Pointing the Finger: Issues in Apportioning Liability to Non-Parties

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Revised Code Section 2307.23 provides the procedural mechanism of apportioning liability for purposes of determining joint and several liability and contributory fault of a plaintiff. Apportionment can serve as a valuable tool for defendants, particularly larger corporate defendants that may be a disproportionately large target at trial.

Pursuant to the definition of "tort action," R.C. 2307.23 applies to product liability and asbestos claims.[1] Ohio Jury Instructions' interrogatories for product liability claims include apportionment pursuant to R.C. 2307.23.[2]

R.C. 2307.23 provides as follows:

> (A) In determining the percentage of tortious conduct attributable to a party in a tort action under section 2307.22 or sections 2315.32 to 2315.36 of the Revised Code, the court in a nonjury action shall make findings of fact, and the jury in a jury action shall return a general verdict accompanied by answers to interrogatories, that shall specify all of the following:
>
> (1) The percentage of tortious conduct that proximately caused the injury or loss to person or property or the wrongful death that is attributable to the plaintiff and to each party to the tort action from whom the plaintiff seeks recovery in this action;
>
> (2) The percentage of tortious conduct that proximately caused the injury or loss to person or property or the wrongful death that is attributable to each person from whom the plaintiff does not seek recovery in this action.
>
> (B) The sum of the percentages of tortious conduct as determined pursuant to division (A) of this section shall equal one hundred per cent.
>
> (C) For purposes of division (A)(2) of this section, it is an affirmative defense for each party to the tort action from whom the plaintiff seeks recovery in this action that a specific percentage of the tortious conduct that proximately caused the injury or loss to person or property or the wrongful death is attributable to one or more persons from whom the plaintiff does not seek recovery in this action. Any party to the tort action from whom the plaintiff seeks recovery in this action may raise an affirmative defense under this division at any time before the trial of the action.

Recent cases have raised two issues in applying R.C. 2307.23. First, can a defendant assign liability to *any* person from whom the plaintiff does not seek recovery? Second, when and how must a defendant seek apportionment to a non-party? While the answers may seem clear from the statutory language, plaintiffs and Ohio courts have pushed back.

To Whom May the Jury or Court Apportion Liability?

Significantly, R.C. 2307.23 provides that a defendant may seek apportionment of liability not only to any plaintiff or co-defendant, but also to non-parties.[3] Specifically, pursuant to R.C. 2307.011(J), a party may seek apportionment to the following:

(1) Persons who have entered into a settlement agreement with the plaintiff;
(2) Persons whom the plaintiff has dismissed from the tort action without prejudice;
(3) Persons whom the plaintiff has dismissed from the tort action with prejudice;

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(4) Persons who are not a party to the tort action whether or not that person was or could have been a party to the tort action if the name of the person has been disclosed prior to trial.[4]

Ohio courts have split regarding whether a defendant may apportion liability to a non-party that is immune from liability. The Fifth District and Eighth District reached opposite conclusions when asked whether defendants may apportion liability to a non-party employer that has workers compensation immunity.

In upholding apportionment to an immune employer in *Fisher v. Beazer East, Inc.*, the Eighth District noted that R.C. 2307.23 does not exclude any party who may be entitled to immunity (as an employer or otherwise).[5] Rather, under the express language of R.C. 2307.011(J), "'[p]ersons from whom the plaintiff does not seek recovery in this action'" includes '[p]ersons who are not a party to the tort action whether or not that person was or could have been a party.'"[6] Franklin County and Union County common pleas courts have agreed with the Eighth District.[7]

In *Wise v. Merry Moppet Early Learning Ctr.,* the Franklin County Court of Common Pleas applied Fisher to allow apportionment of liability to a minor plaintiff's parent despite.

In *Romig v. Baker Hi-Way, Inc.,* the Fifth District held that a jury should not be asked to apportion liability to a non-party employer since doing so would conflict with the immunity provided by the Workers' Compensation Act.[8] The Fifth District noted that R.C. 2307.23 does not exclude claims against employers but concluded that including an employer's negligence in the allocation of fault is inconsistent with the workers' compensation system as structured by the constitution and legislature.[9] The Fifth District went even further and suggested that evidence of the employer's negligence might be excluded.[10] In dissent, Judge Edwards noted that the majority's decision forced the defendant to pay its own fair share plus that of the employer.[11] In a 4-3 decision, the Ohio Supreme Court declined to accept *Romig* for review.[12]

The Supreme Court declined jurisdiction in *Romig* prior to the Eighth District's *Fisher* decision. *Fisher* is a more persuasive decision and common pleas courts outside the Fifth District have adopted its reasoning but there is still a risk in many Ohio courts that a defendant may not be allowed to apportion liability to a negligent but immune employer. Given the restriction of employer intentional torts in recent years, injured employees may increasingly seek recovery at trial from manufacturers and suppliers but not an employer, either because the employee did not bring an employer intentional tort claim or because the employer prevailed at summary judgment. Thus, this issue is ripe for a decision from the Ohio Supreme Court.

