Dear Insurance Professional:

I am an attorney who never took Latin. However, our law firm’s theme and my message to you this year is rooted in the Latin term “ad valorem” which simply means “value added.”

We understand the changing business climate and the economy in the insurance industry. Since our founding in 1989, our goal has been to partner with each of our clients and bring high quality legal insight and representation to insurance law matters. Throughout that process, we have always understood it is our duty as your legal counsel to bring value to the legal services we provide. Value may be defined in many ways, including a defense jury verdict at trial, a successful summary judgment motion, a thorough and complete insurance investigation, a clear and concise coverage analysis, the collection of subrogation funds, or recovering payments made due to medical fraud.

We believe at the start of this second decade of the new millennium our firm must not only continue to add value, but must partner with you in new and innovative ways to achieve our goal. In the year ahead, you will hear of many changes which our firm plans to be at the forefront of regarding alternative fee agreements, value added billing, and shared responsibilities to hold down litigation costs while delivering the same level and quality of legal representation we have provided for more than 20 years.

Right now, these are simply “words on a page.” We look forward to continuing to be the innovator in providing of insurance legal service and appreciate the confidence and trust you place in us with each new file assignment or consideration of adding our firm to your panel counsel programs. We renew to you our pledge to not only provide the high quality of service you have come to expect, but to do so in new and innovative ways to meet the challenges which lie ahead.

Sincerely yours,

Matthew J. Smith
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I. AUTOMOBILE LIABILITY COVERAGE FOR PERMISSIVE USER UNDER POLICY ISSUED TO VEHICLE OWNER: A COMPARISON OF THE LAW IN OHIO, KENTUCKY, INDIANA AND MICHIGAN

A. Introduction

Insurance coverage issues involving permissive users of vehicles arise in many types of situations. Suppose an employer allows an employee to drive the company vehicle to and from work, but prohibits the employee from using the company vehicle for personal use. The employee then has an accident for which he is liable while driving the company vehicle for personal use. As another example, consider the mother who allows her teenage son to drive her car, but says nothing to her son as to whether he may allow a friend of his to drive the car. The son then allows a friend to drive the car, and the friend is responsible for causing an accident and resulting injury. Are the drivers in these two situations covered under the respective automobile liability policies issued to the employer and the mother?

The answer is whether coverage is provided to permissive users under the policies issued to the vehicle owners in these two situations may vary from state to state. This article addresses the insurance coverage issues arising from various permissive user situations based upon the applicable laws of Ohio, Kentucky, Indiana and Michigan. The initial discussion concerns the typical grant of coverage to permissive users (under what is known as the omnibus clause), and explains general principles which have developed as to the scope of coverage afforded under the omnibus clause. The article then explores the similarities and differences in the applicable statutory and case law of these four states.

B. Omnibus Clause – General Principles

The person to whom the policyholder (named insured) gives permission to use the policyholder’s vehicle is referred to as the permittee. As used in this article, unless otherwise qualified, “permittee” will refer to the initial person to whom the policyholder grants permission to use the vehicle. Where the initial permittee allows another person to use the vehicle, this person is referred to as the second permittee.

1. Scope of Permission Granted to Initial Permittee

The liability coverage section of an automobile policy typically identifies persons qualifying as an “insured” in several ways. The policyholder is identified by name in the policy declarations. An omnibus clause is a way of designating insured persons by relationship. An omnibus clause in an auto liability policy commonly states a person driving the insured vehicle with the permission of the named insured is also an insured. E. Fischer & P. Swisher, Principles of Insurance Law § 5.02[C].

Omnibus clauses may differ from policy to policy. Sometimes the unmodified word “permission” is used. Another form of the omnibus clause grants coverage to the driver who has the permission, “express or implied,” of the policyholder. Questions often arise as to the scope of permission implied by the relevant circumstances, such as the driver’s previous usage of the vehicle, the location of the keys, and other facts bearing upon the implied scope of permission.
In general, three judicial interpretations have emerged as to whether a driver has express or implied permission to use the named insured’s vehicle under the *omnibus* clause. *Id.* § 5.02.

The first interpretation, referred to as the “strict construction” view, is the use of the vehicle by the permittee must be clearly within the scope of the named insured’s permission. Under this rule, if a father gives his son permission to use the father’s car to drive to and from work, consent of the father would not be implied for the son to take a pleasure trip. *Id.*

The “liberal” interpretation of the *omnibus* clause finds coverage for almost any use of the vehicle, as long as the named insured gave initial permission to the permittee to drive the vehicle. *Id.*

The third interpretation is known as the “minor deviation” rule. Under this rule, a minor deviation from the initial scope of permission would still be covered under the vehicle owner’s insurance policy. But a material deviation from the initial scope of permission would result in no coverage being afforded under the *omnibus* clause. *Id.*

Many states have adopted statutes addressing permissive users under motor vehicle *omnibus* statutes. *Id.* Ohio, Indiana, and Michigan have such statutes.

