STATE OF OHIO
COMPENDIUM OF LAW

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PRE-SUIT NOTICE REQUIREMENTS/PREREQUISITES TO SUIT

A) Before an action in court can be commenced, some conditions precedent may have to be satisfied. Such conditions may be required by a statute, provided for in an agreement between the parties, or implied by law. Usually, one of such conditions is a requirement that a party commencing a suit gives the opposing party a notice prior to that. If a statute requires a claimant to give notice to the opposing party, the filing of an action is not a substitute of the notice and is not a compliance with the statute, unless the statute makes the bringing of an action a substitute for the notice. OHIO JUR. 3d., Actions, § 57.

B) **Municipalities.** OHIO REV. CODE ANN. § 727.43 (2013) provides that:

> [n]o person who claims damages, arising without his fault from the acts of a municipal corporation . . . in the construction of a public improvement, shall commence a suit thereof against a municipal corporation until he files a claim for such damages with the clerk of such municipal corporation, and sixty days elapse thereafter, to enable the municipal corporation to take such steps as it deems proper to settle or adjust a claim.
>
> This section does not apply to an application for an injunction or other proceeding to which it may be necessary for such applicant to resort in case of urgent necessity.

However, the Ohio courts interpreted this provision as related only to the actions for the recovery of damages for injury to property resulting from such construction. *City of Warren v. Davis*, 3 N.E. 301 (1885). The statute has no application to an action brought for recovery of damages for a personal injury. *Id.*

C) **Evictions.** OHIO REV. CODE ANN. § 1923.04(A) (2013) provides that at least three days prior to commencing a forcible entry and detainer action, a landlord has to request the other party to leave the premises. Such notice shall be either sent by a certified mail, return receipt requested, given in writing to the defendant in person or left at the defendant's residence or at the place from which the defendant is sought to be evicted. The notice must be very clear and contain required statutory language, notifying the tenant that an eviction action may be commenced against him.

D) **Insurance.** Many insurance policies provide that a notice to the insurer about a possible action brought against the insured is the prerequisite to coverage by the policy. Many employee handbooks or contracts contain similar provisions requiring notice to an employer before an employee may sue him/her.

Relationship to the Federal Rules of Civil Procedure

The Ohio Supreme Court has adopted its own Ohio Rules of Civil Procedure. Provisions of the Ohio Rules of Civil Procedure differ from the Federal Rules, but are in large part the same**.**

Organization of the State Court System

A) **Judicial selection.** Ohio state judges are elected by the voters for a term of six years in nonpartisan elections after partisan primaries. In order to qualify for the election, a person must have practiced law, served as a judge of a court, or both, for at least 6 years and

"shall be a qualified elector and a resident of the territory of the court to which the judge is elected or appointed." The Ohio Constitution provides for an obligatory termination of office at the age of 70. OHIO CONST. ART. IV, § 6(C). A candidate who turns 70 before the first day of the elected term would be ineligible. *See, e.g.*, OHIO REV. CODE ANN. § 1901.06 (2013).

B) **Structure.** The Ohio state court system consists of three levels of courts: the Supreme Court, the Court of Appeals, and the Court of Common Pleas. The Court of Appeals is divided into twelve judicial districts, consisting of three-judge panels. There is one Court of Common Pleas in each of 88 state counties. Each Court of Common Pleas consists of four divisions: the general division, the domestic relations division, the juvenile division and the probate division. In addition, there are 47 county courts, 118 municipal courts, and 440 mayor's courts in the state. The Mayor's Courts refer cases "up" to the local county Municipal Court. Generally, appeals from the court and municipal courts go directly to the Court of Appeals, bypassing the local Common Pleas Court. There is one Court of Claims, located in Columbus, that hears and determines all civil actions filed against the State of Ohio. *See generally* the Supreme Court of Ohio, Ohio Courts, available at http://www.sconet.state.oh.us/JudSystem/default.asp (last visited July 5, 2017).

C) **Alternative dispute resolution.** There is no statute in Ohio requiring the parties to engage in dispute resolution before they can turn to courts. However, various sections of the Ohio Revised Code provide that the courts of different levels may establish procedures for the resolution of disputes between parties to any civil action or proceeding that is within the jurisdiction of the court. In addition, the Ohio Supreme Court Rules set general guidelines for mediation procedures to be established in the lower courts. OHIO SUP. R. 16 (2013).

1) **Commission on dispute resolution and conflict management.** OHIO REV. CODE ANN. § 179.02 (2011) established the Ohio Commission on Dispute Resolution and Conflict Management. The Commission consisted of twelve members and its primary purpose is to provide and fund education in the field of dispute resolution and to assist persons and entities that are engaged in activities related to dispute resolution.

However, this section of the Ohio Revised Code was subsequently repealed and on January 5, 2012, the Supreme Court of Ohio created a new Dispute Resolution Commission. *See generally* the Supreme Court of Ohio, Judicial System News, available at http://www.supremecourt.ohio.gov/PIO/news/2012/disputeResComm_010512.asp (last visited July 5, 2017). In voting to create this new Commission, the Supreme Court assumed two programs that were "formerly operated by the disbanded Ohio Commission on Dispute Resolution and Conflict Management . . . [which] include managing the former commission's truancy mediation program and the conflict resolution services program for government officials. Additionally, the Court has been identified as the repository for all original paperwork and other intellectual property of the former commission." *Id.*

The governing provisions for the Commission can be found in Rules 16.01 through 16.14 of the Rules of Superintendence for the Courts of Ohio. *Id. See also* Rules Establishing Commission, available at https://www.sconet.state.oh.us/Boards/disputeResolution/rule.pdf (last visited July 5, 2017). The new Commission will consist of 21 members that "will be nominated by various judicial, legal, and Ohio government-related associations and organizations and appointed by the Chief Justice and Justices of the Court." *Id.*

2) **Uniform Mediation Act.** Ohio has adopted the Uniform Mediation Act that has been codified in Chapter 2710 of the Ohio Revised Code (2008). OHIO REV. CODE ANN. § 2710.01(A) (2011) defines mediation as "any process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute." Mediation is not allowed in cases of domestic violence or violation of a protection order. OHIO SUP. R. 16(B)(1)(d) (2013).

Service of Summons

A) **Methods.** Methods of service of process are governed by OHIO Civ. R. 4.1 (2012). Three major avenues of service are listed in this rule. First, a person can be served individually and usually such service is accomplished by mailing a copy of the summons by certified or express mail to the person's residence. Second, a plaintiff can request that a party be served personally at a specific address by a Sheriff, Bailiff, or other person designated by court order to make service of process. Third, a plaintiff can request that a party be served at their residence by a person designated to serve. The clerk is required to make an entry on the docket concerning whether or not service was effectuated successfully.

B) **Entities.** Upon whom process may be served is governed by OHIO CIV. R. 4.2(A)-(O) (2014). Process can be served on an individual who is at least 16 years old, unless that person is deemed incompetent. Individuals under the age of 16 can be served by serving the person's guardian, parent with whom they live with, the person who cares for the minor, or the minor themselves if they have no guardian and do not live with a parent. Those who are deemed incompetent can be served by serving the incompetent person's guardian, or if the person is confined to an institution, the superintendent of the institution or the person to whose custody the incompetent is confined. If the incompetent person has no guardian and is not confined to an institution, service upon the individual is permissible.

C) **Prisoners.** Service of summons upon an individual committed to a penal institution is done by serving the individual, unless the individual is under the age of 16. OHIO CIV. R. 4.2(D) (2014).

D) **Corporations.** Service of summons upon a domestic or foreign corporation is governed by OHIO CIV. R. 4.2(F) (2014). Service upon a domestic or a foreign corporation can be accomplished by: (1) "serving the agent authorized by appointment or by law to receive

service of process;" or (2) "serving the corporation by certified or express mail at any of its usual places of business;" or (3) "serving an officer or a managing or general agent of the corporation."

E) **Waiver.** Waiver of service is governed by OHIO CIV. R. 4(D) (2014). Service of summons may be waived in writing by any person who is at least 18 years of age and not under a disability.

F) **Long-arm statute.** OHIO CIV. R. 4.3 (2014) is Ohio's codified "long-arm statute." The statute states that service of process can be made outside the state of Ohio, in an action inside Ohio, "upon a person who, at the time of service of process, is a nonresident of [Ohio] or is a resident of [Ohio] who is absent from the state." This rule provides that Ohio state courts may have personal jurisdiction over out-of-state defendants under certain circumstances, including conduction of business within the state, commission of a tortious act within the state, possession of real property within the state, and others. Out-of-state defendants may be served via certified or express mail, or, upon an order by a court, shall be served personally.

G) **Publication.** OHIO CIV. R. 4.4 (2014) allows service to be made by publication when the defendant's residence is unknown. Upon filing of an affidavit by a plaintiff stating that he made all efforts to establish defendant's residence and was unable to find it, the clerk of the court will publish summons in a newspaper of a general circulation in a county where the complaint is filed. However, service by publication raises a lot of due process issues and thus shall be used only as the last resort and in strict compliance with the statute.

H) **Time limit for service.** Summons shall be served upon a defendant within six months after the complaint is filed unless a plaintiff asks the court for an extension of time upon showing a good cause why the summons was not served in time. After that time, the court, in its discretion, may dismiss without prejudice. After 12 months, dismissal is mandatory. OHIO CIV. R. 4(E) (2014).

Statutes of Limitations

A) In general, time limitations for civil actions that can be brought in Ohio courts are contained in § 2305.03 – 2305.22 (2013) of the Ohio Revised Code.

B) **Written Contracts.** The statute of limitations for a contract action based on a written contract is governed by OHIO REV. CODE ANN. § 2305.06 (2013). Actions on a contract, agreement, or promise in writing shall be brought within eight (8) years after the cause of action arises. However, that provision does not apply to an action for a breach of any contract for the sale of goods, which is governed by the Uniform Commercial Code, § 2-275. Per OHIO REV. CODE ANN. § 1302.98, which adopts the provisions of the Uniform Commercial Code, an action for a breach of a contract for the sale of goods must be brought within four (4) years after the cause of action accrued.

