2022

Ohio Law Summary

Rendigs
ATTORNEYS AT LAW

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Procedural Issues

1. **Jurisdiction**
   - Municipal court has jurisdiction over cases involving claims not exceeding $15,000 - ORC § 1901.17.
     - Judgment may exceed that amount
   - Common pleas court has jurisdiction over cases involving claims over $500 – ORC § 2305.01 & ORC § 1907.03.

2. **Initial Pleadings**
   - **A defendant has 28 days from the date the complaint is served on the defendant to** file an answer or move to dismiss the complaint.
   - Affirmative defenses may be pleaded prospectively and are subject to a waiver argument if not asserted in the answer.

3. **Required Initial Disclosures**
   - Without awaiting a discovery request, a party must provide certain information and documents, including the insurance policy.
   - The parties are to hold a Discovery Conference no later than 21 days before the first court scheduling conference.

4. **Discovery**
   - The scope of discovery has been broadened to "any nonprivileged" matter that is relevant to any party's claim or defense and proportional to the needs of the case.
   - Interrogatories are limited to 40 interrogatories and each subpart of a question counts as a separate interrogatory.
   - There are no limitations on the number of document requests and requests for admission.
   - Failure to respond to a request for admission not less than twenty-eight days after service of the request or within such shorter or longer time as the court may allow, can lead to the request being deemed admitted by the Court. While judges do not often deem unanswered requests for admission admitted, it does happen.
   - There are no limitations on the number of depositions.

Practice Pointer – *Ohio's new Rule 26 discovery requirements should be reviewed in context with local court rules which may be more specific.*

5. Standard for Motion to Dismiss

- A motion to dismiss for failure to state a claim upon which relief can be granted is a procedural motion to test the sufficiency of the complaint. The court looks at the complaint to determine whether the allegations are legally sufficient to state a claim. Further, in order to sufficiently set forth a cause of action, a pleading must contain a short and plain statement of the claim that entitles that party to relief Civ. R. 8(A)(1). The factual allegations are presumed to be true, and all reasonable inferences are made in favor of the nonmoving party.

- Once it appears beyond a doubt that the plaintiff can prove no set of facts in support of a claim which would entitle the plaintiff to the relief sought, the motion to dismiss should be granted. *LGR Realty, Inc. v. Frank and London Ins. Agency* ,152 Ohio St. 3d 517, 98 N.E.. 3d 241 (2018).

6. Motion for Judgement on the Pleadings

- Even if it is denied, you will still have an opportunity to file a Motion for Summary Judgement

7. Standard for Motion for Summary Judgment

- Civ. R. 56(C) provides, in pertinent part, that "[s]ummary judgment shall be rendered forthwith if the pleading, depositions…show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Moreover, the mere existence of disputed facts does not necessarily render summary judgment inappropriate. Rather, Civ. R. 56(C) requires that summary judgment be entered in favor of the movant where "there is no genuine issue as to any material fact."

- Civ. R. 56(E) makes it clear that a party may not rely merely on his pleadings to oppose summary judgment. Rather, the rule requires that an opposing party's "response, by affidavit or as otherwise provided…must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party." *Wing v. Anchor Media, Ltd. Of Texas*, 59 Ohio St.3d 108 (1991) See also *Dresher v. Burt,* 75 Ohio St.3d 280, 293 (1996) and *Trafalgar Corp., et al. v. Miami Co.,* 104 Ohio St. 3d 50, 355 (2014).

Claims

1. **Premises Liability**
   - A Licensee is the one who enters property for his own pleasure and not by invitation of landowner. *Light v. Ohio University*, 28 Ohio St.3d 66 (1986). Landowner owes a duty only to refrain from causing wanton or willful injury to licensee or trespasser.
   - A business invitee is a "person[s] who come[s] upon the premises of another, by invitation, expressed or implied, for some purpose which is beneficial to the owner." *Norman v. Tri-Arch Inc.,* 2018 WL 68I29197 (9th Dist. 2018). Landowner has duty to keep premises in reasonably safe condition and warn of dangers of which he actually knows about or, with the exercise of reasonable care, should know about. No duty of care is owed to those lawfully on the premises for open and obvious dangers.
   - Frequenter statute imposes duty on an employer to keep the workplace in reasonably safe condition including furnishing safety devices and safeguards for its employees and frequenters of its work place. ORC § 4101.11, *et. seq*. Same duty as to business invitee. *Cornell v. Mississippi Lime Co.,* 95 N.E.3d 923, 2017 -Ohio- 7160 (7th Dist.).
   - Independent contractors who are working on the premises and that are not trespassing are business frequenters. ORC § 4101.11; *Salvati v. Anthony-Lee Screen Printing, Inc.,* 2018 WL 3599317, 2018-Ohio- 2935 (8th Dist.).