2. **Scope of Permission to Second Permittee**

Four theories have emerged to determine liability coverage where the initial permittee has granted permission to another person (the permittee’s permittee) to drive the policyholder’s vehicle. *Id.* § 5.04.

a. The “strict” view is that the named insured’s grant of original permission to the first permittee does not include the authority to delegate permission to another permittee. *Id.*

b. If the named insured expressly delegates upon a permittee the right to grant permission to any other person to drive the vehicle, some courts have held this express consent would extend coverage under the *omnibus* clause to the second permittee. *Id.*

c. Many courts apply a “middle ground” view of implied authority. Under this view, where the first permittee allows another person to drive the vehicle, a factual determination must be made as to whether the policyholder’s initial grant of permission was broad enough to include implied permission to the first permittee to allow another person to use the vehicle. *Id.*

d. Under the “liberal” view, the initial grant of permission from the policyholder to the first permittee allows the permittee to delegate permission to any other driver. *Id.*
C. **Distinguishing Coverage under the Omnibus Clause from an Entitlement Exclusion**

The *omnibus* clause has the effect of providing coverage to a person who has permission of the policyholder to drive the insured vehicle. Questions of coverage frequently focus upon the scope of permission, and the extent of permission granted from the policyholder based upon the relevant facts and circumstances. The *omnibus* clause should be distinguished from what is commonly referred to as an entitlement exclusion, which precludes coverage for a person who uses the insured vehicle “without a reasonable belief he is entitled to do so.” It is important to distinguish these provisions, because the *omnibus* clause focuses upon the intent of the policyholder in extending permission, whereas the focus of the entitlement exclusion is upon the driver’s “reasonable belief” as to whether he or she was entitled to use the insured vehicle. Because the entitlement clause is an exclusionary provision, the insurer has the burden of establishing a set of facts to support the applicability of the exclusion.

The focus of this article is on the *omnibus* clause. The cases cited herein address issues of scope of permission and coverage afforded under the *omnibus* clause.

D. **Ohio Law**

1. **Omnibus Clause Required by Statute in Policies Certified as Proof of Financial Responsibility**

The Financial Responsibility Act is contained in Chapter 4509 of the Ohio Revised Code. After an uninsured motorist causes an accident, the Act requires the person to provide proof of financial responsibility to the Bureau of Motor Vehicles or else the person’s license will remain suspended. When an auto policy is certified as proof of financial responsibility, the policy must contain an *omnibus* clause.

An “owner’s policy” is defined in the Act as a policy certified as proof of financial responsibility. R.C. § 4509.01(L). Such a policy must insure the policyholder and any other person using the policyholder’s vehicle “with the express or implied permission of the insured…” R.C. § 4509.51(B). Ohio thus imposes this type of *omnibus* clause upon every insurance policy certified as proof of financial responsibility.

A person is not an insured under an automobile insurance policy unless such person is defined as an insured by the terms of the policy, except where such policy has been “certified” under the provisions of Section 4509.46, Revised Code, and thereby the definition of who is an “insured” under the policy has been modified to conform to the provisions of the statute. (Section 4509.51, Revised Code.)

*Moyer v. Aron* (1964), 175 Ohio St. 490 Syl. 2.

Where a policy has not been certified as a proof of financial responsibility, an insurer need not even include an *omnibus* clause in its insurance policy. See *Bob-Boyd Lincoln Mercury v. Hyatt* (1987), 32 Ohio St. 3d 300. The *omnibus* provision mandated by R.C. § 4509.51(B)
comes into play only when the policy has been certified as proof of financial responsibility. *Knapp v. State Farm Mut. Auto* (1982), 6 Ohio App. 3d 53.

2. **Case Law**

   a. **Implied Permission**

      Where an *omnibus* clause does not require the express permission of the named insured, but merely requires the policyholder’s “permission,” permission may be implied by the past or present conduct of the policyholder. 58 O. Jur. 3d Insurance § 905 (case citations omitted).

      A distinction is drawn between situations where the vehicle may be used for social or non-business purposes, as opposed to an employer/employee situation where the company vehicle is to be used for business purposes. *Id.* § 905 (citations omitted). Permission is more readily assumed where the vehicle is used for social or non-business purposes. *Id.*

      As to the question of whether an employee has implied permission to use an employer’s vehicle, to infer implied permission for a non-business use requires some express words to this effect, or conduct by the employer leading the employee to believe such permission was intended. *Id.* § 905.

