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CLEVELAND ▪ COLUMBUS ▪ BEACHWOOD

2017
DESKTOP LEGAL PRIMER FOR OHIO CLAIMS

Van Wert County Court of Common Pleas

Harrison County Court of Common Pleas

Guernsey County Court of Common Pleas

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I. CLAIM LIMITATION PERIODS

A. Statutes of Limitation

1 Year

- Actions for libel, slander, malicious prosecution or false imprisonment – one year after the cause of action accrues. O.R.C. §2305.11(A).
- Assault and battery. O.R.C. §2305.111(B).
- Contribution claims can be brought within one year after final judgment. O.R.C. §2307.26.
- Legal malpractice (with discovery rule). O.R.C. §2305.11(A).
- Loss of consortium arising from medical malpractice. O.R.C. §2305.113.

2 Years

- Bodily injury. O.R.C. §2305.10(A). Including common law dog bite claims.
- Wrongful death. O.R.C. §2125.02(D)(1).
- Injury to personal property. O.R.C. §2305.10(A).
- Product liability. O.R.C. §2305.10(A). Subject to product liability statute of repose.
- Employer intentional tort. O.R.C. §2305.10(A); *Funk v. Rent All Mart, Inc.*, 89 Ohio St.3d 1468 (2000).

4 Years

- Fraud. O.R.C. §2305.09(C). Except five years for identity theft.
- Invasion of privacy. O.R.C. §2305.09(D).
- Trespass upon real property. O.R.C. §2305.09(A).
- Breach of contract for the sale of goods. O.R.C. §1302.98(A).
- General negligence, where there is no specific statutory statute of limitation. O.R.C. §2305.09(D).
- For the recovery of personal property or for taking or detaining it. O.R.C. §2305.09(B).
- Tort actions for damage to real property. O.R.C. §2305.09(D).
- Breach of fiduciary duty. O.R.C. §2305.09; *Cundall v. U.S. Bank,* 122 Ohio St.3d 188, 2009-Ohio-2523.
- Conversion. O.R.C. §2305.09(B).
- Claim of bad faith against an insurer. O.R.C. §2305.09(D); *United Dept. Stores Co. No. 1 v. Continental Cas. Co.,* 41 Ohio App.3d 72 (1st Dist. 1987).
- Loss of consortium for non-medical malpractice claims. O.R.C. §2305.09(D).
- Intentional infliction of emotional distress, unless the emotional distress is "parasitic" to another tort. O.R.C. §2305.09; *Yeager v. Local Union 20*, 6 Ohio St.3d 369 (1983); *Doe v. First United Methodist Church*, 68 Ohio St.3d 531 (1994).

6 Years

- Oral contract. O.R.C. §2305.07.
- Statutory dog bite claims. O.R.C. §2305.07; *Bora v. Kerchelich*, 2 Ohio St.3d 146 (1983).
- Action for indemnification based on primary and secondary liability. *Poe v. Dixon*, 60 Ohio St. 124 (1899).
- Unjust enrichment. O.R.C. §2305.07; *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179 (1984).
- Claims to recover workers' compensation benefits. O.R.C. §2305.07; *Ohio Bureau of Workers' Comp. v. McKinley,* 130 Ohio St.3d 156, 2011-Ohio-4432.

8 Years

- Written contract. O.R.C. §2305.06. (For causes of action governed by O.R.C. §2305.06 and that accrued prior to 9/28/2012, the period of limitations shall be eight years from 9/28/2012 or the expiration of the 15-year period of limitations in effect prior to 9/28/2012, whichever occurs first.) Generally, in the absence of a controlling statute to the contrary, a provision in a contract may validly limit, as between the parties, the time for bringing an action on such contract to a period less than that prescribed in a general statute of limitations provided that the shorter period shall be a reasonable one. *Shafer v. Russ Newman Ins. Agency,* 2013-Ohio-885 (4th Dist. 2013).
- 28 U.S.C. §2415 limits actions for money damages brought by the United States and covers conditional payments and recovery of payments. But Medicare's right to be reimbursed as a secondary payer is determined by the Social Security Act, which established the eight-year statute of limitation that was modified in 2013 by H.R. 1845. Statute of limitation for the purposes of secondary payer recovery begins to run when services are rendered.

12 Years

- Childhood sexual abuse. O.R.C. §2305.111(C). Starts to run when child turns 18.

Claims Against an Estate – All claims against an estate, including claims arising out of contract, tort, cognovit notes, or on judgments, whether due or not due, secured or unsecured, liquidated or unliquidated, shall be presented within six months after the death of the decedent, whether or not the estate is released from administration or an executor or administrator is appointed during that six-month period. O.R.C. §2117.06(B). If a claim is contingent at the time of a decedent's death and a cause of action subsequently accrues on the claim, it shall be presented to the executor or administrator in the same manner as other claims before the expiration of six months after the date of death of the decedent, or before the expiration of two months after the cause of action accrues, whichever is later. The executor or administrator shall allow or reject the claim in the same manner as other claims are allowed or rejected. If the claim is allowed, the executor or administrator shall proceed to pay it. If the claim is rejected, the claimant shall commence an action on the claim within two months after the rejection or be forever barred from maintaining an action on the claim. O.R.C. §2117.37.