2. **Negligent Entrustment**
   - "To sustain an action for negligent entrustment of a vehicle, the plaintiff must show that the vehicle was driven with the owner's permission and authority, that the person entrusted with the vehicle was an incompetent driver, and that the owner knew or should have known that the driver was incompetent when the vehicle was entrusted to him." *Hicks v. State Farm Mutual Automobile Ins. Co.*, 95 N.E. 3d 852, 2017-Ohio-7095, quoting *St. Amand v. Spurling*, 2d Dist. Montgomery Nos. 20904, 20929, 21391, 20931, 2006-Ohio-4391, 2006 WL 2459082, ¶ 9.

3. **Wrongful Death/Survivorship**

   Survivorship claims
   - A decedent may not recover for pain and suffering when it is shown that the decedent was rendered unconscious at the instant of the injury and dies of such injuries without ever having regained consciousness. However, one may recover for the pain and suffering endured when there is affirmative evidence to show that the decedent was not completely unconscious during the interval between the injury and death. *Bradley v. Univ. Hospitals of Cleveland,* 2001 WL 1654762 (8th Dist.) (Citations omitted).

   Wrongful Death Claim
   - A cause of action for wrongful death requires the claimant to demonstrate that: (1) a wrongful act (breach of a duty of care) actually and proximately caused a death, and that would have entitled the decedent to maintain an action and recover damages if death had not ensued; (2) the decedent was survived by a spouse, children, parents, or other next of kin; and (3) the

survivors suffered damages by reasons of the wrongful death. *Overly v. Columbiana Cnty. Eng'r*, 2006-Ohio-2188.

Wrongful death damages - ORC § 2125.02 - include all of the following:

- reasonable funeral and burial expenses;
- evidence of the cost of an annuity in connection with an issue of recoverable future damages;
- loss of support from the reasonably expected earning capacity of the decedent;
- loss of services of the decedent;
- 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;
- loss of prospective inheritance to the decedent's heirs at law at the time of the decedent's death;
- the mental anguish incurred by the surviving spouse, dependent children, parents, or next of kin of the decedent.

Practice Pointer – *A tailored set of damages discovery requests should be issued in a wrongful death case.*

4. Emotional Distress Claims

- A plaintiff may recover for intentional infliction of emotional distress provided the following elements are demonstrated:
  (1) that the actor either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to the plaintiff;
  (2) that the actor's conduct was so extreme and outrageous as to go beyond all possible bounds of decency and was such that can be considered as utterly intolerable in a civilized community;
  (3) that the actor's actions were the proximate cause of the plaintiff's psychic injury; and,
  (4) that the mental anguish suffered by plaintiff is serious and of a nature that no reasonable man could be expected to endure it. *Watson v. Ford Motor Co.*, 2007-Ohio-6374 ¶¶ 76-80 (6th Dist. 2007).
- Emotional distress recovery may not be had for mere loss to personal property. An owner who suffers emotional distress after witnessing the negligent damaging of

personal property arising out of the defendant's negligence has no right of recovery. *Ulmann v. Duffus*, *DVM*, 2005-Ohio- 6060, ¶ 29 (10th Dist. 2005).

- Ohio courts have limited recovery for negligent infliction of emotional distress to such instances where one was a bystander to an accident or was in fear of physical consequences to his own person. *Heiner v. Moretuzzo*, 73 Ohio St.3d 80 (1995).

5. **Employer vicarious liability (*respondent superior*)**
    - For an employer to be liable for a tortious act of its employee under the doctrine of respondent superior, the employee must be acting within the scope of employment when he or she commits the tortious act. *Groob v. KeyBank*, 108 Ohio St.3d 348 (2006).
    - However, even if an employee's actions are outside the scope of his employment, an employer may be held liable if the employee is on the employer's premises and the employer knows or has reason to know that he or she has the ability to control the employee, and knows or should know of the necessity and opportunity for exercising such control. *Cooke v. Montgomery Cty.*, 158 Ohio App.3d 139 (2nd Dist. 2004).

6. **Employer Intentional Tort- ORC §2745.01**- This statute requires the plaintiff to prove that the employer committed the tortious act with the intent to injure another or with the belief that the injury was "substantially certain" to occur. "Substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death. See also, *Kaminski v. Metal & Wire Products Co.*, 125 Ohio St.3d 250 (2010); *Hoyle v. DTJ Ents., Inc.*, 143 Ohio St.3d 197, 2015-Ohio-843, 36 N.E.3d 122 (2015).

