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2023 DESKTOP LEGAL PRIMER FOR OHIO CLAIMS

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A. Statutes of Limitation

1 Year

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- Assault and battery. O.R.C. §2305.111(B).
- Contribution claims – one year after judgment has become final by lapse of time for appeal or after appellate review. O.R.C. §2307.26.
- Legal malpractice (with discovery rule). O.R.C. §2305.117(A).
- Loss of consortium arising from medical malpractice. O.R.C. §2305.113.

2 Years

- Bodily injury, including common law dog bite claims. O.R.C. §2305.10(A).
- 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.*, 91 Ohio St.3d 78, 81, 742 N.E.2d 127, 129-130 (2001).
- Actions under the Ohio Consumer Sales Practices Act cannot be brought more than two years after the cause of action accrues or more than one year after the termination of proceedings by the attorney general, whichever is later. O.R.C. §1345.10.

3 Years

- The SMART Act imposes a statute of limitations on Medicare filing suit over an unpaid lien. It has three years from the date it receives notice that the plaintiff's case has settled. (Applies to all suits settled after July 10, 2013). 42 U.S.C. §1395y(b)(2)(B)(iii).

4 Years

- Fraud. O.R.C. §2305.09(C). Except for identity theft which is five years.
- Invasion of privacy. O.R.C. §2305.09(D).
- Trespass upon real property. O.R.C. §2305.09(A).
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- 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, 375 (1983). *Manin v. Diloreti,* 94 Ohio App.3d 777, 641 N.E.2d 826 (9th Dist. 1994).
- Claims for tortious interference with business and tortious interference with contract. O.R.C. §2305.09(D).
- Oral contract. O.R.C §2305.07. This limitations period was shortened effective June 16, 2021, from six to four years through recent legislation, S.B.13, 134th General Assembly. For claims governed by O.R.C. §2305.07(A) that accrued prior to the effective date, the period of limitations is four years from the effective date or the expiration of the period of limitations in effect prior to the effective date, whichever occurs first.
- Unjust enrichment. O.R.C §2305.07. On unjust enrichment claims, Ohio courts apply the limitations period applicable to oral contracts. *Hambleton v. R.G. Barry Corp.,* 12 Ohio St.3d 179 (1984). As such with the recent shortening of the statute for oral contracts, the limitations period for unjust enrichment claims should likewise be shortened. No recent published decisions have addressed this issue, and it may be a subject of future litigation.
- Implied contract to indemnify. O.R.C §2305.07; *Ohio Cas. Ins. Co. v. Ford Motor Co.,* 502 F2d 138, 141 (6th Cir. 1974).

5 Years

- Actions against the state for failure to make payment (other than unclaimed funds) under O.R.C. §126.301 (five years).

6 Years

- Implied contract to indemnify. O.R.C §2305.07; *Ohio Cas. Ins. Co. v. Ford Motor Co.,* 502 F2d 138, 141 (6th Cir. 1974).
- Written contract. O.R.C. §2305.06. Effective June 16, 2021, the limitations period was shortened from eight to six years. Causes of action governed by §2305.06 that accrued prior to June 16, 2021, must be filed six years from June 16, 2021, or before the expiration of the limitations period in effect prior to the effective date, whichever occurs first. S.B.13, 134th General Assembly. 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,* 4th Dist. Highland No. 12CA11, 2013-Ohio-855.
- Statutory dog bite claims. O.R.C. §2305.07(B); *Bora v. Kerchelich*, 2 Ohio St.3d 146 (1983).
- Claim **by a statutory subrogee** to recover workers' compensation benefits. O.R.C. §2305.07(B); *Ohio Bureau of Workers' Comp. v. McKinley,* 130 Ohio St.3d 156, 2011-Ohio-4432.
- An action to enforce a note payable at a definite time must be brought within six years of the date due or, if accelerated, within six years of the date of acceleration. O.R.C. §1303.16(A).

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- An action to enforce a note payable on demand must be brought within six years of the demand date, but if no demand is made, an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of 10 years. O.R.C. §1303.16(B).
- An action arising out of a consumer transaction incurred primarily for personal, family, or household purposes, based upon any contract or agreement, express or implied, including an account stated, whether written or not, must be commenced within six years after the cause of action accrued. §2305.07(C). For claims that accrued prior to June 16, 2021, the period of limitations is six years from the effective date or the expiration of the period of limitations in effect prior to the effective date, whichever occurs first.
- An action for liability created by statute other than a forfeiture or penalty, O.R.C. §2305.07(B).

12 Years

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

21 Years

- An action to recover the title to or possession of real property shall be brought within 21 years after the cause of action accrued. O.R.C. §2305.04.

Other Limitation Periods

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 10-year statute of repose for product liability claims. No product liability claim shall accrue against the manufacturer or supplier of a product later than 10 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 bodily injury claims based on exposure to asbestos. It does not apply to claims based on exposure to hazardous or toxic chemicals, or to certain drugs or medical devices, as long as the exposure to these items occurs during the 10-year period. If the manufacturer issued an express written warranty covering a product for longer than 10 years, the statute of repose does not bar an action if the cause of action accrued within the term of the warranty. If the manufacturer engaged in fraud regarding information about the product, and the fraud contributed to the alleged harm, the statute of repose does not apply. O.R.C. §2305.10(C)(2)–(7).