Medical Malpractice – One year after the cause of action accrued. O.R.C. §2305.113(A). No action shall be commenced more than four years after the occurrence of the act or omission. O.R.C. §2305.113(C)(1) and (2). If a person could not have reasonably discovered the medical malpractice within three years of it happening, but discovers the malpractice before the end of four years after it occurred, the person may commence an action not later than one year after the person discovers the injury. O.R.C. §2305.113(D)(1). A person may bring an action over a foreign object left in the body of a person within one year after the person discovers it or should have discovered it. O.R.C. §2305.113(D)(2).

Tolling – Statutes of limitation may be suspended or tolled for minors or for those of unsound mind. O.R.C. §2305.16. But tolling does not affect contractual limitation of action provisions. *Sarmiento v. Grange Mut. Cas. Co.*, 106 Ohio St.3d 403 (2005).

B. Product Liability Statute of Repose

- Ohio has a ten-year statute of repose for product liability claims. No product liability claim shall accrue against the manufacturer or supplier of a product later than ten years from the date the product was delivered to its first purchaser or first lessee. O.R.C. §2305.10(C)(1).
- The statute of repose does not apply to asbestos claims, to claims from exposure to hazardous or toxic chemicals, to drugs or medical devices, or if the manufacturer warranted the product for longer than ten years, or if the manufacturer engaged in fraud in regard to information about the product and if the fraud contributed to the alleged harm.

C. Construction Statute of Repose

- Ohio has a ten-year statute of repose for certain premises liability actions. O.R.C. §2305.131.
- 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. O.R.C. §2305.131(A).
  - Does not apply if there is a longer express warranty [O.R.C. §2305.131(D)], or if the improvements involved fraudulent conduct [O.R.C. §2305.131(C)], or to prevent claims against a person who is an owner of, tenant of, landlord of, or other person in possession or control of the improvement to the real property that caused the accident [O.R.C. §2305.131(B)].

D. Civil Rights Claims

Age Discrimination

- O.R.C. §4112.02 - **180 Days**
- O.R.C. §4112.14 ("Make whole" remedies only.) - **6 Years** O.R.C. §2305.07.
- EEOC Charge - ("Make whole" remedies only.) - **180 Days or 300 Days** (If plaintiff initially instituted proceedings with an authorized state agency.)
- Title VII - within **90 Days** of receipt of "Right to Sue" letter from EEOC.
- OCRC Charge - ("Make whole" remedies only.) - **300 Days**

Race, Sex & Disability Discrimination

- O.R.C. §4112.02 - **6 Years** O.R.C. §2305.07.
- EEOC Charge - **180 Days or 300 Days** (If plaintiff initially instituted proceedings with an authorized state agency.)
- Title VII - within **90 Days** of receipt of "Right to Sue" letter from EEOC.
- 42 U.S.C. §1981 - **4 Years** *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004) (Race only.)
- ADA - within **90 Days** of receipt of "Right to Sue" letter from EEOC.

E. Employment Law Claims

ERISA

- **15 Years** (Generally, may vary depending on type of claim.) O.R.C. §2305.06; *Meade v. Pension Appeals & Review Committee,* 966 F.2d 190, 195 (6th Cir. 1992); *Redmon v. Sud-Chemie Inc. Retirement Plan for Union Employees,* No. 08-5121, 2008 U.S. App. LEXIS 23713 (6th Cir. Nov. 18, 2008).

Fair Labor Standards Act (Overtime, Minimum Wage, Equal Pay) – 29 U.S.C. §201, *et seq.*

- **2 Years**, but **3 Years** for willful violations only. 29 U.S.C. §255.

Minimum Fair Wage Standards Act

- O.R.C. §4111.17 (Wage discrimination based on race, sex, disability, age) - **1 Year** (Can go back five years for wages if timely filed.)
- O.R.C. §4111.02 (Minimum Wage) - **2 Years** O.R.C. §2305.11.
- O.R.C. §4111.03 (Overtime) - **2 Years** O.R.C. §2305.11.

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Workers' Compensation Retaliation

- O.R.C. §4123.90 - Employee has **180 Days** from the date of the retaliatory act to file suit; but employee must also notify employer, in writing, within **90 Days** of the retaliatory act.

Whistleblower

- O.R.C. §4113.52 - **180 Days** (Must notify employer orally and then in writing of employer conduct that is either criminal activity or affects safety.)

FMLA - 29 U.S.C. §2601, *et seq.*

- **2 Years,** but **3 Years** for willful violations only.

"Greeley" Public Policy Claim for Wrongful Discharge

- **4 Years** O.R.C. §2305.09(D); *Pytlinski v. Brocar Prod., Inc.*, 94 Ohio St.3d 77 (2002).

Uniformed Services Employment and Re-Employment Rights Act

- No statute of limitations for instituting litigation - 38 U.S.C. §4323 and 20 C.F.R. §1002.311. (Note: there are time limitations for requesting re-employment, see 38 U.S.C. §4312.)