7. **Contribution Claims**
    - The right of contribution exists only in favor of the tortfeasor who has paid more than that tortfeasor's proportionate share of a common liability and that tortfeasor's total recovery is limited to the amount paid by that tortfeasor in excess of that tortfeasor's proportionate share. ORC § 2307.25(A).
    - A tortfeasor who is found liable for an intentional tort has no right of contribution. ORC § 2307.25(A).
    - A tortfeasor who enters into a settlement with a claimant is not entitled to contribution from another tortfeasor whose liability for the injury or loss is not extinguished by the settlement, or with respect to any amount paid in a settlement that is in excess of what is reasonable. ORC § 2307.25(B).
    - A liability insurer which has discharged, in full or in part, the liability of the tortfeasor by payment, is subrogated to the tortfeasor's right of contribution to the extent of the amount it has paid in excess of the tortfeasor's proportionate share of the common liability. ORC § 2307.25(C).

8. **Indemnity Claims**
    - If one tortfeasor is entitled to indemnity from another, the right is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of the indemnity obligation. ORC § 2307.25(D).
    - ORC § 2305.31 – Indemnity agreements arising in construction contracts are void to the extent they purport to indemnify a party for its own negligence.

9. **Frivolous Conduct ORC § 2323.51**
    - Conduct that "obviously serves merely to harass or maliciously injure" or is for another improper purpose.
    - A filing that is not warranted under existing law, cannot be supported by a good faith argument for an extension or reversal of existing law.
    - An aggrieved party may file for award of court costs and reasonable attorney fees.

Practice Pointer – *Generally, Ohio Courts are reluctant to find that conduct is "frivolous", but if the situation warrants it then the claim may succeed.*

10. **Joint & Several Liability**

ORC § 2307.22 sets out Ohio's law regarding joint and several liability. Where there are multiple defendants, the following rules apply:

FOR ECONOMIC LOSSES

In Ohio, economic loss includes:

(1) All wages, salaries, or other compensation lost as a result of an injury, death, or loss to person or property that is a subject of a tort action, as well as future expected lost earnings;

(2) All expenditures for medical care or treatment, rehabilitation services, or other care, treatment, services, products, or accommodations incurred as a result of an injury, death, or loss to person that is a subject of a tort action;

(3) All expenditures of a person whose property was injured or destroyed or of another person on behalf of the person whose property was injured or destroyed in order to repair or replace the property; and,

(4) Any other expenditures incurred as a result of an injury, or loss. ORC § 2307.011

<u>For a defendant responsible for more than 50% of the tortious conduct:</u> If the trier of fact determines that one defendant is responsible for more than fifty percent of the tortious conduct, that defendant shall be jointly and severally liable in tort for all compensatory damages that represent economic loss.

<u>For a defendant responsible for 50% or less of the tortious conduct</u>: If there are multiple defendants, a defendant to whom fifty percent or less of the tortious conduct is

attributable shall be liable to the plaintiff only for that defendant's proportionate share of the compensatory damages that represent economic loss.

NOTE: If an intentional tort claim is proven against a defendant, then even if that defendant is only responsible for fifty percent or less of the tortious conduct, he will be held jointly and severally liable for all compensatory damages that represent economic loss. ORC 2307.22(A)(3)

FOR NON-ECONOMIC LOSSES

Non-economic loss is nonpecuniary harm that results from an injury, death, or loss to person that is a subject of a tort action, including, but not limited to, pain and suffering; loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education; mental anguish; and any other intangible loss. ORC § 2307.011.

There is no joint and several liability for non-economic loss. Each defendant is responsible only for their portion of the damages that represent non-economic loss based upon the percent of fault assigned to each defendant. ORC § 2307.22(C).

Effect of an agency relationship: A principal and agent, a master and servant, or other persons having a vicarious liability relationship shall constitute a single party when determining percentages of tortious conduct in a tort action in which vicarious liability is asserted.

Evidentiary Issues

1. **Use of Criminal Conviction in Subsequent Civil Proceeding**
   - A guilty plea to a felony, when entered as evidence in any subsequent civil proceeding based on the criminal act, generally precludes the offender from denying any fact material to the judgment. ORC § 2307.60.
   - The offender may introduce evidence of the offender's pending appeal of the final judgment of the trial court, if applicable, and the court may consider that evidence in determining the liability of the offender. ORC § 2307.60.
   - A criminal conviction is conclusive proof and operates as an estoppel on defendants as to the facts supporting the conviction in a subsequent civil action. Estoppels extends only to questions "directly put in issue and directly determined" in the criminal prosecution. *Rhinebolt v. Rhinebolt*, 2009-Ohio-5646.
   - A plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding. Crim. R. 11(A); Evid. R. 410(A); *Elevators Mut. Ins. Co. v. J. Patrick O'Flaherty's, Inc.*, 2010-Ohio-1043, 125 Ohio St.3d 362.

