4. R.C. §2315.20(A) (2005)

    a) Defendants may introduce evidence of any beneficial payments made to plaintiff as long as those payments are not subject to a statutory or contractual right of subrogation

5. *Jaques v. Manton*, 125 Ohio St. 3d 342 (2010)

   a) R.C. §2315.20(A) does not alter Court's ruling in *Robinson*

6. *Moretz v. Muakkassa*, 9th Dist. No. 25602, 2012-Ohio-1177 (2012)

   a) Expert testimony is required to present evidence of medical write offs. No guidance from the court as to what qualifies a person as an expert in this field.

## I. Recorded Statements

1. Evid R. 106 – "when a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which is otherwise admissible and which ought in fairness to be considered contemporaneously with it."

2. The admissibility of a recorded statement turns on whether or not the statement is hearsay, whether a hearsay exception applies, and whether the recording can be properly authenticated.

3. Evid R. 801(C) – "hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"

4. Under Evid. R. 801(D)(1) the following statements are not hearsay:

   a) an admission of a party

   b) prior statements by a witness that are introduced to impeach the witness because they are inconsistent with his present testimony or

   c) that are consistent with the witness's present testimony and are introduced to bolster the witness's credibility against a charge of recent fabrication, or

   d) a previous statement identifying a person soon after perceiving that person

5. Recordings offered for reasons other than proving the truth of the matter asserted are admissible if properly authenticated

## J. Prior Convictions

1. Evid. R. 403 prohibits introduction of any evidence if its probative value is outweighed by its prejudicial effect.

2. Evid. R. 404 prohibits introduction of evidence of past crimes of a

defendant in order to show actions in conformity therewith

3. Evidence that a witness other than the accused was convicted of a crime that is punishable by death or imprisonment of more than one year is admissible to attack the witness's credibility

4. Evidence that the accused was convicted of a crime is admissible to attack his credibility as a witness if the crime is punishable by death or imprisonment of more than one year; this rule is subject to the probative value vs. unfair prejudice determination mandated by Evid. R. 403

## K. Driving History

1. Evid. R. 403 prohibits introduction of any evidence if its probative value is outweighed by its prejudicial effect.

2. Evid. R. 404 prohibits introduction of evidence of past crimes of a defendant in order to show actions in conformity therewith

3. Evidence that a witness other than the accused was convicted of a crime that is punishable by death or imprisonment of more than one year is admissible to attack the witness's credibility

4. Evidence that the accused was convicted of a crime is admissible to attack his credibility as a witness if the crime is punishable by death or imprisonment of more than one year; this rule is subject to the probative value vs. unfair prejudice determination mandated by Evid. R. 403

## L. Fatigue

Hours of Service violations may be admitted to attack the credibility of the driver. *L.S. v. Scarano*, 2011 U.S. Dist. LEXIS 120457 (S.D. Ohio Oct. 18, 2011). In L.S., a tractor trailer collided with a horse drawn buggy causing injuries to the minor child L.S. The driver filed a motion in limine to exclude evidence of his hours of service violations. The court denied the motion because data contained in the driver's written log was inconsistent with evidence contained in the tractor trailer's Electronic Control Module. The judge permitted introduction of the hours of service violations and issued a limiting instruction to the jury that the evidence was only to be used to assess the driver's credibility but not for purposes of determining his liability.

## M. Spoliation

1. Intentional Spoliation

   a) Ohio recognizes an independent cause of action for intentional spoliation or interference with or destruction of evidence

   b) The elements of 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.* (1993), 67 Ohio St.3d 28, 615 N.E.2d 1037. See also Davis v. Wal-Mart Stores, 93 Ohio St.3d 488 (2001).

2. Negligent Spoliation

a) Ohio does not recognize an independent cause of action for negligent spoliation of evidence; however, negligent spoliation can be the basis for sanctions in ongoing litigation. *See Simeone v. Girard City Bd. of Educ.*, 171 Ohio App.3d 633, 2007-Ohio-1775.

b) Sanctions for spoliation may be awarded upon proof that: (1) the evidence was relevant; (2) a party or its expert has had an opportunity to examine the unaltered evidence; and (3) even though that party was contemplating litigation, the evidence was intentionally or negligently destroyed or altered without providing an opportunity for inspection by the opposing party. See *Watson v. Ford Motor Co.*, 6th Dist. No. E-06-074, 2007-Ohio-6374, ¶51; *Cincinnati Ins. Co. v. GM Corp.*, 6th Dist. No. 94OT017, 1994 Ohio App. LEXIS 4960 (Prejudice will be found to exist if there is "a reasonable possibility, based on concrete evidence, that access to the evidence which was destroyed or altered . . . would produce evidence favorable to the objecting party.")

c) If these elements are established, the moving party is entitled to a rebuttable presumption that it was prejudiced by the destruction of evidence, meaning that the burden of persuasion shifts to the other party to show that no prejudice exists. *Bright v. Ford Motor Co.*(1990), 63 Ohio App.3d 256, 578 N.E.2d 547.

