

# DIGEST OF INSURANCE LAW

## OHIO

Courtesy of

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### CIVIL JUDICIAL SYSTEM

Judicial power of state is vested in supreme court, courts of appeals, courts of common pleas, divisions thereof, and such other courts inferior to supreme court as may from time to time be established by law.

#### Courts of Original Jurisdiction

Inferior courts of limited original civil jurisdiction are county courts and municipal courts. County courts have exclusive original jurisdiction over actions not exceeding \$500; original jurisdiction over actions involving less than \$15,000. O.R.C. §1907.03 Municipal courts have original jurisdiction over actions involving up to \$15,000. O.R.C. §1901.17. This limitation does not apply to the housing or environmental divisions of municipal courts. *Id.*

Courts of common pleas have original jurisdiction in all civil cases where sum or matter in dispute exceeds exclusive original jurisdiction of county and municipal courts; and appellate jurisdiction from the decisions of boards of county commissioners. O.R.C. §2305.01. Each county of state has court of common pleas. Ohio Const. Art. IV §4.04 (A).

Probate court in each county prior to May 7, 1968 had jurisdiction in probate and testamentary matters, appointment of administrators and guardians, settlement of accounts of executors, administrators and guardians, etc. By constitutional amendment, probate court became a division of the courts of common pleas, with judges to be elected specifically to such division. Ohio Const. Art. IV §4; O.R.C. §2101.01, *et seq.*

#### Appellate Courts

Courts of Appeals. State is divided into twelve appellate districts. Each appellate district has no fewer than three judges elected at large from respective appellate districts. Before 1912 these were called circuit courts; their predecessors: district courts. courts of appeals have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo and in any cause on review as may be necessary to its complete determina-

tion. Such appellate jurisdiction may be provided by law to review, affirm, modify, or reverse judgments or final orders of courts of record inferior to court of appeals within district and to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies as may be provided by law. Its judgments are final in all cases except cases where appellate jurisdiction is given to supreme court. Ohio Const. Art. IV, §3.

To render judgment, majority of judges is necessary; however, no judgments resulting from trial by jury shall be reversed on weight of evidence except by concurrence of all three judges. If judgment of one court of appeals conflicts with judgment pronounced on same question by any other court of appeals, case may be certified to supreme court for review and final determination. Ohio Const. Art. IV, §3.

Supreme Court. Supreme court is state court of last resort. Including the chief justice, the Court consists of seven justices elected from state at large. It has original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, in any cause on review as may be necessary to its complete determination, and admission to practice of law, discipline of persons so admitted, and all other matters relating to practice of law; and appellate jurisdiction in cases originating in courts of appeals, cases in which death penalty has been affirmed, in all cases involving questions arising under constitution of United States or Ohio, in cases of felony on leave first obtained, in cases which court itself determines are of public or great general interest, and such revisory jurisdiction of proceedings of administrative officers or agencies as may be conferred by law. In cases of public or great general interest supreme court may direct any court of appeals to certify its record and review, affirm, modify or reverse judgment of Court of Appeals. Supreme Court has general superintendence over all courts in state and rule making power. Ohio Const. Art. IV, §2, §5.

(NOTE: Other civil courts such as court of claims with jurisdiction over claims against State of Ohio for which sovereign immunity has been waived by statute,



juvenile court and court of domestic relations are not discussed because of rarity with which they deal with insurance matters.)

## LAW

### Abbreviations

- N.E. – North Eastern Reporter.  
 O.C.P.R. – Code of Professional Responsibility (effective until February 2007).  
 O.R.C. – Ohio Revised Code.  
 O.R.P.C. – Ohio Rules of Professional Conduct (effective February 2007).  
 Ohio Adm. Code – Ohio Administrative Code.  
 Ohio App. – Ohio Appellate Reports.  
 Ohio C.C. – Ohio Circuit Court Reports.  
 Ohio C.D. – Ohio Circuit Decisions.  
 Ohio Dec. – Ohio Decisions.  
 Ohio L. Rep. – Ohio Law Reports.  
 Ohio Law Abs. – Ohio Law Abstract.  
 Ohio Misc. – Ohio Miscellaneous.  
 Ohio N.P. – Ohio Nisi Prius Reports.  
 Ohio Op. – Ohio Opinions.  
 Ohio R. Civ. P. – Ohio Rules of Civil Procedure.  
 Ohio R. Evid. – Ohio Rules of Evidence.  
 Ohio St. – Ohio State Reports.

## TORT REFORM NOTE

On January 6, 2005, the Governor of Ohio signed into law Tort Reform Bill Am. Sub. S.B. 80, effective April 6, 2005. This bill made significant changes to Ohio's tort law in the areas of municipal liability, product liability, toxic torts, and medical malpractice liability, as well as limits and caps on certain non-economic and punitive damage awards. The sweeping changes made by this and other tort reform bills enacted subsequently continue to have a wide-ranging effect on the Ohio civil justice system and are discussed throughout the course of this digest.

### ACCIDENT AND HEALTH INSURANCE

Contract Law. Upon cancellation, insurer must promptly return unearned portion of premium paid. Cancellation does not prejudice any claim originating prior to effective date of cancellation. General rule that insurer cannot cancel health and accident policy. O.R.C. §3923.04(M). However, exception to rule exists if insurer can prove insured willfully and fraudulently made false statement in insurance application that materially affected the acceptance of risk or hazard assumed by insurer, induced insurer to issue policy, and but for false statement policy would not have been issued. O.R.C. §3923.14; *Buemi v. Mutual of Omaha*, 37 Ohio App. 3d

113, 524 N.E.2d 183 (1987). An insured will be viewed as having ratified his or her answers on an insurance application if the individual signed the same. *Republic Mut. Ins. Co. v. Wilson*, 66 Ohio App. 522, 35 N.E.2d 467 (1940). If an insured misrepresents extent of alcohol and drug use on application for medical policy, policy is void as a result of this material misrepresentation even though insured argues he was in denial of abuse at time of application; the distinction between admitting use of substance and abuse of a substance was sufficient for insurer to establish knowledge of false statements on application. *Kelch v. American Community Mut. Ins. Co.*, 97 Ohio App. 3d 212, 646 N.E.2d 518 (1994). With respect to extent of preexisting conditions and disclosure, an insured can be infected without manifesting all symptoms of a specific disease. *Eddy v. Nationwide Ins. Co.*, 13 Ohio Misc. 2d 1, 468 N.E.2d 392 (1983). O.R.C. §3923.39 codifies the procedures that must be used for cancellation by consolidated corporations of individual sickness and accident policies: if a premium payment on an individual policy is not received, no fewer than 15 days beyond notice can an effective date of cancellation take place; notice must be mailed to insured and insured must be advised of right of appeal and amount of payment required to reinstate coverage. O.R.C. §3923.39(B) further provides that an individual terminated for non-payment must be given right to appeal within 60 days and if sufficient extenuating circumstances are provided by insured, and insured pays payment required for reinstatement, policy will reinstate with no lapse in coverage. If insurer reserves right to refuse renewal of health and accident insurance, policy, or endorsement or rider attached thereto, insurer must include provision that insurer may not refuse renewal before first anniversary, or between anniversaries, of policy's issue date and that any non-renewal does not prejudice any claim originating prior to effective date of non-renewal. O.R.C. §3923.04(C). This provision not required in accident "insurance" only policy. *Id.* Health and accident policy must include grace period for payment of premium. *Id.* If insurer accepts payment of premium after grace period expired, without requiring an application for reinstatement, policy is reinstated. O.R.C. §3923.04(D). If insurer requires reinstatement application, and issued conditional receipt of premium, policy reinstated upon insurer's approval of application or upon forty-fifth day following conditional receipt unless insurer previously notified insured in writing that application denied. *Id.*

Disease induced by accident. No Ohio statutes on this subject. If accident is proximate cause of disease or other physical condition not directly within coverage of accident insurance policy, and death or disability follows, insured may recover under policy. *See, e.g., Rheinheimer v. Aetna*, 77 Ohio St. 360, 83 N.E. 491



(1907). Question of whether loss is covered under accident insurance policy excluding loss resulting directly or indirectly from bodily infirmity or surgical treatment thereof is one of fact. *Ferguson v. Prudential Life*, 399 F.2d 47 (6<sup>th</sup> Cir. 1968).

**Excepted Risks.** Must be adequately captioned and clearly set forth. O.R.C. §3923.03(E); *Johnson v. Lincoln National*, 69 Ohio App. 3d 249, 590 N.E.2d 761 (1990). When a policy of insurance provides generally for certain coverages, exclusions from such coverage must be expressly provided for or must arise by necessary implication from the words used in the policy. Thus a congenital condition without manifest symptoms of which insured is unaware and could not possibly have foreseen is not excluded by necessary implication from coverage under hospital care policy by a preexisting condition provision. *Goshorn v. Hospital Care Corp.*, 46 Ohio App. 3d 47, 545 N.E.2d 930 (1989). Under O.R.C. §3923.04(B)(2), within two years after a policy of sickness and accident insurance is issued, an exclusionary clause for preexisting condition may be applied to exclude a preexisting condition that is also a chronic condition or disease, even though chronic condition or disease is not named or specifically described. *Fisher v. Golden Rule Ins. Co.*, 60 Ohio St. 3d 148, 573 N.E.2d 650 (1991). Language in a health benefit plan excluding procedures related to sexual transformations, dysfunction or inadequacies was not ambiguous when an insured sought to recover for a penile implant. *Longpre v. Midwest Optical Supply Inc.*, 68 Ohio App. 3d 198, 578 N.E.2d 948 (1990).

**Notice and Proof of Loss.** Insured must give written notice of claim within twenty days, or as soon thereafter as reasonably possible. O.R.C. §3923.04(E). Insured must give written proof of loss within 90 days or as soon as reasonably possible, but not later than one year except in absence of legal capacity. O.R.C. §3923.04(G). Claimant was not entitled to benefits under the accidental and death benefit provisions of his policy where two years after having burned his feet while repairing a roof, his leg had to be amputated, where the policy provided that benefits would be paid for an insured loss if and only if loss occurred no more than 90 days after injury and provisions of contract were clear and unambiguous. *Major v. Lincoln Nat'l Life Ins. Co.*, 84 Ohio App. 3d 219, 616 N.E.2d 598 (1992).

**Prohibited Practices.** Former O.R.C. §3901.49 provided that no insurer when processing a policy of individual or group sickness and accident insurance can utilize genetic testing or results of genetic testing when determining insurability under health care or accident policy. O.R.C. §3901.491 provides that upon repeal of O.R.C. §3901.49 on February 9, 2004, no insurer can

consider information obtained in genetic screening or testing conducted prior to February 9, 2004 to cancel, refuse to issue or renew, or limit benefits under a sickness and accident insurance policy. O.R.C. §3924.25 provides that no employer shall engage in a practice that causes any individual to be excluded from coverage under an existing employer-provided policy for health care based solely on actual or expected health conditions. O.R.C. §3924.27 provides that a group health benefit plan or carrier offering health insurance coverage may not require an individual in the group to pay a higher premium or contribution than a similarly situated individual on the basis of any "health status-related factor" in that individual or enrolled dependants. O.R.C. §3923.57 prohibits any individual policy of sickness and accident insurance or group policy from denying coverage based upon preexisting conditions for a period beyond 12 months and limitations may only relate to conditions during the six months immediately before the effective date of coverage. O.R.C. §3901.45 prohibits discrimination in sickness and accident policies based on a history of HIV testing or consultation for HIV infection unless a positive test occurred. O.R.C. §3901.45. Questions designed to ascertain the sexual orientation of an applicant are prohibited, and factors may not be used to aid in ascertaining the sexual orientation of an applicant, such as marital status, living arrangements and geographical information. *Id.* O.R.C. §3901.21(Y) *et seq.* prohibits any limitations on coverage or premium surcharge based on an insured's history of having been a victim of domestic violence or failure to pay a benefit for injury resulting from domestic violence.

**Persons and Conditions Covered.** O.R.C. §3923.24(A)(2) provides that insurer affording coverage under a group sickness and accident insurance policy that limits coverage for dependants upon obtainment of a limiting age for dependant children cannot terminate benefits if insured person remains both primarily dependant upon policyholder for support and maintenance and is incapable of self-sustaining employment by reason of mental retardation or physical handicap. O.R.C. §3923.233 and O.R.C. §3923.25 provide that services by a nurse midwife with a supervising physician and kidney dialysis benefits afforded on an outpatient basis must be covered on any sickness and accident policy used in the state. O.R.C. §3923.40 requires that providers of individual or group policies of sickness and accident insurance that make family coverage available must include adopted children on the same basis of other dependants. O.R.C. §3923.54 provides that screening mammography must be provided beyond age 35 for persons covered under group policies of health insurance. O.R.C. §3923.54 also requires coverage for cytologic

screening for the presence of cervical cancer, but without express age restrictions.

Damages. Life insurance companies may insure against accidents, sickness, temporary or permanent physical disability O.R.C. §3911.01. Total and permanent disability provisions and accidental death provisions may be excepted from required incontestable clause in life insurance policy. O.R.C. §3915.05(C). Under ordinary life insurance policy, insurer has burden to establish that the insured's death resulted from an expected risk, such as suicide. *Schultz v. Insurance Co.*, 40 Ohio St. 217, (1883). However, under an increased indemnity provision, insured has burden to show accidental death. *Evans v. National Life and Acc. Ins. Co.*, 22 Ohio St. 3d 87, 488 N.E.2d 1247 (1986); *Venable v. Aetna Life Ins. Co.*, 174 Ohio St. 366, 189 N.E.2d 138 (1963).

### ACCIDENTAL MEANS

Definition. No statutory definition of accidental means. Accidental means has been defined as "any event which takes place without foresight or expectation of person acted upon or affected by event." *United States Mut. v. Hubbell*, 56 Ohio St. 516, 47 N.E. 544 (1897). Showing of death by external and violent means raises rebuttable presumption of accidental means. *Hassay v. Metropolitan Life*, 140 Ohio St. 266, 43 N.E.2d 229 (1942). "Absent any enforceable contractual provisions to the contrary, determination of whether an occurrence is an 'accident' for purposes of uninsured motorist, family compensation, and accident insurance must be from standpoint of the insured." *Kish v. Central Nat'l Ins. Group*, 67 Ohio St. 2d 41, 424 N.E.2d 288 (1981).

The following have been held caused by accidental means: Drowning after incurring known danger. *U.S. Mut. Accid. v. Hubbell*, 56 Ohio St. 516, 47 N.E. 544 (1897). Accidental cut producing blood poisoning. *Rheinheimer v. Aetna*, 77 Ohio St. 360, 83 N.E. 491 (1907). Death from freezing. *Commonwealth Cas. Co. v. Wheeler*, 13 Ohio App. 140 (1919). Mistaken administration of poison by physician. *Mulloff v. National Acc. & Health Ins. Co.*, 67 Ohio App. 464, 37 N.E.2d 217 (1941). Heat exhaustion and sunstroke. *Hammer v. Mutual Ben. Health & Acc.*, 158 Ohio St. 394, 109 N.E.2d 649 (1952). Death of aggressor who did not anticipate serious injury. *Mullins v. Prudential*, 6 Ohio St. 2d 148, 216 N.E.2d 619 (1966). Murder. *Dolence v. Central Nat'l Bank*, 15 Ohio Misc. 300, 238 N.E.2d 849 (1968). Gunshot killing of intoxicated husband by his abused (battered) wife who attempted to frighten deceased while protecting her baby. *Davis v. Equitable Life*, slip op., No. 3233 (Lorain Co., Ct. App. Jan. 6, 1982).

The following have been held not to have been caused by accidental means: Dilation of heart following cold bath. *New Amsterdam Cas. v. Johnson*, 91 Ohio St. 155, 110 N.E. 475 (1914). Death during voluntary fist fight. *Harrison v. Prudential*, 54 Ohio App. 279, 6 N.E.2d 991 (1936). Death from ruptured sigmoid in self-administered enema. *Mitchell v. New York Life*, 136 Ohio St. 551, 27 N.E.2d 243 (1940). Death from heat stroke from artificial heat in customary work. *Ridgeley Protective Ass'n Ins. Co. v. Smith*, 42 Ohio App. 417, 182 N.E. 345 (1932). Death from amebic dysentery. *Burns v. Employer's Liability Assur. Corp.*, 134 Ohio St. 222, 16 N.E.2d 316 (1938). Hernia from heavy lifting. *Blubaugh v. Lincoln Nat'l Ins. Co.*, 84 Ohio App. 202, 82 N.E.2d 765 (1948). Rupture from laughter. *Albers v. Continental Cas. Co.*, 87 Ohio App. 336, 94 N.E.2d 797 (1949). Injury from assault provoked by insured. *Hirschfeld v. Kentucky Life & Acc. Ins. Co.*, 90 Ohio App. 144, 103 N.E.2d 839 (1951). Pulmonary embolism following operation. *Groves v. World Ins. Co.*, 69 Ohio Law Abs. 78, 124 N.E.2d 199 (C.P. Ct. 1952), *aff'd*, 160 Ohio St. 355, 116 N.E.2d 204 (1953).

### ADJUSTERS

Definition. "Public insurance adjusters" means person or entity who, for compensation, acts for or aids in any manner, another in negotiating for, or effecting the settlement of, claim for loss or damage under any insurance policy covering real or personal property; person or entity who advertises, solicits business, or holds self out to public as adjuster; and person who for compensation investigates, settles, adjusts, advises, or assists insurer or insured with claims, on behalf of public insurance adjuster. O.R.C. §3951.01(B). Public insurance adjusters require certificates of authority with following exceptions: Attorney admitted to practice in Ohio not holding himself out to general public as adjuster, officer, agent or regularly salaried employee of insurer or underwriter; certain attorneys-in-fact and underwriters; insurer-owned and maintained adjustment bureau or association or full-time salaried employee thereof; licensed agent or employee or officer of such agent or agency of authorized insurer adjusting losses only for it; and any independent adjuster representing insurer. O.R.C. §§3951.01, 3951.02.

Licensing Requirements. Certificate of authority obtained from Superintendent of Insurance on proof of trustworthiness and competency. O.R.C. §§3951.03, 3951.04. No certificate granted if convicted of felony, offense involving dishonesty or, within 3 years of application, guilty of practice which is grounds for suspension of revocation of certificate. O.R.C. §3951.04. Written examination given unless eligible for waiver if applicant licensed in another state. O.R.C. §§3951.05,



3951.09. Certificates issued only to Ohio residents. O.R.C. §3951.06; *Associated Adjusters of Ohio v. Ohio Dept. of Ins.*, 50 Ohio St.2d 144, 363 N.E.2d 730 (1977). Initial and annual license fees imposed. O.R.C. §§3951.03, 3951.06. Bond in amount of \$1,000 required. *Id.* Fine levied for acting as public adjuster without certificate. O.R.C. §3951.99. Certificate subject to revocation or suspension for violation of Chapter 3951, fraud or dishonesty, material misstatement in certificate application, incompetency or untrustworthiness, or assignment of claim. O.R.C. §3951.07.

### AGE

See “AUTOMOBILES”; “LIABILITY INSURANCE”; “NEGLIGENCE.”

Generally. Age of majority in Ohio is 18. O.R.C. §3109.01. Age for purchasing or consuming beer or intoxicating liquor is 21. O.R.C. §4301.63. Males must be 18 years to marry; females must be 16 to marry and when under 18, must obtain consent from parents or guardian, with certain exceptions. O.R.C. §3101.01.

### AGENTS AND BROKERS

Definition. Agent. One that, in order to sell, solicit, or negotiate insurance, is required to be licensed Ohio, including limited lines insurance agents and surplus line brokers. O.R.C. §3905.01. Broker. One who acts as middleman, not tied to any particular company between insured and insurer, solicits insurance from public and places order for insurance with a company. *Osborn v. Ozlin*, 310 U.S. 53 (1939). Nonresident natural person, resident in any other state or Canada and licensed therein to solicit or place insurance other than life, may obtain foreign broker’s license to place insurance other than life in Ohio with qualified domestic insurer or its agent in Ohio or with licensed agent in Ohio of any foreign insurer admitted to do business in Ohio, or with any insurer not authorized to do business in Ohio so long as such insurance is placed through licensed surplus line brokers; but foreign broker may not solicit insurance in Ohio or by or through representative in Ohio and may only place insurance in Ohio which he has directly procured from insureds outside of Ohio. O.R.C. §3905.03.

For Whom. Soliciting agent represents company. O.R.C. §§3911.22, 3923.141, 3929.27. Absent actual or apparent authority, soliciting agent has no power to act for insurer to create insurance contract, notwithstanding provisions in O.R.C. §3929.27. *Gregg v. Hancock Mut.*, 43 Ohio St. 2d 119, 330 N.E.2d 913 (1975). Solicitor’s agency ordinarily terminates upon issuance of policy and payment of premium. *Thomas v. Fields*, 29 Ohio Op. 2d 286, 196 N.E.2d 103 (1964). Course of dealing and conduct of parties may show agent to be agent of insured for delivery of policy. *See Stachler v. Travelers*, 66 Ohio

Law Abs. 323, 117 N.E.2d 176 (1951); *see also Angelo v. Travaglia*, 7 Ohio Op. 2d 383, 155 N.E.2d 717 (1957). Variation in language of O.R.C. §§3911.22 and 3929.27 seems to indicate intention of legislature to expressly forbid concept of dual agency in life insurance transactions but leaves open possibility for such relationship in non-life insurance transactions. *Jonathan Woodner Co. v. Aetna*, 33 Ohio Misc. 71, 442 F.2d 754 (D.C. Cir. 1971).

Fraud by Agent. Ohio Statute prohibits agents from misrepresenting the terms of any policies. Agents may receive fines and license revocations for violations. O.R.C. §3999.08.

Knowledge of Agent. Agent’s knowledge of subject matter concerning his actions on authority of insurer is generally imputed to insurer. *Saunders v. Allstate Ins. Co.*, 168 Ohio St. 55, 151 N.E.2d 1 (1958). Agent’s knowledge is not imputed to insurer where agent has no authority to act on behalf of insurer and no duty to communicate his knowledge to insurer or where knowledge is acquired after agent has no further authority to represent insurer and no further duties to perform on behalf of insurer. *Myers v. John Hancock Mut. Life*, 108 Ohio St. 175, 140 N.E. 504 (1923). Imputation of knowledge rule applies despite application and policy provision to contrary. *North American Acc. v. Sickles*, 13 Ohio C.D. 594, 2 Ohio C.C. N.S. 222 (1902).

Liability of Agent. Criminal liability may be imposed on an agent under the following provisions: Unfair and deceptive practices. O.R.C. §§3901.20, 3901.22(E). Improper sales of long-term care insurance. O.R.C. §3923.44. Failure to cooperate with, or obstructing or interfering with, superintendent of insurance in connection with proceedings under “Insurers Supervision Rehabilitation, and Liquidation Act” (O.R.C. §3903.01-3903.59). O.R.C. §§3903.06, 3905.99. Sale of stock of life insurance company for which he is licensed to sell life insurance. O.R.C. §§3905.182, 3905.99. Transmitting applications if not licensed, O.R.C. §§3905.21, 3905.31. Racial discrimination. O.R.C. §§3911.16, 3911.17, 3911.99. Offering or accepting rebates and inducements for life policies. O.R.C. §§3911.18, 3911.20, 3911.99. Misrepresentation of life policy. O.R.C. §§3911.23, 3911.99. Participation by agent in false advertising or receipt of commissions with knowledge of false advertising relative to fraternal insurance contracts. O.R.C. §§3921.36, 3921.99. Alteration of application for sickness and accident insurance (*see* O.R.C. §3923.14), misleading or deceptive advertising in solicitation of sickness and accident insurance. O.R.C. §§3923.16, 3923.99. Delivery of sickness and accident policy on disapproved form. O.R.C. §§3923.21, 3923.99. Incomplete references in advertising to non-cancellation provi-



sions. O.R.C. §§3923.161, 3923.99. Offering or accepting rebates and inducements for insurance other than life. O.R.C. §§3933.01 through 3933.04, 3933.99. Making a false statement concerning health or physical condition of an applicant by a medical examiner. O.R.C. §§3999.02, 3999.99. Issuance of fraudulent life or accident policy. O.R.C. §§3999.03, 3999.99. Modification of life policy. O.R.C. §§3999.04, 3999.99. Offering or accepting rebates and inducements for life policies. O.R.C. §§3999.05, 3999.99. Sale or assignment of premium note before delivery of policy. O.R.C. §§3999.07, 3999.99. Misrepresentation of policy or insurer's assets. O.R.C. §§3999.08, 3999.10. Defamation of insurance company. O.R.C. §3999.09. Violation or noncompliance with any law relating to foreign life or accident insurer on assessment plan. O.R.C. §§3999.14, 3999.99.

Grounds for disciplinary action; procedure; action by Attorney General. O.R.C. §3905.14.

Failure to Procure Policy. Agent who through his fault or neglect, fails to procure a policy he has undertaken to procure may be liable for any resulting damage. *Kilburn v. Becker*, 60 Ohio App. 3d 144, 573 N.E.2d 1226 (1990). Absent actual malice or fraudulent acts by agent, damages for breach of duty to procure insurance are limited to amount insurer would have owed under the terms of the supposed insurance contract. *Stuart v. National Indem.*, 7 Ohio App. 3d 63, 454 N.E.2d 158 (1982). Insolvent Company: Agent is obligated to pay liquidator unpaid earned premium due insurer at time of declaration of insolvency and any part of unearned commission held by agent. O.R.C. §3903.33.

License and Regulation. Life agent for life insurance company authorized to provide variable or fixed and variable benefits must be licensed as a variable contract agent. O.R.C. §§3905.02, 3905.06. Licenses for agents are restricted to natural persons. O.R.C. §3905.05. An agent must agree to a criminal background check as part of the process to obtain a license. O.R.C. §3905.05. The superintendent of insurance shall issue a license if the applicant is 18 years old, and has not committed any act that is grounds for denial, completed required education, passed examination, honest, and trustworthy. O.R.C. §3905.06. An agent must be licensed for each line of insurance he sells. O.R.C. §3905.02. See "Broker," *supra*, and O.R.C. §3905.07 as to non-resident broker licensing. Licensee may not use license principally to procure insurance on property sold by him or on his property or that of his relatives, employees, employer, etc. O.R.C. §3905.14.

### ARBITRATION

Insurance policy may provide that disputes be resolved by arbitration before commencing suit against

insurer. *Phoenix Ins. v. Carnahan*, 63 Ohio St. 258, 58 N.E. 805 (1900). Majority of arbitrators must write and sign arbitration award. O.R.C. §2711.08. At any time within one year after an award in an arbitration proceeding is made, any party to the arbitration may apply to the court of common pleas for an order confirming the award. O.R.C. §2711.09. Once arbitration is completed, jurisdiction of court of common pleas is limited to confirmation, vacation, modification or enforcement. *Lockhart v. American Reserve Ins. Co.*, 2 Ohio App. 3d 99, 440 N.E.2d 1210 (1981). See also *Cuyahoga College v. AFL-CIO*, 42 Ohio App. 3d 166, 537 N.E.2d 717 (1988).

In 1993, the United States District Court for the Northern District of Ohio, Eastern Division, certified the following question to the Supreme Court of Ohio: "Does Ohio Revised Code §3929.06 preclude an injured person from bringing any action, including a declaratory judgment action, against the tortfeasor's insurer unless the injured person has first obtained a judgment against the insured?" The Ohio Supreme Court answered this certified question in the negative. *Krejci v. Prudential Prop. & Cas. Ins. Co.*, 66 Ohio St. 3d 15, 607 N.E.2d 466 (1993). In 1999, the Ohio Legislature passed O.R.C. §2721.02, which prohibits commencement of declaratory judgment action by non-insured against insurer, until judgment is obtained against insured-tortfeasor.