C) **Oral contracts.** The statute of limitations for a contract action based on an oral contract is governed by OHIO REV. CODE ANN. § 2305.07 (2013). An action on a contract not in writing, either express or implied, must be brought within six (6) years after the cause of

action accrued. If parties subsequently sign a written memorandum evidencing the oral contract, such contract is not transformed into a written contract and a six year statute of limitations still applies.

D) **Employment.** The statute of limitation for certain employment claims is governed by OHIO REV. CODE ANN. § 2305.11(A) (2013). "[A]n action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation, or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation shall be commenced within two [(2)] years after the cause of action accrued." *Id*.

E) **Fraud.** An action based upon fraud is governed by OHIO REV. CODE ANN. § 2305.09(C) (2013). Such action must be commenced within four (4) years after the cause of action accrued. However, if the cause of action for fraud is in violation of section 2913.49 of the Revised Code, then the statute of limitation changes to five (5) years after the cause accrued.

F) **Against state.** The statute of limitations for civil actions against the state is governed by OHIO REV. CODE ANN. § 2743.16(A) (2013). A civil action against the state must be commenced within two (2) years after the cause of action arises or within a shorter period if the statute of limitations for similar suits between private parties provides for a shorter time limit. Per OHIO REV. CODE ANN. § 2744.04(A) the same rule applies to the actions brought against a political subdivision.

G) **Personal injury.** The statute of limitations for a personal injury is governed by OHIO REV. CODE ANN. § 2305.10 (2013). An action for damages for an injury to a person shall be brought within two years after the cause of action accrued. However, per OHIO REV. CODE ANN. § 2305.111, an action for an assault or battery must be brought within one (1) year after the tort took place or after the plaintiff learned the identity of the defendant, if unknown before.

H) **Professional liability.** An action for professional liability other than medical malpractice is governed by OHIO REV. CODE ANN. § 2305.11(A) (2013). A malpractice action must be commenced within one (1) year after the cause of action accrued.

I) **Medical malpractice.** The statute of limitations for medical malpractice actions is governed by OHIO REV. CODE ANN. § 2305.113 (2013). An action upon medical, dental, optometric, or chiropractic claim shall be brought within one (1) year after the cause of action accrued.

J) **Property damage.** The statute of limitations for a property damage action is governed by OHIO REV. CODE ANN. §§ 2305.09-2305.10 (2013). Actions to recover damages for an injury to real property, to recover the possession of personal property or to recover damages based on physical or regulatory taking of real property must be commenced within four (4) years after the cause of action accrued. Actions for injuries to personal property must be brought within two (2) years after the cause of action accrued.

K) **Wrongful death.** A wrongful death action must be commenced within two (2) years after the decedent's death. OHIO REV. CODE ANN. § 2125.02(D)(1) (2013).

L) **Other causes of action.** Per OHIO REV. CODE ANN. § 2305.14 (2013), if sections 2305.04 to 2305.131 and section 1304.35 of the Ohio Revised Code do not provide for a specific statute of limitations for other causes of actions, such actions must be commenced within ten (10) years after the cause of action accrued.

M) **Tolling.** A number of statutes provide that under certain circumstances the statute of limitations will be tolled.

1) **Minor or disabled.** Per OHIO REV. CODE ANN. § 2305.16 (2013), if a person who is entitled to bring the cause of action described in sections 1302.98, 1304.35, and 2305.04 to 2305.14 of the Ohio Revised Code is a minor or mentally disabled, the statute of limitations will not start to run until the person reaches the age of majority or becomes mentally stable.

2) **Prisoner.** Per OHIO REV. CODE ANN. § 2305.15(B) (2013), if a person against whom the claim is to be brought is imprisoned, the statute of limitation is tolled until that person is released. However, it only works one way, so if it is the plaintiff himself who is imprisoned, the statute of limitations will not be tolled.

3) **Attorney-client relationship**. The one-year statute of limitations for legal malpractice actions is tolled during the period of attorney-client relationship. This is referred to as the "continuous representation" doctrine. *Thayer v. Fuller & Henry, Ltd.*, 503 F.Supp.2d 887 (N.D. Ohio 2007).

4) **Concealment.** OHIO REV. CODE ANN. § 2305.15 (2013) that provided for tolling of the statute of limitations if a person against whom the actions are to be brought is out of state or conceals himself was held to be unconstitutional by the Court of Appeals of Ohio in *Grover v. Bartsch*, 866 N.E.2d 547 (Ohio Ct. App. 2006).

Statutes of Repose

A) **Real property.** The statute of repose applicable to actions based on improvements to real property is governed by OHIO REV. CODE ANN. § 2305.131 (2013). In no event shall any action based upon injury to personal or real property, bodily injury or wrongful death caused by defect in improvement to real property or an action for contribution or indemnity for damages recovered as a result of the above actions be brought later than ten (10) years from the date of substantial completion of such improvement to the property. However, that statute was found to be unconstitutional by the Ohio Supreme Court in *Brennaman v. R.M.I. Co.*, 639 N.E.2d 425 (1994). In 2008, in *Groch v. Gen. Motors Corp.*, 883 N.E.2d 377 (2008), the Ohio Supreme Court revisited the issue, stated that its opinion *Brennaman* was too broad, but refused to find the statute of repose in improvement cases constitutional.

B) **Wrongful death.** The statute of repose applicable to wrongful death actions involving a product liability claim is governed by OHIO REV. CODE ANN. § 2125.02(D)(2)(a) (2013). No cause of action based on such a claim shall be brought later "than ten [(10)] years from the date that the product was delivered to its first purchaser or first lessee who was

not engaged in a business in which the product was used as a component in the production, construction, creation, assembly, or rebuilding of another product."

C) **Product liability.** The statute of repose applicable to a product liability claim is governed by OHIO REV. CODE ANN.§ 2305.10(C) and (G) (2013). The statute imposes a ten (10) year limit for any product liability claims against manufacturers or suppliers since the date the product was delivered to a first purchaser. The constitutionality of the statute was upheld in *Groch v. Gen. Motors Corp.*, 883 N.E.2d 377 (2008). However, in this single case, the Ohio Supreme Court held that the retroactivity clause confined within the statute was unconstitutional as to that particular plaintiff. Each instance will be judged on its facts.

Venue Rules

A) Venue is governed by OHIO CIV. R. 3(B) (2014). In general, venue is proper in the county in which defendant resides; in which "defendant has his or her principal place of business;" "in which the defendant conducted activity that gave rise to the claim for relief;" "in which the property, or any part of the property, is situated if the subject of the action is real property or tangible personal property;" in which all or part of the claim for relief arose," and in some others. If none of those provisions provide for a proper forum, the venue then is proper at the county in which the plaintiff resides or has principal place of business. If this provision is likewise unavailable, then the venue is proper n the county in which the defendant has any property or in which the defendant has appointed an agent to receive service of process.

B) **Transfer.** If venue is not proper, a court must transfer the action to a proper venue as required by OHIO CIV. R. 3(C)(1). What constitutes proper venue is determined by OHIO CIV. R. 3(B).

C) **No proper venue in Ohio.** If a court determines that there is no proper venue in Ohio, it must follow the procedure set in OHIO CIV. R. 3(D) (2013). In this situation, the court

> shall stay the action upon condition that all defendants consent to the jurisdiction, waive venue, and agree that the date of commencement of the action in Ohio shall be the date of commencement for the application of the statute of limitations to the action in that forum in another jurisdiction which the court deems to be the proper forum. If all defendants agree to the conditions, the court shall riot dismiss the action, but the action shall be stayed until the court receives notice by affidavit that plaintiff has recommenced the action in the out-of-state forum within sixty days after the effective date of the order staying the original action. If the plaintiff fails to recommence the action in the out-of-state forum within the sixty day period, the court shall dismiss the action without prejudice. If all defendants do not agree to or comply with the conditions, the court shall hear the action.

Id.

D) ***Forum non conveniens.*** *Forum non conveniens* is a common-law doctrine that allows a court to decline to exercise the jurisdiction even when jurisdiction is authorized by a venue statute, if it appears that there is a forum more convenient for the litigants and

witnesses. In Ohio, there is no general rule governing *forum non conveniens*, but an Ohio court may apply the doctrine pursuant to their inherent powers. *Chambers v. Merrell-Dow Pharmaceuticals, Inc.*, 519 N.E.2d 370 (Ohio 1988). The doctrine applies only to cases in which the more convenient forum is in another state or another country. *Id*. However, the doctrine does not apply to intrastate transfers from one county to another, and in cases of intrastate transfers, OHIO CIV. R. 4 only allows transfers to adjoining counties. *Id*.

1) **Factors.** Courts dealing with *forum non conveniens* consider a number of public and private interest factors to determine whether the transfer of venue is warranted.

i) **Private interest factors.** The private interest factors include: (1) "the convenience to the litigant;" (2) "the ease of access to the sources of proof;" (3) "the availability of compulsory process to secure attendance of unwilling witnesses;" (4) "the cost of obtaining attendance of willing witnesses;" (5) "the possibility of viewing the premises;" (6) "enforceability of judgment once obtained" and (7) "all other considerations that make trial of a case easy, expeditious and inexpensive." *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508-09 (1947).

ii) **Public interest factors.** The public interest factors include: (1) "the administrative difficulties caused when litigation is piled up in congested venues instead of being handled at its origin;" (2) "the unfairness of imposing jury duty on the residents of the community that has no relation to the litigation;" (3) "local interest in having the disputes resolved where they arose;" (4) "the unreasonableness of requiring the judges of a distant forum to apply the state law that governs the case or to deal with a problem of conflicts of law." *Id.*

NEGLIGENCE

Comparative Fault/Contributory Negligence

A) Comparative negligence doctrine provides that plaintiff's recovery should be diminished by an amount proportional to the plaintiff's degree of fault in an accident. The doctrine superseded the contributory negligence doctrine in most of the states that provided that if plaintiffs fault in an accident is significant enough, plaintiff shall be completely barred from recovery. BLACK'S LAW DICTIONARY (8th ed. 2004).