## Settlement

### A. Offer of Judgment

1. An Offer of Judgment is a settlement offer proposed by a defending party in which that party proposes a judgment on specified terms in lieu of trial

2. Ohio has explicitly rejected the treatment given to Offers of Judgment under the federal rules of civil procedure

a) Fed. R. Civ. P. 68(d) – if the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

b) Ohio R. Civ. P 68 – an offer of judgment by any party, if refuted by an opposing party, may not be filed with the court by the offering

party for purposes of a proceeding to determine costs. In Ohio, an offer of judgment is essentially meaningless.

(1) "An offer of judgment by any party may not be filed with the court for use in a subsequent proceeding to determine costs. Offers of settlement and voluntary resolution of litigation are highly encouraged under the Civil Rules. However, it is felt that use of offers of judgment for assessment of costs against plaintiff is a one-sided proposition that unfairly restricts plaintiff's right to a jury trial. For this reason Federal Rule 68 has not been adopted in Ohio and previous Ohio Statutes which permitted offers of judgment for cost determination are no longer in effect. Obviously there is no longer any point in making an offer of judgment. Hereafter all offers will be for settlement purposes only." *Paoletti v. Travelers Indem. Co.*, 6th Dist. No. L-75-196, 1977 Ohio App. LEXIS 10181, 16-17 (May 6, 1977)

## B. Liens

1. Workers' Compensation (O.R.C. § 4123.931 – effective for claims arising on or after April 9, 2003, and determined by the Supreme Court of Ohio that it is constitutional "as written," although it recognized other constitutional issues may arise "as applied" to facts of a case. *Groch v. General Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546.

   a) Statutory Subrogee (Administrator of the Bureau of Workers' Compensation (for state fund claims), a self-insuring employer, or an employer who contracts for direct payment of medical services) holds a statutory right to recover against an individual, private insurer, or private or public entity liable to a workers' compensation recipient pursuant to the formula contained in O.R.C. § 4123.931. A workers compensation insurer is not a "statutory subrogee."

   b) The amount that the Statutory Subrogee can recover (the workers' compensation lien) is determined by dividing the Subrogation Interest (total past, present, and estimated future workers' compensation benefits paid) by the sum of the Subrogation Interest and the Uncompensated Damages (total damages less the Subrogation Interest) multiplied by the Net Amount Recovered (total amount of the verdict or settlement minus attorney fees and expenses).

   c) Statutory Subrogee and the Claimant have the ability to use a more "fair and reasonable" basis to determine the lien or agree to another amount. Parties may also request a conference with a mediator (appointed by the Administrator) or agree to some other form of ADR.

c) Statutory Subrogee may, but is not required, to move to intervene in a pending action to enforce its subrogated claim pursuant to Ohio Rule of Civil Procedure 24.

(1) To avoid the possibility of multiple obligations, a defendant should set forth the affirmative defense that plaintiff has failed to join a necessary party if the Statutory Subrogee is not already a party to the action.

d) O.R.C. § 4123.931(G) demands that the Statutory Subrogee be given notice and a reasonable opportunity to assert its subrogation rights. If such notice is not given, the Claimant and Third Party will be jointly and severely liable for any payments made without affording the Statutory Subrogee notice.

e) No resolution or recovery can become "final" unless the Claimant provides the Statutory Subrogee notice and an opportunity to be heard. Claimant and the Third Party (including liability insurers) may also be liable for entire Subrogation Interest, without application of any setoffs.