### ATTORNEYS

Appointment and Authority. Attorney is empowered to act on behalf of client only under contract of employment, express or implied. Mere offer by prospective client and acceptance by attorney is enough. *Warm v. Greenberg*, 29 Ohio App. 2d 163, 279 N.E.2d 640 (1971); *Doyle v. Byers*, 5 Ohio Law Abs. 727 (1927). With few exceptions, attorney shall not solicit a prospective client where there is a significant pecuniary motive. O.R.P.C. 7.3; see former O.C.P.R. Canon 2, DR 2-104. Attorney shall not handle legal matter which he knows he is not competent to handle. O.R.P.C. 1.1; see former O.C.P.R. Canon 6, DR 6-101 (A)(1).

Scope of attorney's authority is limited by nature of employment for which he is engaged. Attorney without special authorization has no implied or apparent authority, solely by virtue of his general retainer, to compromise and settle client's claim or cause of action. *Morr v. Crouch*, 19 Ohio St. 2d 24, 249 N.E.2d 780 (1969). No certified insurance adjuster may advise any insured or insurer, or perform any service constituting practice of law. O.R.C. §3951.08.

Conflict of Interest. Attorney should refuse proffered employment if exercise of independent professional judgment on behalf of existing client will be adversely and directly affected by acceptance of proffered

employment or the attorney's ability to recommend, consider or carry out appropriate counsel of action bears a substantial risk of being materially limited by other clients, parties or the attorney himself unless attorney can adequately represent interest of each client and if each client consents to representation after full disclosure of possible effect of such multiple representation. O.R.C.P. 1.7.

**Legal Malpractice.** To establish claim of legal malpractice based on negligent representation, plaintiff must show 1) the attorney owed a duty or obligation to plaintiff, 2) there was a breach of that duty or obligation and attorney failed to conform to the standard required by law, and 3) there is a causal connection between conduct complained of and resulting damage or loss. *Vahila v. Hall*, 77 Ohio St. 3d 421, 674 N.E.2d 1164 (1997). A plaintiff in a legal malpractice action may be required in some circumstances to provide evidence of the merits of the underlying claim, but is not required to prove the underlying action would have been successful. *Id.* The Ohio Supreme Court clarified the *Vahila* decision in *Environmental Network Corp. v. Goodman Weiss Miller, L.L.P.* Pursuant to the *Environmental* case, a malpractice plaintiff must prove a case within a case when he alleges that he "would have received a better outcome if the underlying case had been tried to its conclusion rather than settled." *Environmental Network Corp. v. Goodman Weiss Miller, L.L.P.*, 2008-Ohio-3833, 119 Ohio St. 3d 209, 209, 893 N.E.2d 173, 174-75. To establish the attorney failed to exercise the knowledge, skill and ability ordinarily possessed and exercised by similarly situated members of the legal profession, expert testimony is usually necessary to establish standards. *Landis v. Hunt*, 80 Ohio App. 3d 662, 610 N.E.2d 554 (1992). Third party must be in privity with client to recover from attorney, unless attorney acts with malice. *Simon v. Zipperstein*, 32 Ohio St. 3d 74, 512 N.E.2d 636 (1987).

**Fees.** Unless special agreement exists, consumption of attorney's time in consultation of legal matter by client raises implied contract to pay reasonable value for services rendered. *Warm v. Greenberg*, 29 Ohio App. 2d 163, 279 N.E.2d 640 (1971). When discharged with or without just cause, and whether contract between attorney and client is express or implied, attorney is entitled to reasonable compensation for services provided prior to discharge based on theory of quantum meruit. *Fox & Assocs. v. Purdon*, 44 Ohio St. 3d 69, 541 N.E.2d 448 (1989). Contingent fee arrangement concerning tort action must be in writing and signed by attorney and client. O.R.C. §4705.15(B); O.R.P.C. 1.5. Attorney may split fee for legal services with another lawyer, not of the same firm and if 1) division is in proportion to services performed by each lawyer or if, by written agreement with client, all lawyers assume responsibility for the rep-

resentation, 2) client has given written consent after terms of division and identity of all lawyers sharing the fee are disclosed to client, and 3) unless otherwise court ordered, the written closing statement involving contingent fee is signed by client and each representing attorney. O.R.P.C. 1.5.

## AUTOMOBILES

See "NEGLIGENCE"; "NO-FAULT"; "DAMAGES."

**Age.** Driver's License Law, O.R.C. Chap. 4507, among other conditions, requires that person be 18 years of age or over to be issued driver's license, except probationary license may be issued to person over 16 years of age who has held a temporary instruction permit for at least six months and restricted license may be issued to person who is 14 or 15 upon proof of hardship. O.R.C. §4507.071. No temporary instruction permit or driver's license shall be issued to any person who is an alcoholic, or addicted to use of controlled substance to the extent that the use constitutes an impairment of person's ability to operate a motor vehicle with required degree of safety, and no temporary instruction permit, driver's license or probationary license shall be issued to any person who has been adjudicated unruly, delinquent, or a juvenile traffic offender for having committed drug or alcohol abuse related offenses, unless the person has been required by the court to attend, and has satisfactorily completed a driver's intervention program. O.R.C. §4507.08. Probationary, restricted or temporary license shall not be granted to minor under 18 years of age unless application is signed by either parent, guardian or person having custody of minor or, if there is no parent or guardian, by some other responsible person. O.R.C. §4507.07. Any negligence or willful or wanton misconduct of such minor when driving shall be imputed to person signing such application which person shall be jointly and severally liable with such minor except where minor has proof of financial responsibility with respect to operation of motor vehicle in form and amounts required by O.R.C. Chapter 4509. O.R.C. §4507.07(B). School bus drivers must be at least 18 years of age, of good moral character and qualified, physically and otherwise, for position. O.R.C. §3327.10. Likewise, no person shall employ, for purpose of operating taxi cab, any minor under 18 years of age. O.R.C. §4507.321. To procure commercial driver's license, one must have a valid driver's license, and one must be at least 18 years of age. O.R.C. §4506.06. No person shall operate motorized bicycle (moped) unless, among other things, person is 14 or 15 years of age and holds valid probationary motorized bicycle license, or is 16 years of age or older and holds either valid commercial driver's or driver's license or valid motorized bicycle license. O.R.C. §4511.521. Many municipalities in Ohio have enacted ordinances



providing minimum age for operators of motor vehicles. Notwithstanding above age requirements, nonresidents permitted to drive in their own states may operate any motor vehicle upon any highway in this state without examination or license upon condition that such nonresidents may be required to prove rightful possession or right to operate such motor vehicle and proper identity. O.R.C. §4507.04.

Agency. Employer or principal is liable under doctrine of respondeat superior for negligent operation of automobile by agent within scope of agent's employment. *Kellerman v. J.S. Durig Co.*, 176 Ohio St. 320, 199 N.E.2d 562 (1964). Marital relationship alone is insufficient ground for recovery. O.R.C. §3103.08. Where owner is passenger-occupant of his own automobile, rebuttable presumption or inference arises that owner as passenger-occupant has control and direction over it, and that driver is acting as his agent in operating it. *Ross v. Burgan*, 163 Ohio St. 211, 126 N.E.2d 592 (1955). However, negligence of driver is not imputable to owner so as to defeat owner's action against driver or diminish recovery therein. *Parrish v. Walsh*, 69 Ohio St. 2d 11, 429 N.E.2d 1176 (1982). There is no direct statutory liability upon owner for acts of his agent except as noted under "Age." However, Ohio does recognize claims of negligent entrustment. *Mt. Nebo Baptist Church v. Cleveland Crafats Co.*, 154 Ohio St. 185, 93 N.E.2d 668 (1950).

Comparative/Contributory Negligence. See "NEG-LIGENCE."

Compulsory Insurance Coverage. A driver of an automobile is required to continuously maintain proof of financial responsibility. O.R.C. §4509.101 (A)(1). Ohio's Financial Responsibility Law, O.R.C. Chapter 4509, provides for the compulsory reporting of accidents, the depositing of security, a policy of insurance or other proof of financial responsibility with registrar to satisfy judgments arising from accidents, and the suspension of driving rights and registration plus other civil penalties for failure to comply. See O.R.C. §4509.01 *et seq.*

Alcohol/OVI. No person shall operate any vehicle if person is under influence of alcohol and/or drug of abuse, person has a concentration of eight-hundredths (.08) of 1% or more by weight of alcohol in blood, eight-hundredths (.08) of 1 gram or more by weight of alcohol per 210 liters of breath, ninety-six thousandths (.096) of 1% or more by weight of blood serum or plasma, or eleven-hundredths (.11) of 1 gram or more by weight of alcohol per 100 milliliters of urine. O.R.C. §4511.19. Any person who operates vehicle shall be deemed to have consented to chemical test or tests of blood, breath or urine to determine alcohol and/or drug content therein

if arrested for operating a vehicle while under influence of alcohol and/or drug. O.R.C. §4511.191(A)(2). Registrar shall suspend driver's license for one year for first refusal within 6 years to submit to chemical test, and for longer periods if driver refused more than once in 6 years. O.R.C. §4511.191(B)(1). In addition, court is required to suspend driver's license for violation of §4511.19 (or similar municipal ordinances) for varying lengths of time, depending on number and severity of offenses within certain time frames. O.R.C. §4510.02. First offense is misdemeanor of first degree with mandatory jail term of 3 consecutive days. O.R.C. §4511.19(G)(1)(a)(i). The offender may also be sentenced to an intervention program. *Id.* The three-day jail term may be suspended where the offender is required to attend a three-day drivers' intervention program certified under O.R.C. 3793.10. *Id.*

Damages. Common law governs compensatory damages. Compensatory damages make plaintiff whole by covering "actual loss." *Fantozzi v. Sandusky Cement*, 64 Ohio St. 3d 601, 597 N.E.2d 474 (1992). Punitive damages may be awarded only if the actions or omissions of the defendant demonstrate malice, fraud, oppression or insult and plaintiff adduced proof of actual damages. O.R.C. §2315.21 (B)(1)(2). The trier of fact shall determine the liability of any defendant for punitive or exemplary damages and the amount of those damages. O.R.C. §2315.21(C)(1)(2). Punitive damages may not be awarded more than once for a single act. *Digital & Analog Design Corp. v. North Supply Co.*, 44 Ohio St. 3d 36, 540 N.E.2d 1358 (1989).

Family Purpose Doctrine. Disapproved in Ohio. *Ross v. Burgan*, 163 Ohio St. 211, 126 N.E.2d 592 (1955); *Fulk v. Lorenzoni*, 59 Ohio App. 287, 17 N.E.2d 952 (1938).

Guest. Driver of motor vehicle must use reasonable and ordinary care for safety of any guest or passenger and is liable for injuries proximately caused by negligence in handling of vehicle. *Primes v. Tyler*, 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975).

Intentional Acts. Insurance coverage for "accidental injuries" cannot be denied solely on basis of intentional act under uninsured motorist policy, *Kish v. Central Nat'l Ins. Group*, 67 Ohio St. 2d 41, 424 N.E.2d 288 (1981), or if no intent to injure is found. *Cincinnati Ins. Co. v. Mosley*, 41 Ohio App. 2d 113, 322 N.E.2d 693 (1974). An insurance company has no duty to defend or indemnify where insured's act was intentional. *Gearing v. Nationwide*, 76 Ohio St. 3d 280, 665 N.E.2d 115 (1996). To avoid coverage on basis of exclusion for expected or intentional injuries, the insurer must demonstrate injury itself was expected or intended. *Physicians Ins. Co. v. Swanson*, 58 Ohio St. 3d 189, 569 N.E.2d 906

(1991). However, in those cases where an intentional act is substantially certain to cause injury, determination of an insured's subjective intent, or lack of subjective intent, is not conclusive of the issue of coverage. *Gearing v. Nationwide Ins. Co.*, 76 Ohio St. 3d 34, 665 N.E.2d 1115 (1996).

**Imputed Negligence/Joint Enterprise.** Doctrine of imputed negligence repudiated in Ohio, but negligence of driver may be imputed to owner passenger in action against third party; not imputable in action by owner against driver. *See e.g., Parrish v. Walsh*, 69 Ohio St. 2d 11, 429 N.E.2d 1176 (1982). Joint enterprise is joint prosecution of common purpose such that each member has authority to act for all in respect to control of agencies employed. *Bloom v. Leech*, 120 Ohio St. 239, 166 N.E. 137 (1929). Existence of joint enterprise is question of fact for jury. *Id.* Mere relationship of husband and wife is insufficient as foundation for claim of joint enterprise. *Hiller v. Shaw*, 45 Ohio App. 303, 187 N.E. 130 (1932).

**Last Clear Chance.** Doctrine applies only where plaintiff placed himself in perilous position, defendant knew of plaintiff's peril and could have used ordinary care to avoid injury but failed to do so. *Sech v. Rogers*, 6 Ohio St. 3d 462, 453 N.E.2d 705 (1983).

**Ownership/Title.** No person or entity can obtain any interest in a motor vehicle until receipt of certificate of title or manufacturer's certificate. O.R.C. §4505.04(A). Annual vehicle registration required. O.R.C. §4503.10(A). Owner must show proof of ownership, pay fees and sign statement of financial responsibility. O.R.C. §§4503.10(A)(1), 4503.02, 4503.20(B)(1). License plates must be displayed in the front and rear of the vehicle. O.R.C. §4503.21.

**Pedestrians.** Must use sidewalks and crosswalks whenever practicable. O.R.C. §§4511.49, 4511.50(A). Generally, pedestrians have right of way when in crosswalk. O.R.C. §4511.46. If pedestrian walks in two-way roadway, where neither sidewalk nor shoulder is available, must walk on left side of road. O.R.C. §4511.50(C). Pedestrians solicitation of drivers is limited by O.R.C. §4511.51(A)-(B).

**No-Fault.** Ohio is not a no-fault state.

**Motorized Bicycles.** May be operated by any licensed driver and persons ages 14-16 with a limited special license. O.R.C. §4511.521. Motorized bikes must be properly equipped, including rear view mirrors; persons below age 18 must wear helmets. O.R.C. §4511.521(A)(3).

**Seat Belts.** The driver and front seat passenger must wear all of the available elements of a properly adjusted

occupant restraining device. O.R.C. §4513.263 (B). Children required to be properly secured in an approved child restraint system. O.R.C. §4511.81. The failure of a person to wear all available elements of an occupant restraining device or the failure of a person to ensure that each passenger of an automobile being operated by that person is wearing all of the available elements of an occupant restraining device shall not be considered by the trier of fact in a tort action as contributory negligence, except it may be considered to diminish non-economic damages and in some product liability cases. O.R.C. §4513.263 (F).

**Service of Process Upon Non-Resident Motorists.** Ohio R. Civ. P. 4.3 provides that any non-resident or resident absent from state, including his executor, administrator, or personal representative, may be served outside state if person, acting directly or by agent, has caused tortious injury in state arising out of ownership, operation or use of motor vehicle in state. Unless Rule 4.3 provides otherwise, service shall be by certified or express mail or by personal service. Also, service may be completed by serving the Secretary of State if the identity or whereabouts of individual unknown. O.R.C. §2703.20. Alternative modes of service by publication or in foreign country provided. Ohio R. Civ. P. 4.4 and 4.5.

In rem jurisdiction has been used to seize automobiles used to violate the law, but not in modern cases. *Findlay v. Associates Inv. Co.*, 115 Ohio St. 235, 152 N.E. 903 (1926).

**Speed Limits.** Under O.R.C. §4511.21 speed shall not be greater or less than is reasonable for conditions then existing. Statute prohibits speed greater than will permit operator to stop within assured clear distance ahead, prohibits speed exceeding 55 miles per hour (65 miles per hour in limited circumstances), and fixes prima facie lawful speeds at 20 miles per hour in "school zones" during certain school hours; 25 miles per hour in all other portions of municipality except on state routes or through highways outside business districts or alleys; 35 miles per hour on state routes or through highways within municipality outside business districts; 50 miles per hour on controlled-access highways within municipal corporations; also on state routes within municipality outside urban districts unless lower speed is established as further provided in statute; 55 miles per hour on freeways with paved shoulders inside municipal corporations and on highways outside municipal corporations; 15 miles per hour on alleys within municipal corporation; and 65 miles per hour for certain vehicles on interstate freeways outside urbanized areas when appropriate signs giving notice of speed limit have been erected. Under certain circumstances statute provides Director of

Transportation or local authorities may alter prima facie limits. *Id.*

Trailers/Weight Limits. Size of trailers and maximum weight loads set in O.R.C. §§4513.01 *et seq.*; 5577.01 *et seq.* Generally, weight restriction dependant on vehicle size.

Uninsured/Underinsured Endorsements. By statute, all automobile insurance policies may, but are not required to include uninsured and/or underinsured coverage. O.R.C. §3937.18.

### AVIATION

Uniform Act. Ohio has not adopted the Uniform Aircraft Responsibility Act.

Action for wrongful death. In all wrongful death actions, statute creates rebuttable presumption that pilot was in command of the airplane at the time of the crash. O.R.C. §4561.23. Ohio law governs when Ohio estate sues another Ohio estate for wrongful death even though the plane crash at issue took place outside of Ohio. *Moats v. Metropolitan Bank of Lima*, 40 Ohio St. 2d 47, 319 N.E.2d 603 (1974).

Limits to Liability. Where transportation is furnished solely as business accommodation, rather than social accommodation, person furnished such transportation is not a "guest." *Hyer v. Velinoff*, 28 Ohio App. 2d 211 (1971). Transportation is furnished as business accommodation where it is furnished with expectation of receiving business benefit in return for providing transportation. *Id.* No liability for injuries or death of guest transported without payment resulting from negligent operation of airplane. O.R.C. §4561.151. Liability to guest only for willful or wanton misconduct of owner, operator or person responsible for operation of aircraft. O.R.C. §4561.151.

Service of Process. As with motor vehicles, Ohio R. Civ. P. 4.3 governs service of non-resident aviators.

### BROKERS

See "AGENTS AND BROKERS."

### BURGLARY INSURANCE

Term "chest or compartment" of safe in policy of burglary insurance held to be used in alternative and not synonymous. *Copelin-Mohn, Inc. v. Buckeye Union*, 135 Ohio St. 287, 20 N.E.2d 713 (1939). Policy requirement of "visible marks" of forcible entry valid liability limitation; not met by electronic alarm ringing. *Sterling Merchandise v. Hartford*, 30 Ohio App. 3d 131, 506 N.E.2d 1192 (1986).

### CANCELLATION

See "ACCIDENT AND HEALTH INSURANCE, Contracts"; "LIABILITY INSURANCE"; "FIRE INSURANCE, Contracts."

Generally, the right to rescind, cancel or surrender a contract of insurance may arise by statute, consent, contract terms, or breach of contract. Statutory vs. Contract Provisions: Terms of a policy govern as to its cancellation or termination, in absence of legislation. *De Victor v. Preferred Ins. Co., Grand Rapids, Mich.*, 79 Ohio Law Abs. 472, 156 N.E.2d 157 (1958). Generally, insurance policy can only be cancelled through strict compliance with policy conditions permitting cancellation by one of the parties, unless such compliance is waived. *Runkle v. Citizens Ins. Co.*, 6 F. 143 (1881). Partial Cancellations: Without consent of both insurer and insured, an entire insurance contract may not be partially cancelled. Where insured requests insurance company to cancel an existing policy and to issue a new insurance policy, insurance company may not cancel existing insurance policy without issuing new policy. *Wilkins v. Tobacco Ins. Co.*, 30 Ohio St. 317 (1876). Cancellation as Equitable Relief: Where plaintiff has no adequate and complete remedy at law, a court of equity may entertain jurisdiction of action for rescission or cancellation of insurance policy. *Union Central Life Ins. Co. v. Pottker*, 33 Ohio St. 459 (1878). Authority of Agent to Cancel: An insurance agent may be authorized to accept cancellations. *Aetna Ins. Co. v. Stambaugh-Thompson Co.*, 76 Ohio St.138, 81 N.E. 173 (1907). In the case of an auto insurance policy, an insured may delegate cancellation responsibilities to an agent, absent a statutory prohibition of such delegation. When insurance agent represents two companies, agent may accept cancellation for the policy of one company and substitute thereafter with the policy of another company. *Id.*

Mutual Assent Cancellation. Parties who have contracted insurance have ability to mutually consent to cancellation of insurance. Where no cancellation clause is in effect under policy, cancellation of policy is governed by principles of offer and acceptance. *Lewis v. Motorists Ins. Cos.*, 96 Ohio App. 3d 575, 645 N.E.2d 784 (1994). Generally: Where insurance company cancels insurance policy in good faith and returns insurance premium on grounds not included by insurance cancellation clause, and insurer accepts the premium, the parties are considered to have compromised, and insurer and insured are relieved from liability. *Mansfield v. Franklin Furniture Co.*, 4 Ohio C.D. 473 (1893). Cancellation then Substitution of Policy: The surrender of a policy to insured and acceptance by insured of substitute policy amounts to cancellation of previous policy. *Aetna Ins. Co. v. Stambaugh-Thompson Co.*, 76 Ohio St. 138, 81



N.E. 173 (1907). Statutory Provisions: Where life insurance policy, issued by one company upon surrender of a policy of another company, expressly stipulates that policy was issued in consideration of the representations made in application for first policy, such application becomes application for new insurance, and the truth of the representations therein is to be considered as of the time representations were made to original insurer. *Ensel v. Lumber Ins. Co.*, 88 Ohio St. 269, 102 N.E. 955 (1913). Statutory Provisions: Under O.R.C. §3929.05, no contract of employers or public liability insurance against liability on account of bodily injuries or death can be cancelled or annulled by any agreement between insurance company and insured after insured becomes responsible for such loss, damage, or death, and any such cancellation or annulment is void. Under O.R.C. §3915.12, any life insurance company at the request of a policy holder may, subject to certain restrictions, exchange, alter, or convert any policy of life or endowment insurance, or an annuity issued by it, for or into another plan of insurance for annuity as of the date not prior to the effective date of the original or annuity.

**Cancellation by Insurer. Generally:** Unless allowed by express statutory provision or contractual provision, insurance company cannot cancel valid contract of insurance without consent of the insured. *Stachler v. Travelers Fire Ins. Co.*, 66 Ohio L. Abs. 323, 117 N.E.2d 176 (1951). But where insurance company does have right to cancel, and in absence of a provision to the contrary, insurance company does not need to give a reason for cancellation of policy, and even an erroneous statement by insurance company regarding cancellation will have no effect on validity of cancellation. *Gibbons v. Kelly*, 156 Ohio St. 163, 101 N.E.2d 497 (1951). However, insurance company cannot cancel an insurance policy for reasons which violate public policy, are unreasonable, jeopardize or imperil the insured or expose insured to irretrievable loss. *Voyager Village Ltd. v. Williams*, 3 Ohio App. 3d 288, 444 N.E.2d 1337 (1982); *Irwin v. National Ins. Co.*, 13 Ohio Dec. Rep. 43 (1858). In order to terminate automobile policy for nonpayment of premiums and within mandatory statutory renewal period, issuer of policy must send notice of cancellation to policyholder. *DeBose v. Travelers Ins. Companies*, 6 Ohio St. 3d 65 (1983). **Notice of Cancellation - Form and Sufficiency of Notice:** Fire insurance policies and other contracts of insurance upon property generally provide for cancellation by insurer by notice to insured for a prescribed period, which is usually five days, and return of unearned portion of premium paid by insured. The purpose of such a provision is to prevent cancellation of policy without allowing insured opportunities to acquire other insurance. Ultimately, where such a provision exists, a five day period must be allowed by the insurer to

rescind contract, and whether the insurance company has allowed for that amount of time after notice of cancellation is a question for the jury. *Manchester Fire Ins. Co. v. Plato*, 13 Ohio C.D. 35 (1901). Notice of cancellation must be definite and unequivocally show a cancellation which will take effect at a particular time. *Griffin v. General Acc. Fire & Life Assur. Co.*, 94 Ohio App. 403, 116 N.E.2d 41 (1953). Notice of cancellation mailed by insurer does not become effective until received by insured, and receipt of such notice is a condition precedent to a valid cancellation of policy. *Id.* However, under terms of policy, only mailing, not actual receipt of cancellation notice, was required to effect cancellation for nonpayment of premiums. *Clarke v. Smith*, 117 Ohio App. 3d 337, 690 N.E.2d 604 (1997). Beneficiaries with vested interests are entitled to notice of insurance policy cancellation; otherwise, no notice is required for unvested beneficiaries. *Manhattan Life Ins. Co. v. Smith*, 44 Ohio St. 156, 5 N.E. 417 (1886). **Notice to Lienholders of Insured:** Statute requiring notice of cancellation of automobile insurance policy imposed no duty on insurer to provide lienholder of insured prior notice of insurer's intention to cancel insured's policy; requirements imposed by statute were confined to notice which must be sent to insured, not to a third party such as lienholder. *Countywide Federal Credit Union v. Safe Auto Ins. Co.*, 2004 -Ohio- 3560. **Return of Unearned Premium as Condition Precedent:** By agreement, parties may contract return of unearned premiums as condition precedent to valid termination of insurance policy. *Irwin v. National Ins. Co.*, 13 Ohio Dec. Rep. 43 (1858). In such case, only unearned portion of premium can be reclaimed. *Glisson v. Columbus Mut. Life Ins. Co.*, 18 Ohio L. Abs. 606 (1935). In case of insurance cancellation for nonpayment of premium note, insurance company need not pay back unearned premium in cash, since nothing has been paid by insured. *Little v. Charter Oak Life Ins. Co.*, 38 Ohio St. 110 (1882). The duty of insurance company to return a pro rata portion of unearned premiums constitutes merely a debt owed by insurer to the insured. *Plotner v. Buckeye Union Cas. Co.*, 94 Ohio App. 94, 114 N.E.2d 629 (1952).

**Cancellation by Insured. Generally:** Nonpayment of a premium when due may be considered a request by insurer to terminate policy if policy contains a provision to this effect. However, insurance company must terminate policy themselves for cancellation to take effect. *Meeker v. Motorists Mut. Ins. Co.*, 29 Ohio App. 2d 49, 278 N.E.2d 46 (1972). **Cancellation by Surrender of Policy:** Physical surrender of a policy does not terminate policy itself, but request or intent to cancel policy must be manifested, based on surrounding circumstances. **Surrender Dependent upon Consent of Beneficiaries:** Regarding surrender, where rights of beneficiaries have

vested, insured cannot surrender policy so as to forfeit rights of beneficiaries without beneficiaries' consent. *Manhattan Life Ins. Co. v. Smith*, 44 Ohio St. 156 (1886). If insured has a right to change beneficiaries of an insurance policy, for example, the original beneficiary need not be notified regarding surrender of policy and may be cut off from benefits via cancellation. *Baxter v. Old National - City Bank*, 46 Ohio App. 533, 189 N.E. 514 (1933).