B) **Modified contributory negligence.** Since 1980, Ohio modified the common-law doctrine of contributory negligence and substituted it for a form of comparative negligence, thus abolishing a complete bar of plaintiff's recovery in cases of contributory fault, regardless how minimum it was. OHIO REV. CODE ANN. § 2315.33 (2013).

1) **Threshold percentage fault.** OHIO REV. CODE ANN. § 2315.33 (2013) provides that the comparative negligence of a plaintiff will not bar him from recovery unless his negligence was greater than the combined tortious conduct of all other

persons involved in an accident, regardless of whether they are party to a suit or not. Any compensatory damages that the plaintiff may recover in a case shall be diminished by an amount that is proportionately equal to the percentage of her tortious conduct.

2) **Affirmative defense.** Contributory fault must be asserted as an affirmative defense on which the defendant bears the burden of proof. *Dixon v. Penn Central Co.*, 481 F.2d 833, 837 (6th. Cir. 1973). Defendant must prove this by a preponderance of the evidence and the burden of proof will not shift to the plaintiff. *Hawkins v. Graber*, 176 N.E.2d 600, 603 (Ohio Ct. App. 1960).

i) **Reckless or intentional torts.** Comparative negligence cannot be asserted as a defense in cases involving reckless or intentional torts. OHIO REV. CODE ANN. § 2315.32(B) (2013); *Schellhouse v. Norfolk & W. Ry. Co.*, 575 N.E.2d 453 (Ohio 1991).

ii) **Product liability.** Comparative negligence is not a defense to product liability action based on strict liability in tort. *Cincinnati Ins. Co. v. Volkswagen of America, Inc.*, 535 N.E.2d 702, 707 (Ohio Ct. App. 1987).

iii) **Minors.** Comparative negligence defense does not apply in cases involving minors under seven years of age because they are incapable of negligence as a matter of law. *Stinespring v. Natorp Garden Stores, Inc.*, 711 N.E.2d 1104, 1107-08 (Ohio Ct. App. 1998).

Exclusive Remedy – Global Change Workers' Compensation Protections

A) Workers' compensation statutes were adopted because the common law remedies were ineffective to protect employees injured in the workplace. In 1911 the Ohio General Assembly established a voluntary workers' compensation system, but because many employers were reluctant to accept it, the system became compulsory. In general, OHIO REV. CODE ANN. Chapter 4123 codifies the Workers' Compensation Act of Ohio.

1) **Purpose.** The purpose of the Workers' Compensation Act is to promote a safe and injury-free work environment. The Act operates as a balancing system under which an employee relinquishes her right to sue the employer for negligence in exchange for a lower, but secured recovery, and employer gives up her common-law defenses in exchange for protection from unlimited liability. *Rajeh v. Steel City Corp.*, 813 N.E.2d 697, 707 (Ohio Ct. App. 2004). The statute prohibits a waiver of the workers' compensation protection by an employee, except in extremely limited situations. OHIO REV. CODE ANN. § 4123.80 (2013).

2) **Reduction of expenses.** Another purpose of the Act is to avoid the unwillingness of an employee to obtain recovery in a civil suit because of the costs of the proceeding. Thus, the Act ensures that those entitled to receive compensation obtain it promptly and with the fewest possible expenses. *State ex rel. Johnston v. Ohio Bur. of Workers' Comp.*, 751 N.E.2d 974, 982 (Ohio 2001).

3) **Exclusivity.** OHIO CONST. ART. II, § 35 provides that as long as an employer makes contributions to a state fund and complies with other statutory provisions, the compensation from that fund should be the exclusive compensation to an employee or his dependents for death, injury or occupational disease caused by the employment. Thus, the employer shall not be liable to respond for such damages in a common law action. The immunity granted to the employer is crucial to the purposes of the Workers' Compensation Act, as by agreeing to participate in the program, the employer abandons his common-law defenses of assumption of the risk and open danger doctrine. However, there is an important exception to an exclusivity rule: an employee may proceed against an employer if an employer engaged in an intentional tort. *See id*.

4) **Intentional torts.** The injuries caused by an intentional tort of an employer are not covered by the Workers' Compensation Act and an injured employee may proceed with a regular civil action to recover damages. Currently, Ohio has a statute which governs the analysis of employer intentional tort claims for claims arising after April 17, 2005. OHIO REV. CODE ANN. 2745.01 (2013) sets forth the framework:

> (A) In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.
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> (B) As used in this section, "substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.

a) **Common law.** Without the statute, the standard defaults to the common law standard is set forth in *Fyffe v. Jeno's, Inc.*, 570 N.E.2d 1108 (Ohio 1991). The plaintiff must prove that: (1) the employer knew of a dangerous condition, instrumentality or process within its business operation; (2) the employer knew that if an employee is subjected to such dangerous condition, instrumentality or process the harm to an employee will be a substantial certainty; and (3) the employer, under such circumstances and with such knowledge did act to require the employee to continue to perform the dangerous task. *Id*.

b) **Burden of proof.** In order to establish an intentional tort claim against an employer under Ohio law, as required for exception to the exclusive remedy in the Workers' Compensation Act, an employee must present proof beyond that required to prove negligence and beyond that to prove recklessness. *Oros v. Hull & Associates, Inc.*, 302 F. Supp. 2d 839 (N.D. Ohio 2004).

B) **Affirmative defense.** If an employee brings an intentional tort action against his employer, the employer may assert as an affirmative defense the pre-emptive effect of the Workers' Compensation Act. If an employer asserts such a defense, it is his burden of proof to establish that an employee is limited to recovery under the Workers' Compensation Act. In addition, the employer must prove that he complied with all the statutory requirements. *See Fitzgerald v. Chemical Service Corp.*, 84 N.E.2d 754 (Ohio Ct. App. 1948).

C) **Causal connection.** OHIO REV. CODE ANN. § 4123.01(C) (2013) states that the Workers' Compensation Act covers "any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment." Thus, the test for obtaining compensation under the Act is not whether an employer or his employees engaged in some negligent conduct, but whether there is a "causal connection" between an employee's injury and his or her employment, either through the activities, the conditions, or the environment of the employment. *Bralley v. Daugherty*, 401 N.E.2d 448, 449 (Ohio 1980).

1) To determine whether there exists a sufficient causal connection between the injury and the employment, Ohio courts use the test first established in *Lord v. Daugherty*, 423 N.E.2d 96 (Ohio 1981). That test requires analysis of the following factors: (1) "the proximity of the scene of the accident to the place of employment;" (2) "the degree of control the employer had over the scene of the accident;" and (3) "the benefit the employer received from the injured employee's presence at the scene of the accident." *Id*. at 98.

D) **Employee.** To obtain workers' compensation, the person seeking it must be an employee. Otherwise, a person is not entitled to compensation if it is shown that an employer-employee relationship did not exist at the time of an accident or if there was no contract for hire. The Ohio Supreme Court in *Coviello v. Industrial Com'n of Ohio*, 196 N.E. 661, 662 (Ohio 1935) stated that the "controlling question in determining whether the relationship was that of employer and employee is the one of pay." The Court went on to say that to constitute an employer-employee relationship under the Workers' Compensation Act, there must be contract of "hire," which means the price, reward, or compensation paid for personal service or for labor. Thus, an employer's obligation to pay some compensation to an employee is determinative.

E) **In the course of employment.** The compensable injuries are limited to those injuries occurring "in the course of employment." The courts look at the totality of circumstances to determine whether the injury was caused or arises out of the course or scope of employment. To be entitled to workers' compensation, an employee need not necessarily be injured in the actual performance of work for his employer. An injury is compensable if it is sustained by an employee while that employee engages in activity that is consistent with the contract for hire and logically related to the employer's business. *Ruckman v. Cubby Drilling*, 689 N.E.2d 917, 921 (Ohio 1998).

1) **Essential nexus.** The time, place and manner of the injury are not determinative factors, but they are used to determine whether there is an "essential nexus"

between the employment relationship and the injury. *Id*. If the injury is sustained off the employer's premises, it must be determined whether at the time of injury the employee was engaged in the "promotion of his employer's business." *Id*.

F) **Proximate cause.** The issue of proximate cause between the injury and the harm is the same as in the area of torts. The employee must prove by preponderance of evidence that proximate cause exists, which is defined as a "happening or event which as a natural and continuous sequence produces an injury without which the result would have not occurred." *Gomez v. Sauder Woodworking Co.*, 892 N.E.2d 493, 497 (Ohio Ct. App. 2008) (quoting *Zavasnik v. Lyons Transp. Lines, Inc.*, 685 N.E.2d 567, 568-69 (Ohio Ct. App. 1996)). Sometimes an employee must provide medical expert testimony to establish that there was a probability and not a mere possibility of a causal connection between the injury and a subsequent physical condition. *Randall v. Mihm*, 616 N.E.2d 1171, 1174 (Ohio 1992).

G) **Retaliation.** OHIO REV. CODE ANN. § 4123.90 (2013) provides that:

> [n]o employer shall discharge, demote, reassign, or take any punitive action against any employee because the employee filed a claim or instituted, pursued or testified in any proceedings under the workers' compensation act for an injury or occupational disease which occurred in the course of and arising out of his employment with that employer.

Any such employee may file an action in the common pleas court of the county of such employment, but his recovery is limited to reinstatement with back pay and a reasonable attorney fee.