2. **Collateral Source Rule**
   - ORC § 2315.20 - In any tort action (accruing on or after 4/7/05) the defendant may introduce evidence of any amounts payable to the plaintiff as a benefit, except if the source of the collateral benefit has:
     (1) a mandatory self-effectuating federal right of subrogation; or
     (2) a contractual right of subrogation; or
     (3) a statutory right of subrogation; or
     (4) the source pays the plaintiff a benefit that is in the form of a life insurance payment or a disability payment. However, evidence of the life insurance payment or disability payment may be introduced if the plaintiff's employer paid for the life insurance or disability policy, and the employer is a defendant in the tort action.
   - If the defendant elects to introduce evidence described above, the plaintiff may introduce evidence of any amount that the plaintiff has paid or contributed to secure the plaintiff's right to receive the benefits of which the defendant has introduced evidence.
   - A source of collateral benefits of which evidence is introduced shall not recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against a defendant.
   - Exception for write-down of medical bills - *Robinson v. Bates* 112 Ohio St.3d 17 (2006) holds that the Collateral Source Rule does not bar evidence at trial of the amount accepted by a medical care provider from an insurer as full payment for medical or hospital treatment.

- Evidence of write-offs by the medical provider (such as write-offs or write-downs by a medical provider) are admissible. *Jaques v. Manton,* 125 Ohio St.3d 342 (2010).

- Expert testimony is not necessary to introduce evidence of write-offs in medical bills and statements. OR. § 2317.421; *Moretz v. Muakkasa*, 137 Ohio St.3d 171, 2013-Ohio-4656, 998 N.E.2d 479 (2013).

Statutes of Limitation & Repose

Claim	Limitations Period	Statute/Reference
Accountant Malpractice	4 years	ORC 2305.09(D)[1]
Assault and Battery	1 year	ORC 2305.111
Breach of contract for the sale of goods	4 years	ORC §1302.98(A)
Breach of Oral Contract	6 years	ORC 2305.07
Breach of Written Contract	6 years	ORC 2305.06
Consumer Sales Practices Act	2 years after occurrence of violation	ORC 1345.10
Contribution	1 year after final judgment	ORC 2307.26
Conversion	4 years	ORC 2305.09
Fraud	4 years from discovery	ORC 2305.09
Legal Malpractice	1 year	ORC 2305.11
Libel/Slander	1 year	ORC 2305.11
Medical Malpractice	1 year after cause of action accrues, or 4 years after the act or omission.	ORC 2305.113
Miscellaneous (if no specific statute on point)	4 years	ORC 2305.09(D)
Negligence	4 years	ORC 2305.09
Personal Injury	2 years	ORC 2305.10
Personal Property Damage	2 years	ORC 2305.10
Real Property Appraisal Malpractice	4 years	ORC 2305.09(D)[2]
Taking of Personal Property	4 years	ORC 2305.09
Tort Claim For Real Property Damage	4 years	ORC 2305.09
Trespass/taking of Real Property	4 years	ORC 2305.09
Wrongful Death	2 years	ORC 2125.02

[1] *Flagstar Bank FSD v. Airline Union Mtge. Co*, 128 Ohio St.3d 529 (2011).
[2] *Flagstar Bank FSD v. Airline Union Mtge. Co*, 128 Ohio St.3d 529 (2011).

Construction Statute of Repose

- Ohio has a ten-year Statute of Repose for certain actions. ORC § 2305.10(C)(1).
- No claim for bodily injury, wrongful death or injury to real or personal property which arises out of an improvement to real property, shall accrue against a person who furnished the design, planning, supervision of construction, or construction of the improvement to real property later than ten years from the date of substantial completion ORC § 2305.131(A).

Defenses

1. **Seatbelt defense**
   - The failure to use a seatbelt is not admissible to prove negligence or comparative negligence, but such failure may be used as evidence that it contributed to the harm and it may diminish recovery of compensatory damages that represent noneconomic loss. ORC § 4513.263(F)(1).

2. **Comparative Negligence:**
   - In order for a plaintiff to recover, the plaintiff can only be responsible for 50% or less of the tortious conduct. If the plaintiff is found to be 51% or more responsible for the tortious conduct, then the plaintiff recovers nothing. ORC § 2315.33.
   - If the percentage of the plaintiff's negligence is greater than the total of the percentages of negligence assigned to all other parties and non-parties, plaintiff recovers nothing. ORC § 2315.35.
   - The finder of fact allocates the percentages of negligence, and If the plaintiff is found to be negligent, and plaintiff's negligence is less than 50% and less than the combined percentages of negligence of all defendants and non-parties, then plaintiff's recovery is reduced proportionally by the percentage of plaintiff's negligent conduct. As an example, if plaintiff's damages are $10,000 and plaintiff is found to be 20% negligent, plaintiff's recovery is $8,000.
   - can attribute percentages of negligence to both parties and non-parties. It is an affirmative defense to argue that a non-party against whom the plaintiff has not asserted a claim is responsible for some or all of the tortious conduct. ORC § 2307.23.