**Auto Policies - Statutory Cancellation Restrictions.** Scope of Cancellation Restrictions: Under the Ohio Revised Code, statutes detail restrictions to cancellation and nonrenewal of automobile liability insurance. O.R.C. §§3937.30 through 3937.39. "Automobile insurance policy" means a policy delivered or issued in Ohio or covering a motor vehicle required to be registered in state which: a) provides automobile bodily injury or property damage liability or relative coverage, or any combination thereof, O.R.C. §3937.30(A); b) insures as named insured, single person, or husband and wife residence in the same household, or either of them if an endorsement excludes other spouse from coverage under policy and excluded spouse signed endorsement, O.R.C. §3937.30(B); c) insures only private motor vehicles or other four-wheeled motor vehicles which are classified as private passenger vehicles and are not used as livery or rental conveyances, O.R.C. §3937.30(C); d) does not insure more than four motor vehicles O.R.C. §3937.30(D); e) does not cover garage, automobile sales agency, repair shop, service station, or public parking operation hazards O.R.C. §3937.30(E); f) is not issued under an assigned risk plan pursuant to O.R.C. §4507.70. O.R.C. §3937.30(F). Statutes do not prohibit changes, cancellation, or non-renewal in coverage or policy, lawful adjustments or other changes in premium, policy modification to all risks issued to a classification of risk, or insurer's refusing for any reason to renew a policy upon its expiration at end of any mandatory period, complying with procedures set forth in O.R.C. §3937.34. Statutes do not apply to any policy or coverage which has been in effect less than 90 days at time notice of cancellation is mailed by insurer, unless a renewal policy. O.R.C. §3937.31(C). **Special Statutory Restrictions:** If insured is involved in an accident pursuant to his official duties as a law enforcement officer, firefighter, etc., insurance company is not allowed to consider the accident for purposes of renewing existing policy of insurance upon a private automobile. Further, refusal to renew a policy solely based on age, origin, creed, or race of the insured or applicant is prohibited by statute. O.R.C. §3937.38 (Failure to renew because of age prohibited); O.R.C. §3937.39 (Cancellation or refusal because of national origin, creed, or race prohibited); *See also* O.R.C. §§3911.16 through 3911.18 (dis-

crimination prohibited regarding the issuance of life insurance by company or agent). **Policy Period:** Every automobile policy must be issued for period no less than two years or guaranteed renewable for successive periods totaling not less than two years. No insurer may cancel any such policy except pursuant to the terms of the policy, and in accordance with statute. O.R.C. §3937.31(A). **No cancellation for nonpayment of premium within the mandatory two-year renewable period unless a notice of cancellation was sent to policyholder.** O.R.C. §3937.32; *Debose v. Travelers Ins. Co.*, 6 Ohio St. 3d 65, 451 N.E.2d 753 (1983). **Prerequisite Reason for Cancellation:** Automobile insurance may be cancelled by insurance company for one or more of following: 1) misrepresentation or fraud by the insured of any material fact regarding application for insurance or submission of claims, O.R.C. §3937.31(A)(1); 2) loss of driving privileges for named insured or any covered member of his family, provided that insurer shall continue coverage with respect to privileged drivers, O.R.C. §3937.31(A)(2); 3) nonpayment of premium, O.R.C. §3937.32(A)(3); or 4) place or residence of the insured for the state of registration or license of insured automobile is changed to a state or country in which insurer is not authorized to write automobile coverage. O.R.C. §3937.32 (A)(4). These sections of the Revised Code do not apply in situations where insured wants to cancel policy in favor of a new policy with same insurer. O.R.C. §3937.31(C). **Notice of Cancellation or Non-Renewal of Policy:** To be effective, cancellation of an automobile policy requires written notice to insured of cancellation. O.R.C. §3937.32. **Procedures for Cancellation and Refusal to Renew:** Notice must contain: policy number; date of the notice, effective date of cancellation of policy (which shall not be earlier than 30 days following date of notice), explanation (or promise of an explanation) of reason for cancellation and information upon which cancellation is based, or if cancellation is for nonpayment of premium, at least ten days notice from date of mailing of cancellation accompanied by reason therefore must be given, and statement that such cancellation may be reviewed by superintendent of insurance upon written application (with procedure details). O.R.C. §§3937.32(B) through 3937.32(F). Further, insurer canceling an automobile insurance policy as permitted by O.R.C. §3937.31 must mail notification to insured at least thirty days prior to effective date of cancellation. *See* O.R.C. §§3937.32 through 3937.33. Prior to effective date of cancellation, insurer shall refund any unearned premium or other sums which may be due to the insured. O.R.C. §3937.33. Upon following all statutory requirements for cancellation, automobile insurance policy is cancelled on the effective date stated in the notice of cancellation, unless otherwise being reviewed by superintendent of insurance pursuant to O.R.C. §3937.35.



If insurer fails to comply with any requirements under the Revised Code, cancellation is ineffective and the policy continues until such time policy is legitimately cancelled or otherwise terminated pursuant to law or terms of the policy. O.R.C. §3937.33. Similar provisions apply to an insurer who wishes to refuse to renew automobile policy. O.R.C. §3937.34.

**Specific Kinds of Policies. Fire Insurance Policies:** Fire insurance policies may be cancelled pursuant to procedure set forth in O.R.C. §§3929.19 through 3929.22. Included is obligation of insurance company to return unearned premiums on policy upon request of cancellation by insured. O.R.C. §3929.20; *See also* O.R.C. §3929.21 (procedure with respect to insurance issued on mutual plan); O.R.C. §3929.22 (concerning policies issued on installment plan). **Sickness and Accident Insurance Policies:** Every policy of sickness and accident insurance must contain provision that insured may cancel policy at any time by written notice delivered or mailed to insurer. O.R.C. §3923.04(M). Further, insurance company shall return any uninsured portion of any premium paid to insured. O.R.C. §3923.04(M). Cancellation of policy by insured shall not prejudice any claim originating prior to effective date of cancellation.

**Cancellation for Fraud or Misrepresentation. Right of Insured or Applicant:** Insured or applicant for insurance who receives a policy with material representations falsely made by insurer or its agents may maintain a suit to cancel or rescind such a policy. Policyholder whose policy has been induced by fraud may recover amounts paid to insurance company with interest and without deductions for any supposed benefit of intervening insurance. *Provident Savings Life Assur. Co. v. Statler*, 17 Ohio C.C. N.S. 59 (1911), *aff'd*, 88 Ohio St. 549. Further, where insured entered into insurance policy pursuant to agent having made fraudulent representations as to premiums and benefits and where policy issued was materially different from what agent represented, insured may rescind and recover back the premium paid. *U.S. Life Ins. Co. v. Wright*, 33 Ohio St. 533 (1878). **Right of Insurer:** Insurance company is entitled to cancellation of a policy where insured made willfully false and fraudulent statements regarding material matters, but for which insurance company would not have issued policy. *Prudential Ins. Co. v. Heaton*, 20 Ohio Law Abs. 454 (1935); *see also Prudential Ins. Co. v. Carr*, 94 Ohio Law Abs. 385, 199 N.E.2d 412 (1964) (requiring insurance applicant to disclose fully, completely, and truthfully all facts deemed material by insurer, and if applicant does not do so, any policy issued is voidable at election of insurer).

**Remedies for Wrongful Cancellation. Generally:** Where insurer wrongfully cancels, repudiates, or termi-

nates contract of insurance, insured may immediately pursue one of three courses; 1) insured may consider the policy at an end and recover value of the policy or such measure of damages as a court approves; 2) insured may institute proceedings to have policy adjudged to be enforce; 3) insured may tender premiums, and if acceptance is refused, wait until policy, by its terms, becomes payable and test forfeiture and proper action on the policy. Further, any beneficiary who has vested interest in policy has a cause of action for damages in a case of wrongful cancellation or repudiation of insurance contract by insurer. 57 Ohio Jur. 3d Insurance § 432. **Measure of Damages:** In Ohio, there are two schools of thought regarding damages to be awarded in a case of wrongful cancellation of insurance. The first states that if insured does not wish for policy to be enforced, insured may recover damages in the amount of premiums paid or premiums with interest. The second school measures damages by value of the policy, particularly where insured can no longer acquire insurance, or by cost of similar insurance for a similar amount of time with a reputable insurance company where insured is still capable of securing insurance. 57 Ohio Jur. 3d Insurance §433; *see also Union Cent. Life Ins. Co. v. Pottker*, 33 Ohio St. 459 (1878) (the insured may recover premiums and interest without deduction for the risk while carried; *National Life Ins. Co. v. Tullidge*, 39 Ohio St. 240, (1883) (the measure of damages for wrongful cancellation is the value of the policy at the time thereof).

## CHATTEL MORTGAGE

See "FIRE INSURANCE."

## CONSTRUCTION OF POLICY

**Ambiguity of Terms.** Language in contract of insurance reasonably susceptible of more than one meaning will be construed liberally in favor of insured and strictly against insurer. *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 797 N.E.2d 1256 (2003). *See also King v. Nationwide*, 35 Ohio St. 3d 208, 519 N.E.2d 1380 (1988). Rule of construction that language in contract will be interpreted most strongly against party drafting it does not apply to government postal insurance, which is established by regulations that have effect of law. *Ridgeway Hatcheries, Inc. v. United States*, 278 F. Supp. 441 (N.D. Ohio 1968). Self-insured risk pools, though not "insurance," are subject to insurance law rules of construction. *Ohio Risk Mgmt. v. County Risk Sharing*, 130 Ohio App. 3d 174, 719 N.E.2d 992 (1998).

One does not become additional insured under auto policy solely by loading insured vehicle, even where policy includes loading as a use of the vehicle, loading is only covered when incidental to additional independent

use that is sufficient to make person an insured. *Travelers Ins. v. Buckeye Union Cas.*, 172 Ohio St. 507, 178 N.E.2d 792(1961); *Durisek v. Jones & Laughlin Steel*, 277 F. Supp. 350 (N.D. Ohio, 1967); *Kurziel v. Pittsburgh Tube Co.*, 416 F.2d 882 (6<sup>th</sup> Cir. 1969).

Where clause requires “notice as soon as practical after accident,” and notice is given in four months, burden is on claimant to show no prejudice to insurer, and this is issue of fact. *Zurich Ins. Co. v. Valley Steel Erectors Inc.*, 13 Ohio App. 2d 41, 233 N.E.2d 597 (1968). Requirement of “immediate notice” in contract for insurance means notice within reasonable time under circumstances of case, and what constitutes reasonable time is generally question for jury. *Patrick v. Auto-Owners Ins. Co.*, 5 Ohio App. 3d 118, 449 N.E.2d 790 (1982). An insurer is relieved of obligation to provide coverage if insured’s unreasonable delay in giving notice prejudices insurer’s right, and that prejudice is presumed absent evidence to the contrary. *Ferrando v. Auto-Owners Mutual Ins. Co.*, 98 Ohio St. 3d 186, 781 N.E.2d 927, 2002-Ohio-7217. Where policy is mainly liability arising from products hazards, exclusion for “completed operations” refers only to goods or products and not to services performed by insured. *Clements v. Aetna Cas. & Surety Co.*, 15 Ohio Misc. 252, 236 N.E.2d 799 (1968).

“Occurrence” in liability policy construed to include unexpected results from prolonged emission of air pollutants. *Grand River Lime Co. v. Ohio Cas. Ins. Co.*, 32 Ohio App. 2d 178, 289 N.E.2d 360 (1972).

Conditional Receipt of Application. Mere presence of “if approved” language on application may be insufficient to render agreement conditional. *Clements v. Ohio State Life Ins. Co.*, 33 Ohio App. 3d 80, 514 N.E.2d 876 (1986). Where terms of application require application’s physical presence in agent’s office, no insurance contract formed when application mailed but not received. *Stuart v. National Indem. Co.*, 7 Ohio App. 3d 63, 454 N.E.2d 158 (1982).

Inconsistent policy terms and endorsements. If conflicting terms, insurer bound by those most favorable to insured and beneficiaries. *Boyle v. Great-West Life Assur. Co.*, 27 Ohio App. 3d 85, 499 N.E.2d 895 (1985).

Oral binders. Insurance contract may be valid even though oral. *Zimmerman Leasing Co. v. Williams*, 64 Ohio App. 3d 623, 582 N.E.2d 631 (1989). Letter confirming oral binder deemed sufficient to establish coverage, even though letter indefinite. *Sainsbury v. Hartford Acc. & Indem. Co.*, 469 F.2d 392 (6<sup>th</sup> Cir. 1972).

## DAMAGES

Appellate Review. Excessive Verdicts. In any action, if verdict excessive, reviewing court may reverse

and remand for new trial, or may modify verdict and order remittitur, if excess due to: (i) adoption by trial court of wrong measure of damages, *Spira v. Eisen*, 15 Ohio App. 511 (1922); (ii) inclusion of amount for which no evidence was given, *Perrysburg Banking Co. v. Deshler*, 11 Ohio App. 158 (1919); (iii) failure of jury to account for evidence tending to reduce damages, *New York C. & St. L.R. Co. v. Aigler*, 10 Ohio App. 195 (1917), or failure to follow instructions of court, *Pennsylvania Co. v. Wasson*, 3 Ohio App. 458 (1914); (iv) corrupt motive, passion or prejudice on part of jury, *Chester Park Co. v. Schulte*, 120 Ohio St. 273, 166 N.E. 186 (1929); or, (v) misconception of duty on part of jury. *Toledo R.R. Co. v. Miller*, 108 Ohio St. 388, 140 N.E. 617 (1923). Reviewing court may reverse and remand for new trial, or may modify verdict and order remittitur, in contract action, if verdict excessive because not supported by evidence. *C.&M. R.R. Co. v. Himrod Furnace*, 37 Ohio St. 434 (1882). In tort action, if verdict excessive because not supported by evidence, reviewing court may reverse and remand for new trial, or may condition denial of motion for new trial on winning party consenting to remittitur, but may not modify verdict and order remittitur. *Pendleton St. R.R. Co. v. Rahmann*, 22 Ohio St. 446 (1872).

Arbitration Awards. Collateral Estoppel. Where parties make agreement to arbitrate and provide that award of arbitrator shall be final, and award is rendered, award is binding on parties, absent fraud, manifest mistake, collusion, irregularity or misconduct on part of arbitrators. *Clover v. Retail Merchants Delivery*, 115 Ohio App. 467, 185 N.E.2d 658 (1962). When parties are bound to an arbitration agreement, it is error to submit question to jury. *Jones Co. v. Fath*, 101 Ohio St. 47, 126 N.E. 878 (1920). Court has no power to review arbitrator’s findings of fact or law. *Corrigan v. Rockefeller*, 67 Ohio St. 354, 66 N.E. 95 (1902). An arbitration award concludes parties on all matters submitted; all matters in award are res judicata. *Id.* Parties having agreed to binding arbitration must accept the result, even if legally or factually wrong. *Goodyear v. Local Union No. 200*, 42 Ohio St. 2d 516, 330 N.E.2d 703 (1975). An award does not, however, preclude subsequent litigation of issues which might have been decided, but were not, and party seeking to avoid collateral estoppel must prove arbitrator did not decide issue. *Cleveland v. Association of Cleveland Fire Fighters*, 20 Ohio App. 3d 249, 485 N.E.2d 792 (1984).

Comparative Negligence/Contributory Negligence. Contributory negligence may be asserted as an affirmative defense to a negligence claim. O.R.C. §2315.32. Contributory negligence does not bar recovery of compensatory damages that have directly and proximately resulted from negligence or other tortious conduct of one



or more other persons if the contributory negligence of the complainant was no greater than the combined negligence or other tortious conduct of all other persons from whom recovery is sought. O.R.C. §2315.33. Where contributory negligence is established, the finder of fact must determine: (a) total amount of compensatory damages that would have otherwise been recoverable; (b) portion of compensatory damages representing economic loss (e.g., wages, medical expenses, other expenses, etc.); (c) portion of compensatory damages representing noneconomic loss (e.g., pain and suffering, loss of society, consortium, etc.); and (d) percentage of tortious conduct attributable to complainant and to all other persons from whom recovery is sought. O.R.C. §2315.34. If percentage of negligence attributable to complainant is greater than total percentage of risk attributed to all other persons from whom recovery is sought, court must enter judgment against complainant and in favor of other parties. O.R.C. §2315.35. If complainant is entitled to recovery, court must reduce amount of compensatory damages by an amount equal to the percentage of negligence attributable to complainant. *Id.* If complainant is entitled to recovery against multiple parties, court must enter judgment in favor of complainant which states portion of compensatory damages representing noneconomic and economic loss for each party liable to complainant. O.R.C. §§2315.36; 2307.22. In relation to portion of compensatory damages representing noneconomic loss, each party is liable to complainant only for his proportionate share. O.R.C. §2307.22. In relation to portion of compensatory damages representing economic loss, each party is jointly and severally liable to complainant for entire amount of economic loss for which complainant is entitled to judgment. *Id.*

**Indemnification.** Ohio defines indemnity as right of person who has been compelled to pay what another should pay in full to require complete reimbursement. *Travelers Indem. v. Trowbridge*, 41 Ohio St. 2d 11, 321 N.E.2d 787 (1975), *overruled on other grounds*, *Motorists Mutual Ins. v. Huron Hosp.*, 73 Ohio St. 3d 391, 653 N.E.2d 235 (1995). Indemnity arises from express or implied contract. *Id.* Express indemnity contracts subject to general contract law rules. *Id.* Must be in writing. O.R.C. §1335.05. Must be supported by valid consideration. Contract cannot indemnify against illegal acts or act opposed to public policy. *Worth v. Aetna Cas. & Surety*, 32 Ohio St. 3d 238, 513 N.E.2d 257 (1987); O.R.C. §2305.31. In interpreting contract, court will reasonably construct contract to carry out intent of parties as expressed by language used. *Id.* Contracts assignable unless contract indicates parties intended otherwise. *Clephane v. Progressive Realty*, 26 O.N.P.N.S. 513 (1927). Generally, one found liable for damages caused by another is entitled to indemnity. *Albers v. Great Central*

*Transp. Corp.*, 145 Ohio St. 129, 60 N.E.2d 669 (1945). One party must be liable for damages, and that party must prove that second party committed wrongful acts which caused damages. *Fidelity & Cas. Co. v. Federal Express, Inc.*, 136 F.2d 35 (1943). Ohio courts refuse to enforce indemnity between joint tortfeasors. *Id.*

**Psychic Injuries—Mental Pain and Suffering.** Cause of action may be stated for negligent infliction of serious emotional distress without contemporaneous physical injury. *Schultz v. Barberton Glass Co.*, 4 Ohio St. 3d 131, 447 N.E.2d 109 (1983). To state cause of action for negligent infliction of serious emotional distress, emotional injuries sustained must be both serious and reasonably foreseeable. *Paugh v. Hanks*, 6 Ohio St. 3d 72, 451 N.E.2d 759 (1983). Negligently inflicted emotional and psychiatric injury by plaintiff who also suffers contemporaneous physical injury need not be severe and debilitating to be compensable and recovery may include damages for mental anguish, emotional distress, anxiety, grief or loss of enjoyment of life caused by the death or injury of another. *Binns v. Fredendall*, 32 Ohio St. 3d 244, 513 N.E.2d 278 (1987). Cause of action for intentional infliction of emotional distress may be stated where one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another. *Yeager v. Local Union 20*, 6 Ohio St. 3d 369, 453 N.E.2d 666 (1983), *abrogated on other grounds*, *Welling v. Weinfeld*, 113 Ohio St. 3d 464, 866 N.E.2d 1051 (2007). Expert medical testimony not essential to establish proximate cause in action for intentional infliction of serious emotional distress. *Foster v. McDevitt*, 31 Ohio App. 3d 237, 511 N.E.2d 403 (1986). No cause of action based solely on negligent infliction of emotional distress in course of commercial transaction. *Wolfe v. Diamond S & L Co.*, No. 5-93-3 (Ohio 3<sup>rd</sup> Dist., April 27, 1993).

**Punitive Damages.** Punitive damages are recoverable in discretion of jury. *Sears v. Holly*, 113 Ohio App. 349, 178 N.E.2d 91 (1960). As prerequisite, actual damages, either nominal or compensatory, must be found and assessed. *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St. 3d 638, 635 N.E.2d 331 (1994). Recoverable in tort actions, but rarely in contract actions, unless the breach of contract was occasioned by malice, fraud, or some other aggravating circumstances. *Steinberg v. Ogden Foods*, 501 F.2d 1339 (1974). Example: insurer guilty of wrongfully delaying or refusing to make payments due. *Kirk v. SAFECO*, 57 Ohio Op. 2d 49, 273 N.E.2d 919 (1970). Note: contract action must be pleaded as tort action to recover punitive damages. *Tibbs v. National Homes*, 52 Ohio App. 2d 281, 369 N.E.2d 1218 (1977). Punitive damages authorized by statute in some cases, but not recoverable in actions created by statute in derogation of common law. *Kleybolte v. Buffon*, 89 Ohio St.

61, 105 N.E. 192 (1913). Example: wrongful death. O.R.C. §2125.02.

**Collateral Source Rule.** Damages cannot be reduced by amounts plaintiff receives from third parties acting independently of defendant. *Suchy v. Moore*, 29 Ohio St. 2d 99, 279 N.E.2d 878 (1972). Receipt of such benefits not admissible in evidence. *Id.* Exception: in medical malpractice actions, awards against physicians or hospitals cannot be reduced by insurance proceeds where premiums paid by injured party or his employer, but must be reduced by any other collateral recoveries. O.R.C. §2323.41. Exception: awards against state must be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery. O.R.C. §2743.02(D). Exception: award against political subdivision must be reduced by amount of collateral recovery. O.R.C. §2744.05(B)(1).

**Statutory Caps on Awards.** Demand for judgment which seeks judgment for money shall limit claimant to sum claimed in demand. Ohio R. Civ. P. 54(C). Ohio statute cap on general damages in medical malpractice case held unconstitutional. *Morris v. Savoy*, 61 Ohio St. 3d 684, 576 N.E.2d 765 (1991).

## DEATH

**Abatement and Survival.** O.R.C. §2311.21 governs abatement by death of a party. Pursuant to O.R.C. §2311.21, no action or proceeding pending in any court shall abate by the death of either or both parties, except actions for libel, slander, malicious prosecution, nuisance, or misconduct in office by a judge of a county court. O.R.C. §2305.21 governs survival of actions. Pursuant to O.R.C. §2305.21, in addition to causes of action that survive at common law, causes of action for mesne profits, injuries to person or property, or deceit or fraud survive the death of the person entitled or liable thereto. Consequently, an insurance claim will survive the death of the claimant unless one of exceptions in O.R.C. §2311.21 applies. Punitive damages may be recoverable in a survival action if the decedent suffered property loss or personal injury caused by intentional, reckless, wanton, willful and gross acts or by malice. *Rubeck v. Huffman*, 54 Ohio St. 2d 20, 374 N.E.2d 411 (1978).

**Action for Wrongful Death. Damages.** Types of damages recoverable greatly expanded with the adoption of amended O.R.C. Chapter 2125, effective February 5, 1982. Beneficiaries are not limited to the amount of pecuniary loss sustained. O.R.C. §2125.02. Compensatory damages now recoverable include: loss of support from reasonably expected earning capacity of decedent; loss of services of decedent; loss of society of decedent, including loss of companionship, consortium, care, assistance, attention, protection, advice, guidance, counsel,

instruction, training, and education, suffered by surviving spouse, dependant children, parents, or next of kin; loss of prospective inheritance to decedent's heirs-at-law at time of decedent's death; and mental anguish incurred by surviving spouse, dependant children, parents, or next of kin. O.R.C. §2125.02(B). Non-pecuniary damages are recoverable by the next of kin despite the fact that surviving spouse, minor children or parents exist. O.R.C. §2125.02; *Ramage v. Central Ohio Emergency Serv., Inc.*, 64 Ohio St. 3d 97, 592 N.E.2d 828 (1992). Jury, or court if not tried to jury, may award reasonable funeral and burial expenses incurred, and any amount so awarded for these expenses shall be set forth separately by court or jury. O.R.C. §2125.02(A)(2). Does not include medical expenses occasioned by injury resulting in death. *Barcus v. Union Hosp. Ass'n*, 14 Ohio Misc. 168, 236 N.E.2d 232 (1965).

In determining probable future earnings of decedent, as evidence of damages, not proper to deduct income taxes decedent would be required to pay on such earnings. *Terveer v. Baschnagel*, 3 Ohio App. 3d 312, 445 N.E.2d 264 (1982).

O.R.C. §2125.02(A)(3)(b)(ii) and (iii) allow any party in wrongful death action to introduce evidence of cost of an annuity in connection with any issue of recoverable future damages and evidence that the surviving spouse is remarried.

**Parties in Interest.** Surviving spouse, children and parents of decedent are all rebuttably presumed to have suffered damages. O.R.C. §2125.02(A)(1). No presumption of pecuniary loss arises in favor of collateral relative, such as brother, resulting from wrongful death of child. *Karr v. Sixt*, 146 Ohio St. 527, 67 N.E.2d 331 (1946). No recovery by parent who has abandoned minor decedent. O.R.C. §2125.02(A)(1).

**Statute of Limitations.** Action for wrongful death must be commenced within two years after decedent's death. O.R.C. §2125.02(D). Discovery rule applies to wrongful death case. *Collins v. Sotka*, 81 Ohio St. 3d 506, 692 N.E.2d 581 (1998).

**Unexplained Absence.** Presumption of death arises when person has disappeared and is continuously absent from last place of domicile for at least 5 years or, if less than 5 years, if person had been exposed to a specific peril of death at the beginning of absence. O.R.C. §2121.01(A). Presumption sufficient under facts of case to establish claim on life policy. *Doty v. Ohio Nat'l Life Ins. Co.*, 58 Ohio App. 1, 15 N.E.2d 544 (1937). Presumption insufficient. *Brunny v. Prudential Ins. Co.*, 151 Ohio St. 86, 84 N.E.2d 504 (1949).

## DISABILITY

Partial, total. Partial disability is not defined by statute. Ohio Revised Code defines term “total disability,” as used in any policy of sickness and accident insurance (unless otherwise provided in policy or endorsements thereon or in rider attached), as inability to perform duties of any gainful occupation for which insured is reasonably fitted by training, experience and accomplishment. O.R.C. §3923.011 (A). Where policy provides that insured must become “totally and permanently disabled and will for lifetime be unable to perform any work or engage in any business for compensation or profit,” insured unable to pursue regular vocation or employment is disabled within terms of policy. *Gibbons v. Metropolitan*, 135 Ohio St. 481, 21 N.E.2d 588 (1939). Where insured lost one eye due to disease, loss of vision to remaining eye solely due to trauma constitutes total disability. *Garrigan v. Fidelity & Cas. Co.*, 6 Ohio App. 2d 141, 216 N.E.2d 891 (1966).

Summary judgment for insurer is proper where insured claims “wholly disabled” benefits under insurance policy which provides for such benefits only if insured “has become wholly disabled by bodily injuries or disease, and will be permanently, continuously and wholly prevented thereby for life from engaging in any occupation or employment for wage or profit” and it is indicated that insured-claimant is engaged in remunerative employment for which he is fitted, albeit at considerably reduced remuneration. *Myers v. Travelers*, 14 Ohio St. 2d 76, 236 N.E.2d 209 (1968).

No disability where medical evidence shows insured fully recovered physically even though insured obsessed with idea he cannot work. *Pennsylvania R.R. v. Giovanni*, 52 Ohio App. 50, 2 N.E.2d 614 (1935).

Waiver of premium clause does not apply where disability occurred prior to due date of first premium and lasted until death of insured where insured was at all times capable of giving notice, but no notice was given until year after disability began, insured having died in meantime. Policy lapsed at end of grace period. *Knight v. New England Mut.*, 74 Ohio App. 211, 57 N.E.2d 131 (1942).