II. EMPLOYER INTENTIONAL TORT

- The employer shall not be liable unless the plaintiff proves that the employer acted with the intent to injure or with the belief that the injury was substantially certain to occur. "Substantially certain" means that the employer acts with 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 intent to injure. O.R.C. §2745.01; *Stetter v. R.J. Corman Derailment Servs., L.L.C.,* 125 Ohio St.3d 280, 2010-Ohio-1029; *Kaminski v. Metal & Wire Prods. Co.,* 125 Ohio St.3d 250, 2010-Ohio-1027; *Houdek v. Thyssenkrupp Materials N.A.,* 134 Ohio St.3d 491, 2012-Ohio-5685.
- Free-standing items that serve as physical barriers between the employee and potential exposure to injury, such as rubber gloves and sleeves, are not "an equipment safety guard" for purposes of O.R.C. §2745.01(C). *Hewitt v. L.E. Myers Co.,* 134 Ohio St.3d 199, 2012-Ohio-5317.
- The failure to provide protective equipment and the failure to adequately train and supervise does not rise to the level of deliberate intent to cause injury required by O.R.C. §2745.01. *McCarthy v. Sterling Chemicals, Inc.,* 193 Ohio App.3d 164, 2011-Ohio-887. Alleged deficiencies in training, safety procedures, safety equipment, instructions or warnings are insufficient to create a genuine issue of material fact as to deliberate intent. *Roberts v. RMB Enterprises, Inc.,* 197 Ohio App.3d 435, 2011-Ohio-6223.

III. DAMAGES

A. Caps on Non-Economic (Pain and Suffering) Damages

1. Tort Claims Other Than for Medical Malpractice

- Ohio has **NO** limits on the amount of compensatory damages that an injured person can recover for economic losses in a tort action.
- Any bodily injury qualifies.
- However, non-economic (pain and suffering) damages are capped in non-medical malpractice tort actions.
  - Those caps do not apply to wrongful death or if the plaintiff has suffered a permanent and substantial physical deformity, loss of use of 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 himself/herself and perform life sustaining activities. O.R.C. §2315.18(B)(3)(a) and (b).
- When the non-economic loss compensatory damage caps apply, such non-economic losses are limited to the greater of $250,000 or three times the economic loss, not to exceed $350,000 for each plaintiff or a maximum of $500,000 for each occurrence that is the basis of tort action. O.R.C. §2315.18(B)(2).
- In determining an award of non-economic loss, the trier of fact shall **not** consider evidence: (1) of a defendant's alleged wrongdoing, misconduct or guilt; (2) of the defendant's wealth or financial resources; or (3) offered for the purpose of punishing the defendant. O.R.C. §2315.18(C)(1)-(3).
- The trier of fact is required in its verdict accompanied by answers to interrogatories specifying the total compensatory damages and the amount representing economic loss and the amount representing non-economic (pain and suffering) loss. O.R.C. §2315.18(D).
- Any party may seek summary judgment prior to trial with respect to whether the alleged injury falls within or outside the caps on non-economic damages. O.R.C. §2315.18(E)(2).
- A court of common pleas has no jurisdiction to enter a judgment on an award of compensatory damages for non-economic loss (pain and suffering) in excess of the limits set forth above [O.R.C. §2315.18(F)(1)] and neither the court, counsel nor witnesses may inform or instruct the jury or potential jurors about the caps or limits on non-economic (pain and suffering) damages. O.R.C. §2315.18(F)(2).
- In any tort action, except a wrongful death action, against a city, political subdivision or state, the amount of non-economic damages that a party may recover, in a non-death lawsuit, is capped at $250,000, even if a jury should award damages in excess of that amount. O.R.C. §2744.05(C)(1); *Oliver v. Cleveland Indians Baseball Co.,* 123 Ohio St.3d 278, 2009-Ohio-5030.

2. Medical Malpractice Claims

- In actions for medical, dental, optometric or chiropractic malpractice, the same caps for non-economic (pain and suffering) damages apply: The greater of $250,000 or three times the economic loss, not to exceed $350,000, for each plaintiff or $500,000 per occurrence. O.R.C. §2323.43(A)(2).
  - However, these caps are raised in such malpractice actions to $500,000 for each plaintiff or $1 million per occurrence if the non-economic losses for the plaintiff are for either:
    - (a) Permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system;
    - (b) Permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life sustaining activities. O.R.C. §2323.43(A)(3).