Damages

1. **Compensatory**
   - There are no limits on economic compensatory damages in Ohio; however, there is a cap on non-economic damages: the greater between $250,000 or three times the amount of economic damages, not to exceed $350,000 for each plaintiff or a maximum of $500,000 for each occurrence.
   - This cap does not apply if the injury involves permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system or permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities.
   - Tort actions against the state in the court of claims, tort actions against political subdivisions and wrongful death actions are excluded from these limits. ORC § 2315.18.
   - The jury may not be instructed about these caps. They are applied post verdict.

Practice Pointer – *A party may seek a partial summary judgment prior to trial on the issue of whether the injury falls within the caps on damages.*

2. **Punitive Damages**
   - Punitive or exemplary damages are not recoverable from a defendant in a tort action unless both of the following apply:
     (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 for compensatory damages against that defendant. ORC § 2315.21.
   - Punitive damages must be proved by clear and convincing evidence with the burden of proof on the plaintiff.
   - There are caps on punitive damages. If the defendant is a small employer (employs less than 100 people on a full time basis or if a manufacturer, less than 500) or individual, damages are capped at the lesser of :
     (1) two times the amount of the compensatory damages awarded to the plaintiff from the defendant; or
     (2) ten percent of the employer's or individual's net worth when the tort was committed up to a maximum of $350,000.

     For all others, punitive or exemplary damages are limited to two times the amount of the compensatory damages awarded to the plaintiff from that defendant. A separate statute governs product liability actions.
   - Ohio prohibits the provision of automobile/ motor vehicle insurance for punitive damages. ORC § 3937.182. However, case law provides that attorney's fees may be

recoverable from an insurance policy where awarded as a punitive measure. *Neat-Pettit v. Lahman*, 125 Ohio St.3d 327 (2010).

- ORC § 2315.21(B) constitutes a substantive right to bifurcation, which takes precedence over the bifurcation provision in Civ.R. 42(B), and makes bifurcation mandatory. *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235.

3. Damage to Real Property

- For permanent or irreparable damage to real property, the measure of damage is the difference in the fair market value of the whole property, including improvements thereon, immediately before and immediately after the damage occurred.

- Fair market value is defined as the price real property would bring if offered for sale in the open market by an owner who wanted to sell it, but was under no necessity to do so, and when purchased by a buyer who wanted to buy it, but was under no necessity or compulsion to do so - both parties being aware of the pertinent facts concerning the property.

- In an action based on temporary injury to noncommercial real estate, a plaintiff need not prove diminution in the market value of the property in order to recover the reasonable costs of restoration, but either party may offer evidence of diminution of the market value of the property as a factor bearing on the reasonableness of the cost of restoration. *Martin v. Design Const.*, 121 Ohio St.3d 66.

4. Damage to Personal Property

- The damage is the difference in the fair market value of the property immediately before and after the damage.

- Fair market value is defined as the price the property would bring if offered for sale in the open market by an owner who wanted to sell it, but was under no necessity to do so, and when purchased by a buyer who wanted to buy it, but was under no necessity to do so.

- For personal property without market value, the reasonable value to the owner, if the property has been totally destroyed. If the property has not been totally destroyed, the measure of damage is the cost of repair to restore it to the condition it was in before it was damaged, provided the repairs do not exceed the reasonable value of the property to the owner. If repairs to the property will not restore its value, or if the cost of repairs exceeds its reasonable value to the owner, the measure of damage is the difference in reasonable value of the article to the owner immediately before and immediately after it was damaged.

5. Parental Liability

- A parent may be held civilly liable, up to $10,000, to a property owner when the parent's minor child willfully damages property or commits a "theft offense." ORC § 3109.09(B).

  A parent may be held civilly liable, up to $10,000, to someone who is willfully and maliciously assaulted by the parent's minor child, by a means or force likely to produce great bodily harm. ORC § 3109.10.

  A parent is jointly and severally liable, up to $15,000, for the minor child's acts of vandalism, desecration and ethnic intimidation. ORC § 2307.70(B)(1).

6. Settlement of a Claim by a Minor

- Settlements for greater than $25,000 require the appointment of a guardian and approval by the probate court.
- Settlements for $25,000 or less do not require appointment of a guardian, but still must be authorized by the probate court. ORC § 2111.18.

Practice Pointer – *Although typically plaintiff's counsel assumes the responsibility of obtaining approval of a settlement involving a minor, it is prudent to involve defense counsel to assure it is done properly.*

7. Pre-Judgment Interest/Post-Judgment Interest

- Pursuant to ORC § 1343.03 the statutory rate of recovery ORC § 5703.47 is linked to annual federal rates rounded up to the nearest whole number plus 3%.
- In tort actions, prejudgment interest will be awarded under ORC § 343.03(C)(1), after a post-judgment hearing, the trial court determines both:
  1) the party that lost failed to make a good-faith effort to settle; AND
  2) that the party who won did make a good-faith effort to settle.
- ORC § 1343.03(C)(1)(a) & (b)- If the losing party admits liability in a pleading or acts with deliberate purpose to cause harm, interest will run from the date the cause of action accrues until the date of judgment.
- ORC § 1343.03(C)(1)(c)(i)-(ii)-In all other actions, interest runs for the longer of the following:
  1) from the date when the winning party gave the first notice to the losing party to the date on which the judgment, order, or decree was retendered, but only if the winning party made a reasonable attempt to determine if the losing party had insurance coverage the tortious conduct and gave the losing party and to the losing party's insurer, as nearly simultaneously as practicable, written notice in person or by certified mail that the cause of action had accrued; OR

2) from the date on which the winning party filed the pleading on which the judgment, decree, or order was based to the date on which the judgment, decree, or order was rendered.