Insured, under group policy providing that benefits will start with eighth day of total disability resulting from nonoccupational sickness or accident and “continue during your total disability up to maximum of 26 weeks” and “if after you return to work you again become disabled from different and unrelated cause, you again become eligible for full benefits,” who applies for sick leave and disability benefits because of non occupational right direct inguinal hernia, and, without having recommended surgery performed, receives disability benefits

for full twenty-six weeks, returns to work and later takes sick leave because of same right direct inguinal hernia which was then corrected by surgery, is not entitled to benefits under policy for such second period of sick leave. *Knox v. Metropolitan Life Ins. Co.*, 12 Ohio App. 2d 5, 230 N.E.2d 352 (1967). Group insurance policy provision defining “total disability” must be read in conjunction with definition thereof in O.R.C. §3923.011 (A). Policy provision denying “total disability” benefits to insured who is able to engage in any reasonably fitting occupation or employment for wage or profit will be enforced. *Myers v. Travelers Ins. Co.*, 14 Ohio St. 2d 76, 236 N.E.2d 209 (1968).

Proof of Condition. Total permanent disability exists when there is reasonable probability that total disability will last indefinitely. *Stuhlberg v. Metropolitan Life*, 143 Ohio St. 390, 55 N.E.2d 640 (1944). But where total disability cannot be proven of at least indefinite duration, there can be no recovery of total permanent disability benefits. *Blumenthal v. Metropolitan Life*, 143 Ohio St. 464, 55 N.E.2d 803 (1944); *Kramer v. Metropolitan*, 144 Ohio St. 13, 56 N.E.2d 248 (1944).

Test of permanent disability is whether or not insured is able to perform for compensation any labor for which insured is suited by education, experience and physical condition. *Stuhlberg v. Metropolitan Life*, 143 Ohio St. 390, 55 N.E.2d 640 (1944). Insured was totally disabled under terms of disability policy, defining total disability as an inability to perform duties of any occupation for wages or profit to which one is reasonably qualified by education, training or experience because of sickness or accidental injury, where a physician’s report stated insured could only return to work with 35 lb. weight limitation. An appropriate job was not available with insured’s employer of 20 years. Court held it would be patently unreasonable to expect a 20-year career employee to seek new employment during a period of documented physical disability. *Davis v. Classic Life Assur. Co.*, 114 Ohio App. 3d 688 (1996).

Requirement of “due proof” of total and permanent disability is not met by statements of insured or certificates of physicians, which characterize disability only as “temporary” and disclose no existing ailment or condition indicating any probability of permanency of physical disability. *Blumenthal v. Metropolitan Life*, 143 Ohio St. 464, 55 N.E.2d 803 (1944).

Fact that person, generally disabled as result of impairment of mind or body, does occasional work, does not, as matter of law, preclude recovery for total permanent disability under policy containing specific clauses pertaining to total and permanent disability benefits. Court held that finding that insured was totally and permanently disabled was authorized even though he was



employed after his injury by one company for almost four years. *Everhart v. State Life*, 154 F.2d 347 (6th Cir. 1946). Insured is not “wholly and continuously disabled and prevented from performing every duty pertaining to his occupation” if he works every day even though he suffers pain while working and receives help in lifting from fellow workmen. *Yeager v. Pacific Mut. Life*, 166 Ohio St. 71, 139 N.E.2d 48 (1956). In action on policy of health and accident insurance excluding coverage “for any period for which insured is not under professional care and regular attendance of legally qualified physician or surgeon,” there can be no recovery for periods of disability claimed which are not supported by medical proof. *Redden v. Constitution Life*, 113 Ohio App. 202, 166 N.E.2d 410 (1960), *aff’d in part*, 172 Ohio St. 20, 173 N.E.2d 365 (1961).

Accidental injury to person suffering from physical ills which are substantial contributing cause of ensuing disability of such person is not within coverage of policy of health and accident insurance which excludes liability where disease is concurrent cause of disability. In such case, however, recovery can be had under insurance policy for such disability, and its duration in time, which was suffered as result of trauma resulting from accident. *Posey v. Old Equity Life*, 119 Ohio App. 495, 200 N.E.2d 719 (1963).

Insured had lost one eye to glaucoma and other eye diseased but functioning well enough to allow insured to work. Accident detached functioning eye’s retina, thus disabling insured. Held insured may recover under total disability clause. *Garrigan v. Fidelity & Cas. Co. of N.Y.*, 6 Ohio App. 2d 141, 216 N.E.2d 891 (1966).

## FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables.

## FIRE INSURANCE

Arson. Arson is an affirmative defense to a fire loss insurance claim. To establish defense it must be shown that insured participated in burning of property to obtain insurance proceeds either by personally setting fire or having someone else set it for him. *Caserta v. Allstate*, 14 Ohio App. 3d 167, 470 N.E.2d 430 (1983). An insured’s marital relationship with arsonist does not make her accountable for his misconduct and does not, by itself, cause insured’s claim to come under arson policy exception. *Attallah v. Midwestern Indem.*, 49 Ohio App. 3d 146, 551 N.E.2d 619 (1988).

Appraisal. Provision in policy that amount of damage or loss shall be submitted to arbitration or appraisal and that suit shall not be brought until after award has been made is valid. The distinction between agreement for appraisal and agreement to submit to arbi-

tration may not always be plain. But, when question of liability of company under policy, and every other question is reserved, and only submission provided for is appraisal of property at and after time of fire to determine single question of amount of loss, it is agreement for appraisal and not arbitration. Such submission is not to be judged by strict rules applicable to arbitration and award. *Royal Ins. Co. v. Ries*, 80 Ohio St. 272, 88 N.E. 638 (1909). *See also* 25 A.L.R.3d 680.

Assignment. Assignments are not regulated by statute. Consent of insurer is necessary, contract being personal and not passing as incident to transfer of property. Method of assignment is immaterial unless policy prescribes certain method, and assignment may be oral, unless required to be in writing. If fire insurance agent assures assignee of fire insurance policy (the policy being in hands of mortgagee) that assignee is covered by insurance as to property transferred to assignee and agent (although authorized so to do) does not endorse assignment on policy or notify company, company nevertheless is liable under policy for any loss that may occur prior to its expiration date, even though policy carries provision requiring such assignment to be endorsed on policy. *Hall v. Franklin Fire*, 149 Ohio St. 216, 78 N.E.2d 360 (1948).

Chattel Mortgages. Where policy provides that it shall be void if property is encumbered by chattel mortgage without knowledge of insurer, insured cannot recover in case of loss if property was subject to chattel mortgage. Failure to disclose encumbrance avoids policy condition that it shall be void if, without notice to company and permission therefor in writing endorsed thereon, property be mortgaged or otherwise encumbered, and this is true even though insurer neither made inquiry of insured nor examined record of mortgages. However, provision for sole and unconditional ownership in insurance policy is not violated if there is chattel mortgage on property at time policy is issued or if mortgage is subsequently placed thereon where there was no intentional fraud on part of insured.

Severable Contracts. Insurance policy that contains stipulation that “this entire policy shall be void” on certain named conditions, is not severable risk, although amount of insurance is distributed among different classes or articles of property. *Germania Fire v. Schild*, 69 Ohio St. 136, 68 N.E. 706 (1903).

Standard Provisions. Ohio has no statutory standard policy for fire insurance policies.

Cancellation. Fire insurance policies may be cancelled pursuant to the procedure set forth under O.R.C. §§3929.19 through 3929.22. Included is obligation of insurance company to return unearned premiums on pol-

icy upon request of cancellation by insured. O.R.C. §3929.20. Where insurance policy provided that “this policy may be cancelled at any time by this company by giving to the insured a five days’ [sic] written notice of cancellation with or without tender of the access of paid premium above the pro rata premium for the expired time,” court held that notice sent but not actually received was not effective to cancel insurance policy. *Quirino v. Washington & Jefferson Mut.*, 1983 WL 5616 (1983).

**Reformation.** Reformation of insurance contract available when true intent of parties is not expressed due to fraud or inequitable conduct on part of insurer’s agent. *Kungle v. Equitable General*, 27 Ohio App. 3d 203, 500 N.E.2d 343 (1985). Reformation available for mutual mistake where shown that written instrument does not express true agreement between contracting parties by reason of mutual mistake. *Id.* However, in an action for reformation, “mutual mistake” must be proven by clear and convincing evidence. *Farr v. Ricker*, 46 Ohio St. 265, 21 N.E.354. A mistake in reducing agreement to writing is mutual and writing subject to reformation if resulting written contract fails to reflect agreement of the parties. *Guenther v. Downtown Mercury*, 105 Ohio App. 125, 151 N.E.2d 749 (1958). When action in reformation of contract initiated, credible testimony concerning conduct of parties, any course of dealing between them and method of handling transaction at issue are entitled to great weight in determining parties’ agreement. *Castle v. Daniels*, 16 Ohio App. 3d 209, 475 N.E.2d 149 (1984).

**Damages. Explosion.** “Explosion” is rapid, sudden, and violent expansion of air or relinquishment of energy, causing rupture accompanied by loud noise. *Royal Sausage & Meat Co. v. Aetna*, 99 Ohio App. 77, 117 N.E.2d 207 (1954). Provision of policy that provides for protection from loss “by fire arising from any cause whatsoever” is not limited or modified by provision for protection against loss from explosives so as to exclude protection for loss from explosion accompanying or following as direct result of fire. *Stillpass v. Fidelity & Guaranty*, 71 Ohio App. 197, 48 N.E.2d 1017 (1942). Loss resulting from sudden expansion, caused by fire, of combustible gas will come within term of policy protecting against loss by fire unless clearly excluded by other provisions of policy. *Id.* It is incumbent upon insured to produce evidence that overheating of boiler and resulting damage was caused by gas explosion, under terms of policy, in action to recover damage to such boiler of heating equipment in his dwelling house, brought on gas explosion clause attached to policy which clause provides that policy shall cover loss or damage to property caused by explosion of natural or artificial gas when used or supplied for fuel or lighting purposes, whether

fire ensues or not. *Apseloff v. Northwestern*, 34 Ohio Law Abs. 149, 36 N.E.2d 194 (1941).

**Fixtures.** Items attached by a coupling to gas line or an electric wire are personal property, and do not become part of realty. A gas range when installed in dwelling and connected with supply pipe does not become fixture. Electric range installed in residence by owner which may be removed without substantial damages to the free hold, though attached to the building by means of screws, does not become a part of realty. Gas fixtures which are simply screwed onto the gas pipes of a building form no part of realty. *Silverberg v. Kramer*, 34 Ohio Op. 145, 68 N.E.2d 835 (1946).

**Friendly Fires.** Insurer liable only for loss or damage by reason of “hostile” as distinguished from “friendly” fires, such as usually employed for economic or scientific purposes as light, heat, etc. *Stillpass v. Fidelity & Guaranty*, 71 Ohio App. 197, 48 N.E.2d 1017 (1942). Thus burning gas jet is not “fire” against immediate effects of which policy is intended to cover, even though it is means of putting destructive force in operation. *Id.* But fire in chimney of heating apparatus, which is so excessive as to damage chimney and surrounding parts of building, is not intentional fire in heating apparatus so as to relieve insurer from liability. *Washington v. Sherer*, 32 Ohio App. 465, 168 N.E. 234 (1927). Fire intentionally started to serve useful purpose may get beyond control and thereby lose its original innocent character and become hostile so as to bring resulting loss within terms of fire insurance policy. *Stillpass v. Fidelity & Guaranty*, 71 Ohio App. 197, 48 N.E.2d 1017 (1942); *Frings v. Farm Bureau*, 99 Ohio App. 293, 133 N.E.2d 407 (1955).

**Proof of Loss.** It is general rule that notice and proofs of loss should be furnished by insured even though loss is to be paid to another person. However, if insured is non-resident and his attorney in fact has negotiated policy and has knowledge of necessary facts he may make out and swear to proofs. *Gump v. National U.F. Ins. Co.*, 15 Ohio C.C. (N.S.) 428 *aff’d*, 86 Ohio St. 325 (1912). Ohio law requires that insured be given reasonable time to discover extent and amount of loss before being required to file proof of loss. *Russell Gasket Co. v. Phoenix of Hartford Ins. Co.*, 512 F.2d 205 (6th Cir. 1975). Mortgagee is not within meaning of term “the insured,” as used in so-called New York Standard Mortgage Clause that stipulates that no act or neglect of mortgagor shall invalidate policy as to mortgagee, and requires insured to furnish notice and proofs of loss within 60 days after fire as condition of recovery, and such mortgagee may recover although proofs of loss were not furnished within required time. *Ohio German*



*Fire Ins. v. Krumm*, 12 Ohio C.C. (N.S.) 362, 21 Ohio Cir. Dec. 409 (1909).

Fraudulent statement made by insured to insurer as to amount of loss by fire, which statement is not shown to have been required by insurer, does not operate as bar to recovery on fire insurance policy, where constitution and by-laws of insurer provide that insured shall furnish statement of loss "when so required" and that "any statement made for purpose of defrauding association" shall render claim void. In such case, claim is rendered void only when fraudulent representation is made in statement "required" by insurer. *Holloway v. Mutual*, 57 Ohio App. 507, 15 N.E.2d 155 (1937). However, where policy provided that any willful concealment or misrepresentation of material fact would render entire policy void, willful concealment by insured of fact that some of personal property reported in proof of loss was not destroyed bars recovery on such policy. *Lakes v. Buckeye State Mut.*, 110 Ohio App. 115, 168 N.E.2d 895 (1959).

Although failure of insured to file written proof of loss in accordance with provisions of policy bars his recovery for failure to comply with condition precedent in contract, rights of named mortgagee in policy are not abrogated by this failure and it may recover. *Shouse v. Indiana Lumbermen's Mut. Ins. Co.*, 9 Ohio Misc. 24, 254 F. Supp. 989 (Ohio, S.D.W.D., 1964), *aff'd*, 361 F.2d 969 (6th Cir. 1960). Where insured sustains loss that is partially covered by policy of insurance, and assigns to insurer all right of recovery against third-party wrongdoer to extent of payment by insurer to insured; and where prior to filing of insured's lawsuit against tortfeasor, insurer communicated to insured's counsel its wish to enter lawsuit as co-plaintiff, and asked insured's counsel to represent it, which request was never answered; and although no cooperation and assistance was given thereafter by insurer, equity does not require that insured be first indemnified out of proceeds of such recovery. *Ervin v. Garner*, 25 Ohio St. 2d 231, 267 N.E.2d 769 (1971).

Repairs and Replacement. O.R.C. §3929.25 ("Ohio Valued Property Law") specifically provides: "A person, company, or association insuring any building or structure against loss or damage by fire or lightning shall have such building or structure examined by his or its agent, and full description thereof made, and its insurable value fixed, by said agent. In absence of any change increasing risk without consent of insurers, and in absence of intentional fraud on part of insured, in case of total loss whole amount mentioned in policy or renewal, upon which insurer received premium, shall be paid. However, if the policy of insurance requires actual repair or replacement of building or structure to be completed for policyholder to be paid the cost of such repair or re-

placement, without deduction for depreciation or obsolescence, up to the limits of the policy, then the amount to be paid shall be prescribed by policy."

Cellar and foundation walls shall not be considered part of such building or structure in settling losses, despite any contrary provisions in application or policy. O.R.C. §3929.25.

In the event of a total loss, insured can collect up to total loss maximum whether or not property is replaced or repaired. *McGlone v. Midwestern Group*, 61 Ohio St. 3d 113, 573 N.E.2d 92 (1991); *see also, Myers v. Cincinnati Ins. Co.*, 55 Ohio App. 3d 34, 561 N.E.2d 1060 (1989) (holding that where building insured for amount exceeding replacement value and totally destroyed by fire, O.R.C. §3929.25 does not preclude homeowner from receiving replacement value in policy where he chooses not to repair or replace home).

Recovery is limited by text of statute to damage caused by fire or lightning only. *Kenmore Constr. Co. v. Maryland Cas. Co.*, 46 Ohio App. 2d 229, 348 N.E.2d 374 (1973). Condition in valued policy insuring building against loss or damage by fire that purports to give insurer option to rebuild in case of total loss is repugnant to the Ohio Valued Property Law (§3929.25) and void. Refusal of insured to furnish plans and specifications for rebuilding, and to permit insurer to rebuild, constitutes no defense to action for recovery of such loss. *Milwaukee Mechanics v. Russell*, 65 Ohio St. 230, 62 N.E. 338 (1901).

Concurrent Insurance. Where party with contract to purchase resident property obtains two fire and extended coverage policies covering same premises, first policy is rendered null and void upon procurement and issuance of second policy. *Shouse v. Indiana Lumbermen's Mut. Ins. Co.*, 9 Ohio Misc. 24, 254 F. Supp. 989 (S.D. Ohio W.D. 1964), *aff'd*, 9 Ohio Misc. 28, 361 F.2d 969 (6th Cir. 1966).

Contribution between Companies. Each policy shall contribute to fire loss in proportion of amount of policies, but not more than amount of policy (O.R.C. §3929.26); this statute does not apply to insurance contracts covering personal property. *National Fire v. Denison*, 93 Ohio St. 404, 113 N.E. 260 (1916). Clause in insurance contract that voids that contract if at time loss occurs there is any other insurance covering same risks that would attach if this insurance had not been effected was held valid condition. *New Jersey Ins. v. Ball*, 119 Ohio St. 550, 165 N.E. 41 (1929). However, clause in first policy, which provides only that if insured shall have any such other insurance, whether collectible or not, insurance under policy will be suspended and of no effect, is not bar to recovery by insured where first pol-

icy comes within prohibition against other insurance contained in subsequent policies thus preventing subsequent policies from ever taking effect. *Grace v. Westchester Fire Ins. Co.*, 7 Ohio App. 2d 156, 219 N.E.2d 227 (1964). Statute referred to above contemplates contribution between valid policies only. *New Jersey v. Ball*, *supra*.

## GUEST CASES

See "AUTOMOBILES, Guests."

## HOSPITALS

Evidence-Records. Admissible under O.R.C. §2317.40. This section was not repealed by adoption of Ohio Rules of Civil Procedure on July 1, 1970. Under this and similar statutes, by great weight of authority, those portions of hospital records made in regular course of business and pertaining to business of hospitalization and recording observable acts, transactions, occurrences or events incident to treatment of patient are admissible, in absence of privilege, as evidence of facts therein recorded, insofar as such records are helpful to understanding of medical or surgical aspects of case, and insofar as relevant to issues involved, provided such records have been prepared, identified and authenticated in the manner specified in statute itself. Such hospital or physician's office record may properly include case history, diagnosis by one qualified to make it, condition and treatment of patient covering such items as temperature, pulse, respiration, symptoms, food and medicines given, analysis of tissues or fluids of body and behavior of and complaints made by patient.

Independent tort exists for unauthorized, unprivileged disclosure to a third party of medical records. Hospital privileged to disclose medical records only where statutory duty to disclose or where disclosure is necessary to protect an interest greater than patient's privacy interest; inducing a hospital to disclose records which are unauthorized is a separate tort; and hospital cannot disclose records to their attorney in the absence of specific authorization or privilege. *Biddle v. Warren Gen. Hosp.*, 86 Ohio St. 3d 395, 715 N.E.2d 518 (1999). Hospital cannot disclose names of potential class members without obtaining their informed consent. *Walker v. Firelands Community Hosp.*, 2004 WL 290832, 2004 Ohio 681.

Exception to hearsay rule of evidence in such cases is based on assumption that records, made in regular course of business by those who have competent knowledge of facts recorded and self-interest to be served through accuracy of entries made and kept with knowledge that they will be relied upon in systematic conduct of such business, are accurate and trustworthy. *Weis v. Weis*, 147 Ohio St. 416, 72 N.E.2d 245, 250 (1947); *Per-*

*ry v. Industrial Commission*, 160 Ohio St. 520, 117 N.E.2d 34 (1954). However, hospital bills not incorporated as part of hospital records are not admissible in evidence in absence of proper foundation. *Lacy v. Uganda Investment Corp.*, 7 Ohio App. 2d 237, 195 N.E.2d 586 (1964). Further, the admission of hospital records under O.R.C. §2317.40 does not dispense with the need of establishing a causal relation between the information contained in the report and the incident or accident at issue. *Id.*

Hospital records containing nurse's notes are within the physician-patient privilege. *Johnson v. Miami Valley Hosp.*, 61 Ohio App. 3d 81, 572 N.E.2d 169 (1989). Attack on patient by another is special situation where disclosure of medical records must be made to protect victim's rights. *Fair v. St. Elizabeth Med. Ctr.*, 136 Ohio App. 3d 522, 737 N.E.2d 106.

Admission of hospital records does not dispense with need of establishing causal relation between surgery and accident, so that admission of report on operation performed one year after accident sued upon is prejudicial error without offer of medical evidence as to causal relation between two events. *Lacy v. Uganda Investment Corp.*, 7 Ohio App. 2d 237, 195 N.E.2d 586 (1964). Any attempt to change such record at date remote to occurrence is of no weight whatsoever. *Masek v. Brandt, Admx.*, 26 Ohio Misc. 178, 180, 265 N.E.2d 846, 847 (1971).

The Health Insurance Portability and Accountability Act of 1996(HIPAA) (42 U.S.C.A. §300gg-42) was designed to protect medical records and other personal health information held by health care providers and others with access to such records. The act imposes tougher standards on doctors compelling them to protect privacy and secure individual information.

Determination of whether documents requested pursuant to administrative subpoena were relevant to health care fraud investigation undertaken pursuant to HIPAA, required weighing of likely relevance of requested material to investigation against burden of producing material. *Doe v. U.S.*, 253 F.3d 256 (N.D. Ohio 2001). The likely relevance of documents relating to doctor's professional education and training regarding ethical issues that were sought by administrative subpoena in connection with health care fraud investigation outweighed burden on doctor of producing materials, given that extent to which doctor knew tests at issue were medically unnecessary and his alleged kickback arrangements with medical testing laboratories were illegal or unethical, were not ancillary or unimportant issues in investigation, that doctor made no attempt to reach reasonable accommodation with government regarding potentially burdensome aspects of subpoena,

and that doctor otherwise field to show subpoena was unduly burdensome. *Id.*

Hospital practitioners are required to provide patients access to records upon written request, except where physician determines disclosure of requested records will likely have an adverse effect on patient. In such an event, the provider is required to provide records to a physician designated by patient. O.R.C. §3701.74.

Under O.R.C. §3701.34, a patient can either examine his records during regular business hours without charge or may obtain a copy of the records in accordance with rates established in O.R.C. §3701.741.

Commencement of personal injury action is not waiver of plaintiff's physician-patient privilege as to hospital records and medical reports made by patient's attending physicians in relation to injury. *State ex. rel. v. Brenton*, 21 Ohio St. 2d 21, 254 N.E.2d 681 (1970); *accord Huzjak v. United States*, 118 FRD 61 (N.D. Ohio 1987); *Urseth v. City of Dayton*, 653 F.S. 1057 (S.D. Ohio 1986); *but see Ramage v. Central Ohio*, 64 Ohio St. 3d 97, 592, N.E.2d 828 (1992).

However, under O.R.C. §2317.02, testimonial privilege does not apply in medical, dental, chiropractic, or optometric claims; actions for wrongful death; workers' compensation claims; civil actions concerning court-ordered treatment services; criminal actions to the extent that privilege would bar testimony regarding results of relevant substance abuse tests; criminal actions against a physician or dentist if actions are pursuant to a subpoena or search warrant; certain will contests, and criminal investigations where request has been submitted for relevant substance abuse test results.

Any hospital records of a party may not be released, even if subpoenaed, to anyone if such matters are privileged, unless such privilege is waived by the party who is the subject of the records. *Pacheco v. Orriz*, 11 Ohio Misc. 2d 1 (1983); *see also Grove v. Northeast Ohio Nephrology Assoc., Inc.*, 164 Ohio App. 3d 829 (2005).

O.R.C. §2317.02 allows testimony regarding medical information relevant to criminal substance abuse case. - R.C. 4511.19(D)(1)(a) permits the results of any blood or urine test withdrawn and analyzed at any health care provider to be admitted with expert testimony in DUI cases.

Under O.R.C. §2305.253, incident report or risk management report and contents of incident report or risk management report are not subject to discovery, and are not admissible in evidence in tort trial.

Diagnostic report, from examining physician who is not a witness, and, therefore, not available for cross-

examination, to personal physician of plaintiff is not business record of reviewing doctor within purview of O.R.C. §2317.40. *Hytha v. Schwendeman*, 40 Ohio App. 2d 478, 320 N.E.2d 312 (1974); *Ohio Dept. of Mental Health v. Milligan*, 39 Ohio App. 3d 178, 530 N.E.2d 965 (1988); *see also Kraner v. Coastal Tank Lines, Inc.*, 26 Ohio St. 2d 59, 269 N.E.2d 43 (1971). A letter by a physician contained in a patient's medical record may be introduced into evidence if it is not used to establish a medical fact or contains statements regarding the underlying facts of the matter. *Dewey v. Olson*, 2000 Ohio App. LEXIS 4440 (6<sup>th</sup> Dist.); 2000 WL 1434138.

Hospital record, so far as it pertains to cause of accident resulting in injuries to person causing his resort to hospital, and not to medical or surgical treatment of patient, is inadmissible in evidence as business record. *Mastran v. Urichich*, 37 Ohio St. 3d 44, 523 N.E.2d 509 (1988); *see also Green v. City of Cleveland*, 150 Ohio St. 441, 83 N.E.2d 63 (1948); *Ronald v. Young*, 117 Ohio App. 362 (1963), 187 N.E.2d 74 (records of corporate dispensary admissible under O.R.C. §2317.40); *Hytha v. Schwendeman*, 40 Ohio App. 2d 478 (1974), 320 N.E.2d 312 (detailed list of requirements before medical diagnosis may be admitted). *State v. Spikes*, 67 Ohio St. 2d 405, 423 N.E.2d 1122 (1981) discusses applicability of O.R.C. §2317.40 to Ohio criminal proceedings.

Dispensary entry which contained information based on hearsay and describing manner in which patient suffered his injury was not admissible. *Schmitt v. Doehtler Die Casting Co.*, 143 Ohio St. 421, 55 N.E.2d 644 (1944).

Admission as part of hospital records of opinion that fracture disclosed by such records is of recent origin constitutes error prejudicial to complaining party. *Lewis v. Woodland*, 101 Ohio App. 442, 140 N.E.2d 322 (1955); *but see Hytha, supra.* (records containing medical diagnosis admissible if requirements met.)

In action by employee for workmen's compensation for alleged industrial injury, business records kept by employer, which concern employee's visits to company dispensary, are admissible in evidence pursuant to O.R.C. §2317.40, where such records are kept in usual course of business by personnel in charge of such dispensary. In such case, that portion of such records which contains handwritten report by employer's physician is admissible in evidence, notwithstanding such physician has no independent recollection of incident involved, but where he does testify, from his own knowledge, concerning circumstances and manner of making of such report and that he could affirm truth thereof. *Ronald v. Young*, 117 Ohio App. 362, 187 N.E.2d 74 (1963).

In action on policy of life insurance, it is not erroneous to permit expert medical witness to consider facts shown by hospital records, compiled during insured's final stay in hospital, and autopsy report, but to exclude from his consideration opinions expressed therein. *Horn v. Commonwealth Life Ins. Co.*, 118 Ohio App. 375, 194 N.E.2d 892 (1963).

Properly authenticated record of medical diagnosis made by qualified doctor may be admitted into evidence under O.R.C. §2317.40. *Dillow v. Young*, 3 Ohio App. 2d 110, 209 N.E.2d 623 (1965); *Hytha v. Schwendeman*, 40 Ohio App. 2d 478, 320 N.E.2d 312 (1974). Statements in such record relating to cause of injury and found in recitation of medical history used as basis for such diagnosis may be admitted for limited purposes or excluded in discretion of trial court as in case of medical histories generally. *Id.*

Statements in hospital record regarding cause of injury not admissible to extent not pertinent to diagnosis or treatment. *McQueen v. Goldey*, 20 Ohio App. 3d 41, 484 N.E.2d 712 (1984).

Liens. Liens for medical services rendered are permissible.