B. Caps on Punitive Damages

- Punitive damages must be proven by "clear and convincing evidence." O.R.C. §2315.21(D)(4).
- The punitive damages statute differentiates between two classes of employers, a "small employer" and a "large employer." A "small employer" is one who employs less than 100 people on a full-time basis, or, in the case of a manufacturer, an employer who employs less than 500 full-time employees.
- Punitive damages against "small employers," including individuals, are capped at the lesser of:
  1. Two times the amount of the compensatory damages awarded to the plaintiff from the defendant; or
  2. 10% of the employer's or individual's net worth when the tort was committed, up to a maximum of $350,000. O.R.C. §2315.21(D)(2)(b).
- For all other employers, punitive damages are limited to not more than two times the amount of compensatory damages. O.R.C. §2315.21(D)(2)(a).
- Punitive damages are not recoverable from a defendant unless the trier of fact has awarded the plaintiff compensatory damages, and the actions or omissions of that defendant demonstrate malice or aggravated or egregious fraud, or that the defendant, as principal or master, knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate. O.R.C. §2315.21(C)(1) and (2). *Niskanen v. Giant Eagle, Inc.,* 122 Ohio St.3d 486, 2009-Ohio-3626.
- Upon motion of any party prior to trial where punitive damages are claimed, the trial court shall bifurcate the compensatory damage part of the trial from the punitive damage part of the trial. O.R.C. §2315.21(B)(1)(a); *Havel v. Villa St. Joseph,* 131 Ohio St.3d 235, 2012-Ohio-552.
- There is a separate statute covering punitive damages in product liability actions. O.R.C. §2307.80.
- Punitive damages are not recoverable from a city, political subdivision or state. O.R.C. §2744.05(A).
- Punitive damages are not recoverable for a wrongful death claim. Ohio's wrongful death statute, O.R.C. §2125.02, only allows for the recovery of compensatory damages in wrongful death actions. *Rubeck v. Huffman,* 54 Ohio St.2d 20, 23 (1978).

C. Damage to Real Property

- When real property has been permanently or irreparably damaged, 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.
- The fair market value of real property is the price it 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, 2009-Ohio-1; *Ohio Collieries Co. v. Cocke*, 107 Ohio St. 238 (1923).

D. Damage to Personal Property

- The measure of damages to personal property is the difference in the fair market value of the property immediately before and after the damage. *Falter v. Toledo*, 169 Ohio St. 238 (1959).
- The fair market value is 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. *Bishop v. East Ohio Gas Co.*, 143 Ohio St. 541 (1944).
- For vehicles, the cost of repair may be recovered as well as the residual diminution of value, so long as it does not exceed the difference between the value of the property before and after the accident. *Rakich v. Anthem Blue Cross & Blue Shield,* 172 Ohio App.3d 523, 2007-Ohio-3739, 875 N.E.2d 993 (10th Dist.).
- For personal property without market value, the measure of damage is 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. *Erie Rd. Co. v. Steinberg*, 94 Ohio St. 189 (1916); *Bishop v. East Ohio Gas Co.,* 143 Ohio St. 541 (1944); *Layton v. Ferguson Moving and Storage Co.*, 109 Ohio App. 541 (1st Dist. 1959).
- For an item to be assessed by its value to the owner (i.e. that it has no market value), the owner must show exceptional circumstances that warrant a departure from the market value rule. *White v. Ohio State Univ. College of Veterinary Med.,* 2009-Ohio-7034.

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E. Admissibility of "Writedown" of Medical Bills

- In tort actions, defendants can admit into evidence that the plaintiff's medical providers accepted in payment for their services an amount less than the stated or face value of the medical bills.
- The plaintiff can introduce the full amount or stated "list" price of the medical services rendered. The defendant can introduce evidence that the medical provider accepted a negotiated reduction in, or "write off" of, the medical bills. *Robinson v. Bates,* 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195; *Jaques v. Manton*, 125 Ohio St.3d 342, 2010-Ohio-1838, 928 N.E.2d 434.
- Expert testimony is not necessary to introduce evidence of write-offs reflected on medical bills and statements. O.R.C. §2317.421; *Moretz v. Muakkasa,* 137 Ohio St.3d 171, 2013-Ohio-4656, 998 N.E.2d 479.

F. Evidence of Collateral Benefits Paid to Plaintiff

- In any tort action, the defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the same injury, death or loss in issue, except if the source of collateral benefits has:
  - A mandatory self-effectuating federal right of subrogation;
  - A contractual right of subrogation;
  - A statutory right of subrogation;
  - Or, if the source pays the plaintiff a benefit in the form of a life insurance payment or 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. O.R.C. §2315.20(A).
- If the defendant elects to introduce evidence of such collateral benefits, the plaintiff may introduce evidence of any amount that the plaintiff has paid or contributed to secure the plaintiff's right to receive the benefits about which the defendant has introduced evidence. O.R.C. §2315.20(B).
- A provider of subrogated collateral benefits, which are introduced at trial, shall not recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against the defendant. O.R.C. §2315.20(C).

G. Prejudgment and Post Judgment Interest

1. Statutory Rate for Prejudgment and Post Judgment Interest.
   2017: 4%; 2016: 3%; 2015: 3%; 2014: 3%; 2013: 3%; 2012: 3%; 2011: 4%; 2010: 4%; 2009: 5%; 2008: 8%
   - Set every October 15th by the tax commissioner by adding 3% to the federal short term rate. O.R.C. §5703.47.
2. In tort actions, prejudgment interest will be awarded if, after a post judgment hearing, the trial court determines that:
   a. The party who lost failed to make a good faith effort to settle, and
   b. The party who won did not fail to make a good faith effort to settle. O.R.C. §1343.03(C)(1).
3. Where the losing party admitted liability in a pleading or acted with the deliberate purpose to cause harm, interest runs from the date the cause of action accrued to the date of the judgment. O.R.C. §1343.03(C)(1)(a) and (b).
4. In all other actions, prejudgment interest runs for the longer of the following periods:
   a. From the date the winning party gave first notice and if the winning party made reasonable efforts to determine if the losing defendant had liability insurance and plaintiff gave written notice to the defendant and the liability insurer that the cause of action had accrued;
   b. From the date on which the prevailing plaintiff filed the lawsuit or pleading giving rise to the judgment. O.R.C. §1343.03(C)(1)(c)(i) and (ii).
5. No prejudgment interest on awards for future damages. O.R.C. §1343.03(C)(2).
6. Post judgment interest and interest on a settlement run from the date of the judgment or settlement until the satisfaction of the judgment or settlement. O.R.C. §1343.03(A) and (B); *Hartmann v. Duffey*, 95 Ohio St.3d 456, 2002-Ohio-2486, 768 N.E.2d 1170.