2. Med Pay Liens

a) Contract Provisions - Med pay subrogation clauses are not against public policy.

b) Separate Action - An insurer, subrogated to the medical payments claim assigned by the insured, may prosecute this claim in a separate action against the tortfeasor unless the tortfeasor requires joinder of the insurer-subrogee to an action by the insured against the tortfeasor. Nationwide Ins. Co. v. Steigerwalt (1970), 21 Ohio St. 2d 87.

c) Insurer's Entitlement –

(1) The insurer is entitled to recover the full subrogated amount and, typically, no deductions for the insured's expenses in maintaining the suit are allowed. *State Auto. Mutual Ins. Co. v. Manges* (Aug. 19, 1993), 7th Dist.,No. 715, 1993 Ohio App. LEXIS 4015.

(2) If an insured is required to reimburse the insurer for amounts paid under a policy, the recovery may be reduced, by reasons of equity, for the efforts made by the insured's attorney to recover that which is owed to the insurer. *Thatcher v. Sowards*, 2000-Ohio-1970.

3. Med Pay Liens and UM/UIM Set-offs

a) In *Berrios v. State Farm Insurance Co.*, 98 Ohio St.3d 109, 2002-Ohio-7115, the Supreme Court of Ohio held that an insurer has no right of subrogation against its insured to reduce the amount of UIM coverage paid to the insured, even though it results in a "double recovery".

(1) The court based its decision on *Grange Mut. Cas. Co. v. Lindsley* (1986), 22 Ohio St.3d 153 and the need to protect the amount of coverage required to be provided by R.C. § 3937.18.

(2) To do otherwise would be to "allow insurers to use subrogation clauses to avoid their obligations" under R.C. § 3937.10.

b) Berrios was abrogated by SB 97, which eliminated mandatory UM/UIM coverage and permits insurers to include limitations and exclusionary clauses in UM/UIM policy provisions.

(1) In *State Farm Mut. Auto. Ins. Co. v. Grace*, 123 Ohio St. 3d 471, 2009-Ohio-5934, the Supreme Court of Ohio held that "R.C. 3937.18(I), as amended by S.B. 97, permits an insurer to limit coverage so as to preclude payment pursuant to UM/UIM coverage for medical expenses that have previously been paid or are payable under the medical payment coverage in the same policy."

4. Hospital and Doctor's Liens

a) Creatures of Contract: A number of states have statutes regarding hospital's and doctor's liens, and the recovery thereof, but Ohio has no such statute. Rather, such liens and the right of subrogation of amounts recovered from third parties, is a creature of contract. Courts will enforce the contractual lien to the extent that the contract is valid.

b) The majority of litigation in this area has arisen in situations where an attorney of an injured plaintiff has signed an agreement promising to reimburse a hospital or doctor for services provided out of any monies received through judgment or settlement in the case.

(1) In *Manor Care v. Ruppert* (1997), 123 Ohio App.3d 481, the attorney sent a letter to the health services provider stating: "Please be advised that our office is hereby guaranteeing that before any funds are disbursed to Bonnie Thomas or her husband, we will pay any balance due and owing Manor [Care] out of any settlement proceeds or jury demand."

(2) This obligation was akin to a “contingent-suretyship.” A suretyship is the “contractual relation whereby one person, the surety, agrees to answer for the debt, default or miscarriage of another, the principal * * *.” Id. Thus, to that extent, the plaintiff’s attorney was a surety for the hospital bill up to the amount received.

5. Medicaid Liens

a) The Ohio Revised Code gives a “right of recovery” to the Ohio Department of Job and Family Services (ODJFS) against tortfeasors for collection of medical expense payments made on behalf of Medicaid recipients. O.R.C. § 5101.58(A). Because the statute provides a “right of recovery” and not a right of “subrogation,” a tortfeasor may be liable to reimburse Medicaid even if the Medicaid recipient cannot recover from the liable third party.

(1) In *Ohio Dep't of Human Serv . v. Kozar* (1995), 99 Ohio App. 3d 713, the court dismissed the state's subrogation claim against the tortfeasor because the injured party had no cause of action against the tortfeasor. The court reasoned that the prior statute provided subrogation rights against the tortfeasor and not an independent cause of action against the tortfeasor.

b) After Kozar, the legislature amended the statute to provide the state an independent “right of recovery” from the tortfeasor. Therefore, the state may bring its own cause of action directly against the tortfeasor for recovery of benefits paid by the state. Additionally, the statute requires the Medicaid recipient to notify ODJFS of the identity of any liable third parties. O.R.C. § 5101.58(C).

c) However, like the BWC subrogation statute, the Medicaid statute does not require a third party to notify ODJFS, and any settlement between the tortfeasor and the Medicaid recipient will not prevent ODJFS from asserting its lien against a liable party. O.R.C. § 5101.58(A).