C. Construction Statute of Repose

- Ohio imposes a 10-year statute of repose barring any cause of action to recover damages for bodily injury, injury to real or personal property, or wrongful death arising out of a defective and unsafe condition of an improvement to real property against a person who performed services for the improvement to real property later than 10 years from the date of substantial completion of the improvement. O.R.C. §2305.131.
- The Ohio Supreme Court clarified that the statute's bar applies to any civil cause of action meeting its statutory criteria, regardless of sounding in tort or breach of contract. *New Riegel Local School Dist. Bd. of Edn. v. Buehrer Group Architecture & Eng., Inc.*, 157 Ohio St.3d 164 (2019).
  - The statute includes certain exceptions. For example, the statute does not bar claims for breach of express warranty where the warranty guarantees the work for a period longer than the 10-year repose period [O.R.C. §2305.131(D)], does not apply to improvements in which the party providing services engaged in fraudulent conduct [O.R.C. §2305.131(C)], and does not bar causes of action against the owner, tenant, landlord, or other person in possession or control of the improvement to real property at issue.

D. Legal Malpractice Statute of Repose

- Effective June 16, 2021, Ohio has a four year statute of repose for claims of legal malpractice under O.R.C. §2305.117, and no legal malpractice claim may be commenced more than four years after the occurrence of the act or omission constituting the alleged basis of the legal malpractice claim. If a legal malpractice claimant, in the exercise of reasonable care and diligence, could not have discovered the claim within three years after the occurrence of the act or omission, but, in the exercise of reasonable

care and diligence, discovers the injury resulting from that act or omission before the expiration of the four-year period, the claimant may commence an action upon the claim not later than one year after discovery. A person who commences legal malpractice action under the circumstances just described must prove, by clear and convincing evidence, that the person, with reasonable care and diligence, could not have discovered the injury resulting from the act or omission constituting the alleged basis of the claim within the three-year period.

E. Employment Discrimination Claims Under O.R.C. §4112

- An employment discrimination claimant must first exhaust all administrative remedies at the Ohio Civil Rights Commission prior to filing a lawsuit. Claimant must file a charge with the Ohio Civil Rights Commission within two years.
- As amended in January 2021, and effective April 15, 2021, a person who files a civil action in Common Pleas Court alleging employment discrimination must file within two years of the unlawful discriminatory practice, per O.R.C. §§4112.052(C)(1) and 4112.14(E)(1).
- The time period to file a civil action is tolled for the period of time the charge is pending with the Ohio Civil Rights Commission, O.R.C. §§4112.052(C)(1) and 4112.14(E)(2).
- EEOC Charge for federal employment discrimination claims must be filed: 180 days or 300 days (if plaintiff initially instituted proceedings with an authorized state agency). See 42 U.S.C. §2000e-5(e)(1); see also *Skinner v. Bowling Green State Univ.,* 461 F. Supp. 3d 667, 672.
- 42 U.S.C. §2000e Title VII Claims (age, race, gender, and retaliation): within 90 days of receipt of "Right to Sue" letter from EEOC. See 42 U.S.C. §2000e-5(f)(1); see also *Thompson v. Fresh Prods., LLC,* 985 F.3d 509, 521 (6th Cir. 2021) (explaining that federal 90-day limitations period applies to claims under the Age Discrimination in Employment Act).
- ADA Claim: within 90 days of receipt of "Right to Sue" letter from EEOC. See *McGhee v. Disney Store,* 53 F. App'x 751, 752 (6th Cir. 2002).

F. Employment Law Claims

ERISA

- Six years per O.R.C. §2305.06 (generally, may vary depending on type of claim); See *Meade v. Pension Appeals & Review Committee,* 966 F.2d 190, 195 (6th Cir. 1992); (because ERISA provides no statute of limitations for claims for benefits under 29 U.S.C. §1132(a)(1)(B), the court should apply the most analogous state law statute of limitations, which is breach of contract in Ohio); *Engleson v. Unum Life Ins. Co. of Am.,* N.D. Ohio No. 5:09-CV-2969, 2012 U.S. Dist. LEXIS 187548, at *30 (June 29, 2012) (same; noting, however, that if the plan contains a contractual statute of limitations, courts generally apply the contractually agreed upon statute of limitations provided that the limitation period is reasonable).
- However, federal law determines when an ERISA cause of action accrues despite the fact that state law determines the relevant statute of limitation. *Davis v. Bante,* E.D. Mich. No. 07-12270, 2007 U.S. Dist. LEXIS 99287, at *9-10 (Sep. 12, 2007).

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

- Two years (three years for willful violations) per 29 U.S.C. §255.

Minimum Fair Wage Standards Act

- Claims for wage discrimination under O.R.C. §4111.17(E): one year.
- Claims for nonpayment of minimum wage under O.R.C. §4111.02: two years per O.R.C. §2305.11(A).
- Claims for unpaid overtime compensation under O.R.C. §4111.03: two years per O.R.C. §2305.11(A).

Workers' Compensation Retaliation

- Claims under Ohio Workers' Compensation Retaliation Statute, 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

- Claims under Ohio Whistleblower Statute, O.R.C. §4113.52(D): 180 days from the date of the disciplinary or retaliatory act (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.*

- Two years after the date of the last event constituting the alleged violation (three years for willful violations) per 29 U.S.C. §2617(c).