H. Parental Liability

- A parent can be civilly liable, up to $10,000, to a property owner when the parent's minor child willfully damages property or commits a "theft offense." O.R.C. §3109.09(B).
- A parent can be 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. O.R.C. §3109.10.
- A parent and the parent's minor child are jointly and severally liable, up to $15,000, for the child's acts of vandalism, desecration and ethnic intimidation. O.R.C. §2307.70(B)(1).
- Any negligence, or willful or wanton misconduct, that is committed by a minor when driving on a highway shall be imputed to the person who signed the application for the minor's probationary license. The person who signed the application shall be jointly and severally liable with the minor for any damages caused. O.R.C. §4507.07.

I. 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 approved by the probate court. O.R.C. §2111.18.

J. Statutory Damages

- A person who, without privilege to do so, recklessly cuts down, destroys or injures a vine, shrub, sapling, bush, tree or crop growing upon another's land or on public land is subject to treble damages. O.R.C. §901.51.

- A consumer who proves a knowing violation of Ohio's Consumer Sales Practices Act may recover three times the amount of the consumer's actual economic damages or $200, whichever is greater, plus an amount not exceeding $5,000 in noneconomic damages or recover damages or other appropriate relief in a class action.

IV. NEGLIGENCE

A. Comparative Negligence

- The contributory fault of the plaintiff may be asserted as an affirmative defense to a tort claim, except that the contributory fault of the plaintiff may not be asserted as an affirmative defense to an intentional tort claim. O.R.C. §2315.32.
- If the plaintiff's percentage of negligent conduct is greater than the sum of the percentages of the tortious conduct attributable to the defendants plus non-parties, the plaintiff recovers nothing. O.R.C. §2315.35.
- If the plaintiff's negligence is less than 50% and less than the total negligence attributable to the defendants and non-parties, the plaintiff's compensatory damage award is reduced proportionally to the percentage of the plaintiff's negligent conduct. O.R.C. §2315.35. For example, if the plaintiff is found to be 30% negligent and the jury awards $100,000, the plaintiff's net recovery is $70,000.
- The trier of fact shall return a general verdict, accompanied by interrogatory answers, that specify the percentage of negligence attributable to the plaintiff, to each defendant, and any attributable to non-parties. O.R.C. §2307.23(A)(1) and (2).
- Any defendant may argue that a non-party, against whom the plaintiff is not seeking recovery, is responsible for some or all of the tortious conduct. O.R.C. §2307.23(C). This defense may be raised at any time before trial.

V. JOINT AND SEVERAL TORT LIABILITY

- Where there are two or more defendants, all of whom are found to be 50% or less at fault, each is only liable for its proportionate share of the compensatory damages that represent economic loss. O.R.C. §2307.22(B).
- Where a defendant is found to be more than 50% at fault, that defendant shall be jointly and severally liable, in tort, for all compensatory damages that represent economic loss. O.R.C. §2307.22(A)(1).
- Each defendant who is determined to be 50% or less at fault shall be liable only for that defendant's proportionate share of the compensatory damages that represent economic loss. O.R.C. §2307.22(A)(2).
- All defendants are only liable for their proportionate share of non-economic (pain and suffering) losses, regardless of their degree of fault. O.R.C. §2307.22(C).
- Intentional tort defendants are treated differently.
  - Any defendant found to be liable for an intentional tort is jointly and severally liable in tort for all compensatory damages that represent economic loss even if that defendant is less than 50% at fault. O.R.C. §2307.22(A)(3).
  - Each defendant against whom an intentional tort claim has not been alleged and established, and to whom 50% or less of the tortious conduct is attributable, is not jointly and severally liable with a co-defendant who has been found liable for an intentional tort. Instead, such a defendant, who is found liable, but **NOT** for an intentional tort, is liable only for that defendant's proportionate share of the compensatory damages that represent economic loss. O.R.C. §2307.22(A)(4).

VI. CONTRIBUTION AND INDEMNITY

A. Contribution

- 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. O.R.C. §2307.25(A).
- There is no right of contribution in favor of any tortfeasor against whom an intentional tort claim has been established. O.R.C. §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. O.R.C. §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. O.R.C. §2307.25(C).

B. Indemnity

- If one tortfeasor is entitled to indemnity from another, the right of the indemnity obligee 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. O.R.C. §2307.25(D).