- ORC § 1343.03(C)(2)-No interest may be awarded on future damages.
- ORC § 1343.03(A) & (B) Post-judgment interest and interest on a settlement runs from the date of the judgment or settlement until the judgment or settlement is satisfied. See, also, *Hartmann v. Duffy,* 95 Ohio St.3d 456 (2002).

Coverage Issues

1. **Uninsured (UM)/Underinsured (UIM) Automobile Coverage**
   - UM/UIM coverage in an automobile insurance policy is no longer mandatory. ORC § 3937.18(A).

2. **"Phantom" Vehicles**
   An uninsured motorist claim does not require physical contact; however, if the vehicle's owner or operator cannot be identified "independent corroborative evidence" must exist to prove that the insured's injury was proximately caused by the negligence or intentional actions of the unidentified operator of a motor vehicle. The testimony of any insured seeking recovery from the insurer shall **not** constitute "independent corroborative evidence," unless the testimony is supported by additional evidence. ORC § 3937.18(B)(3). However, a police officer's firsthand observations constitute "independent corroborative evidence." *Honzell v. Nationwide Ins. Co.*, 2012-Ohio-6154 (10th Dist.).

3. **Not Excess Coverage**
   UIM coverage provides protection for an insured where the total limits of coverage under all applicable liability bonds and insurance policies covering the tortfeasor are less than the insured's UIM coverage limit. Hence, UIM coverage is not excess coverage and provides the insured with an amount of protection no greater than that which would be available under the insured's UM coverage if the tortfeasor was uninsured at the time of the accident. ORC § 3937.18(C).

4. **Set-Off**
   An insured's policy limit for UIM coverage shall be reduced by those amounts available for payment under all applicable liability bonds and insurance policies covering the tortfeasor. ORC § 3937.18(C).

5. **Workers' Compensation Benefits**
   Neither UM nor UIM coverage is subject to an exclusion or reduction in amount because of any workers' compensation benefits payable as a result of the same injury or death. ORC § 3937.18(E).

6. **Stacking**
   - Any insurance policy that includes UM/UIM coverage may include terms and conditions that preclude any and all stacking of such coverages including, but not limited to:

     1) Interfamily Stacking - which is the aggregation of the limits of policies by the same person or two or more persons who are not members of the same household; AND

     2) Intrafamily Stacking - which is the aggregation of the limits of policies purchased by the same person or two or more family members of the same household. ORC § 3937.18(F)(1) and (2).

- Any insurance policy that includes UM or UIM coverage or both may include terms limiting all claims arising from any one person's bodily injury or death, to a single per person limit of liability. Any such policy limit shall be enforceable regardless of the number of insureds, claims made, vehicles or premiums shown in the declarations page or policy, or vehicles involved in the accident. ORC § 3937.18(G).

7. Limitations Period

Any insurance policy that includes UM/UIM coverage may include terms requiring that, so long as the insured has not prejudiced the insurer's subrogation rights, all UM/UIM claims or suits must be made or brought within three years after the date of the accident or within one year after the tortfeasor's liability insurer has become the subject of insolvency proceedings. ORC § 3937.18(H).

8. Exclusions

Any insurance policy that includes UM/UIM coverage may include terms and conditions that exclude coverage for bodily injury or death suffered by an insured under specified circumstances, including but not limited to any of the following circumstances:

- When the insured is operating or occupying a motor vehicle owned by, furnished to or available for the regular use of the named insured, a spouse, or resident relative of a named insured, if the motor vehicle is not specifically identified in the policy under which a claim is made or is not a newly acquired or replacement motor vehicle. ORC § 3937.18(I)(1);
- When the insured is operating or occupying a motor vehicle without a reasonable belief that the insured is entitled to do so. Under no circumstances will an insured whose license has been suspended, revoked or never issued be held to have a reasonable belief that the insured is entitled to operate a motor vehicle. ORC § 3937.18(I)(2);
- When the bodily injury or death is caused by a motor vehicle operated by any person who is specifically excluded from coverage for bodily injury liability in the policy under which the UM/UIM coverages are provided. ORC § 3937.18(I)(3);
- While any employee, officer, director, partner, trustee, member, executor, administrator or beneficiary of the named insured, or any relative of any such person, is operating or occupying a motor vehicle unless that person is operating or occupying a motor vehicle for which UM/UIM coverage is provided in the policy. ORC § 3937.18(I)(4);
- When the person actually suffering the bodily injury or death is not an insured under the policy. ORC § 3937.18(I)(5).