Indemnification

A) Indemnity arises from contract, express or implied, and is the "right of a person, who has been compelled to pay what another should have paid, to require complete reimbursement." *Travelers Indemn. Co. v. Trowbridge*, 321 N.E.2d 787, 789 (Ohio 1975). A person has a right to indemnity only if his liability is secondary, *i.e.* when he himself is passively negligent, but a relationship exists between him and a tortfeasor because of which he may be held liable for tort. *Whitney v. Horrigan*, 679 N.E.2d 315, 317 (Ohio Ct. App. 1996). There is no right to indemnification between two parties who actively participate in the commission of a tort, and thus are joint tortfeasors. *Id.*

B) **Circumstances.** A person, who can be held constructively liable in tort, is entitled to indemnity regardless of whether the liability is imposed on him by a statute or common law, and whether there was an express contract to indemnify between him and a tortfeasor. *Burns v. Pennsylvania Rubber & Supply Co.*, 189 N.E.2d 645, 649 (Ohio Ct. App. 1961).

C) **Express indemnity.** The right of indemnity may result from an express agreement or contractual provision in which one party, who has been compelled to pay what the other party should have paid, reserves the right to require complete reimbursement. *Worth v. Aetna Cas. & Sur. Co.*, 513 N.E.2d 253, 256 (Ohio 1987) (citing *Travelers Indemn. Co. v. Trowbridge*, 321 N.E.2d 787 (Ohio 1975)). Contracts of indemnity purporting to

relieve one from the results of his own failure to exercise ordinary care will be strictly construed, and will not be held to provide such indemnification unless so expressed in clear and unequivocal terms. *George H. Dingledy Lumber Co. v. Erie R. Co.*, 131 N.E. 723, 725 (Ohio 1921).

D) **Implied indemnity.** "[A]n implied right to indemnification arises only within the context of a relationship wherein one party is found to be vicariously liable for the acts of a tortfeasor." *Indiana Ins. Co. v. Barnes*, 846 N.E.2d 73, 77 (Ohio Ct. App. 2005).

E) **Relationships.** Classic situations when a right to indemnity arises are employee-employer, retailer-manufacturer of a defective product, or lessor-lessee relationships. See, e.g., *Indiana Ins. Co. v. Barnes*, 846 N.E.2d 73 (Ohio Ct. App. 2005) (employer-employee). An insurer may also have a right to indemnity from the party against whom the insured had a right to indemnity, providing that the insured himself was not negligent. As a general rule, an insurer has no right to indemnity (subrogation) from the insured. *Id.*

F) **Settlements.** The right to indemnity also exists in situations when the claim was not litigated, but was settled. Thus, the voluntary payment of the claim does not negate the right to indemnity. In order to collect indemnity for sums paid in settlement of a claim, the party seeking indemnity must prove that the party from whom indemnity is claimed received proper and timely notice of the settlement, that legal liability required the settlement, and that the settlement was fair and reasonable. *Globe Indemn. Co. v. Schmitt*, 53 N.E.2d 790, 794 (Ohio 1944).

G) **Notice.** As a condition precedent to an indemnification action, Ohio law requires a written and prompt notice of an underlying action to be given to an indemnitor. "Prompt notice is required so that an indemnitor has a meaningful opportunity to investigate the claim, to determine the applicability of the indemnity provision, to join and control potential litigation, and otherwise to protect its interests." *Bank One, NA. v. Echo Acceptance Corp.*, 522 F.Supp.2d 959, 966 (S.D. Ohio, 2007). The notice must be not only prompt, but also adequate, so that the indemnitor receives an opportunity to defend or participate in the defense of the underlying action. *Id*. at 968.

Joint and Several Liability

A) The doctrine of joint and several liability provides that each tortfeasor is individually responsible for the entire damage, but that he has a right to contribution from other non-paying parties. Joint liability is liability shared by two parties for a single, indivisible injury. Several liability is liability that is separate and distinct from another's liability, so that the plaintiff may bring a separate action against one defendant without joining the other liable parties. BLACK'S LAW DICTIONARY (8th ed. 2004).

B) **Example.** In the states that follow the doctrine of joint and several liability, it allows the plaintiff who sues two defendants to recover 100% of her damages from a solvent defendant who is only 5% at fault, even if another defendant is 95% at fault, but is insolvent. Many states found such doctrine to be unfair and as a result of a tort reform substituted the doctrine for some other method of recovery from joint tortfeasors.

C) In Ohio, liability of joint and several tortfeasors is governed by OHIO REV. CODE ANN. § 2307.22 (2013). It provides that:

1) **Defendant more than 50% liable.** If a plaintiff in a tort action establishes that two or more defendants proximately caused the same injury, and the jury establishes that one of the defendants is more than 50% liable for the injury, that defendant is jointly and severally liable for all compensatory damages that represent economic loss. The defendants in the same case, to whom 50% or less of the tortious conduct is attributable, shall be liable to the plaintiff only for that defendant's proportionate share of the compensatory damages that represent economic loss. The proportionate share is calculated by multiplying the total amount of economic damages awarded to the plaintiff by the percentage of the fault of the defendant.

2) **Defendant 50% or less liable.** If a plaintiff in a tort action establishes that two or more defendants proximately caused the injury, and the jury determines that 50% or less of tortious conduct is attributable to any defendant against whom an intentional tort claim had been brought and established, that defendant shall be jointly and severally liable for all compensatory damages that represent economic loss. If all of the above applies to a defendant, but an intentional tort claim against him has not been claimed or established, that defendant will only be liable for his proportionate share of the compensatory damages that represent economic loss.

3) **Proportion of damages.** In a tort action where the jury determines that two or more persons proximately caused the same injury or loss, each defendant who is determined by the jury to be responsible for the same injury or loss is shall be liable to the plaintiff only for his proportion in the noneconomic loss.

D) **Contribution.** Contribution is a separate and distinct right from indemnification. "Contribution is defined as the 'tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as percentage of fault. *US. v. Atlantic Research Corp.*, 127 S. Ct. 2331, 2337-338 (U.S. 2007) (quoting Black's Law Dictionary 353 (8th ed. 2004)). Ohio's contribution statute is set forth in OHIO REV. CODE ANN. § 2307.25 (2011).

1) OHIO REV. CODE ANN. § 2307.25(A) (2011) provides that a tortfeasor who was found jointly and severally liable and who has paid more than his proportionate share of liability has a right to recover the amount that he paid in excess of his proportionate share from other tortfeasors. "No tortfeasor may be compelled to make contribution beyond that tortfeasor's own proportionate share of the common liability. There is no right of contribution in favor of any tortfeasor against whom an intentional tort claim has been alleged and established."

2) **Settlement.** A tortfeasor who, in good faith settles the case with the claimant and pays the damages is not entitled to contribution from another tortfeasor, whose liability is not extinguished by the settlement. OHIO REV. CODE ANN. § 2307.25(B)(2013).

Strict Liability

A) **Standard.** Strict liability is liability that does not depend on actual negligence or intent to harm. There are certain activities for which legislature preferred to establish an absolute duty to prevent harm to someone. BLACK'S LAW DICTIONARY (8th ed. 2004). Liability attaches, regardless of absence of fault, because of the hazards involved. Strict liability most often applies to animal owners, operators of ultra hazardous activities, or in product liability cases.

B) **Ultra hazardous activities.** When deciding whether certain activities are ultra hazardous activities and impose absolute duty on the defendant, Ohio courts evaluate the following factors:

> (1) the existence of a high degree of risk of harm; (2) the likelihood that great harm will occur; (3) the inability to eliminate the risk of harm through the exercise of ordinary care; (4) how common or uncommon the activity is; (5) whether the activity is appropriately conducted in the location where it is found; (6) and the extent to which the activity's value outweighs the dangerous nature of the activity.

Abraham v. BP Exploration & Oil, Inc., 778 N.E.2d 48, 53-54 (Ohio Ct. App. 2002). The factors carry different weight, and the courts usually look at their combination to decide whether the activity is ultra hazardous.

C) **Animals.** In addition, OHIO REV. CODE ANN. § 955.28 (2013) imposes strict liability on owners or keepers of dogs for any injury, death or loss to person or to property that is caused by the dog. The owner will be liable regardless of what degree of care he exercised in trying to prevent the dog from causing that injury. The only exception when the owner is not to be held liable is when the person to whom the injury was caused was criminally trespassing onto the owner's property, was committing a criminal offense against another person, or was teasing or abusing the dog while on the owner's premises.

The Ohio Supreme Court has held that a plaintiff may, in the same case, pursue both statutory and common law negligence claims for a dog bite injury. *Beckett v. Warren*, 921 N.E.2d 624, 628 (Ohio 2010). "[I]n a common-law action for bodily injuries caused by a dog, a plaintiff must show that (1) the defendant owned or harbored the dog, (2) the dog was vicious, (3) the defendant knew of the dog's viciousness, and (4) the dog was kept in a negligent manner after the keeper knew of its viciousness." *Id.* (citing *Hayes v. Smith*, 56 N.E. 879, paragraph one of the syllabus (Ohio 1900)). As with other common law tort actions, punitive damages may be awarded in a common law action for bodily injuries caused by a dog. *Id.*

D) **Duty.** Application of strict liability doctrine reduces plaintiff's burden of proving the duty owed by the defendant. Application of the doctrine in a negligence case means that the plaintiff has established duty owed to him by the defendant and the breach of that duty. However, the plaintiff still has to prove proximate cause and damages. *Chambers v. St. Mary's School*, 697 N.E.2d 198, 201 (Ohio 1998).

E) **Product liability.** In product liability cases, the Ohio courts have held that the doctrine of strict liability applies to a manufacturer of a product where there is either a design defect in the product or actual defects in a properly designed product that cause injuries to a person. *Birchfield v. International Harvester Co.*, 726 F.2d 1131 (6th. Cir. 1984). The courts have expressly adopted the RESTATEMENT (SECOND) OF TORTS § 402A (1965) as part of the Ohio product liability law. *Id*. Section 402A provides that unless the product was substantially modified before it reached the consumer, the manufacturer or a seller of the product that is engaged in business of selling such products are strictly liable for defective conditions of such product that made it unreasonably dangerous for the consumer. *Id*. That rule applies even if the seller has exercised all possible care in selling such product.