Warranties. No action may be brought upon any promise or agreement relating to medical prognosis unless promise or agreement is in writing and signed by party charged. O.R.C. §1335.05.

Immunity. Pursuant to O.R.C. §2743.02(B), Ohio has waived immunity from liability of hospitals owned or operated by any political subdivision, subject to certain exception. However, any recovery against the state will be off-set by any other recoveries made by plaintiff against other co-defendants.

## HUSBAND AND WIFE

Community Property. There is no community property in Ohio, though community property held in another state will be recognized. *In Re Estate of Kessler: Schneider v. Toledo Trust Co.*, 177 Ohio St. 136, 203 N.E.2d 221 (1964).

Common Law Marriage. Effective October 10, 1991, common law marriage was abolished in Ohio. Common law marriages in existence before 10/10/91 are valid. O.R.C. §3105.12(B)(1), (3). Elements of common law marriage include a present agreement to be married, cohabitation, holding out as a married couple, and reputation in community as husband and wife. *Nestor v. Nestor*, 15 Ohio St. 3d 143, 145-6, 472 N.E.2d 1091 (1984).

A marriage may only be entered into by one man and one woman. Ohio Const. Art. 15, §11.

Interspousal Immunity. Doctrine of interspousal tort immunity has also been abolished. *Shearer v. Shearer*, 18 Ohio St. 3d 94, 247 N.E.2d 740 (1985). Thus spouse may maintain personal injury action based upon negligence against other spouse. *Id.*

Loss of Consortium. Husband has right to recover damages from any person who tortiously impairs his right to consortium of his wife, independent of his right to recover for loss of her services. *Crowe v. Bumford*, 22 Ohio St. 2d 78, 258 N.E.2d 110 (1970). In suit by husband against tortfeasor for damages resultant to him for injury to his wife, husband, however, can recover for loss of earnings of his wife for services performed outside of the home and in factory, where wife makes no claim in her separate action for loss of earnings. *Sutton v. City of Cincinnati*, 26 Ohio Op. 248 (1943). Compulsory joinder is required of personal injury or property damage claims of husband or wife and claims of spouse for loss of services or expenses or property damage if caused by same wrongful act. Rule 19.1 (A)(2), Ohio R. Civ. P.; *Moore v. Baker*, 25 Ohio Misc. 140, 266 N.E.2d 593 (1970). However, where defendant negligently causes injury to minor child, that single wrong gives rise to separate and distinct causes of action; action by minor child for his personal injuries and derivative action in favor of parents of child for loss of his services and his medical expenses. *Grindell v. Huber*, 28 Ohio St. 2d 71, 275 N.E.2d 614 (1971). Rights of wife to recover damages for loss of consortium resulting from negligent injury to her husband, are equal to those of husband to recover for loss of consortium resulting from negligent injury to his wife. *Clouston v. Remlinger Oldsmobile*, 22 Ohio St. 2d 65, 258 N.E.2d 230 (1970). Minor child has claim for loss of parental consortium due to tortious injury to parent. *Gallimore v. Children's Hosp. Med. Ctr.*, 67 Ohio St. 3d 244, 617 N.E.2d 1052 (1993); *see also, Rolf v. Tri State Motor Transit Co.*, 91 Ohio St. 3d 380, 745 N.E.2d 424 (2001) (extending rule to adult emancipated children).

## INFANTS

See "AUTOMOBILES, NEGLIGENCE, Age"

General Cases on Liability. Doctrine of parental immunity has been abolished in its entirety. *Kirchner v. Crystal*, 15 Ohio St. 3d 326, 474 N.E.2d 275 (1984), *overruling Teramano v. Teramano*, 6 Ohio St. 2d 117, 216 N.E.2d 375 (1966) and *Mauk v. Mauk*, 12 Ohio St. 3d 156, 466 N.E.2d 166 (1984). Unemancipated minor may sue parent in tort in any situation; parent may likewise sue minor in tort.

Compulsory joinder is required of personal injury or property damage claims of minor and claims of parent or guardian of minor for loss of services or expenses or

property damage if caused by the same wrongful act. Rule 19.1 (A)(3), Ohio R. Civ. P.

Whenever minor (under 18) has representative guardian or other like fiduciary, such representative may sue or defend on behalf of minor. If minor does not have duly appointed representative, he may sue by next friend or defend by guardian ad litem. When minor is not otherwise represented in action, court shall appoint guardian ad litem or make such other order as it deems proper for protection of minor. Rule 17 (B), Ohio R. Civ. P.

Service of Minors. Service of process, except by publication as provided in Rule 4.4 (A), Ohio R. Civ. P., upon a person under sixteen years of age shall be made by serving either his guardian or any one of following persons with whom he lives or resides: father, mother, or individual having care of such person; or by serving such person if he neither has guardian nor lives or resides with parent or person having his care. Rule 4.2 (B), Ohio R. Civ. P. Service of process, except by publication as provided in Rule 4.4 (A), Ohio R. Civ. P., shall be made upon individual sixteen years of age or older (unless incompetent) by serving individual. Rule 4.2 (A), Ohio R. Civ. P. Service on infant as adult co-defendant of father is defective as to infant. *Juhasz v. Corson*, 171 Ohio St. 218, 168 N.E.2d 491 (1960). Order or judgment against infant may be set aside for cause by infant within one year after majority. O.R.C. §2323.21.

Ohio courts have found that a child under seven is, as a matter of law, incapable of primary negligence. *DeLuca v. Bowden*, 42 Ohio St. 2d 392, 329 N.E.2d 109 (1975). Minors are generally chargeable with the capacity for contributory negligence, except that a child under seven years of age has been found, as a matter of law, incapable of contributory negligence. *Holbrook v. Hamilton Distributing, Inc.*, 11 Ohio St. 2d 185, 228 N.E.2d 628 (1967). A minor between seven and fourteen years of age is presumptively incapable of negligence. *Holman v. Licking Cty.*, 107 Ohio App. 3d 106, 667 N.E.2d 1239 (1995). A minor is liable at any age for torts committed by force. The controlling intent in such cases is the intent of the minor to complete the physical act. *Allstate Fire v. Singler*, 9 Ohio App. 2d 102, 223 N.E.2d 65 (1967), *rev'd on other grounds*, 14 Ohio St. 2d 27, 236 N.E.2d 79 (1968).

### INLAND MARINE

Cases on Coverage. Inland marine endorsement contained express language subjecting coverage to terms and conditions of policy to which it was attached. Coverage denied upon proof of intent to destroy cargo and thereby fraudulently collect proceeds under inland marine endorsement. *Eastern Motor Freight, Inc. v. Potomac Ins.*, 21 Ohio Law Abs. 395 (1936).

Comparison of inland marine insurance and fire insurance. Inland marine underwriter obligated to rely fully upon information furnished by insured and, therefore, has right to full disclosure of facts underlying coverage which may in any way affect risks to be assumed. *A.C. Strip v. Buckeye Union Ins.*, 1975 WL 181194 (1975).

Absent special relationship or some type of continuing duty, agent does not have ordinary duty to inform insured of new, more comprehensive inland marine coverages offered by insurer. Ongoing business relationship between agent and insured not considered "special relationship" (such as one created by contract or arising from trust or fiduciary relationship). Continuing duty to inform insured of new coverage arises when major changes occur which affect existing coverage and agent has knowledge of such changes. *Nielsen Enterprises, Inc. v. Ins. Unlimited Agency, Inc.*, 1986 WL 5411 (1986).

Transportation policy insuring against loss for goods only while in transit or being transported does not extend to goods lost where goods in transit were unloaded from conveyance and deposited on designated warehouse premises and left there to await further transportation on same means of conveyance to point of final delivery. Court considered this interruption in initial transportation as abandonment of initial transportation even though such interruption was temporary. *Dealers Dairy Products v. Royal Ins. Co.*, 10 Ohio Op. 2d 424 (1971).

"Debris" as used in policy ambiguous, and insurance company required to tow away several damaged vehicles involved in accident where policy stated "we will pay for your expenses to remove debris..." *Stadium Lincoln-Mercury v. Heritage Transport*, 2005-Ohio-1328, 826 N.E.2d 332 (2005).

### LIABILITY INSURANCE

Cancellation and Non-Renewal. Right to rescind, cancel or surrender insurance contract may arise by statute, terms of contract, breach of insurance contract, or mutual consent of parties. Insurance company cannot, without consent of insured, cancel valid insurance contract or refuse to renew policy except where permitted by express statutory provision or by provision to same effect in policy. O.R.C. §§3937.25 through 3937.39. Policy cannot be canceled by unilateral action of insurer's agent. *Sanford v. Briedenbach*, 111 Ohio App. 474, 173 N.E.2d 702 (1960).

Cancellation By Insurer. To cancel policy, insurer must comply with statutory requirement that it give notice to insured. Notice of cancellation, and for automobile policy, of nonrenewal, must contain policy number, date of notice, effective date of cancellation, and reason



for cancellation or nonrenewal. O.R.C. §§3937.25, 3937.32, 3937.34. Notice must be mailed to last known address of insured; actual receipt of notice by insured not required. *Clarke v. Smith*, 117 Ohio App. 3d 337, 690 N.E.2d 604 (1997).

**Cancellation By Insured.** Property insurance policies generally contain provisions allowing cancellation at request of insured. Under such provisions, surrender of policy with request that it be terminated operates ipso facto as a cancellation. In order to effectuate a cancellation of policy giving insured right to cancel it at his request or instance, mere physical surrender of policy by insured does not terminate contract, but an appropriate request or intent to cancel must be manifested. Insured who receives policy at variance with material representations falsely made by insurer or agents, or who is induced to make or sign application for policy by reason of fraud or misrepresentation of the insurer or its agents in regard to the character or provisions of the policy involved, may maintain a suit to cancel or rescind policy. *Provident Sav. Life Assur. Soc'y v. Statler*, 17 Ohio C.C. NS 59 (1911).

Where insurer wrongfully cancels, repudiates or terminates insurance policy, insured may pursue one of three courses: consider the policy at an end and recover just value of policy, or damages as a court approves; institute proceedings to have policy adjudged to be in force; or he may tender premiums, and if acceptance is refused, wait until the policy by its terms becomes payable and test the forfeiture in a proper action in the policy. *Nat. Life Ins. Co. v. Tullidge*, 39 Ohio St. 240 (1883).

**Compromise of Claims.** If insurer wrongfully refuses to defend claim, insured may, without relieving insurer of liability, settle claim if settlement is reasonable and is made in good faith. *Socony-Vacuum Oil Co. v. Continental Cas. Co.*, 144 Ohio St. 382, 59 N.E.2d 199 (1945).

**Duty to Act in Good Faith.** Liability insurer who has reserved right to compromise and settle claims has duty to act in "good faith" in considering whether to accept or reject a claimant's offer to compromise for an amount which falls within the policy limit of liability. *Hart v. Republic Mut.*, 152 Ohio St. 185, 87 N.E.2d 347 (1949). Tort claim for bad faith denial of coverage arises where insurer refuses to pay claim without reasonable justification for refusal. *Zoppo v. Homestead Ins. Co.*, 71 Ohio St. 3d 552, 644 N.E.2d 397 (1994).

Liability for failure to act in good faith may exceed policy limits. *J. Spang Baking Co. v. Trinity Universal*, 45 Ohio Law Abs. 577, 68 N.E.2d 122 (1946).

Insured who alleges bad faith on part of insurer may discover any correspondence between insurer and its attorneys that took place prior to denial of coverage. *Boone v. Vanliner Ins. Co.*, 91 Ohio St. 3d 209, 744 N.E.2d 154 (2001).

**Contribution Among Joint Tortfeasors.** When it is determined that two or more persons are responsible for the same injury and more than fifty per cent of the tortious conduct is attributable to one defendant, that defendant will be jointly and severally liable for all compensatory damages for economic loss. Those tortfeasors who are responsible for less than fifty per cent of the tortious conduct are liable for their proportionate share of compensatory damages for economic loss. If there is an intentional tort established against a defendant that defendant is jointly and severally liable for all compensatory damages for economic loss. Tortfeasors are only responsible for their proportionate share of non-economic damages. R.C. 2307.22

Subject to specific exceptions a tortfeasor who has paid more than that tortfeasor's proportionate share of liability has a right of contribution against the other tortfeasors for their proportionate share of liability, not to exceed the amount paid in excess of that tortfeasor's proportionate share. There is no right of contribution in favor of the tortfeasor against whom an intentional tort claim has been established. R.C. 2307.25

**Cooperation of Insured.** Failure of insured to comply with provisions of policy requiring cooperation in defense will bar both insured and claimant from recovery. *Conold v. Stern*, 138 Ohio St. 352, 35 N.E.2d 133 (1941). Failure to cooperate must be material and substantial and must result in actual prejudice to insurer to bar coverage. *Weller v. Erie Ins. Co.*, 125 Ohio App. 3d 270, 708 N.E.2d 271 (1998). A plaintiff proceeding against an insurance company is subject to limitations and conditions of insurance contract between insurance company and insured, including the duty of insured to cooperate in defense of case. *Conold; Bennett v. Swift*, 170 Ohio St. 168, 163 N.E.2d 362.

Under O.R.C. §3929.05 and 3929.06, judgment creditor succeeds to only rights of insured and cannot recover in action on policy against insurer if there has been such breach of contract by insured as would prevent recovery by him. Failure of insured to give notice of accident or to assist and cooperate, as required by insurance policy, is complete defense to action seeking to satisfy judgment as authorized by O.R.C. §3929.06. *Costa v. Cox*, 168 Ohio St. 379, 155 N.E.2d 54 (1958). Ordinarily issue of assistance and co-operation is question of fact. Failure of insured to appear at trial is important fact but is not necessarily conclusive of issue of assistance and cooperation. *Weaver v. Ballard*, 174 Ohio St.

59, 186 N.E.2d 834 (1962). Failure to forward process to insurer constitutes affirmative defense which may bar recovery on policy for failure to cooperate. *Howell v. Frost*, 98 Ohio App. 127, 128 N.E.2d 189 (1954). However, where insurance company had actual notice of accident and service was by publication, failure of insured to forward summons and complaint is not bar to claimant's recovery. *Brown v. Donders*, 42 Ohio St. 2d 133, 326 N.E.2d 647 (1975). If delay was unreasonable, prejudice is presumed and insured has burden of proving otherwise. *Patrick v. Auto Owners Ins. Co.*, 5 Ohio App. 3d 118, 449 N.E.2d 790 (1982). Prejudice is presumed where insured destroys insurer's subrogation rights, but presumption is rebuttable. *Ferrando v. Auto-Owners*, 98 Ohio St. 3d 186, 781 N.E.2d 927 (2002).

Insured not required to join in sham defense, but may not condition cooperation upon arbitrary demands for settlement. *Luntz v. Stern*, 135 Ohio St. 225, 20 N.E.2d 241 (1939). Material misrepresentation of facts of accident constitutes grounds for avoidance of policy, but only if the insurer is prejudiced as a result. *Erie Ins. Co. v. Maxwell*, 1999 WL 771726, app. denied, 88 Ohio St. 3d 1415, 723 N.E.2d 120 (2000).

Coverage. Insurance contract provisions reasonably susceptible to more than one interpretation will be strictly construed against insurer and liberally in favor of insured. *King v. Nationwide Ins.*, 35 Ohio St. 3d 208, 519 N.E.2d 1380 (1988). Promises inconsistent with terms of clear and unambiguous policy endorsement in respect of coverage will be excluded by parol evidence rule. *Stratman v. Atkinson*, 40 Ohio App. 2d 337, 319 N.E.2d 372 (1974). Two insurers liable under policies containing excess coverage clauses are liable in proportion to amounts of coverage of respective policies. *Buckeye Union Ins. Co. v. State Auto Mut. Ins. Co.*, 49 Ohio St. 2d 213, 361 N.E.2d 1052 (1977). Financial responsibility bond issued under O.R.C. §4509.45 is not motor vehicle liability policy of insurance for purposes of excess coverage clauses. *Republic Franklin Ins. Co. v. Progressive Cas. Ins. Co.*, 45 Ohio St. 2d 93, 341 N.E.2d 600 (1976). Issuer of financial responsibility bond not liable for failure to settle and provide defense when issuer paid full amount of bond into court. *Thornton v. Personal Service Ins. Co.*, 48 Ohio St. 2d 306, 358 N.E.2d 579 (1976), cert. denied, 431 U.S. 939 (1977). However, issuer of financial responsibility bond has duty to act in good faith in handling and payment of claims by one who may be injured by principal. Bad faith actions are breach of this duty and will give rise to cause of action in tort against issuer of bond. *Suver v. Personal Service Ins. Co.*, 11 Ohio St. 3d 6, 462 N.E.2d 415 (1984).

Where jury finds that while insured did not instruct his son not to permit other persons to operate his auto-

mobile, son was main user of vehicle and was given express or implied authority to permit others to drive, and insurer is obligated to indemnify such third person for any claims presented or judgments recovered against him. *Western Assur. Co. v. Bevacqua*, 33 Ohio Op. 2d 326, 209 N.E.2d 249. (C.P. 1964).

Recently divorced woman who comes to temporarily reside with her parents and has accident while using her father's automobile was not "resident of same household" as her father, within meaning of such phrase in her insurance policy defining "non-owned automobile" as one "not owned by or furnished for regular use of either named insured or any relative" "of named insured who is resident of same household." *Napier v. Banks*, 19 Ohio App. 2d 152, 250 N.E.2d 417 (1969). Minor child of divorced parents may maintain dual residency for insurance purposes. *Farmers Ins. v. Taylor*, 39 Ohio App. 3d 68, 528 N.E.2d 968 (1987). Dual residence determined on factual basis of actual residence pattern, not simply by custody order. *Id.*

Permanently disabled automobiles or those which are not used for travel on public ways are not within term "automobiles" contained in newly acquired automobile clause of standard insurance policy. *Harshbarger v. Meridian Mut. Ins. Co.*, 40 Ohio App. 2d 296, 319 N.E.2d 209 (1974).

Repairman driving for purpose of testing repairs is within exclusion in owners policy of person "employed or otherwise engaged in automobile business." *Royal Indem. v. Laudenbach*, 46 Ohio App. 2d 47, 345 N.E.2d 623 (1973).

For purpose of liability coverage, ownership of vehicle is determined under Uniform Commercial Code rather than under Certificate of Title Act. *Smith v. Nationwide*, 37 Ohio St. 3d 150, 524 N.E.2d 507 (1988).

Where garage liability insurance policy provides coverage for automobiles "furnished for use of...any person or organization to whom named insured furnishes automobiles for their regular use," "regular use" is that use of vehicle which is usual and customary for person for whose use automobile was furnished. *Ohio Cas. v. Travelers Indem. Co.*, 42 Ohio St. 2d 94, 326 N.E.2d 263 (1975).

Automobile insurance policy issued to bank to provide coverage for liability with respect to use of any automobile in connection with its resale after repossession affords coverage to bank when it permitted dealer to have possession of car for purposes of resale and prospective purchaser was involved in accident while driving car with permission of dealer. *Peffer v. Kenner*, 20 Ohio Misc. 163, 250 N.E.2d 122 (1969).

Where automobile, for which purchase agreement has been executed, is furnished and delivered by seller to prospective purchaser, equipped with 10-day license cards and for which application for certificate of title has been signed by prospective purchaser, and is damaged in collision with another car before certificate of title is delivered, use of such automobile by prospective purchaser is not “furnished for regular use” as such phrase is used in standard “Drive Other Cars” provision of automobile insurance policy. *Oberdier v. Kennedy Ford*, 23 Ohio App. 2d 168, 261 N.E.2d 348 (1970).

Injury resulting to employee of freight company while operating hired truck in course of his employment for freight company is covered by hired car policy indemnifying freight company from any liability incurred as result of operation of automobiles hired by freight company. *Maryland Cas. v. Bankers Indem.*, 51 Ohio App. 323, 200 N.E. 849 (1935).

Liability insurance policy executed pursuant to predecessor to O.R.C. §4923.08, liberally construed to protect general public. Movement to or from repair shop is transportation service within meaning of policy. *Wood v. Vona*, 147 Ohio St. 91, 68 N.E.2d 80 (1946); *Leonard v. Murdock*, 147 Ohio St. 103, 68 N.E.2d 86 (1946).

Where restaurant patron left his automobile for restaurant parking lot attendant to park and attendant lost control of automobile and ran into patron, in parking lot supplied by restaurant’s lessor for use of customers, restaurant did not charge patrons any fee for parking in lot, and attendant, in addition to parking cars, had duty of performing other courtesies, the automobile, while in care of attendant, was not being used in business of “storing or parking of automobiles” within automobile liability policy exclusion clause, and therefore attendant was insured under omnibus clause, and was entitled to protection of policy. *Chavers v. St. Paul Fire & Marine Ins. Co.*, 188 F. Supp. 39 (N.D. Ohio 1960), *aff’d*, 295 F.2d 812 (6<sup>th</sup> Cir. 1961).

Standard Provisions. Word “replacement” in automobile liability policy was held to mean substitute or equivalent in place of person or thing when there was absence of evidence that term had meaning peculiar to insurance field or that insured and insurer had any definite meaning for term. In addition, test to be applied in construing word “replacement” is what reasonable person in place of insured would have understood it to mean. *Brescoll v. Nationwide Mut. Ins. Co.*, 116 Ohio App. 537, 189 N.E.2d 173 (1961).

Automobile insurance policy provision extending liability coverage to named insured in using automobiles other than those named in policy includes one subject to agreement to purchase, since this situation is not within

meaning of exception for automobile furnished for “regular use” of named insured. *Grange Mut. Cas. Co. v. Clifford*, 13 Ohio Misc. 12, 230 N.E.2d 686 (1967).

Term “person” in “family compensation” clause of automobile liability insurance contract includes fetus which has reached such stage of development that it can live outside uterus, does so upon delivery for appreciable length of time and exhibits visible and audible signs of physical life. *Peterson v. Nationwide Mut. Ins. Co.*, 175 Ohio St. 551, 197 N.E.2d 194 (1964). Undefined term “theft” in automobile policy does not include summary repossession of automobile in Ohio by resident of another state having valid recorded mortgage lien thereon. *Riley v. Motorist Mut. Ins. Co.*, 176 Ohio St. 16, 197 N.E.2d 362 (1964). Where term “theft” is used but not defined in insurance contract drafted by insurer, it includes any wrongful deprivation of property of another without claim or color of right. *Munchick v. Fidelity & Cas. Co.*, 2 Ohio St. 2d 303, 209 N.E.2d 167 (1965).

Where city police officer working on general police duty is assigned to work in police motor vehicle 122 of 164 working days, such vehicle is as matter of law “an automobile...furnished for” his “regular use” within meaning of such exclusion from coverage under family automobile policy. *Kenney v. Employers’ Liability Assur. Corp.*, 5 Ohio St. 2d 131, 214 N.E.2d 219 (1966).

Where garage liability policy provides coverage for automobiles “furnished for use of... any person or organization to whom named insured furnishes automobiles for their regular use,” the term “regular use” provides coverage for use of loaned vehicle which is within scope of permission given by insured and which is usual and customary for person for whose use automobile was furnished. *Ohio Cas. Ins. Co. v. Travelers Indem. Co.*, 42 Ohio St. 2d 94, 326 N.E.2d 263 (1975).

Word “operations” in liability policy is not confined to actual operation of fireworks display but covers alleged injury of patron of amusement park occurring at time when fireworks display was not in progress. *Coney Island, Inc. v. Midland Nat’l Ins. Co.*, 33 Ohio Op. 2d 385, 200 N.E.2d 717. (Ct. App. 1963).

Liability policy covering professional corporation does not extend to liability incurred by doctor-shareholder individually. *Miller v. Marrocco*, 28 Ohio St. 3d 438, 504 N.E.2d 67 (1986).

Omnibus Provisions. Under O.R.C. §3937.182, no policy of automobile insurance which is issued or renewed shall provide coverage for judgments or claims against an insured for punitive or exemplary damages. Inclusion of omnibus clause providing liability coverage for anyone operating vehicle with permission is required by law. O.R.C. §4509.51(B).

No coverage for permissive driver if use of automobile at time of accident is complete departure from use for which permission was granted. *Gulla v. Reynolds*, 151 Ohio St. 147, 85 N.E.2d 116 (1949). Standard omnibus clause will extend coverage where use deviates slightly from purpose for which permission initially granted. *Erie Ins. Group v. Fisher*, 15 Ohio St. 3d 380, 474 N.E.2d 320 (1984). No coverage where auto being operated without permission express or implied. *West v. McNamara*, 159 Ohio St. 187, 111 N.E.2d 909 (1953). Express instruction to first permittee not to allow second permittee to operate insured's vehicle impliedly revoked by silence following knowledge that instruction was being violated and no follow-up admonition given. *Security Mut. Cas. Co. v. Hoff*, 54 Ohio St. 2d 426, 377 N.E.2d 509 (1978).

**Uninsured Motorist Coverage.** Uninsured and underinsured motorist coverage may be offered in connection with automobile liability policy but is not required. O.R.C. §3937.18. Coverage issued to corporation applies to employee injured in course and scope of employment, but not to off-duty employee or employee's family. *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 797 N.E.2d 1256 (2003). Coverage may not be offset by workers compensation payment. O.R.C. §3937.18(E). Exclusions allowed as enumerated in statute. O.R.C. §3937.18(I). Uninsured motorist property damage must be included. O.R.C. §3937.181.

**Rights of Injured Party.** Payment by insurer shall not depend upon satisfaction by insured of final judgment against him. O.R.C. §3929.05. However, injured person is not third party beneficiary of liability insurance contract between insurer and its insured. *Chitlik v. Allstate Ins. Co.*, 34 Ohio App. 2d 193, 299 N.E.2d 295 (1973). Judgment Creditor is entitled to have insurance money applied in satisfaction of judgment and if not so applied in thirty days, he may have action against insurer and insured to have insurance money applied in payment of his judgment. O.R.C. §3929.06. Judgment creditor may not proceed directly against insurer until 30 days have elapsed from entry of final judgment against insured. O.R.C. §3929.06. Chapter 3955 creates Ohio Insurance Guaranty Association for providing mechanism for payment of covered claims under certain insurance policies, avoiding excessive delay in payment and financial loss to claimants or policyholders because of insolvency of insurer, and providing association to assess cost of such protection among insurers. Chapter 3955 was designed to protect policyholders and persons who had claims against policyholders, not general creditors of insolvent insurance companies. *Ohio Ins. Guaranty Ass'n v. Simpson*, 1 Ohio App. 3d 112, 439 N.E.2d 1257 (1981). Attorney's claim for attorney's fees for pre-

insolvency legal services is not "covered claim" within meaning of O.R.C. §3955.01(B). *Id.*

**Duty to Defend.** Under policy binding insurer to defend any suit brought against insured to enforce a claim for damages covered by policy, whether groundless or not, and bear expense incurred by him, obligation to defend lawsuit is determined from the allegations of the complaint and not by outcome of action, so that it is duty of insurer to defend every action in which complaint shows a claim for damages arguably or potentially covered by policy, and failure to do so renders it liable for any judgment rendered, whether claim was in fact groundless or not; also, for cost and expense of making defense thereto. *City of Willoughby Hills v. Cincinnati Ins. Co.*, 9 Ohio St. 3d 177, 459 N.E.2d 555 (1984). Where pleadings state claim which is arguably within policy coverage, or there is some doubt as to whether covered claim has been pleaded, insurer must accept defense of claim. *Id.* Claim for cost and expense of defending belongs solely to insured. Attorney who provides such defense may not recover fees from insurer under policy. *In re Hronek v. Silverman*, 563 F.2d 296 (6<sup>th</sup> Cir. 1977).