5. Medicare Liens

a) Medicare Secondary Payer Act: Provides that Medicare is the “secondary payer” for eligible Medicare beneficiaries' medical expenses when a “primary payer” is available. Primary payers include health insurance, worker’s compensation insurance, any liability or no-fault insurance and any tortfeasor. See 42 USCS §1395y(b)(2). The statute provides that if Medicare pays compensation when it is the “secondary payer,” Medicare has a

right of subrogation against any “primary payer.”

b) Even though the Medicare statute uses the word “subrogation,” Medicare's right to recovery from “primary payers” does not depend on the recipient’s rights of recovery. *United States v. York* (C.A.6 1968), 398 F.2d 582, 584 (finding that “Congress intended to give the United States an independent right” to recover Medicare benefits from a liable third party). The Medicare Secondary Payer Act goes beyond other statutorily imposed liens because Medicare has a right of recovery against many homeowners and automobile policies, including their “med pay” coverages. See *United Services Auto. Assoc. v. Perry* (C.A.5 1996), 102 F.3d 144, 148 (“[medical payments coverage] is a form of no-fault insurance”). Additionally, because a review of a patient’s medical records will generally put a third party on notice of the patient’s eligibility for Medicare, Medicare is not required to notify the third party of its lien. See *United States v. Bartholomew* (W.D. Okla. 1967), 266 F. Supp. 213, 215 (stating a party can easily determine through a review of the medical records that a party is eligible for Medicare benefits).

c) Amendments to Medicare Secondary Payer Act: The amendments require a primary insurer to 1) determine whether a Claimant qualifies for Medicare benefits currently or in the future; and 2) notify Medicare when a primary insurer resolves a claim with a current or future Medicare beneficiary. The amendment provides stiff penalties for primary insurers who fail to notify Medicare of a resolved claim with a current or future Medicare beneficiary.

6. Ohio Victims of Crime: If a person receives compensation under the Ohio Victims of Crime Compensation (O.R.C. §§ 2743.51 to 2743.72), the Reparations Fund has an independent cause of action for “reimbursement, repayment and subrogation” against 1) the offender; 2) an insurer of the offender or the victim; or 3) the victim if the victim receives additional benefits from other sources. R.C. 2743.72. See also Montgomery v. John Doe 26, (2000), 141 Ohio App. 3d 242. While the reparations fund has a notice provision allowing it to assert its recovery rights through correspondence from the Attorney General, the statute does not require notice to be sent to a third party. R.C. 2743.72(L). Finally, the statute provides that any settlement between a victim and an insurer does not release the Reparations Fund’s interest. O.R.C. § 2743.72(I).

7. U.S. Veterans and Military Personnel: Under the Federal Medical Care Recovery Act (FMCRA), the United States has a statutory right of recovery for compensation paid by the government to active military personnel and veterans against tortfeasors and any applicable insurance available to the injured party. 42 USCS § 2651. Further, the United States also has a right of subrogation against an insurer that provides medical payments or no-

fault personal injury protection (PIP) to the injured military employee or veteran. 42 USCS §2651(c); cf. *United States v. Trammel* (C.A.6 1990), 899 F.2d 1483, 1486 (holding that Kentucky's statutory no-fault insurance abolished a finding of a tortious actor in an automobile accident precluding recovery under the former FMCRA because it only confers a right of subrogation against tortfeasors).

## C. Minor Settlement

1. O.R.C. § 2111.18 – when Guardians must be appointed

   a) Pursuant to O.R.C. § 2111.18, for a settlement in the amount of $10,000.00 or less, the probate court, upon application of any person whom the court may authorize, may authorize the settlement without the appointment of a guardian and authorize the delivery of the moneys to the natural guardian of the minor, to the person by whom the minor is maintained or to the minor himself.

   b) Pursuant to O.R.C. § 2111.18, for a settlement in the amount of more than $10,000.00, a guardian must be appointed and the guardian may settle the claim with the advice, approval, and consent of the probate court.

2. Role of Probate Court

   a) Applicable Case Law:

      (1) A probate court does not have authority to order a guardian to accept a settlement offer on a minor's personal injury claim. In re Guardianship of Hicks (1993), 63 Ohio Misc. 2d 280.