"Greeley" Public Policy Claim for Wrongful Discharge

- Four years per O.R.C. §2305.09(D). See *Pytlinski v. Brocar Prods.,* 94 Ohio St.3d 77, 80 (2002) ("An action for wrongful discharge in violation of public policy is not specifically covered by any statutory section. Accordingly, we find that the limitations period for common-law claims for wrongful discharge in violation of public policy is four years as set forth in R.C. 2305.09(D)").
- However, Pytlinski does not eliminate the requirements that a plaintiff must comply with in other statutes, such as the 180-day limitations period contained in O.R.C. §4123.90 or O.R.C. §4113.52. See, e.g., *Contreras v. Ferro Corp.,* 73 Ohio St.3d 244, 652 N.E.2d 940 (1995); *Thompson v. Gynecologic Oncology & Pelvic Surgery Assocs.,* 10th Dist. Franklin No. 06AP-340, 2006-Ohio-6377; *Lesko v. Riverside Methodist Hosp.,* 10th Dist. Franklin No. 04AP-1130, 2005-Ohio-3142; *Shaffer v. OhioHealth Corp.,* 10th Dist. Franklin No. 04AP-236, 2004-Ohio-6523.

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Uniformed Services Employment and Re-Employment Rights Act, 28 U.S.C. §§4301 to 4335

- No statute of limitations for instituting litigation. See 38 U.S.C. §4327(b); See *Corbin v. Southwest Airlines, Inc.,* 2018 U.S. Dist. LEXIS 171672 (S.D. Tex. Oct. 4, 2018) (Congress amended USERRA to make it clear that there is no state or federal statute of limitations for USERRA claims); *Brill v. AK Steel Corp.,* S.D. Ohio No. 2:09-CV-534, 2012 U.S. Dist. LEXIS 35251, at *29 (Mar. 14, 2012) (Congress never intended a statute of limitations to apply to USERRA claims); *Ward v. Shelby Cty.,* W.D. Tenn. No. 2:20-cv-02407-JPM, 2020 U.S. Dist. LEXIS 219256, at *11-12 (Nov. 19, 2020) ("The USERRA does not impose a statute of limitations on the Plaintiff").
- Note: there are time limitations for requesting re-employment. See 38 U.S.C. §4312.

II. EMPLOYER INTENTIONAL TORT

- An 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 cause an employee to suffer an injury, a disease, a condition, or death. *Wentling v. David Motor Coach Ltd.,* 5th Dist. Stark No. 2017CA00190, 2018-Ohio-1618.
  - Deliberate removal of an equipment safety guard, or deliberate misrepresentation of a toxic or hazardous substance, creates a rebuttable presumption that the employer acted with intent to injure. See O.R.C. §2745.01(C); *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St.3d 280 (2010); *Kaminski v. Metal & Wire Prods. Co.*,125 Ohio St.3d 250 (2010); *Houdek v. ThyssenKrupp Materials N.A., Inc.*, 134 Ohio St.3d 491 (2012).
- 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).
- 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 Chems., Inc.*, 193 Ohio App.3d 164, 2011-Ohio-887, 951 N.E.2d 441 (1st Dist.).
- 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 Ent., Inc.,* 197 Ohio App.3d 435, 2011-Ohio-6223, 967 N.E.2d 1263 (12th Dist.).
- Absent a deliberate intent to injure another, an employer is not liable for a claim alleging an employer intentional tort, and the injured employee's exclusive remedy is within the workers' compensation system. *Cincinnati Ins. Co. v. DTJ Ents., Inc. (In re Hoyle),* 143 Ohio St.3d 197, 2015-Ohio-843, 36 N.E.3d 122.

III. EMPLOYMENT PRACTICES

- When a supervisor's sexual harassment of an employee takes place during work hours, at the office, and was carried out by someone with the authority to hire and fire, it will normally fall within the supervisor's scope of employment. *Ohio Government Risk Management Plan v. Harrison,* 115 Ohio St.3d 241, 2007-Ohio-4948.

IV. 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.
- Ohio's caps on non-economic damages also apply to defamation claims. *Wayt v. DHSC, L.L.C.,* 2018-Ohio-4822.

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 cannot be awarded against a manufacturer or supplier unless the claimant establishes, by clear and convincing evidence, that the harm was the result of misconduct that manifested a "flagrant disregard of the safety of persons who might be harmed by the product in question." O.R.C. §2307.80(A).
  - The fact that a product is defective does not establish a flagrant disregard of the safety of persons who might be harmed by the product. O.R.C. §2307.80(A).
  - If a jury determines that a manufacturer or supplier is liable for punitive damages, the judge, not the jury, decides the amount after considering factors outlined in the statute. O.R.C. §2307.80(B). 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).

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- 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.

E. Admissibility of "Writedown" of Medical Bills

- In tort actions, defendants can admit into evidence that the plaintiff's medical providers accepted an amount less than the stated or face value of the medical bills as payment in full for their services.
- 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. O.R.C. §2315.20(A).
- 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 of which the defendant has introduced evidence. O.R.C. §2315.20(B).
- A provider of 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

- Statutory Rate for Prejudgment and Post Judgment Interest.
  2023: 5%; 2022: 3%; 2021: 3%; 2020: 5%; 2019: 5%; 2018: 4%; 2017: 4%; 2016: 3%; 2015: 3%; 2014: 3%
- The rate is set every October 15th by the tax commissioner by adding 3% to the federal short-term rate. O.R.C. §5703.47.
- 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).
- 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).
- In all other actions, prejudgment interest runs for the longer of the following periods:
  a. From the date the winning party gave first notice that the cause of action had accrued to the date the judgement was rendered, only if the winning party made reasonable efforts to determine if the losing party had liability insurance, and 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).
- There is no prejudgment interest on awards for future damages. O.R.C. §1343.03(C)(2).
- Post judgment interest and interest on a settlement runs 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 and costs of suit, 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 not including court costs and other reasonable expenses incurred in maintaining the action and reasonable attorney fees, 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, restricted license, or temporary instruction permit. The person who signed the application shall be jointly and severally liable with the minor for any damages caused, unless the minor has proof of financial responsibility with respect to the operation of a motor vehicle owned by the minor or, if the minor is not the owner of a motor vehicle, with respect to the minor's operation of any motor vehicle. 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 and §2111.05.