Insurer may maintain a declaratory judgment action under O.R.C. Ch. 2721 for purposes of establishing its rights and obligations under contract of insurance. Insurer, if proceeding in good faith, is entitled to bring such an action for purpose of adjudicating its duty to defend and/or indemnify insured in a tort action brought by a third party, even where underlying tort complaint alleges conduct within the coverage of the contract of insurance, so long as insurer has not agreed to defend groundless, false or fraudulent claims. *Preferred Risk v. Gill*, 30 Ohio St. 3d 108, 507 N.E.2d 1118 (1987).

Expenses incurred in investigation and defense by insurer who is secondarily liable are recoverable from insurer primarily liable given proper and timely notice. *Nationwide Mut. v. General Acc., Fire & Life*, 23 Ohio App. 2d 263, 262 N.E.2d 885 (1970).

**Liability Between Insurers.** Primary. Where several insurance policies exist on same property and amount in aggregate to more than value, recovery by an owner is restricted to actual loss, since contract is one of indemnity only. Up to this limit, insured has option to either recover a proportionate part of loss from each of the insurers or to recover the entire amount from any one of them whose policy is sufficiently large. *Harris v. Ohio Ins. Co.*, 5 Ohio 466 (1832). Excess: When a policy contains an "excess insurance" clause, liability of excess insurer does not arise until limits of collectible insurance under primary policy have been exceeded. *Maryland Cas. Co. v. Banker's Indem. Ins. Co.*, 51 Ohio App. 323, 200 N.E. 849 (1935). In case of an excess insurance

clause, insurance company is not liable for any part of the loss or damage which is covered by other insurance.

**Intentional Acts.** Policy covering accidental injuries does not cover liability for assault and battery because intentional act is not accidental. *Commonwealth Cas Co. v. Headers*, 118 Ohio St. 429, 161 N.E. 278 (1928). Public policy prohibits an individual from obtaining coverage for injuries inflicted intentionally by individual himself. *Rothman v. Metro. Cas. Ins. Co.*, 134 Ohio St. 241, 16 N.E.2d 417, 420 (1938). Stop-gap coverage may be obtained for employer's liability for injuries to employee which employer knew to be substantially certain to occur, despite label of "employer intentional tort." *Harasyn v. Normandy Metals*, 49 Ohio St. 3d 173, 551 N.E.2d 962 (1990). Bad faith denial of insurance coverage with actual malice is not intentional act precluding coverage for insurer found liable. *Buckeye Union Ins. Co. v. New England Ins. Co.*, 87 Ohio St. 3d 280, 720 N.E.2d 495 (1999). Uninsured motorist coverage may apply to injury arising from ownership, use or maintenance of vehicle even though injury intended from standpoint of tortfeasor, although shooting during traffic argument is not injury arising from use of automobile. *Kish v. Central Nat'l Ins. Group*, 67 Ohio St. 2d 41, 424 N.E.2d 288 (1981).

Insurer must demonstrate that injury itself was expected or intended to avoid coverage on basis of intentional act exclusion – it is not sufficient to show merely that the act was intentional; coverage not excluded for accidental BB-gun injury where tortfeasor intended to shoot in direction of victim but did not intend to cause injury. *Physicians Ins. Co. v. Swanson*, 58 Ohio St. 3d 189, 569 N.E.2d 906 (1991). Intentional injury exclusion does not apply to injuries intentionally caused by insured while acting in self-defense. *Preferred Mut. Ins. Co. v. Thompson*, 23 Ohio St. 3d 78, 491 N.E.2d 688 (1986). Court may infer intent to injure from guilty plea or conviction regardless of tortfeasor's state of mind, precluding coverage for sexual molestation or murder as matter of public policy. *Gearing v. Nationwide*, 76 Ohio St. 3d 34, 665 N.E.2d 1115 (1996). Employer's liability for negligent hiring or supervision may be covered even though underlying sexual molestation was intentional. *Doe v. Schaffer*, 90 Ohio St. 3d 388, 738 N.E.2d 1243 (2000). However, if the molester has a history of sexual abuse or the employer knew of those propensities than those acts may not be covered. *Cincinnati Ins. Co. v. Oblates of St. Francis de Sales*, 2010-Ohio-4382, Ohio App. 6<sup>th</sup> Dist. No. L-09-1146.

**Violations of Law.** Insurer under automobile insurance policy which provides that it shall not cover any liability of insured while automobile is being operated by any person under age limit "fixed by law" is not li-

able for damages arising out of accident while automobile was being operated by person under age limit fixed by ordinance of city on streets of which accident occurred. *United States Fid. & Guar. Co. v. Guenther*, 281 U.S. 34 (1930). Where violation of law clause exempts insurer from liability if insured's injury or death is result of violation of law, such violation must be proximate cause of injury. *Furjesz v. National Acc. & Health Ins. Co.*, 37 Ohio Law Abs. 507, 49 N.E.2d 66 (1940).

**Waiver.** Waiver of conditions as to immediate written notice of an accident, furnishing proofs of loss, and similar notices, may be effectively accomplished through words, acts, or conduct of authorized agent of insurer, and whether or not such waivers has taken place is generally question of fact for jury. *Ohio Farmers Co. v. Cochran*, 104 Ohio St. 427, 135 N.E. 537 (1922). Clauses in insurance policies prohibiting waiver, unless the same are endorsed on such policies and in a prescribed manner, refer only to provisions and conditions constituting part of the contract of insurance, and do not affect conditions to be performed after loss, such as furnishing proofs of loss, sending immediate written notice of an accident, and the giving of other notices. *Hartford Acc. & Indem. Co. v. Randall*, 125 Ohio St. 581, 183 N.E. 433 (1932).

**Reservation of Rights.** Insurer obligated by contract of liability insurance to defendants insured in certain lawsuits may defend in good faith without waiving its rights to assert at a later time the policy defenses it believes it has, provided that it gives its insured notice of any reservation of rights. *Motorist's Mut. Ins. Co. v. Trainor*, 33 Ohio St. 2d 41, 294 N.E.2d 874 (1973). The reservation of rights must be timely and provide clear, noncontradictory statement of the insurer's position. *Socony-Vacuum v. Continental Cas. Co.*, 144 Ohio St. 382, 59 N.E.2d 199 (1945).

**Infants.** The relationship of parent and child gives to each an insurable interest in the other. A child has an insurable interest in the life of a parent who is a member of the household, especially to the extent of burial expenses. *Shadlinger v. Metropolitan Life*, 11 O. Dec. Rep. 892 (1901).

**Insolvency of Insured.** Statutes have been enacted which prevent insertion in liability insurance policies of clause making payment conditioned upon insured's payment of judgment against insured. Purpose is to give to injured claimant who has obtained judgment against insured, and has been unable to collect, a direct right to recover from insurer and to prevent such claimant from being deprived of such right through cancellation of policy after insured's liability to him has accrued. O.R.C. §§3929.05 and 3929.06.

Ohio has no statute requiring that liability policies contain provision that insolvency or bankruptcy of insured shall not release insurer from payment of damages for injuries covered by insured's policy. However, pursuant to O.R.C. §3929.05, liability of insurance company under its policy of liability insurance for damages resulting from negligence of insured is absolute liability, and such liability is not affected by release of insured's liability in bankruptcy proceedings. *Kutza v. Parker*, 115 Ohio App. 313, 185 N.E.2d 53 (1962).

Jury. O.R.C. §2311.04 provides for trial by jury of issues of fact arising in actions for the recovery of "specific real or personal property." An action to compel return of an insurance policy claimed to have been assigned under duress was not an action for the recovery of specific personal property within the meaning of the statute, and thus is not triable by a jury. *Windhorst v. Wilhelms*, 1 Ohio C.C. 28 (1885). In the examination of a juror on voir dire, it is not prejudicial or reversible error in negligence cases involving property damage, personal injury, or both, to ask the general question whether the juror has or has had any connection with, or interest in, a casualty insurance company. If the juror answers in the affirmative, he may then be asked the name of the company and the nature of his connection with that company. *Dowd-Feder, Inc. v. Truesdell*, 130 Ohio St. 530, 200 N.E. 762 (1936). However, when mode of questioning is such as to indicate lack of good faith on part of plaintiff's counsel, court has duty to compel inquiry to proceed according to approved methods of interrogation. Character and scope of questions can not become standardized and must be controlled by discretion of trial court. *Id.*; *Morrow v. Hume*, 131 Ohio St. 319, 3 N.E.2d 39 (1936); *Krupp v. Poor*, 24 Ohio St. 2d 123, 265 N.E.2d 268 (1970). While counsel in good faith may interrogate a juror on voir dire regarding connection with casualty insurance companies, some courts have found it impermissible to examine jurors where no insurance company is party or actively or directly interested in litigation. *Vega v. Evans*, 128 Ohio St. 535, 191 N.E. 757 (1934) (*questioned by Salerno v. Oppman*, 52 Ohio App. 416, 3 N.E.2d 801 (1936)); *see also Yates v. Irvin*, 85 Ohio App. 164, 85 N.E.2d 404 (1948); *Krupp, supra*.

Notice. Notice provision allows insurer to form intelligent estimate of its rights and liabilities, to afford it an opportunity for investigation, and to prevent fraud and imposition upon it. *Travelers v. Myers*, 62 Ohio St. 529, 57 N.E. 458 (1900), *overruled on other grounds by Employers' Liability Assur. Corp. v. Roehm*, 99 Ohio St. 343, 124 N.E. 223 (1919). Breach of notice or subrogation provisions precludes coverage if insurer has been prejudiced. *Ferrando v. Auto-Owners Mut. Ins. Co.*, 98 Ohio St. 3d 186, 781 N.E.2d 927 (2002). Prejudice is presumed unless insured presents contrary evidence. *Id.*

When insurance coverage is imposed by operation of law, insured must satisfy duties imposed on him by policy in order to obtain benefits of concomitant duty to provide coverage that law imposes on insurer. *Luckenbill v. Midwestern Indemnity Co.*, 143 Ohio App. 3d 501, 758 N.E.2d 301 (2001). Failure of insured to meet such requirements creates a presumption of prejudice, and insured is entitled to an evidentiary hearing to rebut that presumption. *Allgive v. Buckeye State Mut. Ins. Co.*, 2003-Ohio-3760. As a general rule, notice and proof of property loss should be furnished by party with whom insurance contract is made, namely, the insured, and not by the person to whom the policy is payable. *Western Ins. Co. v. Carson*, 9 Ohio Dec. Rep. 848 (1899). If policy prescribes a place at which notice must be given or proofs furnished, or the method by which notice must be transmitted there must be compliance with such provision unless it is waived by insurer. *Kornhauser v. National Surety Co.*, 114 Ohio St. 24, 150 N.E. 921 (1926). If policy specifies the time at or within which notice and proofs of loss must be given or made, provision must be complied with unless performance is excused or compliance is waived. *Shaffer v. Prudential*, 83 Ohio App. 384, 81 N.E.2d 239 (1948). If notice is given late, an acceptable excuse or explanation may result in finding that the notice given was, in fact, timely. *Heller v. Standard Acc. Ins. Co.*, 118 Ohio St. 237, 160 N.E.2d 707 (1928). Possible excusing events include: insanity or sickness or insured, ignorance of existence of insurance, insured's belief that accident or injury is not covered by policy, and ignorance of event upon which policy is payable. *Keith v. Lutzweit*, 106 Ohio App. 123, 153 N.E.2d 695 (1957); *Potts v. Travelers*, 75 Ohio App. 401, 62 N.E.2d 583 (1944).

Punitive Damages. Punitive damages may be recovered against an insurer who breaches his duty of good faith in refusing to pay claim of insured upon proof of actual malice, fraud, or insult on the part of insurer. *Hoskins v. Aetna Life*, 6 Ohio St. 3d 272, 452 N.E.2d 1315 (1982).

#### LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

Limitations in Contract. In the absence of controlling statute to the contrary, provisions in insurance contracts generally may validly limit, as between parties, time for bringing action on such contract to a period less than that prescribed by the general statute of limitations, provided that the shorter period is a reasonable one. *Miller v. Progressive Cas. Ins. Co.*, 69 Ohio St. 3d 619, 635 N.E.2d 317 (1994). A policy provision which requires that any suit on the policy be brought within one year after the date of loss will be enforced. *Broadview Sav-*

*ings & Loan v. Buckeye Union*, 70 Ohio St. 2d 47, 434 N.E.2d 1092 (1982), *but see Hounshell v. American States Ins. Co.*, 67 Ohio St. 2d 427, 424 N.E.2d 311 (1981) (an insurance company may be held to have waived a limitation of action clause in a fire insurance policy by acts or declarations which evidence a recognition of liability, or acts or declarations which hold out a reasonable hope of adjustment and which acts or declarations occasion the delay by the insured in filing an action on the insurance contract until after the period of limitation has expired.) A fire policy provision which limits time within which an action shall be sustainable, wherein action must be brought within six months after date of fire is enforceable in accordance with plain meaning of policy terms. *Appel v. Cooper Ins.*, 76 Ohio St. 52, 80 N.E. 955 (1907); *but see Ameritrust Co. v. West American Ins.*, 37 Ohio App. 3d 182, 525 N.E.2d 491 (1987) (cautioning that limitation cannot be unreasonable).

To reduce time to bring a cause of action provided by statute of limitations on a contract, insurance policy must be written in terms that are clear and unambiguous to policyholder. *Sarmiento v. Grange Mut. Cas. Co.*, 106 Ohio St. 3d 403, 835 N.E.2d 692 (2005); *Lane v. Grange Mut. Cos.*, 45 Ohio St. 3d 63, 543 N.E.2d 488 (1989). Provisions of contracts of insurance which purport to extinguish claim for uninsured motorist coverage by establishing a limitations period that expires before or shortly after the accrual of the right of action for that coverage are per se unreasonable and violative of public policy. *Kraly v. Vannewdirk*, 69 Ohio St. 3d 627, 635 N.E.2d 323 (1994); *but see Ross v. Farmers Ins. Group*, 82 Ohio St. 3d 281, 695 N.E.2d 732 (declining to extend *Kraly* rule to underinsured policy case).

In the event an insurance policy contract does not provide for a limitation of action, the general statutes of limitation apply. Sickness and accident insurance—three years after proof of loss. O.R.C. §3923.04(K). Written contracts in general—15 years after cause of action accrues. O.R.C. §2305.06. Oral contracts, express or implied contracts or promises—6 years after the cause of action accrues. O.R.C. §2305.07.

**Accrual of Action.** An action based on a product liability claim and/or an action for bodily injury or injury to personal property shall be brought within two years after the cause of action accrues. In general, a cause of action based upon a product liability claim, bodily injury or injury to personal property accrues when the injury or loss to person or property occurs. O.R.C. §2305.10(A) (effective April 7, 2005). Cause of action for bodily injury caused by exposure to hazardous or toxic chemicals, ethical drugs, or ethical medical devices accrues upon the date on which the plaintiff is informed by competent

medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first. O.R.C. §2305.10(B)(1). A cause of action for bodily injury caused by exposure to chromium, asbestos, diethylstilbestrol or other nonsteroidal synthetic estrogens, chemical defoliant or herbicides or other causative agents, including agent orange accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first. O.R.C. §§2305.10(B)(2)-(5).

**Accrual of Action - Limitations as to Product Liability Claims.** In most circumstances no cause of action based on a product liability claim shall accrue against the manufacturer or supplier of a product later than ten 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. O.R.C. §2305.10(C)(1). However, the aforementioned ten-year time limit does not apply if the manufacturer or supplier of a product engaged in fraud in regard to information about the product and the fraud contributed to the harm that is alleged in a product liability claim involving that product and does not bar an action for product liability where a manufacturer or supplier of a product who made an express, written warranty as to the safety of the product that was for a period longer than ten years and that, at the time of the accrual of the cause of action, has not expired in accordance with the terms of that warranty. O.R.C. §§2305.10(C)(2)-(3). If the cause of action relative to a product liability claim accrues during the ten-year period described in O.R.C. §2305.10(C)(1) but less than two years prior to the expiration of that period, an action based on the product liability claim may be commenced within two years after the cause of action accrues. O.R.C. §2305.10(C)(4). If a cause of action relative to a product liability claim accrues during the ten-year period described in O.R.C. §2305.10(C)(1) and the claimant cannot commence an action during that period due to a disability described in O.R.C. §2305.16, an action based on the product liability claim may be commenced within two years after the disability is removed. *But see* O.R.C. §§2305.10(C)(6)-(7) aforementioned ten-year limitation does not apply to bodily injury claims arising out of claims for bodily injury arising out of exposure to asbestos and those actions described in O.R.C. §§2305.10(B)(1), (2), (3), or (4).

Cause of action accrues when injury is or should have been discovered by the patient, but must accrue no later than four (4) years from occurrence of the act or omission. O.R.C. §2305.113(C)(1). Medical malpractice cause of action accrues and the statute of limitations begins to run when (1) the patient discovers or, in the exercise of reasonable care and diligence, should have discovered the resulting injury, or (2) the physician-patient relationship for that condition terminates, whichever occurs later. *Frynsinger v. Leech*, 32 Ohio St. 3d 38, 512 N.E.2d 337 (1987).

Medical malpractice – one year after cause of action accrues unless, within the one-year period, claimant gives written notice to subject of the claim that he or she is considering bringing an action, in which case claimant has 180 days thereafter to commence an action. O.R.C. §§ 2305.113(A), (B)(1). Medical malpractice actions are subject to a four (4) year statute of repose. O.R.C. §2305.113. Nonmedical malpractice – one year after discovery or termination of relationship. *Zimmie v. Caffee, Halter & Griswold*, 43 Ohio St. 3d 54, 538 N.E.2d 398 (1989).

Fraud. Actions based in fraud must be brought within four years from time the cause of action accrues. O.R.C. §2305.09(C).

Tolling. Savings clause- when a cause of action accrues against a person, period of limitations does not begin to run if person is out of the state or conceals himself until he is in the state or discovered. O.R.C. §2305.15. O.R.C. §2305.15 has been held violative of the commerce clause since it imposes an impermissible burden on interstate commerce by forcing a foreign corporation to choose between exposure to general jurisdiction of Ohio courts by appointing a statutory agent or forfeiture of limitations defense remaining subject to suit in Ohio in perpetuity. *Bendix Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 888 (1988). However, application of statute against defendants who temporarily left state for non-business reasons did not constitute impermissible burden on interstate commerce. *Johnson v. Rhodes*, 89 Ohio St. 3d 540, N.E.2d 1132 (2000).

Disability. The limitation is tolled for persons of unsound mind until disability is removed. O.R.C. §2305.16. The burden of proof to show that a disability rests upon party claiming such disability. *Bowman v. Lemon*, 115 Ohio St. 326, 154 N.E. 317 (1926). Minority tolls the statute of limitations until age of majority. O.R.C. §2305.16; *Mominee v. Scherbarth*, 28 Ohio St. 3d 270, 503 N.E.2d 717 (1986). Imprisonment may toll a statute of limitations under certain circumstances. O.R.C. §2305.15.

Waiver. Contractual limitations may be waived by insurers or authorized agents by their acts. *Reynolds v. Detroit Fidelity & Surety*, 19 F.2d 110 (6th Cir. 1927); *Hounshell v. American States*, 67 Ohio St. 2d 427, 424 N.E.2d 311 (1981). Parties may agree to a waiver supported by consideration. *Reynolds, supra*. Insurer waives a limitations clause if it evinces a recognition of liability or leads insured to believe that there is a reasonable hope of payment. *Hounshell, supra*; *Broadview Savings & Loan Co. v. Buckeye Union Ins. Co.*, 70 Ohio St. 2d 47, 434 N.E.2d 1092 (1982).

Statutory and Case Law References to Specific Limits on Causes of Action. Sickness and accident policies - three years after proof of loss is required to be furnished. O.R.C. §3923.04(K). Wrongful death – two years from date of death. O.R.C. §2125.02(D). Action for bodily injury or property damage - two years after cause accrues. O.R.C. §2305.10. Employer intentional tort – a two-year statute of limitations governed employee's intentional tort action against her employer, rather than one-year statute of limitations in effect at time of employee's underlying injury, where one-year statute of limitations (O.R.C. §2305.112) was found unconstitutional; one-year statute of limitations was to be treated as though it had never been enacted, and cases became subject to earlier two-year statute of limitations. *Keith v. Spectrum Sportswear, Inc.*, 120 Ohio App. 3d 30, 696 N.E.2d 637 (1997). Written contracts, specialty or promise in writing - fifteen years after cause accrued. O.R.C. §2305.06. Nonwritten contracts express or implied - six years after cause of action accrued. O.R.C. §2305.07. Subrogation-varies on nature of relief sought. Action on ground of fraud - four years after cause of action accrued. O.R.C. §2305.09. Action on official bond within ten years after cause of action accrues. O.R.C. §2305.12. Accountant negligence - four year statute of limitations applicable to general negligence claims. *Investors REIT One v. Jacobs*, 46 Ohio St. 3d 176, 546 N.E.2d 206 (1989); O.R.C. §2305.09(D).

Where no action taken by insured on policy for more than 15 years, cause of action for disability benefit installments barred as to only those installments for which recovery was not sought within 15 years from due date. *Everhart v. State Life*, 154 F.2d 347 (6th Cir. Ohio 1946).

## MALPRACTICE

Medical. O.R.C. §2305.113 generally governs medical malpractice claims. Effective April 11, 2003 wide spread tort reform took effect in Ohio under O.R.C. §2323.43. This statute limits recovery of plaintiff who did not suffer permanent and substantial physical deformity, loss of use of a limb or bodily organ system or permanent physical function to \$250,000 for non-



economic loss or three times economic loss up to \$350,000 per plaintiff or \$500,000 per occurrence. Plaintiffs who suffered permanent and substantial physical deformity or permanent loss of physical function may recover no greater than \$500,000 per plaintiff or \$1,000,000 per occurrence.

Under O.R.C. §2323.43(D) a jury will not be instructed of the limits on compensatory damages for non-economic loss. The court, counsel, and all witnesses are prohibited from informing jury of these limits.

Non-economic loss is defined in O.R.C. §2323.43(H)(3) as including but not limited to pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education, disfigurement, mental anguish, and any other intangible loss.

O.R.C. §2323.43 does not apply to medical malpractice suits brought against the state of Ohio or political subdivisions of the state.

Former O.R.C. §2305.11(D)(3) defined “medical claim” as any claim, including derivative claims, asserted in any civil action against physician, podiatrist, or hospital, against any employee or agent of any of them, or against registered nurse or physical therapist, arising out of diagnosis, care or treatment of any person. O.R.C. §2305.113(E)(3) states a medical claim includes any claim asserted in any civil action against a physician, podiatrist, hospital, home or residential facility, an employee of a physician, podiatrist, hospital, home and residential facility or against a licensed practical nurse, registered nurse, advanced practical nurse, physical therapist, physician assistant, emergency medical technician-paramedic, and arises out of the medical diagnosis, care or treatment of any person. As such the statute has been greatly broadened to eliminate former gray areas in its application.

Action for malpractice must be brought within one year after cause accrued, except that, upon written notice to person who is subject of claim prior to expiration of one year, such period may be extended for 180 days after notice. O.R.C. §2305.113(A)(B); *Oliver v. Kaiser Community Health Foundation*, 5 Ohio St. 3d 111, 449 N.E.2d 438 (1983); *Deskins v. Young*, 26 Ohio St. 3d 8, 496 N.E.2d 897 (1986), clarified by *Hershberger v. Akron City Hosp.*, 34 Ohio St. 3d 1, 516 N.E.2d 204 (1987). In no case may action be brought more than four years after alleged malpractice unless person is minor, of unsound mind or imprisoned. O.R.C. §2305.113(C)(1). Cause of action can be extended by up to one year if plaintiff discovers the injury three years after the occurrence and could not have discovered the alleged basis for the injury sooner. O.R.C. §2305.113(D)(1).

An allegation of negligence against an individual whose occupation is not among those enumerated in O.R.C. §2305.11(A) or within the common-law definition of “malpractice” does not present a claim for malpractice. *Lombardi v. Good Samaritan Med. Ctr.*, 69 Ohio St. 2d 471, 433 N.E.2d 162 (1982). Nurses do not fall within the one-year statute of limitations for medical malpractice. *Id.* Action against physician or hospital for negligence of nurse is an action of ordinary negligence, not medical malpractice. *Morris v. Children’s Hosp. Med. Ctr.*, 73 Ohio App. 3d 437, 597 N.E.2d 1110 (1991).

A spouse’s loss of consortium claim arising from alleged occurrence of medical malpractice may accrue prior to medical malpractice claim itself based upon notice. *Musick v. Dutta*, 2006-Ohio-2864, 854 N.E.2d 1114 (2006). The Ohio Supreme Court held that O.R.C. §2305.113(B)(1) (extending the statute of limitations by 180 days with a notice letter) does not limit the number of effective 180 day letters a claimant can send providing they are sent within the one-year statutory time period for bringing an action and limitations period begins to run from the date last notice is received. *Marshal v. Ortega*, 87 Ohio St. 3d 522, 721 N.E.2d 1033 (2000).

Two-year statute of limitations for bringing a malpractice action against psychologists, social workers and clinical counselors. *Thompson v. Community Mental Health Ctrs.*, 71 Ohio St. 3d 194, 642 N.E.2d 1102 (1994).

A parent may recover damages, in a derivative action against a third party tortfeasor who intentionally or negligently causes physical injury to the parent’s minor child, for loss of filial consortium. A minor child has a cause of action for loss of parental consortium against a third party tortfeasor who negligently or intentionally causes physical injury to the child’s parent. *Gallimore v. Children’s Hosp. Med. Ctr.*, 67 Ohio St. 3d 244, 617 N.E.2d 1052 (1993).

Adult emancipated children may recover damages for loss of consortium. *Rolf v. Tri-State Motor Transit Co.*, 91 Ohio St. 3d 380, 745 N.E.2d 424 (2001). Ohio courts have split on whether a parent may recover loss of consortium resulting from injury to adult child. See *Moroney v. State Farm Mut. Ins. Co.*, 2002-Ohio-3829; *Brady v. Miller*, 2003-Ohio-4582.

O.R.C. §2743.43 contains qualifications that must be met by expert witness regarding liability in medical claims. An expert witness must be state licensed and must devote 75% of his professional time to the active clinical practice in field of licensure, or to its instruction in an accredited school. O.R.C. §2743.43(A)(2). A trial judge may, however, adjudge or allow the testimony of

expert witness incompetent on any other ground. O.R.C. §§2743.43(B), (C). A medical expert may not testify against a physician in another specialty. *Price v. Cleveland Clinic Foundation*, 33 Ohio App. 3d 301, 515 N.E.2d 931 (1986). However, where fields of medicine overlap, a physician may testify against a physician in another specialty. *Alexander v. Mt. Carmel Med. Ctr.*, 56 Ohio St. 2d 155, 383 N.E.2d 564 (1978).

Lack of informed consent established when (a) physician fails to disclose to patient and discuss material risks and dangers inherently and potentially involved with respect to proposed therapy, if any; (b) unrevealed risks and dangers actually materialize and proximately cause patient's injury; and (c) reasonable person in patient's position would have decided against therapy had risks and dangers been disclosed. *Nickell v. Gonzelez*, 17 Ohio St. 3d 136, 477 N.E.2d 1145 (1985).

Malpractice cause of action rests in tort and not contract. *Gillette v. Tucker*, 22 Ohio C.C. 664 (1901), *aff'd*, 67 Ohio St. 106, 65 N.E. 865 (1902), *overruled on other grounds*, 5 Ohio St. 3d 111, 449 N.E.2d 438 (1983); *see also Bowers v. Santee*, 99 Ohio St. 361, 124 N.E. 238 (1919), *overruled on other grounds*, 5 Ohio St. 3d 111, 449 N.E.2d 438 (1983); *Wyler v. Tripi*, 25 Ohio St. 2d 164, 267 N.E.2d 419 (1971), *overruled on other grounds*, 5 Ohio St. 3d 111, 449 N.E.2d 438 (1983).