      (2) A probate court, in order to maintain control over any personal injury settlement entered into on behalf of a ward under its protection, has subject matter jurisdiction over the entire amount of settlement funds. In re Kinross (1992), 84 Ohio App. 3d 335.

      (3) A probate court may properly scrutinize the expenses incurred in litigation to ensure that they are necessarily incurred in order to serve the ward's best interests. In re Guardianship of Prince (1995), 104 Ohio App. 3d 657.

## D. Negotiating Directly with Attorneys

1. It is the normal and accepted practice in Ohio for claims professionals to negotiate settlements directly with attorneys. This practice is bolstered by the Ohio Rules of Professional Conduct 4.2 which provides "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by

another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

2. However, settlement negotiations with persons other than parties' attorneys have been held by the Ohio Supreme Court to be the unauthorized practice of law under certain circumstances.

a) In *Cincinnati Bar Ass'n v. Foreclosure Solutions, L.L.C.*, 123 Ohio St. 3d 107 (Ohio 2009), the Supreme Court of Ohio held that a company that was in the business of assisting its customers avoid foreclosures violated the prohibition on the unauthorized practice of law when, despite hiring attorneys, had its representatives impose a one-size-fits-all strategy to directly negotiate foreclosure settlements with the mortgage companies on behalf of its customers.

b) In *Disciplinary Counsel v. Alexicole, Inc.*, 105 Ohio St. 3d 52 (Ohio 2004), the Supreme Court of Ohio found that representatives from Alexicole, Inc. violated the prohibition on the unauthorized practice of law by representing customers in securities arbitrations in which they would routinely prepare statements of claim, conducts discovery, participate in prehearing conferences, negotiate for settlements, and participates in mediation and arbitration hearings.

## E. Confidentiality Agreements

Confidentiality agreements like all settlement provisions are contracts and can only be set aside for the same reasons that any other contract could be rescinded, such as fraud, duress, or undue influence. Alternatively, a party could claim that a material condition precedent had not been met. See City of Mentor v. Lagoons Point Land Co., 11th Dist. No. 98-L-190, 1999 Ohio App. LEXIS 6127 (Dec. 17, 1999)

## F. Releases

1. O.R.C. §2307.28

a) When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons for the same injury or loss to person or property or the same wrongful death, both of the following apply:

(1) The release or covenant does not discharge any of the other tortfeasors from liability for the injury, loss, or wrongful death unless its terms otherwise provide, but it reduces the claim against the other tortfeasors to the extent of the greater of any amount stipulated by the release or the covenant or the amount of the consideration paid for it, except that the

reduction of the claim against the other tortfeasors shall not apply in any case in which the reduction results in the plaintiff recovering less than the total amount of the plaintiff's compensatory damages awarded by the trier of fact and except that in any case in which the reduction does not apply the plaintiff shall not recover more than the total amount of the plaintiff's compensatory damages awarded by the trier of fact.

b) The release or covenant discharges the person to whom it is given from all liability for contribution to any other tortfeasor.

## G. Voidable Releases

Whether a release of liability is void or voidable upon an allegation of fraud is dependent on the nature of the fraud alleged. A release obtained by fraud in the factum is void ab initio, while a release obtained by fraud in the inducement is merely voidable upon proof of fraud. Haller v. Borror Corp., 50 Ohio St. 3d 10 (Ohio 1990)

# Transportation Law

## A. State DOT Regulatory Requirements

Ohio's DOT regulatory information can be found at www.puco.ohio.gov. The PUCO has adopted the FMSCR under Ohio Administrative Code 4901 and they apply to all commercial motor vehicles operating in Ohio as the term "motor carrier" is defined under Section 390.5 of the FMSCR.

## B. State Speed Limits

1. Governing authority- Ohio's speed limits are governed by O.R.C. 4511.21, which provides in pertinent part that it is unlawful to operate a motor vehicle in excess of the following speed limits:

   a) 20 MPH in a school zone

   b) 25 MPH in a municipal corporation, except on state routes or highways within that municipal corporation, where the speed limit is 36 MPH.

   c) 55 MPH on highways outside municipal corporations

   d) 55 MPH on freeways who had established that speed limit prior to October 1, 1995, or 65 MPH if that was the speed as of October 1, 1995.