C. Effect of a Payment and Release

- A release or covenant does not discharge any of the other tortfeasors from liability, 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 amount of 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 award. O.R.C. §2307.28(A).

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- 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. O.R.C. §2307.28(A).
- The release discharges the person to whom it is given from all liability for contribution to any other tortfeasor. O.R.C. §2307.28(B).

VII. AUTOMOBILE INSURANCE

A. Mandatory Liability Limits

- Bodily injury - $25,000 per person/$50,000 per accident. O.R.C. §4509.01(K) (eff. 12/22/2013).
- Property damage - $25,000 per accident. O.R.C. §4509.01(K) (eff. 12/22/2013).
- UM/UIM coverage – The offering of Ohio UM/UIM coverage is optional. O.R.C. §3937.18(A).

B. Pro-rata v. Excess Coverage

- Where one carrier's policy applies on a pro-rata basis and another applies on an excess basis, the pro-rata coverage will be primary and the excess coverage will be excess. *Motorists Mutual Ins. Co. v. Lumbermens Mutual Ins. Co.*, 1 Ohio St.2d 105, 107 (1965).

C. UM/UIM Coverage

1. Not Excess Coverage

- UIM coverage is not excess coverage and shall only provide the insured an amount of protection not greater than that which would be available under the insured's UM coverage if the person or persons liable to the insured were uninsured at the time of the accident. O.R.C. §3937.18(C).

2. Set-Off

- The limits of UIM coverage shall be reduced by those amounts available for payment under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured. O.R.C. §3937.18(C).

3. Stacking

- Any UM/UIM coverage may include terms and conditions that preclude any and all stacking of such coverages including, but not limited to, Interfamily Stacking, which is the aggregating of the limits of such coverages by the same person or two or more persons who are not members of the same household, and Intrafamily Stacking, which is the aggregating of the limits of such coverages purchased by the same person or two or more family members of the same household. O.R.C. §3937.18(F)(1) and (2).
- Any 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, and, for the purpose of such policy limit, all those claims shall constitute a single claim. O.R.C. §3937.18(G).
- Auto insurers can validly preclude UM/UIM coverage for medical expenses when those same medical expenses have been paid, or are payable, under the same auto policy's Medical Payments coverage provisions. *State Farm Mut. Auto. Ins. Co. v. Grace,* 123 Ohio St.3d 471, 2009-Ohio-5934.

4. "Phantom" Vehicles

- A UM/UIM claim does not require "physical contact," but "independent corroborative evidence" must exist to prove that the injury or death was proximately caused by the negligence or intentional actions of an unidentified driver 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. O.R.C. §3937.18(B)(3).

5. Limitations Period

- UM/UIM coverage may include terms requiring that UM/UIM claims 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. O.R.C. §3937.18(H).

6. Exclusions

- 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. O.R.C. §3937.18(E).
- UM/UIM coverage may include terms that preclude coverage under any of the following circumstances:
  1. 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;
  2. When the insured is operating or occupying a motor vehicle without a reasonable belief that the insured is entitled to do so. Under no circumstance 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;
  3. When the 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;
  4. 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;
  5. When the person actually suffering the bodily injury or death is not an insured under the policy. O.R.C. §3937.18(I)(1) - (5).

D. Admissibility of Lack of Seatbelt, Protective Eye Device and Protective Helmet Use

- Failure to use a seatbelt is not admissible to prove negligence or comparative negligence but is admissible to reduce damages by showing that the failure to use contributed to the harm alleged in the action. O.R.C. §4513.263(F)(1).
- Operators and passengers of motorcycles, bicycles and snowmobiles are required to wear a protective eye device. Operators and passengers of motorcycles who are under the age of 18 and/or who are operating the motorcycle with a "novice" license are required to wear a protective helmet. However, these requirements and any failure of an operator or passenger to comply with these requirements are not admissible in a trial of any civil action. O.R.C. §4511.53(C) (eff. until 1/1/17).

VIII. DECLARATORY JUDGMENT ACTIONS

A. Joinder

- Insurers litigating coverage issues in a declaratory judgment action must name as parties all those whom the insurer seeks to be bound by the declaratory judgment. *The Estate of Heintzelman v. Air Experts, Inc.,* 126 Ohio St.3d 138, 2010-Ohio-3264.
- However, an insured can bring a declaratory judgment action directly against his/her/its insurer without joining claimants and potential judgment creditors, and those non-party claimants/potential judgment creditors are still bound by the outcome of the declaratory judgment action. O.R.C. §2721.02(C) and §3929.06(C)(2).

B. Insurer's Coverage Defenses Against Supplemental Petitions

- Once a claimant or judgment creditor obtains a judgment against the insured, the claimant or judgment creditor can, after 30 days of final judgment, if the judgment remains unsatisfied, file suit directly against the defendant/judgment debtor's insurer to try to collect the judgment. O.R.C. §2721.02(B) and §3929.06 (A)(2).
- In defense of such a supplemental petition or declaratory judgment action, the insurer may assert, as an affirmative defense against the judgment creditor, any coverage defense that the insurer possesses and could assert against the insured. O.R.C. §2721.02(C) and §3929.06(C)(1).