F) **Learned intermediary.** The learned intermediary doctrine relieves the manufacturer or the supplier of a prescription drug of liability to a consumer for failure to warn the consumer of the dangerous propensities of the drug, as long as they provided adequate warnings to the prescribing physician. The reasoning behind the doctrine is that most of the drugs are inherently dangerous substances that can harm a person and a manufacturer shall not be held strictly liable to such person as long as it provided adequate warnings to the physician, who is in the best position to balance the needs of a patient against the risks involved in administration of the drug. *Vaccariello v. Smith & Nephew Richards, Inc.*, 763 N.E.2d 160, 164-65 (Ohio 2002). The doctrine applies not only to prescription medical drugs, but also to other medical devices.

1) **Adequate warnings.** The warnings given to the physician must be adequate, meaning that they have to warn against all known or reasonably discoverable risks of the drug and they do so with some intensity. *Daniel v. Fisons Corp.*, 740 N.E.2d 681, 684 (Ohio Ct. App. 2000).

Willful and Wanton Conduct

A) Willful and wanton conduct is a separate degree of conduct, distinguishable from negligence. Misconduct that is negligent can never be either willful or wanton. Thus, an action based upon willful or wanton conduct is a separate cause of action from negligence.

B) **Willfulness.** "Willfulness implies design, set purpose, intention, deliberation." *Payne v. Vance*, 133 N.E. 85, 87 (Ohio 1921). To constitute a willful injury an act must be intentional, or committed with a reckless disregard of the safety of the others. *Id*. "In order that one may be held guilty of willful or wanton conduct, it must be shown that he was conscious of his conduct, and conscious, from his knowledge of existing conditions, that injury would likely or probably result from his conduct, and that with reckless indifference to consequences he consciously and intentionally did some wrongful act or omitted some known duty which produced the injurious result." *Id.* Thus, knowledge of pre-existing conditions is a prerequisite to finding willful or wanton conduct. The Court will be reluctant to find a willful injury when the result of the act can be attributed to negligence or inattention. *Id*.

C) **Wantonness.** "Wanton misconduct is such conduct as manifests a disposition to perversity and it must be under such surrounding circumstances and existing conditions that the party doing the act or failing to act must be conscious, from his knowledge of surrounding circumstances and existing conditions, that the conduct will in all common probability result in injury." *Bailey v. Brown*, 295 N.E.2d 672, 676 (Ohio 1973). One acts wantonly when there is a complete failure to exercise any care whatsoever. Thus, the difference between willful and wanton misconduct is that defendant acts wantonly if he completely fails to exercise any degree of care whatsoever and such failure occurs under the circumstances indicating a great probability that the harm will result from the lack of care. *Matkovich v. Penn Cent. Transp. Co*., 431 N.E.2d 652, 654 (Ohio 1982).

D) **Legal effect.** The legal effect of willful or wanton conduct is such, that in some situations when plaintiff's recovery would have been barred in a negligent case, he may still recover damages if he proves that the defendant acted willfully or wantonly. For example, OHIO REV. CODE ANN. § 3109.09(B) (2013) provides that a parent of a minor under 18 years old may be compelled to compensate a property owner, whose property is damaged as a result of a willful, as oppose to simply negligent, conduct of a minor. OHIO JUR. 3d., Negligence, § 35.

DISCOVERY

Electronic Discovery Rules

A) Pursuant to the amendments made to the Federal Rules of Civil Procedure in December 2006 regarding the issue of electronic discovery, the Supreme Court Commission on the Rules of Practice and Procedure recommended to the Supreme Court of Ohio several amendments to the Ohio Rules of Civil Procedure. The proposed amendments were published in October 2007 for public comment. On July 1, 2008 the amendments to the Ohio Rules of Civil Procedure were adopted.

B) OHIO CIV. R. 26(B)(4) (2014) governs the discovery of electronically stored information. It provides that a party to whom a request for such information has been given does not have a burden to provide the discovery when it causes the party undue burden or expense. However, the court may still compel discovery if the party making the request may show good cause. The rule also provides that while ordering the production of electronically stored information, the court may specify the format, extent, timing and allocation of expenses related to such discovery.

OHIO CIV. R. 26 (2014) was subsequently amended by Ohio Court Order 0004 which will become effective on July 1, 2012. For purposes of the remainder of this section on discovery, the relevant amendment for Rule 26 is as follows:

> [t]he amendments align the scope of expert witness discovery in Ohio with expert witness discovery in Federal courts. The Federal rule was amended in 2010 to provide work product protection to expert witness draft reports and to provide limited exceptions to work-product protection for communications between an attorney and the expert witness. Under the Federal rule amendments, communications between an attorney and the expert witness are protected work product except for communications that relate to the expert's compensation, identify facts or data

> that the attorney provided to the expert and the expert considered in forming the opinions, or identify assumptions the attorney provided and the expert relied on in forming the opinions.

2012 Ohio Court Order 0004 (C.O. 0004).

C) OHIO CIV. R. 26(B)(6)(b) (2014) reflects another recent amendment to the Ohio Rules of Civil Procedure and provides that in case a privileged document was inadvertently sent to the opponent, the sending party may notify the opponent that the information is privileged. Upon the receipt of such notice, a receiving party must promptly return or destroy such documents or any copies in its possession. The sending party may also ask the court to resolve the issue of whether such information may be used by the opponent.

Expert Witnesses

A) Expert witnesses are governed by OHIO CIV. R. 26(B)(5) (2014). Any party by means of interrogatories may require any other party to "(i) identify each person whom the other party expects to call as an expert witness at trial and (ii) state subject matter on which the expert is expected to testify." *Id*. The requesting party may subsequently depose those expert witnesses without any showing of substantial need. OHIO CIV. R. 26(B)(5)(c) (2014) provides that a party taking such deposition must pay an expert witness a reasonable fee for her time.

1) **Failure to identify and disclose.** If a party fails to timely identify and disclose an expert witness and decides to call such expert witness after representing to another party that the discovery is complete, such expert testimony may be excluded from trial, because it leaves no opportunity to the opposing party to depose a witness and to study the expert report. *Buszkiewicz v. DiFranco*, 746 N.E.2d 712, 718 (Ohio Ct. App. 2000).

2) **Subject matter.** When a party is required to disclose the subject matter on which the expert witness will testify, subject matter is understood in a broad way and does not mean a detailed account of the expert's possible testimony. *Beavercreek Local Schools v. Basic, Inc.*, 595 N.E.2d 360, 367 (Ohio Ct. App. 1991). Courts can require more, including reports, by order and/or local rule.

B) **Non-testifying experts.** OHIO CIV. R. 26(B)(5)(a) (2014) governs the expert witnesses who are not going to testify at trial. A party may obtain facts or opinions held by such expert witness retained by another party for preparation for trial only upon showing that it is unable without undue hardship to obtain facts or opinions on the same subject by other means, or upon showing that denial of such discovery will result in manifest injustice. The party rarely succeeds in such requests, and usually only in situations when the expert knowledge is very unique or specialized (for example the witness is the only expert in the field).

Non-Party Discovery

A) **Depositions.** Any party may take a deposition of any person and call that person to testify at trial, even if she is not party to a trial. A notice of a deposition may be issued to a non-

party witness, and if she fails to voluntarily appear in response to notice, then the party may subpoena that witness. OHIO CIV. R. 30(A) (2014). Subpoenas also secure the appearance of a non-party witness at trial. Witness who fails to obey a subpoena may be found in contempt. OHIO REV. CODE ANN. § 2317.21 (2013).

Just as OHIO CIV. R. 26 was amended by Ohio Court Order 0004, so was OHIO CIV. R. 30. The relevant portion of the amendment is as follows:

> [u]nder the current procedure for service of process by mail, the Clerk must mail the summons with complaint attached to each defendant by U.S. certified or express mail. If the mailed envelope is returned showing failure of delivery, the Clerk must notify the plaintiff of the failure, and thereafter follow any written instructions to reissue service of process at some other place or by some other method, including service by U.S. ordinary mail when the U.S. certified/express mail envelope is returned with the notation "Refused" or "Unclaimed" (Rules 4.6(C) and 4.6(D)).
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> The amendments permit clerks of courts to make service of process using commercial carrier services as an alternative to service of process by United States certified or express mail. Concurrent amendments to other rules were also proposed for purposes of consistency.

2012 Ohio Court Order 0004 (C.O. 0004).

B) **Form and issuance.** OHIO CIV. R. 45 (2014) governs the form and issuance of subpoenas. A subpoena may contain a command to a non-party to: (i) appear and testify in a certain place; (ii) to produce documents, electronically stored information or tangible items at a specified place; (iii) to produce and permit inspection of certain documents or tangible items under the person's control; (iv) to permit entry upon certain property under the person's control. This section of the Ohio Rules of Civil Procedure was also amended by Ohio Court Order 0004. The relevant amendment is as follows:

> [a]mendments to Civ. R. 45 state a deponent may no longer be compelled by subpoena to appear for a deposition anywhere in the state, but only in the county where the deponent resides or is employed or transacts business in person, or at such other convenient place as ordered by the court. A subpoena may still compel a witness to appear for trial or hearing at any place within the state.

2012 Ohio Court Order 0004 (C.O. 0004).

C) **Service.** Subpoena shall be served upon a person named in it by delivering a copy of a subpoena to that person; by reading it to her in person; by leaving it at the person's usual place of residence or by sending subpoena in a sealed envelope by a certified mail. If the person being subpoenaed resides outside the county in which the court is located, the fees for one's day attendance and mileage shall be tendered without demand. OHIO CIV. R. 45(B) (2014).

D) **Objections.** A person upon whom a subpoena asking to produce documents/tangible items is served has 14 days or before the time specified in subpoena to serve upon the party in the subpoena written objections to production. Upon receiving such notice, the party may move for an order to compel the production. OHIO CIV. R. 45(C) (2014).