## C. Overview of State CDL Requirements

1. When is a CDL required-The classes of CDL and the commercial motor

vehicles that they authorize the operation of are as follows:

a) Any combination of vehicles with a combined gross vehicle weight rating of twenty-six thousand one pounds or more, provided the gross vehicle weight rating of the vehicle or vehicles being towed is in excess of ten thousand pounds;

b) Any single vehicle with a gross vehicle weight rating of twenty-six thousand one pounds or more, or any such vehicle towing a vehicle having a gross vehicle weight rating that is not in excess of ten thousand pounds;

c) Any single vehicle or combination of vehicles that is not a class A or class B vehicle, but that either is designed to transport sixteen or more passengers including the driver;

d) Any school bus with a gross vehicle weight rating of less than twenty-six thousand one pounds that is designed to transport fewer than sixteen passengers including the driver;

e) Any single vehicle that is transporting hazardous materials for which placarding is required under subpart F of 49 C.F.R. part 172;

f) Any single vehicle or combination of vehicles that is designed to be operated and to travel on a public street or highway and is considered by the Federal Motor Carrier Safety Administration to be a commercial motor vehicle, including, but not limited to, a motorized crane, a vehicle whose function is to pump cement, a rig for drilling wells, and a portable crane.

2. Classes of CDL licenses

a) Class A- Allows the operator to drive any combination of vehicles with a combined gross vehicle weight rating of twenty-six thousand one pounds or more, if the gross vehicle weight rating of the vehicle or vehicles being towed is in excess of ten thousand pounds

b) Class B- Allows the operator to drive any single vehicle with a gross vehicle weight rating of twenty-six thousand one pounds or more or any such vehicle towing a vehicle having a gross vehicle weight rating that is not in excess of ten thousand pounds.

c) Class C- Allows the operator to drive any single vehicle, or combination of vehicles, that is not a Class A or Class B vehicle, but that is designed to transport sixteen or more passengers, including the driver, or is transporting hazardous materials in an

amount requiring placarding, or any school bus with a gross vehicle weight rating of less than twenty-six thousand one pounds that is designed to transport fewer than sixteen passengers including the driver.

d) The higher class CDL allows the operator to drive vehicles in any of the lower classes provided the operator has the correct endorsements.

e) In addition to a CDL, drivers may need special endorsements if they:

(1) Drive vehicles carrying passengers, (buses);
(2) Pull double or triple trailers;
(3) Drive tank vehicles; or
(4) Haul placarded hazardous materials

3. Requirements for obtaining a CDL

a) To get a CDL or CDL instruction permit (CDIP) an individual is required to be at least 18 years of age and have a valid Ohio State driver's license.

b) Both the knowledge (written) and skill (driving) tests are required to receive a CDL. A knowledge test is required for:

(1) The class of vehicle;
(2) Each endorsement; and
(3) Removing the air brake restriction.

c) The skill test consists of a pre-trip inspection and a road test, and takes up to 90 minutes.

d) All commercial drivers must meet minimum medical standards as established by federal (49 C.F.R.391) and state (Ohio Revised Code, Section 4506.10) rules and regulations.

4. Renewal or upgrade of a CDL

a) When applying for a renewal or upgrade of a CDL, all applicants shall:

(1) Provide any updated information;
(2) Pass a written hazardous materials test if wishing to retain or upgrade a hazardous materials endorsement; and

(3) Complete any additional testing requirements for an upgrade

5. CDL Manual- Ohio's CDL manual can be found at: http://www.publicsafety.ohio.gov/links/hsy7605.pdf

## Insurance Issues

### A. State Minimum Limits of Financial Responsibility

Under the Ohio Financial Responsibility Act, Ohio Rev. Code 4509.01, *et seq.*, no person may operate – or permit to be operated – a motor vehicle unless sufficient financial responsibility is maintained throughout the registration period of the motor vehicle. Ohio Rev. Code § 4509.101(A)(1).

The minimum limits of financial responsibility required under Ohio law are as follows:

Bodily Injury: $12,500 per person / $25,000 per accident

Property Damage: $7,500

Ohio Rev. Code § 4509.20(A).

### B. Uninsured Motorist Coverage

1. UM/UIM Coverage Permitted, But Not Required

Ohio Rev. Code § 3937.18 governs the provision of uninsured and underinsured motorist coverage. Under Ohio law, an automobile insurance policy *may but is not required to* provide uninsured motorists ("UM") coverage or underinsured motorists ("UIM") coverage or both. Ohio Rev. Code § 3937.18.