      The following factors are relevant in determining whether a vehicle owner has given implied consent to the driver of the vehicle in a particular situation:

      - Previous consent of the vehicle owner.
      - Previous use by the driver.
      - Place where the keys to the vehicle are kept.
      - Statements of the insured.
      - The relationship of the parties.

      *See Progressive Casualty Ins. Co. v. Kuhn,* (No. L-88-268, 6th Dist., unreported, 41889). *See also Erie Ins. Co. v. Paradise,* 2009-Ohio-4005 (5th Dist. App.). “Implied permission may be demonstrated by previous use or consent, place of keeping the keys in a car and the like, the relationship of the parties, a course of conduct and circumstantial evidence.” *Id.* at 14.

      Even if implied permission had existed in the past, this is not dispositive of whether permission was implied at the time of the accident. The critical fact to be determined is whether permission existed at the time of the accident. *Frankenmuth Mut. Ins. Co. v. Selz* (1983), 6 Ohio St. 3d 169, 172.
b. Scope of Permission to First Permittee

Ohio adopted the minor deviation rule in *Gulla v. Reynolds*, (1949), 157 Ohio St. 147. The permission granted in the *omnibus* clause of an insurance policy relates to the use to which the vehicle is being put by the permittee at the time of the accident. See *id*. Coverage is not afforded under the *omnibus* clause when the use of the vehicle constitutes a “complete departure from that for which permission was granted.” *Id.*

The *Gulla* decision was explained in the *Frankenmuth* case, *supra*. As to the minor deviation rule, the court stated “where the use of the property deviates only slightly from the purpose from which the permission was initially granted, the standard *omnibus* clause in a liability insurance policy will be interpreted to extend coverage. However, if the use represents a complete departure or gross deviation from the scope of permission, no coverage will be afforded.” *Frankenmuth*, 6 Ohio St. 3d at 171.

In applying the minor deviation rule, a court must determine whether a deviation is minor or substantial on a case-by-case basis. If the person bearing the burden of proof (usually the driver or injured party) demonstrates the deviation from the intended scope of permission was only minor, coverage will be afforded.

c. Issue of Permission as to Second Permittee

Assuming the policyholder has given permission to a friend to drive his vehicle, the question often arises as to whether the friend (the initial permittee) may give permission to someone else (the second permittee) to drive the vehicle. Under Ohio law, the key factors in addressing this question are the intentions of the vehicle owner (the policyholder) and the particular use to which the vehicle is put at the time of the accident.

Oftentimes when a person allows a friend to drive a vehicle, the vehicle owner says nothing about whether the permitted driver may allow anyone else to use the vehicle. In general, silence alone cannot be the basis for showing implied permission for the initial permittee to extend permission to another permittee. *Rice v. Jodrey*, (1984), 19 Ohio App. 3d 183. The situation may differ where the use of the vehicle at the time of the accident served some benefit or purpose to the first permittee, and where there is no express prohibition by the vehicle’s owner for the first permittee to allow anyone else to drive the car. Where a vehicle owner had given her mother unrestricted permission to drive the car, the mother became intoxicated and asked an acquaintance to drive her home in the car. The acquaintance then caused an accident. Under these circumstances, the court held the acquaintance was insured as a permittee under the *omnibus* clause, because the use of the car served some purpose to the first permittee (the mother). *Drake v. State Farm Ins. Co.*, No. 73502, 1998 WL 723176 (Ohio App. 8 Dist.).

In a recent appellate decision, the court determined the second permittee was not entitled to coverage under the *omnibus* clause of the policy issued to the owner of the vehicle she was driving. *Erie Ins. Co. v. Paradise*, 2009-Ohio-4005 (5th Dist. App.). Ms. Paradise was involved in an accident while using a truck owned by Terry Gates. Her passenger was killed in the accident. Terry’s son, Danny, was Ms. Paradise’s boyfriend. Terry had given permission to Danny to drive the truck with the understanding Danny would buy the truck. Terry specifically told Danny no one else could drive the truck. Danny had initially told Ms. Paradise she could drive the truck for emergency purposes only; however, when Danny began commuting to
Michigan for his work, he became aware Ms. Paradise would sometimes use the truck. Terry, the owner of the truck, later learned from other relatives Ms. Paradise was driving the truck, at which point he called his son, Danny, to remind him no one else was to drive the truck. Under these facts, the court determined Terry Gates, the vehicle owner, had not impliedly consented to Ms. Paradise’s operation of the truck. The court ruled Ms. Paradise was not an insured under the terms of the auto liability policy issued to Terry Gates.