E) **Expenses.** OHIO REV. CODE ANN. § 2335.06 (2013) provides that fees and mileage expenses must be paid to a non-party witness testifying at trial or at a deposition. For each full day of appearance at court or before a person authorized to take depositions, a witness must be paid $12.00, and $6.00 for each half-day. Each witness shall also be paid ten cents for each mile traveled to and from his place of residence to the place of giving his testimony.

Privileges

A) OHIO CIV. R. 26(B) (2014) states that discovery is limited to any non-privileged information that is relevant to the subject matter in the action. Thus, privileged matters are not subject to discovery. Privileges are established in certain constitutional provisions, statutes protecting communications between certain persons, or statutes dealing specifically with some type of information. OHIO JUR. 3d, Discovery and Depositions, § 12. Thus, the party may invoke certain privileges, such as attorney-client or work product, to prevent discovery of certain information. However, such privileges may be inadvertently waived by the party which when will be obliged to produce the information.

B) **Work product.** OHIO CIV. R. 26(B)(3) (2014) provides that certain kind of information prepared in anticipation of the litigation is qualifiedly privileged. Thus, the opponent may obtain documents and other tangible things prepared by the party, his attorney, consultant, indemnitor, insurer, or agent only upon a showing of good cause. The rule was the result of the US Supreme Court decision in *Hickman v. Taylor*, 329 U.S. 495 (1947). An opposing party may seek discovery of work product information through the court's order upon showing both substantial need and undue hardship. *Stanton v. Univ. Hosps. Health Sys., Inc.*, 853 N.E.2d 343, 346-47 (Ohio Ct. App. 2006). However, opinion work product prepared by an attorney enjoys almost an absolute protection from discovery. *See id*. Thus, notes containing the mental impressions, conclusions, judgments, opinions or legal theories prepared by the party's attorney will not be disclosed unless some extraordinary circumstances are shown. *Id*. The work-product doctrine is wider in scope than the attorney-client privilege, as it protects work made by other agents of the party.

C) **Attorney-client privilege.** The attorney-client privilege affords the client a right to refuse to disclose and to prevent others from disclosure of confidential communications made between the attorney and client in the course of seeking or rendering legal advice. *Frank W. Schaefer, Inc. v. C. Garfield Mitchell Agency, Inc.*, 612 N.E.2d 442, 446 (Ohio Ct. App. 1992). The purpose of the attorney-client privilege is to encourage frank, full and free exchange of information between the client and the attorney, as attorney has to be fully informed before it can give advice. *First Union Natl. Bank of Delaware v. Maenle*, 833 N.E.2d 1279, 1286 (Ohio Ct. App. 2005). The common law rule of attorney-client privilege is codified in OHIO REV. CODE ANN. § 2317.02 (2015). If a party seeks to exclude information from being relived at trial or during discovery, it has a burden of showing that (1) an attorney-client relationship existed and (2) confidential communications took place within the context of that relationship. *Flynn v. Univ. Hosp., Inc.*, 876 N.E.2d 1300, 1303 (Ohio Ct. App. 2007). Furthermore, the party has to show

that (1) he was seeking legal advice; (2) from a professional legal adviser in his capacity as such; (3) the communication related to that purpose; (4) the communication was made in confidence; and (5) the privilege has not been waived. *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 824 N.E.2d 990, 995 (Ohio 2005).

D) **Self-critical analysis.** The self-critical analysis privilege was designed to protect the internal documents created by a corporation or another entity with a sole purpose of self analysis. The companies that sought the Ohio courts to adopt the privilege argued that self analysis reports help the corporation to conduct purposeful investigations and to improve its internal procedures. *State ex rel. Celebrezze v. CECOS Internatl., Inc*., 583 N.E.2d 1118, 1119 (Ohio Ct. App. 1990). Such privilege would allow companies to admit their mistakes and cure them without fear of subsequent prosecution, thus creating a public benefit. *Id.* The court in *CECOS* studied the approaches to the self-analysis doctrine by other states. Generally, the scope of self-analysis privilege is limited to the information that resulted from a critical self-analysis, which the public has a strong interest to preserve a free flow of information, and the flow could be diminished if discovery is allowed. *Id*. However, the court stated that it found the arguments unpersuasive, and that in general, the Ohio courts seem to be reluctant to adopt the self-critical analysis privilege. *Id.* at 1121.

E) **Waiver**. The parties and their attorneys must be careful not to waive the privileges given to them by law. The privilege may be waived if the party voluntarily makes some disclosure or statements related to the privileged information. However, waiver of one privilege does not mean waiver of the protection afforded by another. *Frank W. Schaefer, Inc. v. C. Garfield Mitchell Agency, Inc.*, 612 N.E.2d 442, 446 (Ohio Ct. App. 1992). Waiver of privilege may also be had where the party asserting it fails to identify the documents withheld and the basis of the asserted privilege. *Mcpherson v. Goodyear Tire & Rubber Co.*, 766 N.E.2d 1015 (Ohio Ct. App. 2001).

F) **Other privileges.** In addition, there are other forms of privileged communications:

1) The physician-patient privilege. OHIO REV. CODE ANN.§ 2317.02(B)(2013).

2) The husband-wife privilege. OHIO REV. CODE ANN. § 2317.02(D) (2013).

3) The cleric-penitent privilege. OHIO REV. CODE ANN. § 2317.02(C) (2013).

4) Confidential communications made to school guidance counselors. OHIO REV. CODE ANN. § 2317.02(G) (2013).

5) Confidential communications made to a mediator in relation to divorce or dissolution proceedings. OHIO REV. CODE ANN. § 2317.02(H) (2013).

6) The newsperson privilege. OHIO REV. CODE ANN. § 2739.12 (2013).

7) The psychologist-patient privilege. OHIO REV. CODE ANN. § 4732.19 (2013).

Requests to Admit

A) Requests for admission are governed by OHIO CIV. R. 36 (2014) which provides that a party may serve upon any other party a request for admission of the truth of any matters covered by Rule 26(B), including the issue of genuineness of any documents described in the request. A party who is serving a request for admission must provide the party served with both a paper and an electronic copy of the request. Each matter of which admission is requested shall be separated from any other matter. The purpose of such requests is to expedite the trial.

Again, OHIO CIV. R. 36 was subsequently amended by Ohio Court Order 0004. The relevant portion of the amendment, which also significantly changed OHIO CIV. R. 5(B) regarding service and filing and pleadings of other papers subsequent to the original complaint, is as follows:

> [w]hen the requirement for an electronic copy of interrogatories and requests for admission was established by the 2004 amendments to Rules 33 and 36, there was no civil rules' provision for "service" by electronic means and it was deemed impractical to require that an electronic copy be "served" by mailing a computer disk or otherwise delivering a disk by one of the other methods permitted under the existing Civ. R. 5(B). Thus the 2004 amendments provided that a printed copy must be "served" (by one of the methods listed under Civ. R. 5(B)), and that an electronic copy also must be "'provided' on computer disk, by electronic mail, or by other means agreed to by the parties." As explained in the proposed Staff Notes for the 2012 amendments, that requirement was problematic not only because of the required dual format but also in determining a party's recourse when a paper copy was served but an electronic copy was not provided--a problem addressed by the 2009 amendments to Civ. R. 33 and Civ. R. 36. The 2012 amendments eliminate the difficulties by taking advantage of the 2012 amendment to Civ. R. 5(B) which permits service of documents by electronic means.
>
> The amendments simply require that an electronic copy be served. Service can be accomplished electronically or by any other method provided under Civ. R. 5(B). Although service of a paper copy is no longer necessary, it is not prohibited and would be appropriate, for example, when a party who is unable to provide an electronic copy is relieved of that requirement by the court.

B) **Responses.** The party on whom the request had been served has to respond to each matter within the time specified in the request that shall be not less than 28 days. An answer or an objection to a request shall be signed by either the party or its attorney. If the party served with request fails to respond or object to such request within the specified time, the matter is considered to be admitted. The party who fails to respond will not be excused because it was proceeding per se. *Id*.

Unique State Issues

Note the difference in discovery between the Ohio Rules of Civil Procedure and the Federal Rules. Federal Rules of Civil Procedure 26 requires party to produce mandatory disclosure of certain information, and Ohio Rules do not contain similar provisions. The information subject to mandatory disclosure under the Federal Rules is still discoverable in Ohio, however, no party is required to produce any information unless first requested to do so.

EVIDENCE, PROOFS, & TRIAL ISSUES

Accident Reconstruction

If reconstruction testimony will assist a trier of fact, and is not based on speculation, it is admissible. *Scott v. Yates*, 643 N.E.2d 105 (Ohio 1994). A reconstruction witness must be qualified as an expert before he is allowed to give his opinion on the angle of travel, point of impact, party responsibility, photographs, and cause of the accident. *Id*. Computer-generated simulation and reconstructions may also be admissible if prepared by a qualified expert. *Deffinbaugh v. Ohio Turnpike Comm.*, 588 N.E.2d 189 (Ohio Ct. App. 1990).

Appeal

A) Admissibility is largely left to the discretion of the trial court excluding decisions inconsistent with "substantial justice." OHIO R. EVID. 103 (2014). Except in cases of plain error, a party must also make a timely objection or motion to strike on the record in order to preserve the admissibility error for appeal. *Id*. Plain error is evident from the record without an express objection or motion to strike. *Id*.

B) **Standards.** In civil cases, an appellate court should weigh the prejudicial effect of an error and determine whether the trier of fact would have made the same decision if the error had not occurred. *O'Brien v. Angley*, 407 N.E.2d 490 (Ohio 1980). In criminal cases, however, the Ohio Supreme Court has adopted the federal standard for both constitutional and non-constitutional errors. The state must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967); *State v. Bayless*, 357 N.E.2d 1035 (Ohio 1976).