IX. INSURANCE COVERAGE

A. Construction Defect Claims

- Claims of defective construction or workmanship brought by a property owner are not claims for "property damage" caused by an "occurrence" under a commercial general liability policy. *Westfield Ins. Co. v. Custom Agri Sys., Inc.,* 133 Ohio St.3d 476, 2012-Ohio-4712.
- Trigger: Ohio appellate courts' holdings vary as to whether construction defect claims are subject to a "continuous trigger" or a "manifestation trigger" or an "injury in fact trigger." Litigants will need to know the case law of their appellate district as the Ohio Supreme Court has not yet addressed the trigger issue in the construction defect context.

B. Allocation

- In the environmental pollution context (*Goodyear Tire & Rubber Co. v. Aetna Cas. & Surety Co.,* 95 Ohio St.3d 512, 2002-Ohio-2842) and the progressive injury (i.e., asbestos exposure) context (*Pennsylvania Gen. Ins. Co. v. Park-Ohio Industries, Inc.,* 2010-Ohio-2745), where the losses occurred over time, the Ohio Supreme Court has adopted an "all sums" approach, meaning that all policies in effect during the loss period were triggered. Thus, the insured can target one insurer from which it is able to obtain a defense and indemnity for any covered judgment. The targeted insurer is then able to seek recovery or "contribution" from the non-targeted insurers.

C. Employer Intentional Tort

- An insurer has no duty to defend an employer intentional tort case against the insured employer, even where an exclusion applies to injury resulting from an act that is "determined to have been committed" by an insured with the belief that an injury is substantially certain to occur. *Ward v. United Foundries, Inc.,* 129 Ohio St.3d 292, 2011-Ohio-3176.
- An insurance provision that excludes coverage for acts committed with the deliberate intent to injure an employee precludes coverage for employer intentional torts. *Cincinnati Ins. Co. v. DTJ Enters.* (*In re Hoyle*), 143 Ohio St.3d 197, 2015-Ohio-843.

D. Punitive Damages

- Ohio law prohibits auto and other casualty and liability insurance policies from providing coverage for punitive damages. O.R.C. §3937.182(B). However, depending on the policy language, a policy might cover the attorney fee component of a punitive damage award. *Neal-Pettit v. Lahman,* 125 Ohio St.3d 327, 2010-Ohio-1829.

E. Retroactive Cancellation of Liability Insurance

- No retroactive cancellation or annulment of liability insurance is permitted after the insured becomes responsible for damages on account of bodily injury or death by accident. O.R.C. §3929.05.

F. Contract Void *Ab Initio*

- A contract for insurance may be void *ab initio* if there is a misstatement in the contract, or in an application for insurance that is explicitly incorporated into the policy, if the misstatement constitutes a warranty, not merely a representation. A warranty is a statement, description or undertaking by the insured of a material fact appearing either on the face of the policy or in another instrument specifically incorporated into the policy. *Allstate v. Boggs*, 27 Ohio St.2d 216 (1971).

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G. Jurisdiction

- An Ohio court may not exercise personal jurisdiction over a nonresident based solely on the conduct of the nonresident's insurance company. *Fraley v. Estate of Oeding,* 138 Ohio St.3d 250, 2014-Ohio-452, 6 N.E.3d 9.
- A domicile is where a person resides, where he intends to remain, and where he intends to return when away temporarily. A person's intent, coupled with objective facts, establishes his domicile. *Schill v. Cincinnati Ins. Co.,* 2014-Ohio-4527.

X. SUBROGATION AND LIENS

A. The Make Whole Doctrine

- Effective 9/29/15, Ohio codified the "Make Whole Doctrine."
- Pursuant to that doctrine, if less than the full value of the tort action is recovered for comparative negligence, or by reason of the collectability of the full value of the claim, resulting from limited liability insurance or any other cause, the subrogee's claim shall be reduced in the same proportion as the injured party's interest is diminished. O.R.C. §2323.44(B).

B. Workers' Compensation Subrogation

- The Ohio Revised Code creates a right of recovery in favor of a statutory subrogee against a third party, and the statutory subrogee is subrogated to the rights of a claimant against that third party. O.R.C. §4123.931(A).
- There is a complex statutory formula for determining the amount of the subrogation interest. O.R.C. §4123.931(B).
- 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. O.R.C. §4123.931(H).
- The statutory subrogation right applies, but is not limited to, amounts recoverable from a claimant's insurer in connection with UM/UIM coverage. O.R.C. §4123.931(I)(1). The Bureau of Workers Compensation can pursue a lien, even if the injured party declines to do so, but would have to prove liability as well as damages.