9. Arbitration

Arbitration of UM/UIM claims is not provided for by statute and is based in contract. It is not mandatory.

10. Exhaustion of Underlying Coverage

Typically, an insurance policy will require exhaustion of the proceeds of a tortfeasor's policy before the right to payment of underinsured motorist benefits will occur. However, the date that exhaustion of the tortfeasor's liability limits occurs is not determinative of the applicable law to a claim for underinsured motorist coverage.

11. Pro-rata v. Excess Coverage

Where one carrier's policy applies on a pro-rata basis and another's applies on an excess basis, the pro-rata coverage will be the primary coverage. *Yates v. Estate of Ferguson,* 2010 WL 877536, 2010-Ohio-892, ¶ 18.

12. Notice of a Tentative Settlement

Ohio case law suggests that the insured's UIM carrier should be given notice of a tentative settlement between the insured and the tortfeasor's carrier where the UIM policy has a consent-to-settle clause and that the UIM carrier must respond to the tentative settlement within a reasonable amount of time. If the UIM carrier fails to respond within a reasonable amount of time, or unjustifiably withholds consent, the insured can collect from the tortfeasor, give a full release, and thereby extinguish the UIM carrier's subrogation rights. Straughan v. Flood Co., 2003-Ohio-290, P24, 2003 Ohio App. LEXIS 286, *6

Subrogation and Liens

1. Worker's Compensation Subrogation

- The Ohio Revised Code creates a right of recovery in favor of statutory subrogee against a third party, and the statutory subrogee is subrogated to the rights of a claimant against that third party. ORC § 4123.931(A).

- The right of workers' compensation subrogation is automatic regardless of whether a statutory subrogee is joined as a party in an action by a claimant against a third party. ORC § 4123.931(H).

- The statutory subrogation right applies, but is not limited to, amounts recoverable from a claimant's insurer in the connection with UM/UIM coverage. ORC § 4123.931(I)(1).

2. Ohio Medicaid Subrogation

- The acceptance of Medicaid benefits gives an automatic right of subrogation to the Department of Medicaid and the County Department of Job and Family Services against the third party for the cost of the medical assistance paid on behalf of the public assistance recipient or participant. ORC § 5160.37(A).

- No settlement, compromise, judgment, or award of any recovery in any action or claim by a recipient or participant shall be made final without first giving the Departments' written notice and reasonable opportunity to perfect their rights of recovery. ORC § 5160.37(E).

- If the Departments are not given the appropriate written notice, the recipient or participant and, if there is one, the recipients' attorney, are liable to reimburse the Departments for the recovery received to the extent of medical payments made by the Departments. ORC § 5160.37(E).

- The Departments shall be permitted to enforce their recovery rights against a third party even though they accepted prior payments and discharge of their rights if, at the time the departments received such payments, they were not aware that additional medical expenses had been incurred but had not yet been paid by the Departments. ORC § 5160.37(F).

- The third party becomes liable to the Department of Job and Family Services or County Department of Job and Family Services as soon as the third party is notified in writing of the claims for recovery under the Medicaid statutes. ORC § 5160.37(F).

- It is incumbent on the medical assistance recipient to inform the Department of Job and Family Services, and the appropriate county, no later than thirty days after initiating the recovery, that he or she is pursuing a third party recover. ORC § 5160.37(C).

- A payment, settlement, compromise, judgment, or award that purports to exclude the cost of medical assistance paid for by the Department of Job and Family Services or a county shall not preclude the Department from enforcing its subrogation rights. ORC § 5160.37(A).

3. Federal Medicare Subrogation

- Federal regulations grant Medicare subrogation and lien rights superior to any other lien or interest on any settlement or judgment proceedings, including Medicaid.

- If Medicare is not reimbursed, the third party payer must still reimburse Medicare even though it has already reimbursed the beneficiary or other party. 42 CFR § 411.24(i)(1).