E. Kentucky Law

1. Statutory Law

KRS 304.39-080(5) is the compulsory liability insurance statute. The statute does not require a vehicle owner to insure against the negligence of a person using his vehicle without his express or implied permission. McGrew v. Stone, 998 S.W. 2d 5, 10 (Ky. 1999) (dissenting opin.)

There is no Kentucky statute which mandates an omnibus clause in an automobile liability insurance policy.

2. Case Law

a. Adoption of Initial Permission Rule

Kentucky law pertaining to permissive users within the context of an omnibus clause changed substantially in 2008, when the Supreme Court of Kentucky adopted the initial permission rule. Mitchell v. Allstate Ins. Co., 244 S.W. 3d 59 (Ky. 2008). In explaining its decision to adopt the initial permission rule, the Court observed sometimes a driver has initial express or implied permission to operate a vehicle, but arguably exceeds the scope of permission granted. In these situations, it is necessary for courts to determine whether such a violation is egregious enough to deny coverage despite the omnibus clause. Id. at 62. Previously Kentucky had adopted the “minor deviation” rule. Id. at 63. The court explained the “initial permission” rule allows for coverage even if the use of the vehicle was not within the contemplation of the parties, or was outside any limitations placed upon the initial grant of coverage. Id. at 62. As long as the original use of the vehicle is within the permission of the named insured, any subsequent use of the vehicle by the borrower is covered under the policy. Id. The rationale of the court was based in part upon its interpretation of the requirements of Kentucky’s Motor Vehicle Reparations Act (i.e., the Kentucky No-Fault Act.)

In adopting the initial permission rule, the court explained, “As long as permission is initially given to a person to use a vehicle, insurance coverage may extend to subsequent vehicle users through the language of the omnibus clause as long as those subsequent users have permission from the initial borrower to use the vehicle. This coverage applies even if the subsequent usage of the vehicle is not contemplated by the parties at the time the initial permission was granted.” Id. at 65.

The Court did limit the application of the initial permission rule. The Court stated use of the vehicle amounting to conversion is not covered through the omnibus clause unless the clause specifically allows for such coverage. Id. at 65.
b. **Scope of Coverage for Second Permittee**

Aside from adopting the initial permission rule, the Supreme Court of Kentucky in *Mitchell, supra*, explained how insurance coverage through the *omnibus* clause may extend to subsequent users of the vehicle (as well as the initial permittee). The Court stated insurance coverage may extend to subsequent vehicle users through the *omnibus* clause as long as those subsequent users have permission from the initial borrower to use the vehicle. *Id.* at 65. This portion of the *Mitchell* decision expands upon the scope of coverage afforded the second permittee under the prior case law in Kentucky. Under the previous decisions in Kentucky, a second permittee was not entitled to coverage under the *omnibus* clause (aside from express permission by the vehicle owner) unless the operation of the insured vehicle by the second permittee benefited either the vehicle owner or the original permittee. See *Seabord Fire & Marine Ins. Co. v. DeMarsh*, 515 S.W. 2d 242, 243 (Ky. App. 1974).

Based upon the recent *Mitchell* decision, in most situations it should not be difficult for a second permittee to demonstrate entitlement to coverage under the standard *omnibus* clause.

**F. Indiana Law**

1. **Statutory Law**

   IC 27-1-13-7 sets forth required provisions of casualty, fire and marine insurance policies. With respect to auto liability insurance, no such policy may be issued to the owner of a motor vehicle, “unless there shall be contained within such policy a provision insuring such owner against liability for damages . . . resulting from negligence in the operation of such motor vehicle . . . by any person legally using or operating the same with the permission, express or implied, of such owner.”

   The statute thus requires auto liability insurers to provide coverage to the owner of a vehicle where a person is using the vehicle with the owner’s express or implied permission.

2. **Case Law**

   a. **Implied Permission**

   Where a vehicle owner (and policyholder) has allowed a person to use a vehicle on numerous occasions in the past, a court may infer the owner had granted implied permission to the person to use the vehicle at the time of the accident, even where the owner had not expressly granted permission to the permittee to do so. Permission may thus be implied from repeated prior use of a vehicle. *American Family Mut. Ins. Co. v. Hall*, 764 N.E. 2d 780, 785-86 (Ind. App. 2002).