J. Statutory Damages

- A person who, without privilege to do so, recklessly cuts down, destroys or injures a vine, bush, shrub, sapling, tree, or crop growing upon another's land or on public land is guilty of a misdemeanor of the fourth degree and is subject to treble damages in a civil action. O.R.C. §901.51 and §901.99.
- A consumer who proves a violation of Ohio's Consumer Sales Practices Act that was either deceptive or unconscionable 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. O.R.C. §1345.09(B).

V. NEGLIGENCE

A. Comparative Negligence

- The contributory fault of a person does not bar the person as a plaintiff from recovering damages that have directly and proximately resulted from the tortious conduct of one or more other persons, if the contributory fault of the plaintiff was not greater than the combined tortious conduct of all other persons from whom the plaintiff seeks recovery in the action and of all other persons from whom the plaintiff does not seek recovery in the action. O.R.C. §2315.33.
    - The court shall diminish any compensatory damages recoverable by the plaintiff by an amount that is proportionately equal to the percentage of tortious conduct of the plaintiff as determined by O.R.C. §2315.34. O.R.C. §2315.33.
- The contributory fault of the plaintiff may be asserted as an affirmative defense to any tort claim, except for intentional torts. O.R.C. §2315.32(B).
- If the plaintiff's percentage of negligent conduct is greater than the sum of the percentages of the tortious conduct attributable to the defendants in addition to 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 is an affirmative defense which may be raised at any time before trial.

B. Negligence Per Se Doctrine

- Allows a plaintiff to establish the duty and breach of duty elements of a negligence claim by showing that the defendant committed a specific act prohibited by statute or omitted a specific act required by statute. *Lang v. Holly Hill Motel, Inc.,* 122 Ohio St.3d 120, 2009-Ohio-2495, 909 N.E.2d 120, at ¶ 15.
- The violation of a legislative enactment, and not an administrative rule, is required to serve as the basis to support an assertion of negligence per se. *Chambers v. St. Mary's School,* 82 Ohio St.3d 563, 565-568, 1998-Ohio 184, 697 N.E.2d 198 (1998).
- For a violation of a statute to constitute negligence per se, the statute must set forth a positive and definite standard of care. *Mann v. Northgate Investors, L.L.C.,* 138 Ohio St.3d 175, 2014-Ohio-455, 5 N.E.3d 594, ¶ 29.
- Where a statute only sets forth a general, abstract description of a duty, a violation of that statute can be considered as evidence of negligence but will not constitute negligence per se. *Mann v. Northgate Investors, L.L.C.,* 138 Ohio St.3d 175, 2014-Ohio-455, 5 N.E.3d 594, ¶ 29.

VI. JOINT AND SEVERAL TORT LIABILITY

- Where there are two or more defendants, and 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 represents 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).

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- 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 represents economic loss. O.R.C. §2307.22(A)(2).
    - The proportionate share of such a defendant is calculated by multiplying the total amount of the economic damages awarded to the plaintiff, by the percentage of tortious conduct as determined to be attributable to that defendant. O.R.C. §2307.22(B).
- All defendants are only liable for their proportionate share of non-economic (pain and suffering) losses, regardless of its 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 represents economic loss even if that defendant is 50% or less 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).

VII. 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).
- The proportionate shares of tortfeasors in the common liability are based on their relative degrees of legal responsibility. If equity requires the collective liability of some as a group, the group shall constitute a single share, and principles of equity applicable to contribution generally apply. O.R.C. §2307.25(F).
- Ohio law imposes certain restrictions on indemnity. In construction contracts, indemnity provisions that impose obligations upon the promisor to indemnify the promisee for damages caused by or resulting from the negligence of the promisee are void and against public policy. O.R.C. §2305.31.

C. Effect of a Payment and Release

- A release or covenant made in good faith 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).
- 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).

VIII. AUTOMOBILE INSURANCE

A. Mandatory Liability Limits

- Bodily injury: $25,000 per person/$50,000 per accident. O.R.C. §4509.01(K); O.R.C. §4509.51(B)(1),(2).
- Property damage: $25,000 per accident. O.R.C. §4509.01(K); O.R.C. §4509.51(B)(3)
- UM/UIM coverage: The offering of Ohio UM/UIM coverage is optional. O.R.C. §3937.18(A).

B. Insurance for Transportation Network Company Gigs

- Ohio now regulates Transportation Network Companies ("TNC") and their ride finding platforms (i.e., Uber, Lyft).
- Ohio's laws re: minimum wages, unemployment insurance, and workers' compensation do **not** apply to TNC drivers. O.R.C. §4925.10(A).
- Unless agreed to by contract, TNC drivers are not employees or agents of the TNC. O.R.C. §4925.10(B) and (C).
- When a TNC driver is logged on to the TNC digital network and actually engaged in providing TNC services, there must be a primary auto insurance policy in place that has at least $1 million of insurance coverage per accident for bodily injury and property damage liability. O.R.C. §3942.02(A)(1), (2)(b).