The interpretation and application of UM/UIM insurance policies is a matter of contractual interpretation. As such, the policy language controls the interpretation and application of UM/UIM insurance policies. *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 797 N.E.2d 1256 (2003).

2. UM/UIM Coverage

A motorist is considered uninsured if:

(1) The motorist has no available insurance coverage or liability bond;
(2) The liability insurer denies coverage or is insolvent;
(3) The motorist is unidentified, as supported by independent corroborative evidence beyond the testimony of the insured;
(4) The motorist has diplomatic immunity; or
(5) The motorist has sovereign immunity.

Ohio Rev. Code 3937.18(B).

A motorist is underinsured where the liability insurance coverage of the tortfeasor is less than the amount of underinsured motorist coverage provided. Coverage is not excess, but is reduced by the amounts available for payment under any policy of insurance available to the tortfeasor.

An insurer generally pays all damages that an insured is legally entitled to recover from an uninsured or underinsured motorist for bodily injury sustained arising out of the ownership, maintenance or use of an uninsured or underinsured automobile. In order to recover in a UM/UIM claim against an insurer, a claimant must prove the same elements of the claim that the claimant would have to prove in a liability claim against the tortfeasor. *Snyder v. Amer. Family Ins. Co.*, 114 Ohio St. 3d 239, 871 N.E.2d 574 (2007).

3. Limits on UM/UIM Coverage

The policy of insurance determines the limits on UM/UIM coverage. Per accident and per person coverage limits are enforceable regardless of the number of insureds or covered vehicles.

The limits of UM/UIM coverage may be reduced by the availability of other insurance. Workers compensation benefits, however, cannot reduce the limits of UM/UIM coverage.

4. UM/UIM Exclusions

Policy exclusions in UM/UIM policies are generally enforceable, including Other Owned Auto exclusions, Regular Use exclusions, Unauthorized Use exclusions, Named Driver exclusions, and exclusions for employees in their personal automobiles or employees acting outside the course and scope of their employment.

5. Stacking

Stacking of coverage is permitted, but may also be prohibited. The terms of the insurance policy control. Under the Ohio UM/UIM statute, an insurer may prohibit all forms of stacking, including interfamily and intrafamily stacking. Ohio Rev. Code § 3937.18(F).

## C. No Fault Insurance

Ohio does not utilize no-fault insurance or personal injury protection. Many automobile liability insurance policies do contain a Medical Payments coverage part, which provides insurance coverage for payments of an insured's medical expenses incurred as a result of bodily injury sustained in an accident.

Payments under Medical Payments coverage are made without regard to liability.

## D. Disclosure of Limits and Layers of Coverage

Ohio law does not require an insurer to disclose the limits or layers of insurance coverage, except as required to comply with the provisions of the Unfair Claims Practices Act. Such information, however, may be subject to discovery in a civil action under the Ohio Rules of Civil Procedure.

## E. Unfair Claims Practices

1. Generally

The Ohio Unfair Claims Practices Act, Ohio Rev. Code § 3901.20, *et seq.* prohibits unfair and deceptive claims practices by insurance companies. It allows the Ohio Department of Insurance to regulate what constitutes an unfair and deceptive claims practice. The Ohio Department of Insurance regulations regarding unfair claims practices are found at Ohio Admin. Code § 3901-1-07 and Ohio Admin. Code § 3901-1-54.

The Ohio Unfair Claims Practices Act does not create a private right of action to remedy violations of the Act or administrative regulations. *Strack v. Westfield Ins. Co.*, 33 Ohio App. 3d 336, 515 N.E.2d 1005 (1988). Instead, the Act gives enforcement authority to the Ohio Department of Insurance. The Ohio Department of Insurance may suspend or revoke a license, order that the insurer not employ the offending party, order return of premium payments and payment of interest, and order reimbursement of investigative costs. In addition to administrative enforcement, evidence of violations may also be admissible in evidence to demonstrate that an insurer has violated its duty of good faith. *Furr v. State Farm Mut. Auto. Ins. Co.*, 128 Ohio App. 3d 607, 716 N.E.2d 250 (1998).

2. File and Record Documentation

Insurers must maintain claim data that is accessible and retrievable for examination. Data for closed claims must be kept no less than three years or until the Ohio Department of Insurance conducts the next financial examination, whichever is greater.

An insurer must be able to reconstruct claim activities by documentation that is appropriate for the type and size of a claim.