   Permissive use cannot be implied where the vehicle owner places express restrictions on the use of the vehicle, and the driver exceeds the scope of the restrictions placed on permission granted to the driver at the time of the accident. *State Farm Mut. Auto Ins. Co. v. Gonterman*, 637 N.E. 2d 811 (Ind. App. 1994).
b. Initial Permission Rule

Indiana follows the initial permission rule (“liberal rule”) when interpreting the scope of insurance under an insurance policy omnibus clause. Gonterman, supra (citing Manor v. Statesmen Ins. Co., 612 N.E. 2d 1109, 1113 (Ind. App. 1983)). Under this rule, the permissive user’s deviation from the use originally intended by the owner does not operate to terminate the initial permission granted by the owner in order to deny coverage under the omnibus clause. Gonterman, 637 N.E. 2d at 814.

The Gonterman case is instructive, because the court explains how the initial permission rule may be reconciled with the idea of the vehicle owner placing specific restrictions upon the permitted driver as to the use of the vehicle. When the owner places restrictions on the use of the vehicle, violations of such use restrictions may terminate the initial permission. Id. at 814. In reconciling this idea with the initial permission rule, the court explained, “when the owner of a vehicle places express restrictions on its use by others, the focus is not on whether the operator deviated from the contemplated use; the determinative question is whether the operator’s use of the vehicle was restricted in the first instance. In a coverage dispute, permissive use cannot be implied when an express restriction on the scope of permission prohibits the use at issue.” Id. at 814.

c. Coverage Issues Concerning Second Permittee

When the insured places no restrictions upon the first permittee as to the use of the vehicle, the second permittee is insured under the omnibus clause if his use of the vehicle was within the scope of permission given by the owner to the first permittee. Safe Auto Ins. v. American Fam. Mut. Ins., 890 N.E. 2d 737, 744 (Ind. App. 2008) (citing Raines v. Auto-Owners Ins. Co., 703 N.E. 2d 689, 692 (Ind. App. 1998)).

In the Safe Auto case, the court drew a distinction where the first permittee is not covered under the terms of the policy issued to the owner of the vehicle. The named insured’s roommate allegedly gave permission to someone else to use the vehicle, who was involved in the accident. The roommate would not have been covered under the policy because he was a resident of the policyholder’s household and was not listed on the policy as an additional driver. The court concluded since the first permittee would not have been covered under the policy, this in effect breaks the chain of permission, and as a result, the second permittee cannot be covered under the omnibus clause. Id. at 744.
G. Michigan Law

1. Statutory Law

MCL 257.401 pertains to the liability of an owner of a motor vehicle, and is sometimes referred to as the owner’s liability statute. The statute provides the owner of a motor vehicle is liable for an injury caused by the negligent operation of the vehicle. However, the owner is not liable unless the motor vehicle is being driven with his or her “express or implied consent or knowledge.” Further, it is presumed the motor vehicle is being driven with the knowledge and consent of the owner where the vehicle is driven by an immediate member of the family. MCL 257.401(1).

Whereas the above-mentioned statute applies to the liability of a vehicle owner, MCL 257.520 applies specifically to insurance policies certified as proof of financial responsibility. When a policy is certified as proof of financial responsibility to a vehicle owner, the owner’s liability policy is required to cover not only the named insured, but also any other person using the vehicle “with the express or implied permission of such named insured . . .” up to the minimum statutory limits of coverage (20k/40k bodily injury and 10k for property damage). MCL 257.520(b)(2).

2. Case Law

MCL 257.401(1) creates a “rebuttable presumption” a vehicle is being driven with the knowledge and consent of the owner if the vehicle is driven by an immediate family member. Although evidence may be introduced to rebut the presumption, a court will initially presume a vehicle driven by an immediate family member of the owner of the vehicle had permission to use the vehicle at the time of the accident. Citizens Ins. Co. v. Secura Ins., 755 N.W. 2d 563, 566 (Mich. App. 2008).

a. Implied Permission; Effect of Initial Permission

“The presumption that a motor vehicle, taken with the permission of the owner, is thereafter being driven with his express or implied consent or knowledge is not overcome by evidence that the driver has violated the terms of the original permission, nor is it overcome by evidence of good faith efforts by the owner to get the vehicle returned voluntarily by the driver.” Roberts v. Posey, 194 N.W. 2d 310, 314 (Mich. 1972). Posey, a minister, was visited at his home by an acquaintance. He asked to borrow Posey’s car to pick up his paycheck. Posey allowed the man to use his car, but instructed him to return the car by a specific time, as Posey had to go out on church business. When the acquaintance did not return the vehicle by the stated time, Posey called the man’s wife, who did not know of her husband’s whereabouts. Posey eventually notified the police his vehicle was missing. The following day the acquaintance called Posey, and said he had been involved in an accident. Citing MCL 257.401, the court held the driver had implied permissive use under the statute. Since this is a Supreme Court of Michigan decision, the case suggests a Michigan court would require significant proof to overcome the statutory presumption of implied consent where the owner of a vehicle has granted initial permission for someone to use the vehicle. Although the court does not specifically refer to the initial permission rule, the effect of the decision is very similar to the outcome expected under the initial permission rule.
The *Roberts v. Posey* case was cited and applied in *Drielick v. Drielick*, 391 N.W. 2d 435 (Mich. App. 1986). In the cited case, the permitted user operated the vehicle in violation of the original permission of the owner. The court explained there was no evidence the owner sought to revoke the permission she had given to the permittee to drive the car. The court concluded the driver still had implied permission to use the vehicle at the time of the accident, based upon the holding of *Roberts v. Posey* and MCL 257.401.