- When the driver is logged on to the TNC digital network, and is available to receive ride requests, but is not yet engaged in TNC services, the insurance must only be at least $50,000 per person/$100,000 per accident and $25,000 for property damage. O.R.C. §3942.02(A)(2)(a)(i-iii).
- If the TNC's driver's auto insurance policy does not provide such minimum coverage, then the TNC's insurance must do so and it may not require the driver's policy to first deny coverage. O.R.C. §3942.02(B)(1)-(2).
- An auto insurer in Ohio may exclude coverage for any loss or injury that occurs while a TNC driver is logged on to a TNC's digital network or while the driver is providing TNC services. O.R.C. §3942.03(A).

C. 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 Mut. Ins. Co. v. Lumbermens Mut. Ins. Co.,* 1 Ohio St.2d 105, 108, 205 N.E.2d 67 (1965).

D. 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 coverage, 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, 918 N.E.2d 135, ¶ 2.

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).
- The additional evidence is not interpreted to mean third-party testimony but can be the police officer's report or the insured's 911 call after the accident. *Smith v. Erie Insurance Company,* 148 Ohio St.3d 192, 2016-Ohio-7742, ¶ 21.

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 whichever is later. 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 a 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).

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E. Seatbelt, Protective Eye Device and Protective Helmet Use Requirements and Admissibility

- Failure to use a seatbelt is not admissible to prove negligence or comparative negligence but is admissible to reduce noneconomic 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 and snowmobiles are required to wear safety glasses or another protective eye device, but the failure to wear the safety glasses or protective eye wear is not admissible in a trial of any civil action. O.R.C. §4511.53(C)(1)
- When the operator of a motorcycle is under the age of 18, the operator and the passenger must wear a protective helmet; but the failure to comply with this requirement is not admissible in a trial of any civil action. O.R.C. §4511.53(C)(1).
- When the operator of a motorcycle has a "novice" license, the operator and passenger must wear a protective helmet; but the failure to comply with this requirement is not admissible in a trial of any civil action. O.R.C. §4511.53(C)(1).

F. Child Safety Restraint Requirements and Admissibility

- It is the responsibility of the operator of the motor vehicle, except for taxis, to ensure that children between birth and 4 years of age and under 40 pounds ride in a child safety car seat in accordance with the manufacturer's specifications. O.R.C. §4511.81(A).
- It is the responsibility of the operator of the motor vehicle, except for taxis, to ensure that children between the ages of 4 and 8 or are under 4'9" tall to ride in a booster. O.R.C. §4511.81(C).
- It is the responsibility of the operator of the motor vehicle, except for taxis, to ensure that children who are over 8 years of age and at least 4'9" tall to wear a seat belt. O.R.C. §4511.81(D).
- The failure of an operator of a motor vehicle to secure a child in a child restraint system, a booster seat, or an occupant restraining device as required by this section is not negligence imputable to the child and is not admissible as evidence in any civil action involving the rights of the child against any other person allegedly liable for injuries to the child. O.R.C. §4511.81(G).

IX. 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).

X. 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 (CGL) policy. *Westfield Ins. Co. v. Custom Agri Sys., Inc.,* 133 Ohio St.3d 476, 2012-Ohio-4712.
- In the absence of consequential damage, a contractor's CGL policy does **not** cover claims for property damage caused by a subcontractor's faulty work due to a lack of an "occurrence." *Ohio N. Univ. v. Charles Constr. Servs.,* 2018-Ohio-4057.
- 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.
- There is no reason to allocate liability across multiple insurers and policy periods if the injury or damage for which liability coverage is sought occurred at a discernable time; in that circumstance, the insurer who provided coverage for that time period should be liable, to the extent of its coverage, for the claim. *Lubrizol Advanced Materials, Inc. v. National Union Fire Insurance Company,* 161 Ohio St.3d 1, 2020-Ohio-1579.

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 Ents., Inc.* (*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).

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.

H. Claims Against Insurance Agents/Brokers

- The delayed-damage rule does not apply to a cause of action alleging negligent procurement of a professional liability insurance policy, or negligent misrepresentation of the terms of the policy, when the policy at issue contains a provision specifically excluding the type of claim that the insured alleges it believed was covered by the policy. The cause of action, in such a case, runs from the date the policy is issued. *LGR Realty, Inc. v. Frank & London Insurance Agency*, 152 Ohio St.3d 517, 2018-Ohio-334.

I. Limitation of Action Provisions

- A provision in an insurance policy, limiting the time to bring suit on the claim, within one year, is enforceable. *Dominsh v. Nationwide Insurance Company,* 129 Ohio St.3d 466, 2011-Ohio-4102.

J. Attorney Fees In Declaratory Judgment Actions

- Under O.R.C. §2721.16(A)(1), a court shall not award attorney fees to any party on the claim or proceeding for declaratory relief unless specifically authorized by statute or such fees are a part of a punitive damage award or are for frivolous conduct.

K. Waiver and Estoppel

*When a party has sought and been denied intervention, collateral estoppel will not prohibit future litigation of similar issues. *Howell v. Richardson,* 45 Ohio St.3d 365, 544 N.E.2d 878 (1989).