C. Ohio Medicaid Subrogation

- The acceptance of Medicaid benefits gives an automatic right of subrogation to the Ohio Department of Job and Family Services 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. O.R.C. §5160.37(A).
- No settlement, 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 a reasonable opportunity to perfect their rights of recovery. O.R.C. §5160.37(E). If the departments are not given the appropriate written notice, the recipient or participant and, if there is one, the recipient's attorney, are liable to reimburse the departments for the recovery received to the extent of medical payments made by the departments. O.R.C. §5160.37(E).
- The departments shall be permitted to enforce their subrogation rights against a third party even though they accepted prior payments in 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. O.R.C. §5160.37(F).
- The third party becomes liable to the Ohio 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. O.R.C. §5160.37(F).
- It is incumbent on the welfare recipient to inform the Ohio Department of Job and Family Services and the appropriate County Department of Job and Family Services that he or she is pursuing a third party recovery. O.R.C. §5160.37(C).
- A payment, settlement, compromise, judgment or award that purports to exclude the cost of medical assistance paid for by the Ohio Department of Job and Family Services or a County Department of Job and Family Services shall not preclude the department from enforcing its subrogation rights. O.R.C. §5160.37(A).

D. 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. 42 U.S.C. §1395y(b)(2)(B)(iii).
- These rights apply even though no lien or other notice was sent and even when the liability insurer and the party's attorneys are not aware that payments have been made by Medicare, if such persons or parties should have been aware of Medicare's interest.
- 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).

XI. OHIO FAIR CLAIMS PRACTICES ACT – 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 suggests 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 insurer shall notify the claimant, within the 21-day period, and explain 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, 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. OAC 3901-1-54(G)(2).
- Notice shall be given to claimants, 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).

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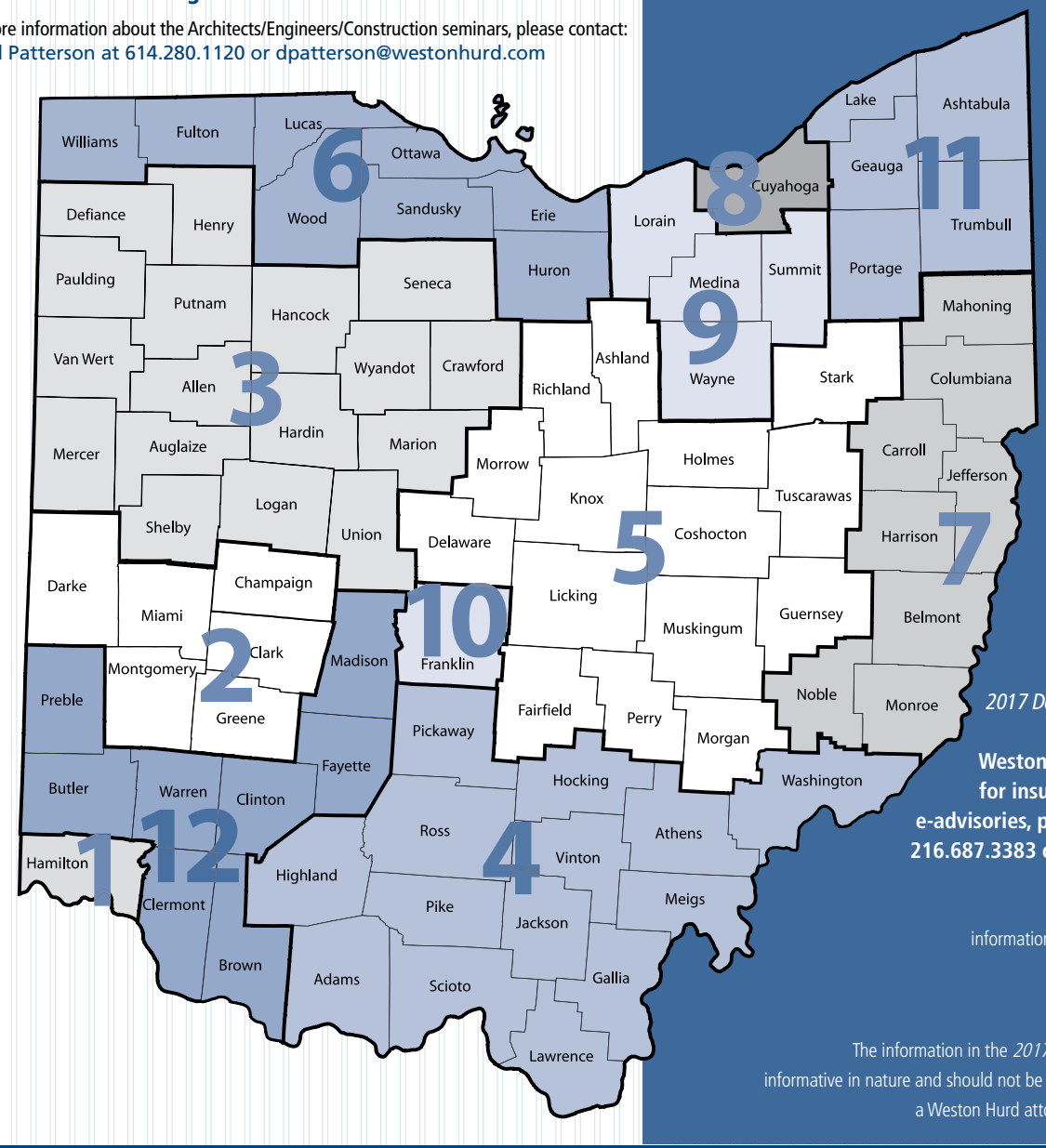
Map of Ohio's Appellate Districts



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