b. **Scope of Permission for Second Permittee**

A vehicle owner allowed her son to drive her car, but had expressly forbidden her son to allow anyone else to drive the car. When the son’s operator license expired, he asked a friend to drive him to work, and allowed the friend to drive his mother’s car. This second permittee then caused an accident. The court held there was no implied consent for the second permittee to use the car under these circumstances. Even though the use of the vehicle was for the benefit of the first permittee (who was being driven to work by a friend), nevertheless the vehicle owner expressly prohibited her son from allowing anyone else to use her car, and on this basis the court would not extend the permission granted to the first permittee to the second permittee. *Detroit Auto Inter-Ins. Exchange v. Swift*, 160 N.W. 2d 738 (Mich. App. 1968).

H. **Conclusion**

This article is intended to provide an overview of the law concerning permissive use in Ohio, Kentucky, Indiana and Michigan. These cases are very fact-specific, and a jurisdiction is not always consistent in applying a given rule concerning the scope of permissive use. Nevertheless, it is hoped the article may provide a useful guide when the reader is faced with a particular claim in one of these four states involving the issue of permissive use.
II. POTENTIAL CHANGES TO OHIO LAW AFFECTING SUBROGATION RECOVERY

In 2008, the president of the Ohio State Bar Association created a “subrogation law sub-committee” as part of the OSBA’s Insurance Law Committee. This sub-committee is comprised of twelve personal injury attorneys, and one in-house, insurance-defense attorney. None of these individuals is a subrogation professional. Earlier this year, this sub-committee proposed two alternative pieces of legislation to the OSBA. The first proposal seeks to eliminate all subrogation rights in insurance contracts across all lines. The second proposal seeks to expand the “make-whole” doctrine to reduce subrogation recoveries for attorney fees under the “common fund” doctrine. If this second legislative proposal was to be adopted, subrogation will be denied unless the insured is “fully” compensated for his injuries and recoveries will be reduced by a proportionate share of the attorney fees incurred by the insured’s counsel. After considering both proposals, the subrogation sub-committee recommended the second proposal be adopted by the OSBA.

Both proposals were intended to be submitted by the subrogation sub-committee to the OSBA Council of Delegates, a group comprised of attorneys elected to represent the attorneys in the district where the delegate is located. The Council meets to consider proposed legislation and other matters affecting the OSBA. If the Council approves proposed legislation, the OSBA will use its resources to find a sponsor for the legislation and then assist in lobbying efforts to pass the legislation. However, before proposed legislation is considered by the Council, it is reviewed by other OSBA committees.

The proposed legislation was presented for review to the Insurance Law Committee and several other OSBA committees. The Insurance Law Committee voted unanimously not to recommend either alternative in the proposed legislation. However, the Negligence Law Committee voted to recommend adoption of the second legislative option. This second proposal was then considered by the Screening Committee (a committee comprised of members of the Council of Delegates to consider proposed legislation before it is presented to the Council as a whole). The Screening Committee voted to recommend the Council approve the second legislative proposal alternative.

At the meeting of the Council of Delegates on November 6, 2009, the Council voted 61-38 to reject the proposed legislation and send it to a new committee for further study. The new committee is to present its findings at the May 2010 meeting of the Council. This means that, for the time being, the OSBA will not expend resources to support or lobby for the proposed legislation. However, new legislation could be proposed at the Council’s meeting in May 2010. In addition, it is likely groups other than the OSBA are considering development of proposed subrogation legislation for consideration by the Ohio legislature.