*In Ohio, insurance coverage cannot be created by estoppel or waiver. *Hybud Equipment Corp. v. Sphere Drake Insurance Company, Ltd.,* 64 Ohio St.3d 657, 597 N.E.2d 1096 (1992). The doctrine of waiver cannot be used to expand coverage. *Id.*

L. Ohio Supreme Court Insurance Coverage Decisions in 2022

- **Insurance Coverage for Integrated Products Claims:** Per the Ohio Supreme Court, claims by a third-party that incorporated an insured's contaminated or defective product into its own product, resulting in losses and damages, are covered claims under the insured's commercial general liability policy because they arose out of an accident resulting in "property damage" and no exclusions applied. *Motorists Mut. Ins. Co. v. Ironics, Inc.,* Slip Opinion No. 2022-Ohio-841.
- **Insurance Coverage for Opioid Epidemic Claims:** Per the Ohio Supreme Court, insurers of distributors of pharmaceutical products owe no coverage for lawsuits brought by government entities seeking economic damages for losses caused by the opioid epidemic because the insurance policies cover damages because of "bodily injury" and the damages sought by the governmental entities did not fall within that coverage. *Acuity v. Masters Pharmaceuticals, Inc.,* Slip Opinion No. 2022-Ohio-3092.
- **Insurance Coverage for Covid Claims:** Per the Ohio Supreme Court, the presence of Covid in the community, or on business surfaces, or in infected people on business premises, does not constitute "direct physical loss" or "damage to property" necessary to fit within the grants of coverage of Business Interruption, Property Damage, Extra Income, or Civil Authority coverage claims even in a policy with no virus exclusion. *Neuro-Communications Services, Inc. v. Cincinnati Insurance Company,* 2022-Ohio-4379.

Continued on page 14

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- **Insurance Coverage for Ransomware Claims:** Per the Ohio Supreme Court, a businessowners insurance policy does not cover losses resulting from a ransomware attack on computer software systems because such a ransomware attack causes no "direct physical loss of or damage to" the software, since software is an intangible item that cannot experience either direct physical loss or direct physical damage. *EMOI Servs., L.L.C. v. Owners Ins. Co.,* Slip Opinion No. 2022-Ohio-4649.

XI. 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).
- In *Masters v. Ohio Dept. of Medicaid,* 2d Dist. Clark No. 2022-CA-9, 2022-Ohio-3075, the court found that because the Ohio Department of Medicaid did not fit within any of the categories or definitions of a "subrogree" as listed in O.R.C. §2323.44(A)(5), there was no jurisdictional basis for the declaratory judgment action. The Ohio Department of Medicaid had a right of recovery granted by separate Ohio statute, O.R.C. §5160.37(A).

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 to, 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 Dept. of Medicaid and/or the respective county equivalent 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 department or county department 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 Dept. of Medicaid and/or the respective county equivalent as soon as the third party is notified in writing of the valid claims for recovery under the Medicaid statutes. O.R.C. §5160.37(F).
- It is incumbent on the welfare recipient to inform the Ohio Dept. of Medicaid and/or the respective county equivalent 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 Dept. of Medicaid and/or the respective county equivalent 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)-(iv).
- 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).

XII. 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).

WORKSITE ACCIDENTS

- Where an independent contractor undertakes to do work for another in the very doing of which there are elements of real or potential danger and one of such contractor's employees is injured as an incident to the performance of the work, no liability for such injury ordinarily attaches to the one who engaged the services of the independent contractor. *Wellman v. East Ohio Gas Co.,* 160 Ohio St. 103 (1953).
- However, there is an exception to the rule on non-liability. One who engages the services of an independent contractor, and who actually participates in the job operation performed by such contractor and thereby fails to eliminate a hazard, which they, in the exercise of ordinary care, could have eliminated, can be held responsible for the injury or death of an employee of the independent contractor. *Hirschbach v. Cincinnati Gas & Elec.,* 6 Ohio St.3d 206 (1983).
- Active participation has been defined to mean that the premise's owner or general contractor directed the activity, which resulted in the injury and/or gave or denied permission for the critical acts that led to the employee's injury. *Bond v. Howard Corp.,* 72 Ohio St.3d 332 (1995).
- For purposes of establishing liability to the injured employee of an independent contractor, active participation means that the owner or general contractor directed the activity, which resulted in the injury and/or gave or denied permission for the critical acts that led to the employee's injury, rather than merely exercising a general supervisory role over the project. If there is active participation and/or retention or exercise of control, a duty of care may be found to attach to the one who engaged the services of the independent contractor. *Sopkovich v. Ohio Edison Co.,* 81 Ohio St.3d 628 (1998).

Key Time Requirements in Ohio State Court Under Ohio Civil Rules

Commencement of Action (Civ. R. 3(A)): A civil action is commenced by filing a complaint if service is obtained within one year.

Summons-Time Limit for Service (Civ. R. 4(E)): Complaint subject to dismissal without prejudice if service not perfected within six months of filing complaint. (not applicable to out of state service)

Time to Answer After Waiver of Service (Civ. R. 4.7(D)): 60 days after request for waiver sent, if waiver returned before service. (90 days if defendant in foreign country)

Filing of Pleadings Subsequent to Complaint (Civ. R. 5(D)): Any paper after complaint that is required to be served shall be filed within three days after service. (not applicable to discovery requests unless used in proceeding or ordered by court)

Time Computation (Civ. R. 6(A)): Do not include day of act, event or default from which designated period begins to run. If last day of period fall on weekend or legal holiday, period runs until end of next day that is not weekend or legal holiday. When period of time is less than seven days, intermediate weekends and legal holidays excluded in computation.