Biomechanical Testimony

Biomechanics, the study of forces acting upon, and the motion of, the body, is often useful in products liability cases where it is used to show a certain defect caused an injury. *Leichtamer v. America Motors Corp.*, 424 N.E.2d 568 (Ohio 1981). Such testimony can only be made by an expert qualified as to the particular subject matter on which an opinion is to be offered. *Id*.; *Paul v. Rawlings Sporting Goods Co*., 123 F.R.D. 271 (S.D. Ohio 1988). The testimony must also aid the trier of fact, be based on generally accepted scientific principles and satisfy other admissibility requirements. *Id*.

Collateral Source Rule

Under the recent tort reform in Ohio, evidence of benefits paid from a collateral source is admissible in a tort action, but not in medical, dental, optometric, chiropractic or breach of contract claims. OHIO REV. CODE ANN. § 2315.20 (2013). A plaintiff is permitted to introduce into evidence the amount they paid to secure benefits from a collateral source that was introduced into evidence by an opposing party. Collateral source evidence is inadmissible if the collateral source has a mandatory, contractual or statutory right of subrogation.

Convictions

A) **Criminal.** Evidence of prior convictions involving crimes punishable by death or in excess of one (1) year in prison may be admissible for purposes of impeachment only. OHIO R. EVID. 609 (2014). A trial court is given great discretion in determining whether evidence of prior convictions should be admitted. *State v. Brown*, 796 N.E.2d 506, 514 (Ohio 2003). The court should consider the following factors in determining whether or not they should be admitted: (1) nature of the prior offense, (2) remoteness of conviction, (3) similarity of crimes, (4) need for accused's testimony, and (5) centrality of credibility at trial. *State v. Goney*, 622 N.E.2d 688 (Ohio Ct. App. 1993).

B) **Traffic.** Past traffic offenses are inadmissible unless it can somehow be shown that they involved dishonesty or false statements. OHIO R. EVID. 609(A)(3) (2014); *Karam v. Columbus Concrete Constr. Co., Inc.*, 1981 WL 3532 (Ohio Ct. App.). Traffic offenses are unreliable and their probative value is easily outweighed by their potential prejudicial effect. *Id*.

"Day-in-the-Life" Videos

"Day-in-the-life" videos may be offered on the issue of damages to show the daily struggles of an injured party, or from the defense perspective, the lack thereof. *Ward v. Hester*, 288 N.E.2d 840, 843 (Ohio Ct. App. 1972). Just as with photographs, videos are admissible if they are shown to accurately depict the scene which they purport to portray. *State v. Gilliam*, 948 N.E.2d 482 (Ohio Ct. App. 2011).

Dead Man's Statute

The former "Dead Man's" Statute, OHIO REV. CODE ANN. 2317.03 (2011), was abrogated by OHIO R. EVID. 601 and 804(B)(5) (2012). *Johnson v. Porter*, 471 N.E.2d 484 (Ohio 1984). It was intended to prevent a living adversary from testifying against a deceased, deaf, mute or insane party who is unable to testify for himself. However, OHIO R. EVID. 804(B)(5) allows statements made by a deceased or incompetent person to rebut testimony, even if not made under oath, if the statement concerned a matter within the deceased's knowledge.

Medical Bills

In *Robinson v. Bates*, the Ohio Supreme Court ruled that medical bills are admissible to show the reasonableness of any damage claims. OHIO REV. CODE ANN. § 2317.421 (2013); *Robinson v. Bates*, 857 N.E.2d 1195 (Ohio 2006). Thus, bills may only be admissible in actions for damages arising from personal injury and wrongful death. *Id*. Under *Robinson*, the common law collateral-source rule does not apply to bar evidence of the amount accepted by a medical care provider from an insurer as full payment for medical or hospital treatment. *Id.*

After *Robinson*, a minority of courts in Ohio misapplied or decided not to apply this rule in Ohio. Some courts relied on OHIO REV. CODE ANN. § 2315.20 in holding that evidence of write-offs is

inadmissible. That statute abrogates the common-law collateral-source rule, but provides exceptions, such as when the source of collateral benefits has a contractual right of subrogation. OHIO REV. CODE ANN. § 2315.20 (2013). The *Robinson* Court did not apply OHIO REV. CODE ANN. § 2315.20 because the statute was enacted after the cause of action had accrued.

However, on May 4, 2010, the Ohio Supreme Court reaffirmed its holding in *Robinson*. *Jaques v. Manton*, 928 N.E.2d 434 (Ohio 2010). . The Ohio Supreme Court held that "evidence of write-offs is admissible [at trial] to show the reasonable value of medical expenses." *Id.* at 439. The Court explained that, because OHIO REV. CODE ANN. § 2315.20 "is no different substantively from the common-law rule described in *Robinson* . . . [o]ur common-law analysis from *Robinson* applies equally in the context of the statute." *Id.* at 438.

Offers of Judgment

Once the opposing party has turned down an offer of judgment, it cannot then be used in support of a proceeding to determine costs. OHIO CIV. R. 68 (2014). Under recent tort reform in Ohio, it has been recommended that the Ohio legislature adopt an offer of judgment rule that mirrors its federal counterpart, FED. CIV. R. 68 (2013). The federal rule requires a party to pay the opposing party's costs if, the opposing party made an offer and the party declining the offer received a lesser amount from the finder of fact.

Offers of Proof

In order to preserve an objection for appeal, a party must not only object, or move to strike, certain evidence or testimony, it must also make an offer of proof as to why that item is or is not admissible. OHIO R. EVID. 103(A)(2) (2014). Counsel must articulate the theory of admissibility or exclusion, as well as the content of the excluded evidence and the court cannot preclude him from doing so. *State v. Hartford*, 486 N.E.2d 131 (Ohio Ct. App. 1984). No offers of proof are necessary (1) when the substance of the excluded evidence is apparent from the context within which question were asked, (2) when evidence is excluded during cross-examination, or (3) there has been plain error on the part of the court. *Id.*

Prior Accidents

Prior accident evidence is governed by OHIO R. EVID. 401 and 403 (2014), unless the evidence involves character or habit. Prior occurrences may be probative to show that a party knew or had notice of a dangerous condition or that a danger did or did not exist. *Renfro v. Black*, 556 N.E.2d 150 (Ohio 1990); *Patton v. City of Cleveland*, 641 N.E.2d 1126 (Ohio Ct. App. 1994).

Relationship to the Federal Rules of Evidence

The Ohio Rules of Evidence were patterned after their federal counterpart and thus the Federal Rules of Evidence and accompanying jurisprudence may be used as interpretive aids. *Ward v. Hester*, 303 N.E.2d 861 (Ohio 1973) (where the language of federal and state rules is similar, federal jurisprudence and interpretation may be used). The Ohio Rules, however, differ in several substantial respects from the federal versions. For example, in Ohio, offers of proof are not necessary when evidence is excluded during cross-examination.

Seat Belt and Helmet Use Admissibility

Evidence of non-use of a seat belt or helmet is admissible to establish that the failure to use a seat belt or helmet contributed to the harm alleged in the tort action. OHIO REV. CODE ANN. § 4513.263(F) (2013). The non-use must be in violation of state law, i.e., involving the driver or front seat passenger. A party is also permitted to introduce evidence showing a failure to ensure a minor used all available occupant restraining devices. Evidence of non-use is not available to establish negligence or contributory negligence, but can be used to diminish recovery of non-economic compensatory damages.

Spoliation

Spoliation is a defense or cause of action revolving around one party's destruction of evidence. *Banks v. Canton Hardware Co.*, 103 N.E.2d 568 (Ohio 1952). "All things are presumed against a wrongdoer." *Id.* at 573. Remedies for spoliation include criminal prohibition, discovery sanctions, exclusion of witnesses, and tort remedies. *See Hamilton Mut. Ins. Co. v. Ford Motor Co.*, 702 N.E.2d 491 (Ohio Ct. App. 1997). A party can defeat a spoliation claim by presenting evidence of a valid record retention policy. *Lewy v. Remington Arms Co*. Inc., 836 F.2d 1104 (8th Cir. 1988).

Subsequent Remedial Measures

OHIO R. EVID. 407 (2014) prevents admission of evidence of measures taken by a party that if taken before an injury would have lessened or eliminated the harm. Although it cannot be used to prove a party's negligence, evidence of subsequent remedial measures may be admissible if used to show ownership or feasibility of certain safety measures. *See generally Thomas v. Merchants Nat'l Bank*, 114 N.E.2d 863 (Ohio Ct. App. 1952).

Use of Photographs

A witness, not necessarily the photographer, must first establish that a photograph is an accurate and faithful representation. *State v. Woodards*, 215 N.E.2d 568, 577 (Ohio 1966). If a party is unable to meet that foundational requirement, an alternative is to show the reliability of the process by which the photo was produced (such as x-rays, surveillance photos, etc.) through the silent witness theory. *Midland Steel Prods. Co. v. UAW Local 486*, 573 N.E.2d 98 (Ohio 1991). Of particular concern are digital photographs and the manner in which such images can be enhanced and altered.

DAMAGES

Caps on Damages

Punitive damages may not be in excess of two times the amount of compensatory damages, however, the jury may not be informed of this limitation. OHIO REV. CODE ANN. § 2315.21 (2013). Compensatory damages, however, are unlimited so long as they represent the economic loss of a person. OHIO REV. CODE ANN. § 2315.18(B)(1) (2013). Compensatory damages for non-economic loss is limited in Ohio to $250,000.00 or three times the economic loss. OHIO REV. CODE ANN. § 2315.18(B)(2) (2013). Damages for non-economic loss will not be limited

when awarded for a substantial physical deformity, loss of use of a limb, or loss of a bodily organ system; or permanent functional injury that prevents the injured person from being able to independently care himself. OHIO REV. CODE ANN. § 2315.18(B)(3) (2013).