A physician is not an insurer and is not required to use the highest degree of knowledge and skill but is only required to use an average degree of skill, care and diligence exercised by members of the same profession in similar circumstances. *Bruni v. Tatswni*, 46 Ohio St. 2d 127, 346 N.E.2d 673 (1976). Standard of care determined by 1) state of advancement of profession at time of treatment; 2) locality or place of practice. *Gillette v. Tucker*, 22 Ohio C.C. 664 (1901). Not determined by customary methods or conduct, but conformity thereto may be considered along with other circumstances in determining whether or not ordinary care has been exercised. *Bruni v. Tatsumi*, 46 Ohio St. 2d 127, 346 N.E.2d 673 (1976). *Ault v. Hall*, 119 Ohio St. 422, 164 N.E. 518 (1928); *Faulkner v. Pezeshki*, 44 Ohio App. 2d 186, 337 N.E.2d 158 (1975).

Specialist not held to exercise special degree of care. Test still ordinary care of reasonable specialist practicing in that same specialty. *Bruni v. Tatsumi, supra*; *Littleton v. Good Samaritan Hosp. & Health*, 39 Ohio St. 3d 86, 529 N.E.2d 449 (1988); *Beach v. Chollett*, 31 Ohio App. 8, 166 N.E. 145 (1928). Agent of surgeon may be held liable. *O'Connell v. Noble*, 8 Ohio L. Abs. 117 (1930). However, where independent-contractor physician cannot be held liable, hospital cannot be liable under respondeat superior theory. *Comer v.*

*Risko*, 106 Ohio St. 3d 185, 833 N.E.2d 712 (2005). Locality or place of practice standard rejected as applied to specialists. *Tirpak v. Weinberg*, 27 Ohio App. 3d 46, 499 N.E.2d 397 (1986); *Bruni v. Tatsumi, supra*. *Littleton v. Good Samaritan Hosp., supra*.

Spouse may only recover for loss of consortium of husband or wife between time of injury and death. *Shaweker v. Spinell*, 125 Ohio St. 423, 181 N.E. 896 (1932); *Clouston v. Remlinger*, 22 Ohio St. 2d 65, 258 N.E.2d 230 (1970); *DeWitt v. B.&C. Machine*, 25 Ohio St. 2d 40, 266 N.E.2d 563 (1971).

In "wrongful pregnancy" action, mother need not mitigate damages by abortion or adoption since tort victim has no duty to make unreasonable efforts to diminish or avoid prospective damages; in "wrongful pregnancy" action, Ohio recognizes "limited damages" rule which limits damages to pregnancy itself and does not include child-rearing expenses. *Johnson v. University Hosp.*, 44 Ohio St. 3d 49, 540 N.E.2d 1370 (1989). The extent of recoverable damages is limited by Ohio's public policy that the birth of a normal, healthy child cannot be an injury to the parents. *Id.*

A child born with physical or other handicaps does not state a cause of action in medical negligence based upon the failure of a doctor to inform the child's mother during her pregnancy of test results indicating a possibility that the child would be born with defects, thereby depriving the mother of an opportunity to make a fully informed decision as to whether to abort the child. *Hester v. Dwivedi*, 89 Ohio St. 3d 575, 733 N.E.2d 1161 (2000). However, parents of child born with birth defects may recover damages of raising child if negligent prenatal care denied opportunity to make informed decision after conception. *Schermer v. Mt. Auburn Obstetrics and Gynecologic Assoc.*, 108 Ohio St. 3d 494, 844 N.E.2d 1160 (2006).

There is no cause of action for the wrongful administration of life-prolonging medical treatment, *i.e.* "wrongful living." *Anderson v. St. Francis-St. George Hosp., Inc.*, 77 Ohio St. 3d 82, 671 N.E.2d 225 (1996).

Patients may bring medical malpractice actions alleging the loss of a chance of survival amounting to less than 50%. *Roberts v. Ohio Permanente Med. Grp., Inc.*, 76 Ohio St. 3d 483, 668 N.E.2d 480 (1996). However, in *McMullin v. Ohio State Univ. Hosp.*, 88 Ohio St. 3d 332, 725 N.E.2d 1117 (2000), the Court held that it never intended the loss and even chance of recovery or survival theory to be applied in a case in which a plaintiff could otherwise prove that specific negligent acts of the defendant caused the ultimate harm.

O.R.C. §2307.28(A) entitles a defendant to set off from a judgment funds received by a plaintiff pursuant to a settlement agreement with a co-defendant.

**Hospital.** A medical claim includes claims against hospital arising out of diagnosis, care or treatment of any person. O.R.C. §2305.113. "Hospital" includes any person, corporation, association, board, or authority responsible for operation of licensed or registered Ohio hospital or clinic that employs full-time staff of physicians practicing more than one recognized medical specialty, but does not include hospital operated by federal government. Same limitations period as above. O.R.C. §2305.113.

Generally, if a plaintiff seeks damages from a hospital vicariously for bodily injury or death, or for bodily injury or death allegedly caused by negligence by a physician, who is not an employee of the hospital, in the rendering of a medical diagnosis, care or treatment, and so forth, the plaintiff must prove by a preponderance of the evidence one or both of the following: 1) the hospital held itself out to the public as a provider of medical services, and in the absence of "notice or knowledge: to the contrary, the patient looked to the hospital to provide competent medical care and a reasonable person would not have sought medical services from the hospital if that person was aware that the person who is alleged in the tort action to be an agent of the hospital was not an agent of the hospital; and 2) the hospital, in a manner that proximately caused injury to the patient, directed or controlled the physician to an extent that impeded or restricted the physician's ability to exercise reasonable care in rendering the professional services that are the basis of the claim against the hospital. *Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio St. 3d 435, 628 N.E.2d 46 (1994).

A hospital, acting as a community regional blood bank for the Red Cross, owes a legal duty to provide blood to a person outside the hospital facility when the hospital knows that person is in a life-and-death situation. *McGill v. Newark Surgery Ctr.*, 113 Ohio Misc. 2d 21, 756 N.E.2d 762 (2001).

Charitable immunity has been abolished. *Albritton v. Neighborhood Centers Assoc. for Child Development*, 12 Ohio St. 3d 210, 466 N.E.2d 867 (1984). State has waived immunity of all hospitals owned or operated by political subdivision. O.R.C. §2743.02(B). A hospital is not liable for physician's failure to obtain patient's informed consent prior to procedure unless physician is an employee of hospital. O.R.C. §2317.54. Hospital generally has no duty to obtain informed consent from patient. *Sallade v. Paternite*, 1979 WL 207728 (1979). Generally, a hospital must exercise such reasonable care for the safety of its patients as their known mental and

physical condition may require. *Johnson v. Grant Hosp.*, 32 Ohio St. 2d 169, 291 N.E.2d 440 (1972).

**Other Professional.** Accountants, architects, attorneys, engineers, surveyors, veterinarians, and other professionals may be subject to liability where the professional fails to exercise the skill and knowledge normally possessed by members of profession.

## NEGLIGENCE

See Law Digest Tables.

**Age.** Children under 7 years are incapable of negligence. *DeLuca v. Bowden*, 42 Ohio St. 2d 392, 329 N.E.2d 109 (1975). Showing lack of maturity in those over 7 years may negate an essential element of negligence, *i.e.*, knowledge.

**Attractive Nuisance.** The Ohio Supreme Court adopted the attractive-nuisance doctrine as set forth in the Restatement (Second) of Torts, holding that a possessor of land is subject to liability for physical harm to trespassing children caused by an artificial condition upon land if (a) the possessor knows or has reason to know children are likely to trespass; (b) the possessor knows or has reason to know of the condition and realizes or should realize it involves an unreasonable risk of death or serious bodily harm to children; (c) the children, because of their youth, do not discover the condition or realize the risk; (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight compared to the risk to children; and (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise protect the children. *Bennet v. Stanley*, 92 Ohio St. 3d 35, 748 N.E.2d 41 (2001). While the attractive-nuisance doctrine does not ordinarily apply to adults, it may be invoked by an adult for injury suffered in an attempt to rescue a child. *Id.*

**Assumption of Risk.** Defense of implied assumption of the risk has been merged with the defense of contributory negligence. *Anderson v. Ceccardi*, 6 Ohio St. 3d 110, 451 N.E.2d 780 (1983). Thus, a claimant's implied assumption of the risk while not an absolute bar to recovery, may be considered in apportioning liability. *Id.* However, express (contractual) and primary (no duty) assumption of the risk will act as a complete bar to recovery. *Id.*

**Comparative/Contributory Negligence.** Comparative/contributory negligence not recognized at common law. *Betras v. G.M. McKelvey Co.*, 148 Ohio St. 523, 76 N.E.2d 280 (1947). However, under O.R.C. §2315.33, contributory negligence or implied assumption of risk may be asserted as a defense to a negligence claim.

Contributory fault of a plaintiff does not bar plaintiff from recovering damages that have directly and

proximately resulted from tortious conduct of others, if contributory fault of plaintiff was not greater than combined tortious conduct of all other persons from whom plaintiff seeks recovery and of all other persons from whom the plaintiff does not seek recovery. O.R.C. §2315.33 Compensatory damages recoverable by plaintiff shall be diminished by amount that is proportionately equal to percentage of tortious conduct attributed to the plaintiff. O.R.C. §2315.33.

**Damages.** Injured party may recover for personal injury and property damage. Non-economic damages are limited to the greater of \$250,000 or three times the economic loss, to a maximum of \$350,000 per person and \$500,000 per occurrence. O.R.C. §2315.18(B)(2). Limits do not apply to damages arising out of catastrophic injuries including loss of limbs or organ systems, permanent deformity, or injuries rendering the claimant incapable of independent self-care. O.R.C. §2315.18(B)(3). However, non-economic damages for catastrophic injury/loss arising out of medical, dental, optometric, and chiropractic malpractice shall not exceed \$500,000 for each plaintiff or \$1 million per occurrence. O.R.C. §2323.43. Punitive damages may not be in an amount more than double the amount of an individual defendant's compensatory obligation. O.R.C. §2315.21(D)(2)(a). For small employers, punitive damages awards are limited to the lesser of double compensatory damages or ten percent of the defendant's net worth at the time of the occurrence, up to a maximum of \$350,000. O.R.C. §2315.21(D)(2)(b). Punitive damages may not be available against a defendant who has already paid a punitive damage award in another case for the same course of conduct. O.R.C. §2315.21(D)(5)(a). An award of punitive damages requires proof of malice, aggravated or egregious fraud, or that principal knowingly authorized, participated in, or ratified such conduct, and actual damages. O.R.C. §2315.21(C)(1), (2). Plaintiff must prove entitlement to punitive damages by clear and convincing evidence. O.R.C. §2315.21(D)(4).

**Definition/Duty.** Negligence is the lack of ordinary care, or failure to exercise ordinary care; it is the failure to do what a reasonable and prudent person would ordinarily have done under same circumstances, or doing what such a person would not have done. *Payne v. Vance*, 103 Ohio St. 59, 133 N.E. 85 (1921).

**Governmental Immunity.** Waived by State of Ohio. O.R.C. §2743.02. Political subdivisions and employees are generally immune from liability for governmental function, O.R.C. §2744.02, and entitled to any defense or immunity available at common law, O.R.C. §2744.03; no limitation on compensatory damages except damages not representing actual loss limited to \$250,000; no punitive damages against political subdivisions. O.R.C.

§2744.05(A), (C). An award of compensatory damages against political subdivision reduced by any collateral source. O.R.C. §2744.05(B)(1).

**Imputed Negligence.** Negligence of operator is not imputed to guest or passenger, *Hocking Valley Railway v. Wykle*, 122 Ohio St. 391, 171 N.E. 860 (1930), unless parties are engaged in joint enterprise. *Bloom v. Leech*, 120 Ohio St. 239, 166 N.E. 137 (1929). Negligence of driver of motor vehicle involved in accident may be imputed to vehicle's owner/passenger to bar action by owner against third party, or diminish recovery, but is not imputable to owner in owner's action against driver. *Parrish v. Walsh*, 69 Ohio St. 2d 11, 429 N.E.2d 1176 (1982).

**Joint and Several Liability.** For economic loss, liability for damages is proportional to percentage of fault attributable to each defendant. O.R.C. §2307.22(2). However, joint and several liability will be imposed where an individual defendant's fault is greater than 50% or an individual is found liable for intentional tort. O.R.C. §§2307.22(A)(1), 2307.22(A)(3). For non-economic loss, liability is proportional to percentage of fault in all cases. O.R.C. §2307.22(C).

**Last Clear Chance.** Doctrine of last clear chance has been abolished and merged into scheme of comparative negligence. *Mitchell v. Ross*, 14 Ohio App. 3d 75, 470 N.E.2d 245 (1984).

**Liquor Liability/Dram Shop Act.** Under O.R.C. §4399.18, liquor permit holder may be held liable for actions of intoxicated patrons under certain circumstances. The statute sets different criteria for liability depending on whether injury occurs on or off premises. For injuries occurring on permit holder's premises, statute imposes liability where personal injury, death, or property damage resulting from actions of intoxicated person is proximately caused by negligence of permit holder or employee of permit holder who sold beer or intoxicating liquor to intoxicated person. For personal injury, death, or property damage caused by negligent action of intoxicated person occurring off premises or away from a parking lot under permit holder's control, liability will be imposed only where it is shown by a preponderance of the evidence that permit holder or employee of permit holder knowingly sold intoxicating beverage to a noticeably intoxicated person and that the person's intoxication proximately caused personal injury, death, or property damage.

**Negligence Per Se.** Where a statute sets forth a positive and definite standard of care whereby a factfinder may determine whether there has been a violation thereof by finding a single issue of fact, a violation of the statute constitutes negligence per se. *Sikora v. Wenzel*,

88 Ohio St. 3d 493, 727 N.E.2d 1277 (2000). However, negligence per se is not equivalent to liability per se because the plaintiff will also have to prove proximate cause and damages. Moreover, negligence per se may be excused, such as where the defendant neither knew nor should have known of the statutory violation.

**Proximate Causation.** That cause which in natural and continued sequence produced result, and without which it would not have happened. *Hocking Valley R. Co. v. Helber*, 91 Ohio St. 231, 110 N.E. 481 (1915). Sufficient if injury could have been reasonably anticipated as probable result of negligent act. *Gedeon v. East Ohio Gas Co.*, 128 Ohio St. 335, 190 N.E. 924 (1934). Person is not liable for proximately causing an injury if, under all of the circumstances, he did not foresee and, acting as a reasonably prudent person, could not have foreseen the consequences of his alleged negligent acts. *Jeffers v. Olexo*, 43 Ohio St. 3d 140, 539 N.E.2d 614 (1989). But foreseeability is not to be equated with proximate cause. *Mussivand v. David*, 45 Ohio St. 3d 314, 544 N.E.2d 265 (1989). Break in chain of causation takes place when conscious and responsible agency which could or should have eliminated hazard created by another intervenes between such hazard and resulting injury, thereby absolving one creating hazard from liability. *Hurt v. Charles J. Rogers Transp. Co.*, 164 Ohio St. 323, 130 N.E.2d 824 (1955); *Cascone v. Herb Kay Co.*, 6 Ohio St. 3d 155, 451 N.E.2d 815 (1983). Where reasonable minds can differ on issue of proximate cause, such issue is properly question of fact for trier thereof. *Jones v. Wehri*, 118 Ohio App. 111, 193 N.E.2d 401 (1963).

**Res Ipsa Loquitur.** Doctrine is rule of evidence permitting jury to draw inference of negligence where instrumentality causing injury is under exclusive management and control of defendant, and accident would not have occurred if ordinary care were observed. *Schafer v. Wells*, 171 Ohio St. 506, 172 N.E.2d 708 (1961).

**Sudden Emergency.** An emergency does not alter requirement of ordinary care; rather, person confronted with sudden emergency must use only that degree of care which ordinary prudent person would exercise under same or similar circumstances. *Pennsylvania R. Co. v. Lindahl*, 111 Ohio St. 502, 146 N.E. 71 (1924). An "emergency" is transitory and demands prompt action due to the imminent sudden peril and the lack of time and opportunity for deliberation. *Badurina v. Bolen*, 114 Ohio App. 478, 183 N.E.2d 241 (1961).

### NO-FAULT INSURANCE

Ohio General Assembly has not enacted any legislation relating to No-Fault insurance coverage.

### PENALTY AND ATTORNEY FEES

Where insurer has agreed to defend any claim asserting injury within coverage, even if claims are groundless, false or fraudulent, duty of insurer to defend determined by complaint regardless of ultimate liability of insured. *Preferred Risk v. Gill*, 30 Ohio St. 3d 108, 507 N.E.2d 1118 (1987). *Willoughby Hills v. Cincinnati Ins. Co.*, 9 Ohio St. 3d 177, 459 N.E.2d 555 (1984); *Motorists Mut. v. Trainor*, 33 Ohio St. 2d 41, 294 N.E.2d 874 (1973). When pleading brings action within coverage of policy, insurer liable for reasonable attorney fees and proper expenses for failure to defend. *Motorists Mut. v. Trainor*, 33 Ohio St. 2d 41, 294 N.E.2d 874 (1973); *Socony-Vacuum Oil Co. v. Continental Cas.*, 144 Ohio St. 382, 59 N.E.2d 199 (1945); also see *Allen v. Standard Oil*, 2 Ohio St. 3d 122, 443 N.E.2d 497 (1982). Insurer is liable for attorney fees and expenses for wrongful refusal to defend under terms of contract of insurance, irrespective of good faith or bad faith in reaching its decision. *Allen v. Standard Oil*, 2 Ohio St. 3d 122, 443 N.E.2d 497 (1982). Punitive damages may be recovered against insurer who breaches its duty of good faith in handling or in refusing to pay claim of its insured upon proof of actual malice, fraud or insult on part of insurer. *Hoskins v. Aetna Life Ins. Co.*, 6 Ohio St. 3d 272, 452 N.E.2d 1315 (1983). Under O.R.C. §2315.21(D)(1) a trier of fact determines the amount of as well as liability for punitive damages. Punitive damages may be recovered against issuer of financial responsibility bond for breach of its duty of good faith upon proof of actual notice, fraud, or oppression. *Suver v. Personal Service Ins. Co.*, 11 Ohio St. 3d 6, 462 N.E.2d 415 (1984). Insurer under duty to defend if allegations of complaint could bring action within coverage of policy, even though other causes of action are not within coverage. *Grand River Lime Co. v. Ohio Cas. Ins. Co.*, 32 Ohio App. 2d 178, 289 N.E.2d 360 (1972). Insurer liable for defense under policy insuring automobiles of defendant even though petition of insured did not contain averment that automobile involved in accident covered by policy. *Bloom v. Union Indem.*, 121 Ohio St. 220, 167 N.E. 884 (1929). Insurer owes duty to defend sexual harassment claims. *Ohio Gov't Risk Mgmt. Plan v. Harrison*, 115 Ohio St. 3d 241, 874 N.E.2d 1155 (2007). In judgment creditor's action, insurer cannot assert exemption from liability under policy where insurer breached contract to defend. *American Liability Co. v. Remke*, 34 Ohio App. 496, 171 N.E. 372 (1929). Statutory immunity of suit by fellow employees does not extend to insurance company of employee otherwise liable for defense under policy. *Allstate Ins. Co. v. Coriell*, 30 Ohio Misc. 67, 284 N.E.2d 202 (1971). Insured's payment of attorneys employed by insurer who refused to pay is not voluntary and insured may recover



attorney's fees from insurer. *Todd v. Fidelity*, 48 Ohio App. 459, 194 N.E. 431 (1934).

### PRIVILEGED COMMUNICATIONS

**Attorney/Client.** Communication made to attorney by client in that relation or attorney's advice to client is generally privileged, although attorney may testify by express consent of client or client's surviving spouse or personal representative. O.R.C. §2317.02(A). Attorney may be compelled to testify about communications to client who is insurance company. O.R.C. §2317.02(A)(2).

**Insurer/Insured.** No express statutory privilege.

**Clergy/Penitent.** Communication concerning a confession made, or any information confidentially communicated for religious counseling purpose, to a "cleric," is generally privileged, O.R.C. §2317.02(C)(1), although a "cleric" may testify by express consent of person making the communication, except when disclosure violates a sacred trust; person voluntarily testifies; or privilege is waived if person is under age eighteen or if person is mentally or physically disabled and under age twenty-one; "cleric" has reasonable cause to believe, based upon the usually privileged communication, that person has suffered or will suffer a physical or mental wound indicating abuse or neglect, and abuse or neglect does not arise from abortion. O.R.C. §2151.421(A)(4)(c).

**Doctor/Patient.** Communication made to a physician or dentist by patient in that relation and advice to patient is generally privileged, O.R.C. §2317.02(B), but waived in certain child abuse cases. O.R.C. §2151.421. The privilege does not apply where a patient files a civil action or workers' compensation claim; the patient, guardian or other legal representative of the patient gives express consent; or, where patient is deceased, surviving spouse or personal representative provides consent, or in any criminal action concerning any test or the results of any tests that determine the presence or concentration of alcohol, drug of abuse, or alcohol and drug of abuse in the patient's blood, breath, urine or other bodily substance at any time relevant to the criminal offense in question; or in any criminal action against a physician or dentist where patient's records or communications are related to the action. O.R.C. §2317.02(B).

**Counselor/Client.** Communication made in confidence to a school guidance counselor, professional counselor, counselor's assistant, social worker, social work assistant or independent social worker by client in that relation and advice to client is generally privileged. O.R.C. §2317.02(G). Privilege is waived where the communication or advice indicates clear and present danger to the client or other persons, upon client's express consent, where client is deceased and surviving

spouse or personal representative provides consent, client voluntarily testifies or a court so orders, relevant to testimony in treatment or services to address child abuse, dependency, neglect or custody. O.R.C. §§2151.421(A)(1)(b), 2317.02(G).

**Communications Assistant.** Communications assistant not permitted to testify concerning a communication made through a telecommunications relay service where communications assistant was acting within the scope of authority. O.R.C. §2317.02(I).

**Spousal.** Spousal communications made outside presence or hearing of third persons are privileged; privilege survives cessation of marital relationship. O.R.C. §2317.02(D). Testimony of husband and wife as to their activities which were open to general observation are not privileged. *Diehl v. Wilmot Castle*, 26 Ohio St. 2d 249, 271 N.E.2d 261 (1971).

**Waiver.** See particular privileged communication. Privilege is generally waived by express consent or by voluntarily testifying. Advance waiver in insurance policy of physician-patient privilege is strictly construed against insurer. *Nationwide v. Jackson*, 10 Ohio App. 2d 137, 226 N.E.2d 760 (1967).

### PRODUCTS LIABILITY

**Strict Liability.** Product liability claims are governed by O.R.C. §§2307.71 through 2307.80. A product liability claim is a claim to recover compensatory damages from a manufacturer or supplier for death, physical injury to person, emotional distress, or physical damage to property other than the product in question, arising from 1) design, formulation, production, construction, creation, assembly, rebuilding, testing, or marketing of that product; 2) any warning or instruction, or lack of warning or instruction, associated with that product; or 3) any failure of that product to conform to any relevant representation or warranty. O.R.C. §2307.71(A)(13). Although an individual or company is a manufacturer it is not strictly liable when: 1) allegedly defective product was manufactured by corporate predecessor whose liabilities the successor did not assume, *Burr v. South Bend Lathe, Inc.*, 18 Ohio App. 3d 19, 480 N.E.2d 105 (1984); 2) plaintiff is unable to identify manufacturer of specific product that caused the injury, unless alternative liability applies. *Minnich v. Ashland Oil Co.*, 15 Ohio St. 3d 396, 473 N.E.2d 1199 (1984). Manufacturer is liable if preponderance of evidence establishes: 1) defect in design or formulation, defect due to inadequate warning or instruction, defect because of non-conformity with a specific representation, or defect in manufacture or construction, and 2) defective aspect of product was proximate cause of the harm for which the claimant



seeks to recover compensatory damages. O.R.C. §2307.73(A).

**Warranty.** The codification of Ohio's product liability law eliminated a cause of action sounding in implied warranty for compensatory damages for personal injury due to an allegedly defective product. *Nadel v. Burger King*, 119 Ohio App. 3d 578, 695 N.E.2d 1185 (1997). A contract action for breach of express warranty or representation is the exclusive remedy where there is privity of contract between commercial parties and the buyer seeks only economic damages. A tort action for strict liability may not be maintained in these circumstances. *Chemtrol Adhesives v. American Mfrs. Mut. Ins.*, 42 Ohio St. 3d 40, 537 N.E.2d 624 (1989). Available damages for breach of warranty include diminution in value of the product and incidental and consequential damages, including personal injury. O.R.C. §§1302.88, 1302.89.

**Duty to Warn.** A product is defective due to inadequate warning or instruction if: 1) at time it leaves manufacturer's control, manufacturer knew or, in the exercise of reasonable care, should have known of a risk associated with the product that allegedly caused the harm for which claimant seeks to recover compensatory damages; and 2) manufacturer failed to provide the warning or instruction that a manufacturer exercising reasonable care would have provided concerning the risk, in light of the likelihood and seriousness of the potential harm. O.R.C. §2307.76(A)(1). Claimant must also show that manufacturer knew or should have known, in the exercise of ordinary care, of the risk or hazard about which it failed to warn. *Crislip v. TCH Liquidating*, 52 Ohio St. 3d 251, 556 N.E.2d 1177 (1990). A product is not defective due to lack of warning or instruction or inadequate warning or instruction if a risk that is open and obvious or a matter of common knowledge exists. O.R.C. §2307.76(B). An ethical drug is not defective due to inadequate warning or instruction if the manufacturer provides otherwise adequate warning and instruction to the physician or other legally authorized person who prescribes or dispenses that ethical drug for a claimant in question and if the FDA has not provided that warning or instruction relative to that ethical drug is to be given directly to the ultimate user of it. O.R.C. §2307.76(C).

**Damages—Compensatory.** Claimant may recover compensatory damages for death, physical injury to a person, emotional distress, or physical damage to property other than the product in question. O.R.C. §2307.72.

**Indemnification.** A seller found liable for damages resulting from the sale of a defective product is entitled to indemnity from manufacturer of the product, in the absence of a finding that the seller's negligence is active

instead of passive, as would render the seller a joint tortfeasor. Seller need not seek indemnification until it has suffered an actual loss by payment of damages. *Ross v. Spiegel*, 53 Ohio App. 2d 297, 373 N.E.2d 1288 (1977).

**Punitive Damages.** Claimant must establish by clear and convincing evidence that the manufacturer or supplier showed a flagrant disregard for the safety of those who might be harmed by the product in order to recover punitive damages. O.R.C. §2307.80(A). The trier of fact determines liability for punitive damages, and the amount is determined by the court. O.R.C. §2307.80(B). The manufacturer of an over-the-counter drug is immune from liability for punitive and exemplary damages in a product liability action if there would be no such liability if the drug was manufactured and labeled in relevant and material respects in accordance with the terms of an approval or license issued by the Federal Food and Drug Administration under the "Federal Food, Drug, and Cosmetic Act" or the "Public Health Service Act." O.R.C. §2307.80(C). This immunity will be forfeited if the manufacturer fraudulently and in violation of applicable FDA regulations withheld from the FDA information known to be material and relevant to the harm that the claimant allegedly suffered. O.R.C. §2307.80(C).