Motions (Civ. R. 6(C)):

- **Responses to motion for summary judgment:** Serve within 28 days after service of motion.
- **Responses to other motions:** Serve within 14 days after service of motion.
- **Movant's reply:** Serve within seven days after service of response to motion.

Additional Time After Service by Mail or Commercial Carrier (Civ. R. 6(D)): When response within prescribed period of service, three days added to prescribed period after service by mail or commercial carrier service. (not applicable to responses to service of summons under Civ. R. 4-4.6)

Extensions of Time to File Affidavit of Merit in Medical Malpractice Claims (Civ. R. 10(D)): For good cause shown, court shall grant extension up to 90 days. Court may extend more than 90 days if defendant or non-party has failed to cooperate with discovery or other circumstances warrant.

Answers, Cross-Claims, Counter Motions to Dismiss and Motions for Judgment on the Pleadings (Civ. R. 12):

- **Answers:** Serve within 28 days of service of complaint.
- **Other responses and motions:**
  - Answer to cross-claim: Serve within 28 days of service.
  - Reply to counterclaim: Serve within 28 days of service of answer unless otherwise ordered.
  - After denial of motion to dismiss, for judgment on pleadings or other Civ. R. 12 motions:
    - Responsive pleading to be served within 14 days after notice of order.
  - After granting of motion under Civ. R. 12:
    - Responsive pleading to be served within 14 days after service of pleading that complies with court's order.

Third-Party Complaint and Responses (Civ. R. 14):

- Third-party complaint may be served not later than 14 days after service of original answer without leave of court.

Initial Disclosures (Civ. R. 26(B)(3)): Due before first pre-trial or case management conference unless other time set by stipulation or order. If party objects, court will rule on required disclosures and timeframe. Parties joined after first pre-trial or case management conference to make within 30 days after being served or joined unless different time set by stipulation or order.

Expert Reports and Supplements (Civ. R. 26(B) (7)(c)): Unless good cause shown, must be supplied no later than 30 days prior to trial, or schedule set by court.

Written Discovery Timelines (Civ. R. 33, 34, 36):

- **Interrogatories and Requests for Production:** Answers, responses, and objections due within period designated by requesting party, not less than 28 days after service, or within such shorter time as court may allow.
- **Requests for Admission:** Responses and objections due within period designated by requesting party, not less than 28 days after service, or within such shorter time as court may allow, or else matter deemed admitted.

Time for Filing Appeals to Courts of Appeals from Trial Courts of Record in Ohio

Appeal of Right (ORAP 4):

- **Final Orders:** Party must appeal within 30 days of entry of final order.
- **Multiple or cross appeals:** Within the above stated time or, within 10 days of filing of first notice of appeal.
- **Partial final judgment or order:** If appeal permitted from judgement or order in case where not all claims as to all parties resolved, other than judgment entered under Civ. R. 54(B), party may appeal within 30 days of entry of the judgment or order appealed or the order or judgment that disposes of the remaining claims.

Time for Filing Appeals to Ohio Supreme Court

Jurisdictional Appeals (Ohio S.Ct.Prac.R. 5.02 and 7.01):

- Ohio Supreme Court may decide to assert jurisdiction in appeals that assert one of the following:
  - Case involves substantial constitutional question
  - Case involves a felony pursuant to Article IV, Section 2(B)(2)(b) of Ohio Constitution
  - Case involves a question of public or great general interest
- To perfect a jurisdictional appeal to the Ohio Supreme Court, appellant shall file a notice of appeal within 45 days from entry of judgment being appealed along with a memorandum in support of jurisdiction.
- **Motion for reconsideration:** Timely filed motion for reconsideration in court of appeals under App.R.26 tolls time for filing a notice of appeal to Ohio Supreme Court.
- **Motion for en banc consideration:** Timely filed application for en banc consideration in court of appeals tolls time for filing notice of appeal to Ohio Supreme Court.

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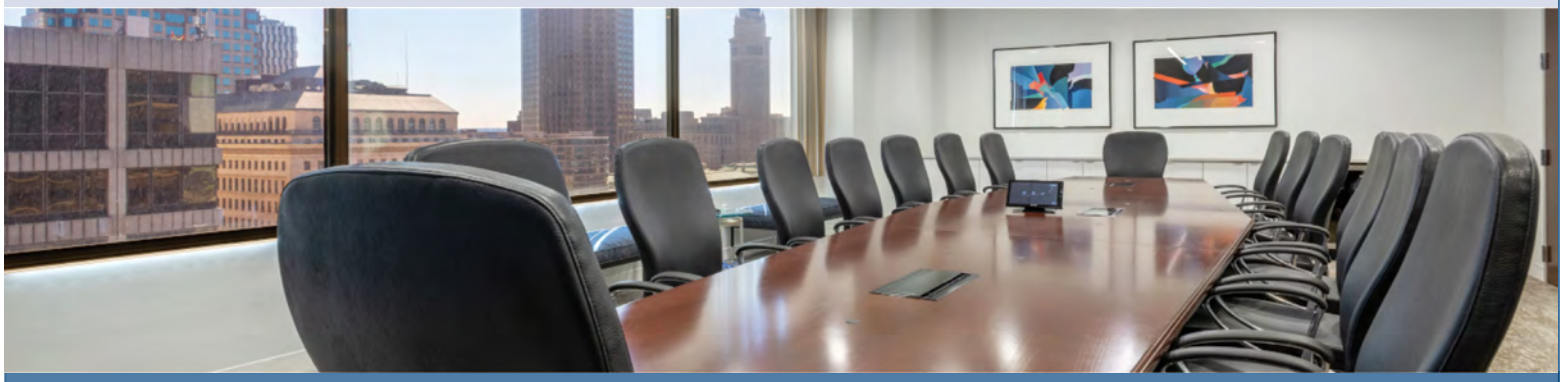