3. Misrepresentation of Policy Provisions

An insurer must fully disclose all pertinent benefits, coverage parts and other provisions to first-party claimants. No insurer or agent may willfully conceal pertinent benefits, coverage parts or other provisions from first-party claimants.

No insurer may deny a first-party claim based on the claimant's failure to make property available for inspection unless this constitutes a documented breach of the insurance policy.

No insurer may deny a first-party claim based on the claimant's failure to give written notice of loss, unless notice is required as a policy condition and lack of notice constitutes breach of the claimant's duty to cooperate. The insurer must provide a proof of loss form to the claimant.

4. Communication

An insurer must acknowledge receipt of a claim within 15 days.

An insurer must respond to communications from any claimant within 15 days. This requirement does not apply to claims in litigation.

An insurer must provide first- and third-party claimants sixty days notice before the expiration of any applicable statute of limitations or contractual period of limitations. This requirement does not apply to claimants represented by counsel.

An insurer must respond to inquiries from the Ohio Department of Insurance within 21 days.

An insurer must notify the Ohio Department of Insurance of its belief that a claimant has engaged in fraud within 60 days of receipt of the proof of loss.

5. Settlement or Denial of Claims

An insurer must decide to accept or deny a claim within 21 days. If more time is necessary, the insurer must provide the claimant with an explanation of the need for more time. In such cases, an insurer must provide a claimant with the status of the investigation every 45 days thereafter.

An insurer that denies a claim must do so by reference to the specific policy provision, condition or exclusion. The insurer must retain denial letters in the claim file.

An insurer must settle a first-party claim without regard to whether the responsibility for payment should be assumed by another.

An insurer must tender payment of an undisputed first-party claim no later than 10 days after accepting the claim, unless a structured settlement,

probate court action or other extraordinary circumstances require delay. Such circumstances must be documented in the claim file.

An insurer must document the application of comparative negligence. An insurer may not use pattern settlements, which automatically impute a percentage of comparative fault to particular occurrences.

An insurer may not engage in settlement practices that force first-party claimants to litigation by offering substantially less than the amounts claimed.

## F. Bad Faith Claims

Ohio law imposes a duty upon insurers to act in good faith with respect to their insureds. An insurer is subject to tort liability for breach of its obligation to act in good faith. Ohio law does not recognize third-party bad faith claims.

An insurer has a duty to act in good faith in the processing and payment of the claims of its insured. An insurer breaches its obligation to act in good faith if the insurer lacks reasonable justification for its refusal to pay a claim. *Zoppo v. Homestead Ins. Co.* 71 Ohio St. 3d 552 (1994); *Tokles & Son, Inc. v. Midwestern Indem. Co.*, 65 Ohio St. 3d 621 (1992).

Denial of coverage is "an initial factual prerequisite" for a bad faith claim. *Bob Schmitt Homes, Inc. Cincinnati Ins. Co.*, 2000 Ohio App. LEXIS 659 (2000). An insured may not maintain a claim of bad faith in the absence of coverage under the policy. *Toledo-Lucas Cty. Port Auth. v. AXA Marine & Aviation Ins. (UK) Ltd.*, 220 F. Supp. 2d 868 (N.D. Ohio 2002).

## G. Coverage – Duty of Insured

An insured normally has a contractual obligation to cooperate with its insurer. An insured's failure to cooperate with its insurer may excuse the insurer from further obligation with respect to the claim. *Gabor v. State Farm Mut. Auto. Ins. Co.*, 66 Ohio App. 3d 141, 583 N.E.2d 1041 (1990)

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To constitute a defense to liability, an insured's lack of cooperation must result in material and substantial prejudice to the insurer. *State Farm Mut. Auto. Ins. Co. v. Holcomb*, 9 Ohio App. 3d 79, 458 N.E.2d 441 (1983). Before lack of cooperation warrants cancellation of the policy or relief from liability on the claim, the insurer must demonstrate that the insured's lack of cooperation has resulted in material prejudice to the insurer. *Costa v. Cox*, 168 Ohio St. 379, 155 N.E.2d 54 (1958).

## H. Fellow Employee Exclusions

Business automobile policies of insurance often exclude coverage for bodily injury to any fellow employee of the insured arising out of and in the course of the

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| fellow employee's employment. Ohio courts have not directly addressed the fellow employee exclusion in business automobile policies of insurance. |
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