We are keenly aware of the need to protect the insurer’s right of subrogation. As such, we continue to work with groups such as the National Association of Subrogation Professionals and the Ohio Association of Civil Trial Attorneys to closely monitor any proposed legislation. We intend to take all steps necessary to ensure any proposed legislation does not adversely affect the right of subrogation.
At this time, Indiana, Michigan, and Kentucky do not have in effect any legislation similar to that proposed in Ohio. None of the three states apply the “make whole” doctrine to subrogation recoveries. We are unaware of any pending legislation in these states. Recently, however, New York passed a bill similar to the one proposed by the OSBA subrogation subcommittee. Currently, some form of “anti-subrogation” legislative proposal is pending in five states.
III. FREQUENTLY CITED OHIO STATUTES

A. General Considerations in Insurance Claims Management

Ohio Administrative Code § 3901-1-54
Unfair Claims Practices

This provision is not a statute but is part of the state regulations governing insurers. It governs unfair settlement practices in the handling of property and casualty claims. Numerous minimum standards of conduct for claims representatives are set forth. It was substantially modified in November 2004.

Although the code expressly provides violations of the code may result in disciplinary action being taken by the Department of Insurance, violations do not lead to civil liability, even on first-party claims.

R.C. § 2111.18
Settlement of Minor’s Claims

All settlements of personal injury claims of minors must be approved by the probate court of the county where the minor resides.

If the net amount of the settlement proceeds to the minor exceeds $10,000.00, a guardianship must be established until the minor turns 18 or the balance of funds no longer exceeds $10,000.00.

R.C. § 3737.16
Release of, or Request for, Information Relating to Fire Loss by Insurance Company

Civil authorities investigating property fire losses (including the fire marshal, a fire department chief, local law enforcement, or the county prosecutor) may request an insurance company investigating a property fire loss to release any information in its possession concerning the loss.

R.C. § 4505.11
Salvage Titles

If it is economically impractical to repair a vehicle and the insurer has paid the owner an agreed sum for the purchase of the vehicle, the insurer shall obtain the title and within 30 days obtain a salvage title.

If the owner retains possession of the vehicle, the insurer cannot pay the owner to settle the claim until the owner first obtains a salvage title.

R.C. § 4509.53(D)
Motor Vehicle Insurance Policy Applications

The written application of insurance is part of a motor vehicle liability policy.
B. Clarification of Facts and Legal Duties

R.C. § 2317.48
Action for Discovery
When information and facts surrounding a case are difficult to obtain, a person claiming to have a cause of action, or a person against whom a cause of action has been filed, may bring an action for discovery. A discovery action allows such party to explore the strengths of the complaint or defense without subjecting the party to the potential penalties associated with frivolous lawsuits.

R.C. §§ 2721.01 et. seq.
Declaratory Judgment Actions
This chapter allows parties to file suit to have the court determine the validity of a contract and/or the rights of the parties under the contract. This is the most effective tool for resolving disputes on the availability or amount of insurance coverage available.

Effective September 24, 1999, a plaintiff who is not an insured under a policy cannot bring a declaratory judgment action against a third party’s insurer to determine if coverage is available for a claim until or unless a final judgment has been placed of record awarding the plaintiff damages against the insured.

R.C. § 4123.01(A)(1)(c)
“Employee” Under Construction Contract
The statute sets out specific factors to determine whether a person is an “employee” under a construction contract.

C. Uninsured Motorist Coverage

R.C. § 3937.18
UM/UIM Coverage
(A) Effective October 31, 2001, an insurer no longer has a duty to offer UM/UIM coverage to its insured with the sale of a policy. As a result, there will no longer be any requirement that a rejection or reduction in coverage be in writing.

(A) UIM coverage is not excess coverage.

(G) Insurers may preclude both inter-family and intra-family stacking in their policies.

(H) On wrongful death claims, any claim for a single death is subject to the per person limit on coverage.

(H) An insured has a three-year statute of limitations to assert a UM/UIM claim, assuming they did not destroy the insurer’s right of subrogation.

(K) A vehicle available for the regular use of the insured, a family member, or a fellow household member can be deemed an uninsured vehicle.

(L) These requirements only apply to policies meeting the financial responsibility requirements or to umbrella policies.
R.C. § 3937.44  
Per Person Limits  
For both liability and UM/UIM coverages, only the per person limit is available for recovery for each person suffering a bodily injury or for each decedent.

D. Statutory Subrogation Rights

R.C. § 2744.05  
Immunity of Political Subdivisions to Subrogation Claims  
Political subdivisions are immune to any subrogation claim brought by an insurer.

R.C. § 3937.18(E)  
UM/UIM Claims  
In the event of payment to an insured for an uninsured/underinsured motorist claim, the insurer making such payment is entitled to the proceeds of any settlement or judgment resulting from the exercise of the insured’s rights against a legally liable party. This right is limited by relevant insolvency proceedings.