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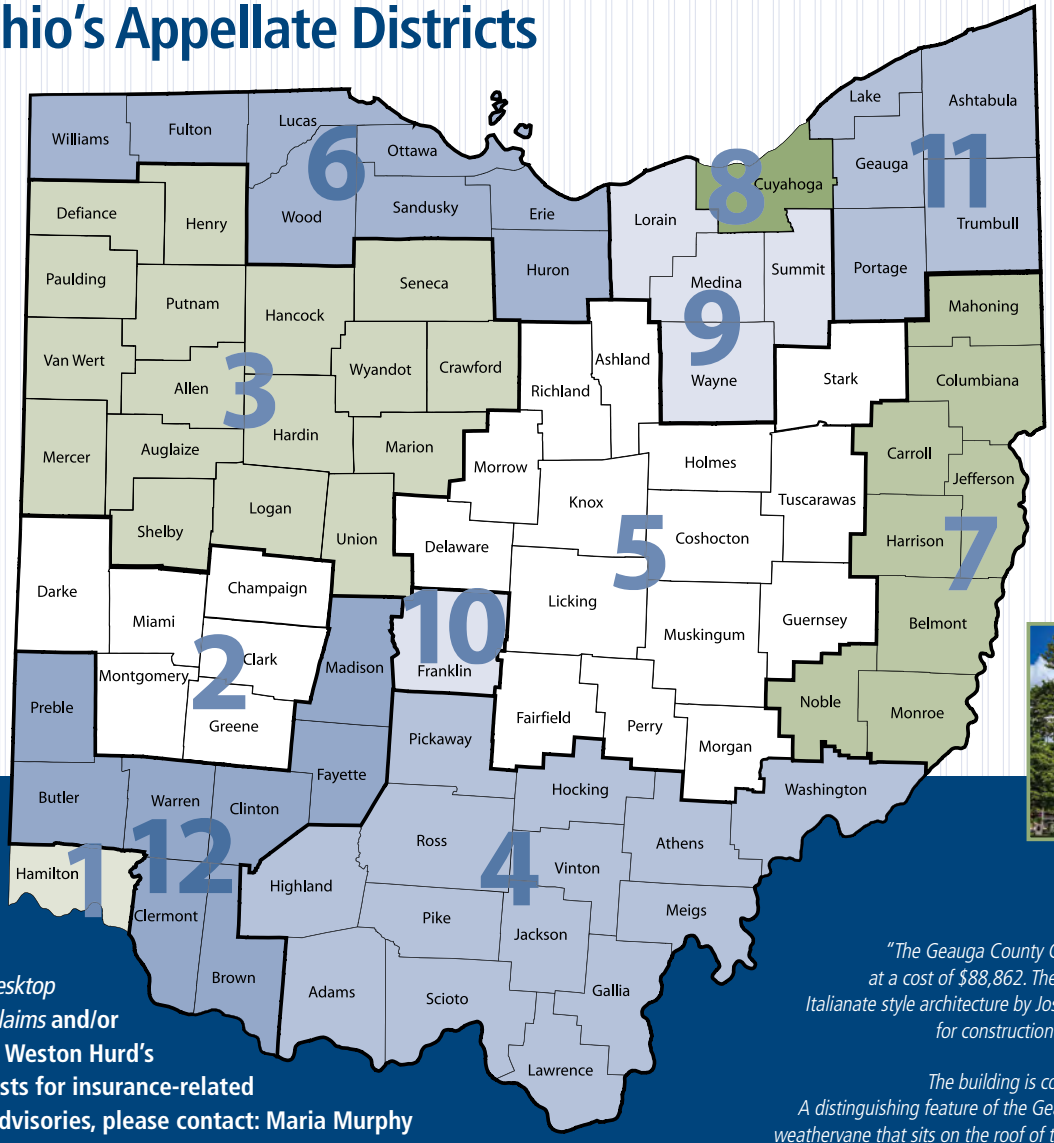
Map of Ohio's Appellate Districts



Geauga County Courthouse,
Chardon, Ohio,
Photo by David L. Dingwell

"The Geauga County Courthouse was built in 1869 at a cost of $88,862. The courthouse was designed in Italianate style architecture by Joseph Ireland and the contract for construction was awarded to L.J. Randall.

The building is constructed of brick and stone. A distinguishing feature of the Geauga County Courthouse is a weathervane that sits on the roof of the building's 112-foot tower.

Located at 100 Short Court St. in the county seat of Chardon, the courthouse today houses the Geauga County Court of Common Pleas.

Geauga County is named for the Indian word sheauga sepe, which means raccoon. The Geauga County Courthouse was placed on the National Register of Historic Places in 1974."

Source: Retrieved from https://www.supremecourt.ohio.gov/courts/judicial-system/ohio-trial-courts/courthouses/ Accessed 24 January 2023.

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