When Must a Defendant Seek Apportionment?

R.C. 2307.23(C) provides that attributing a percentage of liability to a non-party is an affirmative defense that any party may raise "at any time before the trial of the action."[13]

Despite the plain language of R.C. 2307.23(C), plaintiffs occasionally object to a defendant asserting an affirmative defense under that section after the defendant's initial answer. The safest course, of course, is to raise R.C. 2307.22 and R.C. 2307.23 as an affirmative defense in the answer.

In *Simpkins v. Grace Brethren Church of Delaware,* the defendant's answer asserted that "in the event that liability on the part of either of these Defendants is established ..., each Defendant is liable for only that portion of Plaintiff's damages caused by his or her own proportionate share of fault."[14] Two weeks before trial, the defendant filed a notice of intent to seek apportionment. The Fifth District held that the defendant had provided fair notice.[15]

Often, a plaintiff will settle his claims against individual defendants shortly before trial and dismiss them from the action. A co-defendant will thus become a non-party. In *Manchise v. Ionna,* where a plaintiff dismissed a defendant two days before trial, the First District held that the remaining defendant was not required to plead a comparative-fault defense in his answer because the subsequently dismissed co-defendant was a party at the time the answer was filed.[16] The co-defendant was not "[a person] from whom the plaintiff [did] not seek recovery[.]." The First District further concluded that the remaining defendant was not required to seek leave to file an amended answer to assert comparative-fault.[17]

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Apportionment or Setoff of a Settlement Amount? One Additional Caveat.

When a co-defendant settles plaintiff's claims and becomes a non-party, remaining defendants may be entitled to a reduction in plaintiff's claim against them pursuant to R.C. 2307.28. However, R.C. 2307.29 states that R.C. 2307.28 does not apply to the extent that R.C. 2307.22 to 2307.24 make a defendant liable only for that defendant's proportionate share. Thus, if a defendant's liability is reduced by R.C. 2307.23, they are not entitled to setoff of a settlement amount. To date, Ohio courts have not analyzed the application of R.C. 2307.29. This section raises interesting issues of strategy for defendants.

Endnotes

[1] R.C. 2307.011
[2] OJI CV 451.23.
[3] R.C. 2307.23(A)(2), (C).
[4] R.C. 2307.011(G).
[5] *Fisher v. Beazer E., Inc.,* 8th Dist. Cuyahoga No. 99662, 2013-Ohio-5251, ¶ 37.
[6] *Id.*
[7] *Farley v. Complete Gen. Constr. Co.,* Franklin C.P. No. 12CVC-09-12394, 2014 Ohio Misc. LEXIS 9060 (Feb. 12, 2014); *Lu Swartz v. McCormick Equip. Co.,* Union C.P. Nos. 2011-CV-0020, 2011-CV-0546, 2013 Ohio Misc. LEXIS 7943 (July 15, 2013); *Wise v. Merry Moppet Early Learning Ctr.,* Franklin C.P. No. 13CVC-12349, 2015 Ohio Misc. LEXIS 8348 (July 24, 2015).
[8] *Romig v. Baker Hi-Way Express, Inc.,* 5th Dist. Tuscarawas No. 2011AP-02-0008, 2012-Ohio-321.
[9] *Id.* at ¶ 45-46.
[10] *Id.* at ¶ 55.
[11] *Id.* at ¶ 81.
[12] *Romig v. Baker Hi-Way Express, Inc.,* 132 Ohio St.3d 1409, 2012-Ohio-2454.
[13] R.C. 2307.23(C).
[14] *Simpkins v. Grace Brethren Church of Del.,* 2014-Ohio-3465, 16 N.E.3d 687, ¶ 52-55 (5th Dist.).
[15] *Id.*
[16] *Manchise v. Ionna,* 1st Dist. Hamilton No. C-120874, 2013-Ohio-3612, ¶ 14.
[17] *Id.*

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