Claims Handling

1. **Duty to Defend**

   Even where the allegations arguably, potentially, or even doubtfully fall within the coverage of the policy, the insurer must fulfill its duty to defend. *Willoughby Hills v. Cincinnati Ins. Co.* (1984), 9 Ohio St.3d 177, 179, 9 Ohio B. 463 The duty to defend is:

   - broader, separate, and distinct from the duty to indemnify.
   - determined by the scope of the pleadings, not the ultimate outcome of the action or the ultimate liability of the insurer. *Motorists Mut. Ins. Co. v. Trainor*, 33 Ohio St.2d 41 (1973).
   - arises when the complaint contains an allegation in any one of its claims that could arguably be covered by the insurance policy. *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 115 Ohio St.3d 306, 307 (2007).
   - may arise at a point subsequent to the filing of the complaint. *Cincinnati Ins. Co. v. Anders*, 99 Ohio St.3d 156, 159 (2003).
   - insurer not required to defend a claim that is clearly and indisputably outside the contracted policy coverage. *CPS Holdings*, 115 Ohio St.3d at 307.
   - no duty to defend "if there is no set of facts alleged in the underlying complaint against the insured that, if proven true, would invoke coverage." *Cincinnati Indem. Co. v. Martin*, 85 Ohio St.3d 604, 605 (1999); *Hastings Mut. Ins. Co. v. Vill. Communities Real Estate, Inc.*, 2014-Ohio-2916.

2. **Discovery of a Claims File**

   Senate Bill 117 amended the general rule regarding the attorney-client privilege in certain circumstances when an attorney represents an insurance company. A plaintiff may only discover otherwise privileged material if the party seeking disclosure of the communications has made at least a prima facie showing of bad faith, fraud or criminal misconduct. Under ORC § 2317.02 as amended by SB 117, a plaintiff can no longer automatically obtain pre-declination claim file material based merely upon an assertion of bad faith. However, there is a conflict among Ohio courts as to whether the prima facie showing required by ORC § 2317.02 applies only to *testimony*, or whether it also applies to *document discovery*.

3. **Ohio's Unfair Property/Casualty Claims Settlement Practices**

   - An insurer shall fully disclose to first party claimants all pertinent benefits, coverages, or other provisions of an insurance contract under which a claim is presented. OAC 3901-1-54(E)(1).
   - An insurer shall acknowledge the receipt of a claim within 15 days of receiving notice. OAC 3901-1-54(F)(2).
   - An insurer shall respond within 15 days to any communication from the claimant when that communication suggested that a response is appropriate. OAC 3901-1-54 (F)(3).
   - An insurer shall decide whether to accept or deny a claim within 21 days of the receipt of a properly executed proof of loss. If more time is needed to investigate the

claim, the insurer shall notify the claimant, within the 21 day period, and provide an explanation of the need for more time. If an extension of time is needed, the insurer has a continuing obligation to notify the claimant, in writing, at least every 45 days of the status of the investigation and the continued time for the investigation. OAC 3901-1-54(G)(1).

- If the insurer reasonably believes that the claimant has fraudulently caused or contributed to the loss, as represented by a properly and documented proof of loss, such information shall be presented to the fraud division of the Ohio Department of Insurance within 60 days of receipt of the proof of loss. OAC 3901-1-54(G)(1).
- No insurer shall deny a claim on the grounds of a specific policy provision, condition, or exclusion unless reference to such provision, condition, or exclusion is included in the denial letter. OAC 3901-1-54(G)(2).
- Notice shall be given to claimant at least 60 days before the expiration of any statute of limitation or contractual time limit, where the insurer has not been advised that the claimant is represented by legal counsel. OAC 3901-1-54(G)(5).

Although case law holds that this code does not provide a private cause of action to an insured, some courts have utilized it to determine whether a breach has occurred.

4. Bad Faith in Ohio

- The concept of a first party bad faith claim in Ohio was created in *Said v. Motorists Mut. Ins. Co.*, 63 Ohio St.3d 690 (1992), (overruled by *Zoppo* below). The Court held that there must be either no "reasonable basis in law or fact for refusing to satisfy a claim", coupled with actual knowledge of that fact or "an intentional failure to determine whether there was any lawful basis for such refusal" to support such a claim.
- In *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552 (1994), the Ohio Supreme Court overruled the specific intent requirement of *Said* and clarified the standard to be applied. The *Zoppo* court held that "[a]n insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefore." *See also, Kamnikar v. Fiorita*, 2017 WL 2817467, 2017-Ohio-5605.
- An insured may be able to succeed on a bad faith claim even where the insured does not succeed on the breach of contract claim. *Ballard v. Nationwide Ins. Co.*, 2015-Ohio-4474, 46 N.E.3d 170. In other words, a bad faith claim may still be viable even when the insurer's denial of the insured's claim is found to have been reasonably justified. It is possible that the insured would be unable to prove the insurance company's refusal to pay on the claim was unlawful, but still be able to prove that insurer failed to determine whether the refusal had a lawful basis.

5. Consumer Sales Practices Act

- The Ohio Consumer Sales Practices Act does not apply to insurance claims. The Ohio Supreme Court has held that transactions between insurance companies and their customers are not "consumer transactions" as defined in R.C. 1345.01. Thus, because an insurer cannot be a party to a consumer transaction, an insurer cannot commit an unfair or deceptive act or practice under R.C. 1345.81(E). Dillon v. Farmers Ins. of Columbus, Inc., 2015-Ohio-5407.

OHIO COUNTY AND APPELLATE DISTRICT MAP

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