**Defenses. State of the Art.** Not a defense to an action in strict liability. Evidence that defendant was complying with the state of the art would be one factor for jury to consider in determining whether a safer design was feasible at time of manufacture. *Sabel v. Newbury Industries*, 1985 WL 4935 (1985).

**Assumption of Risk.** Assumption of risk may be asserted as an affirmative defense (and may constitute a complete bar) to any product liability action. *Carrel v. Allied Products Corp.*, 78 Ohio St. 3d 284, 677 N.E.2d 795 (1997). One person cannot assume the risk on behalf of another person. *Mulloy v. Longaberger, Inc.*, 47 Ohio App. 3d 77, 547 N.E.2d 411 (1989).

**Alteration.** A manufacturer or seller is not liable for injuries caused by defective product, if defect was created by alteration which amounts to intervening or superseding cause. *Davis v. Cincinnati, Inc.*, 81 Ohio App. 3d 116, 610 N.E.2d 496 (1991).

**Privity of Contract.** Action for strict liability seeking economic damages may be maintained even if parties lack privity of contract. *Chemtrol Adhesives v. American Mfrs. Mut. Ins.*, 42 Ohio St. 3d 40, 537 N.E.2d 225 (1989).

**Accrual of Product Liability Cause of Action.** An action for bodily injury or injuring personal property based on a product liability claim is subject to a two-year statute of limitations O.R.C. §2305.10. The cause of ac-

tion generally accrues when the injury or loss to person or property occurs. O.R.C. §2305.10.

**Defects in Design or Formulation.** Product is defective in design or formulation if at time it left the control of its manufacturer, the foreseeable risks associated with the design or formulation exceeded the benefits associated with that design or formulation. O.R.C. §2307.75(A). Ethical drug or ethical medical device is not defective in design or formulation because some aspect of it is unavoidably unsafe, if manufacturer of ethical drug or ethical medical device provides adequate warning and instruction under §2307.76 of the Revised Code concerning that unavoidably unsafe aspect. O.R.C. §2307.75(D). Product is not defective in design or formulation if the harm for which claimant seeks to recover compensatory damages was caused by an inherent characteristic of product which is a generic aspect of product that cannot be eliminated without substantially compromising product's usefulness or desirability and which is recognized by the ordinary person with the ordinary knowledge common to the community. O.R.C. §2307.75(E). Product is not defective in design or formulation if, at time product left control of manufacturer, a practical and technically feasible alternative design or formulation was not available that would have prevented the harm for which claimant seeks to recover compensatory damages without substantially impairing the usefulness or intended purpose of product. O.R.C. §2307.75(F).

**Burden of Proof and Evidence.** A claimant must establish, by preponderance of the evidence, both of the following to generally recover compensatory damages based on a product liability claim from a manufacturer: 1) product was defective in manufacture or construction, in design or formulation, due to inadequate warning or instruction, or because it did not conform to a representation made by the manufacturer; and 2) a defective aspect of the product was a proximate cause of harm for which the claimant seeks recovery. O.R.C. §2307.73(A).

## RELEASE

See Law Digest Tables.

**Contract Law - General. Consideration.** Release invalid unless supported by consideration. *Toledo & O.C. Ry. v. Coleman*, 22 Ohio C.D. 746, *aff'd*, 81 Ohio St. 522, 91 N.E. 1127 (1909). Release, executed between parties, consideration of which, in whole or in part, is suppression of criminal prosecution, is void for lack of consideration. *Brown v. Best Products, Inc.*, 18 Ohio St. 3d 32, 479 N.E.2d 852 (1985).

**Accord and Satisfaction.** Acceptance of lesser amount where claim is liquidated and undisputed is not accord and satisfaction. *Yin v. Amino Products Co.*, 141

Ohio St. 21, 46 N.E.2d 610 (1943); *Norris v. Royal Indem.*, 20 Ohio App. 3d 206, 485 N.E.2d 754 (1984).

**Covenant Not to Sue.** Treated by same principles as release.

**Fraud and Misrepresentation.** Release obtained by fraudulent representations where releasor intended to release his claim (fraudulent inducement) is voidable only. *Manhattan Life v. Burke*, 69 Ohio St. 294, 70 N.E. 74 (1903). Release is void if signed because of false representations that instrument was other than release (fraud in the factum). *Perry v. M. O'Neil & Co.*, 78 Ohio St. 200, 85 N. E. 41 (1908). Person who can read is bound by release he signs without reading, even if misled into signing unintended paper, at least in absence of evidence that he was induced not to read document. *Dice v. Akron, Canton & Youngstown R. Co.*, 155 Ohio St. 185, *reversed on other grounds*, 342 U.S. 359 (1952). Release obtained by fraud in factum is void, and return or tender of consideration is not necessary to maintain suit on original cause of action. Release obtained by fraud in inducement is voidable, and return or tender of consideration received is necessary to maintain suit on original cause of action. *Picklesimer v. Baltimore & O. R. Co.*, 151 Ohio St. 1, 84 N.E.2d 214 (1949). Release may be set aside where adjuster obtained settlement claiming misrepresentation by insured in application on basis of fraudulent doctor's certificate. *Loyal Protective Ins. Co. v. Thompson*, 21 Ohio Law Abs. 404 (Ohio App. 1936). Release was voidable where doctors and adjusters secured release, knowing seriousness of insured's injury when he was unaware of it. *Provident Life & Acc. v. Bertman*, 151 F.2d 1001 (6th Cir. 1945).

**Wards/Capacity.** Court approval required for release. If amount in excess of \$10,000, guardian must be appointed. O.R.C. §2111.18.

**Joint Tortfeasors.** When release is given in good faith to one of two or more persons liable in tort for same injury or same wrongful death, it does not discharge any of other tortfeasors "unless its terms otherwise provide" but it reduces claim against others by greater of amount stipulated by release or amount of consideration paid for it, except reduction shall not apply when it results in plaintiff recovering less than total amount of compensatory damages awarded by trier of fact. O.R.C. §2307.28(A). Release discharges person to whom given from all liability for contribution to any other tortfeasor. O.R.C. §2307.28(B). Non-settling tortfeasor is entitled to set-off from judgment funds received by complainant pursuant to settlement agreement with tortfeasor only where there is determination that settling tortfeasor is person liable in tort. Determination may be jury finding, judicial adjudication, stipulations of parties, or release language itself. *Fidelholtz v. Peller*, 81 Ohio



St. 3d 197, 690 N.E.2d 502 (1998). Statutory phrase “unless its terms otherwise provide” requires release to expressly designate by name or to otherwise specifically describe or identify any tortfeasor to be discharged. For example, release could meet statutory requirement by naming individual or specifically identifying tortfeasor such as stating “the driver of car which struck motorcycle.” Phrase “all other persons” is not sufficient to satisfy statutory requirement. *Beck v. Cianchetti*, 1 Ohio St. 3d 231, 439 N.E.2d 417 (1982). But language referring to release of “agents” and “employees” of tortfeasor was sufficient to release attorneys of tortfeasor. *Pakulski v. Garber*, 6 Ohio St. 3d 252, 452 N.E.2d 1300 (1983).

Mistake. Release may be avoided by clear and convincing evidence of mutual mistake of material fact. *Swenson v. Ewy*, 54 Ohio St. 2d 470, 377 N.E.2d 519 (1978). Thus general release of all claims arising from automobile accident may not reach personal injury claims where only property damage was contemplated by parties to release. *Sloan v. Standard Oil*, 177 Ohio St. 149, 203 N.E.2d 237 (1964). Determination of mutual mistake for release of personal injury claim includes consideration of absence of bargaining and negotiating, whether releasee is clearly liable, absence of discussion of personal injury, whether injuries were unknown, adequacy of consideration, haste in securing release and whether release excluded injuries. *Lutzick v. Bentzen*, 115 Ohio App. 3d 239, 685 N.E.2d 258 (1996).

## REPRESENTATIONS AND WARRANTIES

Statutory Provisions. Express and implied warranties in connection with transactions in goods are governed by O.R.C. §1302.01, *et seq.*

Misrepresentation. Remedies for material misrepresentation and fraud include all remedies available under O.R.C. §1302.01, *et seq.*, for non-fraudulent breach.

Remedies. O.R.C. §§1302.76-1302.84 specifies in detail various remedies available to seller; buyer’s remedies are detailed in O.R.C. §§1302.85-1302.91.

## SERVICE OF PROCESS

See Law Digest Tables.

Personal Service. Upon Individual. Written request to clerk required for personal service upon competent person 16 years or older. Person serving locates person to be served and tenders copy of process within 28 days. Ohio R. Civ. P. 4.1 (B). Server must return process to clerk. Service is attempted within 28 days after clerk issues process. Ohio R. Civ. P. 4.2 (A).

Upon Minor. Service upon person under 16 by serving either person’s guardian or any one of the following with whom the person lives: father, mother, or

individual having care of the person or by serving the person if no guardian or does not live with parent or anyone having his care. Ohio R. Civ. P. 4.2 (B).

Upon Incompetent Person. Service on guardian or incompetent person himself if no guardian. Ohio R. Civ. P. 4.2 (C). When no guardian but incompetent confined, service is on official or institution responsible for incompetent’s custody. Ohio R. Civ. P. 4.2 (C) and (E).

Upon Non-Resident Motorist. See “AUTOMOBILES”; “SERVICE OF PROCESS.”

Upon Corporations, either Domestic or Foreign. By serving the agent authorized by appointment or by law to receive service of process; by certified or express mail at any of corporation’s usual places of business; or by serving officer or a managing or general agent of corporation. Ohio R. Civ. P. 4.2 (F).

Upon Partnership, Limited Partnership, Limited Partnership Association. Service is on partner, limited partner, manager or member, or by certified or express mail on entity at usual place of business. Ohio R. Civ. P. 4.2 (G).

Upon Unincorporated Association. Service is on officer or by certified or express mail upon entity at usual place of business. Ohio R. Civ. P. 4.2 (H).

Upon Professional Association. Service is on shareholder or by certified or express mail on association at corporate offices. Ohio R. Civ. P. 4.2 (I).

Outside the State—see “SERVICE OF PROCESS, Upon Non-Resident Motorist.”

Upon Superintendent of Insurance. By serving the officer responsible for the administration of the department, office or institution or by serving the Ohio Attorney General. Ohio R. Civ. P. 4.2 (J).

## SUBROGATION

In general. Insurer on payment of full amount of loss is subrogated to all rights of insured against wrong of third party. *Sun Oil Co. v. Ohio Farmers Ins.*, 15 Ohio C.C. 355, 359 (1898). Upon payment of portion of loss insurer is subrogated to extent of payment. *Hoosier Condensed Milk Co. v. Doner*, 96 Ohio App. 84, 121 N.E.2d 100 (1951). Insured is liable to insurer for money received from insurer when insured releases wrongdoer without reserving any rights to insurer, *Allstate Ins. Co. v. Dye*, 113 Ohio App. 90, 170 N.E.2d 862 (1960), but only to extent that insurer and wrongdoer payments create surplus over insurer’s total damages and expenses of recovery. *Newcomb v. Cincinnati Ins. Co.*, 22 Ohio St. 382 (1872). *Newcomb v. Cincinnati Ins.* case was limited to those instances where there was no written subrogation agreement between insurer and insured. *Ervin v.*

*Garner*, 25 Ohio St.2d 231, 267 N.E.2d 769, 773 (1971). A health insurer may recover from the insurer after the insured receives full compensation. *Blue Cross & Blue Shield Mut. of Ohio v. Hrenko*, 72 Ohio St. 3d 120 (1995). Written agreement terms are dispositive of priority or proration of recovery distribution; in absence of such terms, equity may require a pro rata sharing where insured and insurer have agreed to less than full recovery. *Peterson v. Ohio Farmers Ins.*, 175 Ohio St. 34, 191 N.E.2d 157 (1963); *Aetna Life v. Martinez*, 7 Ohio App. 3d 178, 454 N.E.2d 1338 (1982). Where insured executes to his insurer written assignment of all claims against tortfeasor, and returns assignment to insurer, together with letter attempting to limit amount of his claim assigned to insurer, letter alone does not operate to alter terms of written assignment. *Ervin v. Garner*, *supra*. Insurer's rights against wrongdoer are no greater than insured's. *Royal Indem. Co. v. Becker*, 122 Ohio St. 582, 173 N.E. 194 (1930); *American Ins. Group v. McCowin*, 7 Ohio App. 2d 62, 218 N.E.2d 746 (1966).

When insurer is subrogated to part of indivisible claim and is in privity with insured, final judgment adverse to insured is not *res judicata* as to insurer where defendant has failed to require joinder of insurer or to consolidate for trial prosecution of separate causes of action, filed by those in privity arising from one claim and pending in same court. *Nationwide Ins v. Steigerwalt*, 21 Ohio St. 2d 87, 255 N.E.2d 570 (1970); *but see, Nationwide Mut. Ins. Co. v. Collins*, 23 Ohio Misc. 2d 22, 491 N.E.2d 407 (1987). An insurer's subrogation interests will not be given priority where doing so will result in less than full recovery for the insured. *Porter v. Tabern*, 1999 WL 812357, Sept. 17, 1999 Champaign App. No. 98-CA-26.

Failure of defendant in motor vehicle negligence action to act at first opportunity to require joinder of insurer or to consolidate for trial prosecution of separate causes of action, filed by those in privity, arising from one claim and pending in same court, is waiver of any bar to prosecution of separate cause of action by assignee-insurer and waiver of right to assert doctrine of estoppel to prevent litigation of issues previously determined. *Nationwide Ins. Co. v. Steigerwalt*, 21 Ohio St. 2d 87, 255 N.E.2d 570 (1970); *but see, Nationwide Mut. Ins. v. Collins*, 23 Ohio Misc. 2d 22, 491 N.E. 407 (1985), holding that Ohio R. Civ. P. 19 (A)(3) compels subrogated auto insurer to bring suit against defendant with insured in same action.

Where insurer subrogee of employer has settled action of injured person against employer based on doctrine of respondeat superior which injury was caused by negligent act of employee, insurer-subrogee's action against employee arises *ex contractu* and can be filed

within 6-year limitation of O.R.C. §2305.07; *American Ins. Group v. McCowin*, 7 Ohio App. 2d 62, 218 N.E.2d 746 (1966). But, action by property insurer as subrogee is an action for recovery for injury to personal property, and not an action for violation of rights in personal property or for violation of rights arising out of an injury to personal property, and applicable statute of limitations is two years. *Underwriters at Lloyd's v. Peerless Storage Co.*, 561 F.2d 20 (6th Cir. 1977). Where insured filed action against wrongdoer within tort limitations period, subrogated insurer could enter suit after tort limitations period. *Holibaugh v. Cox*, 167 Ohio St. 340, 148 N.E.2d 677 (1958).

**Parties to Action.** Insured and subrogated insurer should be joined as parties in same action against wrongdoer. *Nationwide Mut. Ins. Co. v. Collins*, 23 Ohio Misc. 2d 22, 491 N.E.2d 407 (1985); *but see Hoosier Cas. Co. v. Davis*, 172 Ohio St. 5, 173 N.E.2d 349 (1961) (Insurer subrogated to portion of its insured's property damage claim may prosecute separate action against wrongdoer for subrogated portion of claim but wrongdoer may, upon motion, require joinder of insured in such action); followed by *Shaw v. Chell*, 176 Ohio St. 375, 199 N.E.2d 869 (1964); *Nationwide v. Steigerwalt*, 21 Ohio St. 2d 87, 255 N.E.2d 570 (1970). Insured was real party in interest in action against second insurer even though insurer making loan agreed to pay whole loss if suit against second insurer was unsuccessful. *Thompson v. Hardware Indem. Ins. Co.*, 72 Ohio App. 55, 50 N.E.2d 671 (1943). Insurance company which pays entire judgment pursuant to policy issued to insured tortfeasor and thereafter becomes subrogated to that claim is sole real party in interest in subsequent action brought against joint tortfeasor for contribution. *Shealy v. Campbell*, 20 Ohio St. 3d 23, 485 N.E.2d 701 (1985). Defendant sued by subrogated insurer, and later by insured, who failed to assert defense of failure to join a necessary party, waived objection in insurer's suit to nonjoinder of insured. *Foremost Ins. Co. v. Walters*, 45 Ohio Misc. 51, 345 N.E.2d 93 (1975).

Where policy limits liability of insurer to excess insurance if other insurance is available to insured and where money advanced by insurer to insured under loan agreement payment is a "loan" and not absolute obligation, insured remains real party in interest in subsequent action against other insurer. *Young v. Drive-It-Yourself, Inc.*, 115 Ohio App. 307, 184 N.E.2d 912 (1961).

**Liability Insurance.** Insurance company issuing automobile or motor vehicle liability insurance policy must defend insured against claim even if coverage is provided by another policy, unless insurer of other policy has assumed and is performing obligation to provide defense. O.R.C. §3937.21.

Collision Insurance. Where insured suffers both personal injury and property damage as result of some wrongful act, only single cause of action arises in favor of such insured and, therefore, when his insurer pays him for damage to his property pursuant to policy, insurer, even though subrogated, does not acquire cause of action against tortfeasor separate from its insured's cause of action against tortfeasor. *Shaw v. Chell*, 176 Ohio St. 375, 199 N.E.2d 869 (1964).

Fire Insurance. Where insurer paid part of loss suffered by insured, insurer can only recover from insured surplus, if any, over amount which satisfied insured's uncompensated loss and expense of suit, which insured recovered in his action against wrongdoer. *McConnell v. Conaway*, 62 Ohio App. 335, 23 N.E.2d 970 (1939) (same rule as applied in collision loss in *Newcomb v. Cincinnati Ins. Co.*, 22 Ohio St. 382 (1872)). But, if insured assigned all right of recovery against wrongdoer to extent of payment by insurer to insured, and insurer assisted in suit against wrongdoer, then insurer is entitled to be indemnified first out of proceeds of such recovery, if the contract so provides. *Peterson v. Ohio Farmers Ins.*, 175 Ohio St. 34, 191 N.E.2d 157 (1963); see also *Ervin v. Garner*, 25 Ohio St. 2d 231, 267 N.E.2d 769 (1971) (distinguishing *Newcomb* and *Peterson*, where insured sustains a loss partially covered by insurance, and assigns to insurer all right of recovery against third party wrongdoer to the extent of payment by insurer to insured, and no cooperation and assistance was given by insurer, equity does not require that insured be first indemnified out of the proceeds). Insured and insurer may each be entitled to prorated share of partial recovery unless contract provides otherwise. *Aetna Life Ins. Co. v. Martinez*, 7 Ohio App. 3d 178, 454 N.E.2d 1338 (1982). Where insurer proves that it paid the full amount to property owner for damage by fire, and then received a written "subrogation" from the owner, insurer may recover from one who negligently caused such loss, without establishing existence of policy or payment of premium. *Aetna v. Hensgen*, 22 Ohio St. 2d 83, 258 N.E.2d 237 (1970). Rule does not apply where loss was caused by negligence of insured himself. *Hardy v. Ferguson*, 104 Ohio App. 98, 140 N.E.2d 14 (1956). Statutory liability of railroad (O.R.C. §4963.37) for loss of property by fire inures both to owner of property destroyed and, by way of subrogation, to insurance companies making payment to owner for loss. *Toledo Terminal R. Co. v. Mauk*, 9 Ohio App. 438 (1918).

Insurers as subrogees stood in shoes of insured, owner of building, in action against supplier of propane gas to recover payments made by them to insured under fire policies for damages resulting to building from explosion and fire occurring when liquefied petroleum seeped from tanks supplied by defendant gas company to

tenant into building where it was ignited by lighted boiler. Alleged negligence of tenant's employee in opening valve and neglecting to close it was intervening cause breaking chain of causation between any possible negligence of supplier and fire in building of landlord insured. *Aetna Ins. Co. v. Loveland Gas & Electric Co.*, 369 F.2d 648 (6th Cir. 1966); see also *Aetna Life & Cas. Co. v. Columbia Gas of Ohio*, 33 Ohio App. 2d 283, 294 N.E.2d 897 (1973) (where realtor showing house lit a cigarette and house exploded from gas leak, and homeowner's insurer brought subrogation action against gas company, negligence of realtor could not be imputed to homeowner so as to bar insurer, standing in shoes of homeowner, from recovery from gas company).

Surety. Following rule that surety not subrogated until insured made whole, no cause of action arises in favor of insurer paying full amount of bond where insured released defaulting employee, if total amount received does not exceed amount of loss. *Maryland Cas. Co. v. Rees*, 71 Ohio App. 361, 50 N.E.2d 347 (1942).

Workers' Compensation. O.R.C. §4123.931 provides administrator employers, and self-insuring employer with subrogation rights against a third-party tortfeasor involving the compensable injury or disease, provided the employee is a party to an action involving the third-party tortfeasor. Once payment of workers' compensation benefits is ensured, the employer may, without any disparagement to the bargained-for rights of the employee, seek to impose the loss upon the ultimate wrongdoer. *Holeton v. Crouse Cartage*, 92 Ohio St. 3d 115 (2001).

## WAIVER AND ESTOPPEL

In General. Waiver is the intentional and voluntary relinquishment of known right or privilege. *State v. Bays*, 87 Ohio St. 3d 15, 716 N.E.2d 1126 (1999); *Chubb v. Ohio Bur. Worker's Comp.*, 81 Ohio St. 3d 275, 690 N.E.2d 1267 (1998). Waiver applicable to all personal rights, whether secured by contract, conferred by statute or guaranteed by the constitution, provided waiver does not violate public policy. Competent person may choose to forego even the strongest legal claim. *Chualvas v. Tompkins*, 83 Ohio St. 3d 171, 699 N.E.2d 58 (1998). Estoppel consists of preclusion of person to deny facts upon which he has induced another to act in reasonable reliance to his prejudice. *Sanborn v. Sanborn*, 106 Ohio St. 641, 140 N.E. 407 (1922). However, estoppel cannot be applied against governmental entity engaged in a governmental function, as opposed to a proprietary function. *Ohio Dept. of Natural Resources, Div. Reclamation v. Hemlock Pipeline, Inc.*, 77 Ohio App. 3d 668, 603 N.E.2d 288 (1991). Doctrines of waiver and estoppel generally cannot broaden coverage of policy to protect insured against expressly excluded risks. *Dewey*

*v. Niagara Fire Ins. Co.*, 16 Ohio Misc. 297, 242 N.E.2d 692 (1968). Insurance agent is not estopped from denying certain health insurance coverage under a policy when there is a dispute as to the actual scope of the coverage, if the insured had the ability to readily discover the actual coverage provided by the policy by simply examining the policy document. *Brown v. Woodmen Acc. & Life Co.*, 84 Ohio. App. 3d 52, 616 N.E.2d 278 (1992). However, insurer is estopped to deny full value of coverage stated on insurance certificate by invoking limitations or exclusions contained in policy, where insured bargained and paid for coverage, unless insured knew or should have known of his ineligibility. *Pedler v. Aetna Life Ins. Co.*, 23 Ohio St. 3d 7, 490 N.E.2d 605 (1986). When an insurer receives notice of an action against its insured and the insurer denies liability and does not participate, then the insurer can be estopped from contesting factual issues that are decided against the insured. *Patterson v. Tice*, 91 Ohio App. 3d 414 (1993). By receipt of premium with knowledge of facts to invalidate policy, insurer waives right to avoid policy. *English v. National Cas. Co.*, 138 Ohio St. 166, 34 N.E.2d 31 (1941); *West American Ins. Co. v. Skaggs*, 1988 WL 35801, Ohio App. 4 Dist., March 25, 1988.

**Waiver by Agent.** Unless applicant knows of agent's deception of insurer, insurer is estopped, by agent's imputed knowledge, from disclaiming liability under temporary coverage authorized by agent against insurer's rules. *Jones v. John Hancock Mut. Life Ins. Co.*, 20 Ohio Misc. 227, 289 F. Supp. 930 (1968). Representations of an insurer's agent did not waive an exclusion in a policy, because the representations did not constitute a policy endorsement, which according to the policy, was the only method by which its terms could be waived, changed or modified. *Brogan v. Utica First Ins. Co.*, 1996 WL 74722. Insurer waives policy limitation on time for filing suit when, prior to expiration of such time, insurer undertakes affirmative conduct consistent with recognition of liability to insured. *Hounshell v. American States Ins. Co.*, 67 Ohio St. 2d 427, 424 N.E.2d 311 (1981). However, gathering of information on claim where no settlement is discussed does not stop insurer from enforcing time limitation. *Broadview S&L v. Buckeye Union*, 70 Ohio St. 2d 47, 434 N.E.2d 1092 (1982). Agent's knowledge prior to issuance of policy of defective title in insured will estop insurer from asserting defects in title amounting to breach of warranty of title. *Foster v. Scottish Union & Nat'l Ins. Co.*, 101 Ohio St. 180, 127 N.E. 865 (1920); *Hartford Fire Ins. Co. v. Glass*, 117 Ohio St. 145, 158 N.E. 93 (1927) (same, as to conditions against encumbrances). Where question concerning other insurance not answered in application, condition requiring notice thereof is waived. *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345 (1873).

**Non-waiver Agreements.** Stipulation in policy that agent has no authority to waive or alter anything in policy is valid and enforceable. *Ohio Farmers Ins. Co. v. Titus*, 82 Ohio St. 161, 92 N.E. 82 (1910). But such provision does not operate retroactively to bind insured as against estoppel which had its origin in conduct antecedent to issuance of policy. *Saunders v. Allstate*, 168 Ohio St. 55, 151 N.E.2d 1 (1958).

Ordinarily insurance company may, as part of contract of insurance or independent contract, agree to defend insured in actions in which liability of insurer may be contingent and as a part of agreement reserve certain rights of defense against injured third person, but where insurer assumes defense of insured, reservation of certain rights of defense in contract made with insured after accident involved and without consideration, is not effective or available against judgment-creditor, but are waived by insurer's assumption of defense, especially where contract of defense with insured was entered into after accident and without consideration. *Clarke v. Enders*, 28 Ohio N.P. (N.S.) 596, *aff'd*, 43 Ohio App. 253, 183 N.E. 83 (1932).

Insurer, by defending its primary insured without benefit of reservation of right or non-waiver agreement, will be estopped from disclaiming liability on ground of noncompliance with conditions precedent on part of any individual who is deemed insured under terms of policy. *Socony-Vacuum Oil Co. v. Continental Cas. Co.*, 45 Ohio Law Abs. 458, 67 N.E.2d 836 (1944), *aff'd on other grounds*, 144 Ohio St. 382, 59 N.E.2d 199 (1945); *Borovich v. Fountain*, 30 Ohio Op. 2d 330, 199 N.E.2d 753 (1964).

**Premiums.** Acceptance of premiums from insured may estop insurance company from questioning validity of insurance contract. *Union Central v. Clinton Mut.*, 51 Ohio App. 20, 199 N.E. 223 (1935).

**Proof of Loss.** Waiver of proofs and notices subsequent to loss, may be shown by words or conduct of insurer or authorized agent, inconsistent with intention to enforce strict compliance with terms of policy. Acceptance of oral notice of collision and investigation of same waives written notice of suit. *Lind v. State Auto. Mut. Ins. Ass'n*, 128 Ohio St. 1, 190 N.E. 138 (1934). Retention of proofs without objection plus notification that claim will be considered on merits waives objection to sufficiency of proof. *Hartford Prot. Ins. Co. v. Harmer*, 2 Ohio St. 452 (1853). Denial of liability within period for filing proofs operates as waiver of provision. *Bartley v. National Businessmen's Ass'n*, 109 Ohio St. 585, 143 N.E. 386 (1924).

## WORKERS' COMPENSATION

See Law Digest Tables.