Calculation of Damages

A reasonable basis of computation is all that a party must present the court in order for the trier of fact to calculate damages. *Geygan v. Queen City Grain Co.*, 593 N.E.2d 328 (Ohio Ct. App. 1991). The results may be approximate if the case's nature does not allow for a more precise accounting. *Cincinnati Bell, Inc. v. Hinterlong*, 437 N.E.2d 11 (Ohio Mun. Ct. 1981). The uncertainty of the existence of damages precludes recovery, however, uncertainty as to a damage amount does not. *Accurate Die Casting Co. v. City of Cleveland*, 422 N.E.2d 459 (Ohio Ct. App. 1981).

Available Items of Personal Injury Damages

1) **Past medical bills.** Expenses incurred as a result of past medical treatment should be included within a damage award to the extent such treatment was proximately related to the injury. *Buchman v. Board of Educ.*, 652 N.E.2d 952 (Ohio 1995).

2) **Future medical bills.** Juries are not permitted to speculate as to the amount of future expenses. *Hammerschmidt v. Mignona*, 685 N.E.2d 281 (Ohio Ct. App. 1996). Thus only those future medical bills reasonably certain to follow from an injury may be included within a damage award. *Jordan v. Elex, Inc.*, 611 N.E.2d 852 (Ohio Ct. App. 1992).

3) **Hedonic damages.** The inability to do things a party once enjoyed should be measured on a particularized basis. *McGarry v. Horlacher*, 775 N.E.2d 865 (Ohio Ct. App. 2002). An award of hedonic damages may include anything from the inability to play golf to the inability to dance. A party must be able to show that these activities were usual and specific to the plaintiff. *Ramos v. Kuzas*, 600 N.E.2d 241 (Ohio 1992).

4) **Increased risk of harm.** An increased risk of harm may be included in compensatory damage awards provided there is expert testimony to that effect. *Day v. Gulley*, 191 N.E.2d 732 (Ohio 1963). If the injury is permanent and objective in nature, however, then the jury may be allowed to draw its own conclusion. *Id*.

5) **Disfigurement.** A plaintiff permanently disfigured or impaired should be recompensed if such impairment is the proximate result of defendant's actions. *Farley v. Ohio Dept. of Rehab & Corr.*, 713 N.E.2d 1142 (Ohio Ct. App. 1998). Such compensatory damages must be applied beyond purely economic damages, otherwise the trial court rightly sets the award aside. *Iames v. Murphy*, 666 N.E.2d 1147 (Ohio Ct. App. 1995).

6) **Loss of normal life.** Loss of normal life damages are the foil of hedonic damages, encompassing those normal day-to-day activities, not those which a party enjoys. *Ramos v. Kuzas*, 600 N.E.2d 241 (Ohio 1992). In personal injury actions, such damages can be awarded separate of general pain and suffering damages. *Id*.

7) **Past pain and suffering.** Past pain and suffering damages are awarded in attempt to make the plaintiff whole for those costs already incurred. *Carter v. Simpson*, 476 N.E.2d 705 (Ohio Ct. App. 1984). Damages based on past pain and suffering are not to be set aside unless so excessive that they are obviously the result of passion or prejudice, or manifestly against the weight of the evidence. *Id.*

8) **Future pain and suffering.** Damages are not permitted under this element unless supporting evidence is provided. *Hammerschmidt v. Mignogna*, 685 N.E.2d 281 (Ohio Ct. App. 1996). If the injury is of an objective nature, then that is all that need be shown and the jury may draw its own conclusions as to future pain and suffering. *Ramos v. Kuzas*, 600 N.E.2d 241 (Ohio 1992). If the injury is subjective in nature, though, an expert must testify as to the future pain and suffering that a particular plaintiff may face. *Id.*

9) **Loss of society.** A parent, spouse or other family may present evidence showing that it will suffer injury due to loss of society of companionship of the victim or decedent. *Gallimore v. Children's Hosp. Med. Ctr.*, 617 N.E.2d 1052 (Ohio 1993). Such damages may take into account services, comfort, love, solace, society, and companionship. *Id.*

10) **Lost income, wages, earnings.** A loss of earnings or time must be shown by the weight of the evidence and must be capable of reasonable calculation. *Mikula v. Balogh*, 224 N.E.2d 148 (Ohio Ct. App. 1965). Damages may be awarded for the period from the time of the injury until plaintiff's death. *Id.* A living defendant may also be able to recover for future lost earning capacity provided an expert testifies as to potential earnings for the period of the average life expectancy. *Matthews v. Mumey*, 238 N.E.2d 825 (Ohio Ct. App. 1968).

Lost Opportunity Doctrine

Damages for lost opportunity may be recovered in contract actions if the opportunity was within the contemplation of the parties at the time of the injury, the loss is the probable result of such injury, and the damages are not speculative. *City of Gahanna v. Eastgate Properties, Inc.*, 521 N.E.2d 814 (Ohio 1988).

Mitigation

A defendant may mitigate damages by showing extenuating circumstances. *First Nat. Bank of Akron v. Cann*, 503 F. Supp. 419 (N.D. Ohio 1980). Provocation is one mitigating factor that may be presented to reduce punitive damages, but will not be allowed in order to reduce compensatory damages. *Mahoning Valley Ry. Co. v. De Pascale*, 71 N.E. 633 (Ohio 1904). An agreement to fight, however, may be shown to mitigate any damages. *Id*.

Punitive Damages

In Ohio, punitive damages may only be given upon a finding of actual malice. *Rice v. CertainTeed Corp.*, 704 N.E.2d 1217 (Ohio 1999). Actual malice exists if a defendant is shown to possess either a state of mind evincing hatred, ill will or a spirit of revenge; or conscious disregard for the rights and safety of other persons. *Ward v. Hengle*, 706 N.E.2d 392 (Ohio Ct.

App. 1997). Punitive damages may not be awarded in the absence of actual or compensatory damages. *Id.* In a tort action, punitive damages may not be in excess of two times the amount of compensatory damages, however, the jury may not be informed of this limitation. OHIO REV. CODE ANN. § 2315.21 (2013). If permitted expressly by statute double and treble damages may be permitted such as in anti-trust cases. *Id.*

Recovery and Pre- and Post-Judgment Interest

After money becomes due and payable, the creditor is entitled to an interest rate of 10% per annum unless otherwise provided for by contract or settlement. OHIO REV. CODE ANN. § 1343.03(A) (2011). Post-judgment interest is recoverable according to statute whether or not noted by court or requested by creditor. *Wilson v. Smith*, 85 Ohio App. 3d 78 (9th Dist. 1993). Prejudgment interest is within the discretion of the trial court. *Carmo v. Frankel*, 477 N.E.2d 1244 (C.P. 1984). The court must find that the party seeking the prejudgment interest sought, in good faith, to settle and that the party against whom the interest is sough acted in bad faith in settlement negotiations. *Id*.

Recovery of Attorney Fees

Ohio courts are given more discretion in awarding attorney fees than is common in either federal or other state courts. An award of attorney fees by a trial court is judged by an abuse of discretion standard. *Keal v. Day*, 840 N.E.2d 1139 (Ohio Ct. App. 2005). Yet a trial court is only afforded this level of discretion when an exception to the American Rule has been found. *Id.* Attorney fees may only be awarded when (1) a statute creates a duty to pay such fees; (2) a contract term provides for the fees; or (3) the losing party has acted in bad faith. *Nottingdale Homeowners' Assn., Inc. v. Darby*, 514 N.E.2d 702, 703-704 (Ohio 1987); *Hagans v. Habitat Condo. Owners Assn.*, 851 N.E.2d 544 (Ohio Ct. App. 2006). Regardless of the exception, trial courts are charged with awarding reasonable attorney fees even if an amount or percentage has previously been contracted or stipulated to by the parties. *Id.*; *Leal v. Holtvogt*, 702 N.E.2d 1246 (Ohio Ct. App. 1998).

The Ohio Supreme Court held that an award of attorney fees, awarded as a result of a punitive damages claims, could fall under an insurance policy's general coverage of "damages which an insured person is legally obligated to pay" because of "bodily injury." *Neal-Pettit v. Lahman*, 928 N.E.2d 421 (Ohio 2010). . The Court explained that "[a]lthough . . . attorney fees were awarded as a result of an award of punitive damages, they also stem from the underlying bodily injury." *Id.* at 424. Further, the language of the policy at issue did not limit coverage to damages solely because of bodily injury. *Id.* Noting that both parties had offered their own separate interpretations of the language of the policy, both of which were plausible, the Court stated that it "must resolve any uncertainty in favor of the insured." *Id.* Therefore, the Court held that attorney fees are distinct from punitive damages, and public policy does not prevent an insurance company from covering attorney fees on behalf of an insured when they are awarded solely as a result of an award for punitive damages. *Id.* at 425.

Settlement Involving Minors

In order for a settlement to be binding on minors, a court must first appoint a guardian ad litem to represent the minor's interests, unless the proposed settlement is for an amount less than $10,000.00. *In re Layshock,* 2001 WL 1667872 (7th Dist.). Once a court has determined that the minor's interest have been adequately represented, it has a duty to enforce the settlement. *Id*. Regardless of whether or not a guardian is appointed, all settlements involving minors must obtain probate court approval. OHIO REV. CODE ANN. § 2111.18 (2013).

Taxation of Costs

OHIO CIV. R. 54(d) (2014) makes costs available to the prevailing party. These costs can only include those necessary at trial either due to local rules or necessity. Expert witness fees, cost of depositions not used in trial, etc. are unnecessary costs and accordingly cannot be taxed. *Amerifirst Savings Bank of Xenia v. Krug*, 737 N.E.2d 68 (Ohio Ct. App. 1999).

Unique Damages Issue

Certain losses may damage some plaintiffs and not others, or in the alternative, may damage different plaintiffs in different amounts. *Lookabaugh v. Spears*, 2008 WL 867730 (Ohio Ct. App. 2008). Thus when a damage is so subjective, there need be testimony specifically establishing the value of the damage to that particular plaintiff. *Id*. A jury may not be allowed to infer damages when injuries are so