R.C. § 3937.21  
Subrogation  
If an insurance company pays to, or on behalf of, its insured any amount later determined to be due from another insurer, it shall be subrogated to all rights of the insured against such insurer.

R.C. § 4123.93  
Workers’ Compensation Subrogation Rights  
This statute became effective April 9, 2003, and therefore applies only to injuries occurring on or after that date. It restores subrogation rights of the Ohio Bureau of Workers’ Compensation and self-insured employers. For claims where the injury occurred prior to April 9, 2003, there is no right of subrogation.

Employees now must notify the lienholder if there is a third-party who is responsible for their injuries so that there is a reasonable opportunity to assert their subrogation rights. Responsible parties include UM/UIM insurers.

If an employee is not made whole, then the statute prescribes a formula for pro-rata distribution of any recovery between the employee and lienholder.

If there is the potential for future payments by the lienholder, a portion of the recovery is to be put in an interest-bearing trust account to protect any future lien.
E. Liability and Damages Considerations

R.C. § 1533.181
Immunity – Recreational User Claims

The statute provides where a premises owner may be immune from claims by a recreational user of the premises.

R.C. §§ 2125.01 et. seq.
Wrongful Death Actions

A wrongful death action can only be brought by the executor or administrator of the decedent’s estate.

The decedent’s surviving spouse, parents, and children are rebuttably presumed to have been damaged by the death.

All other family members must prove their entitlement to damages.

R.C. § 2307.22
Allocation of Damages

This statute only applies to claims where the injury occurred on or after April 8, 2003. If there are multiple defendants at fault, any defendant who is more than fifty percent at fault is subject to joint and several liability for the plaintiff’s economic damages. All other at-fault defendants are liable only to the proportionate extent of their liability. All at-fault defendants are only proportionally liable for non-economic damages.

If there are multiple defendants at fault, and no one defendant is more than fifty percent at fault, then the at-fault defendants are liable only to the proportionate extent of their liability for both economic and non-economic damages. The only exception exists for intentional tortfeasors, who are still subject to joint and several liability for economic damages.

R.C. § 2307.25
Right of Contribution

This statute only applies to claims where the injury occurred on or after April 8, 2003. A right of contribution will exist only if two or more tortfeasors are subject to joint and several liability.

R.C. § 2307.28
Set-offs for Damages

This statute only applies to claims where the injury occurred on or after April 8, 2003. A non-settling defendant is entitled to a set-off from any award of damages from what a plaintiff has already recovered from any settling party. This right exists even if the settling party is not found to be liable. This overrules Fidelholtz v. Peller, (1998), 81 Ohio St. 3d 197, which required a finding the settling party was liable before a set-off could be imposed.
R.C. § 2307.32  
Enforcement of Contribution

This statute only applies to claims where the injury occurred prior to April 8, 2003. If the injury occurred on or after that date, R.C. § 2307.25 is applicable instead.

A party has one year from the date of judgment against it to seek contribution from joint tortfeasors.

If the party settles a claim without a judgment, that party has one year from the date of settlement in which to seek contribution.

A party who enters into a good faith settlement with a plaintiff or claimant for only a portion of the plaintiff’s damages is immune to claims for contribution from other tortfeasors. The release of claims bars any contribution claims of joint tortfeasors made either before or after the date of settlement.

R.C. § 2307.711  
Comparative Fault in Product Liability Actions

Assumption of risk is a defense in product liability claims. Depending upon the nature of the assumption of risk, it can be an absolute bar to a plaintiff’s recovery, without any comparative fault analysis, or serves as a proportionate basis for reducing damages and liability. This statute took effect in April 2005.

R.C. § 2315.18  
Caps on Compensatory Damages

There are no caps on economic damages. There are no caps on non-economic damages for “catastrophic” injuries, which are defined as “permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system, or permanent physical functional injury that permanently prevents the injured person from being able to independently care for and perform life-sustaining activities.” With respect to “non-catastrophic” injuries, non-economic damages are capped at the greater of $250,000.00 or three (3) times the amount of economic damages, with an absolute maximum of $350,000.00 per plaintiff or $500,000.00 per occurrence. Thus, if an individual plaintiff incurs more than $83,333.00 in economic loss damages, the cap for non-economic damages increases from $250,000.00 to $350,000.00.

R.C. § 2315.19  
Comparative Fault

A plaintiff’s recovery is reduced in proportion to their percentage of comparative fault. If a plaintiff is 51% or more at fault, they are barred from recovery.

For injuries occurring prior to April 8, 2003, there is joint and several liability among joint tortfeasors for economic damages. For non-economic damages there is only several liability among joint tortfeasors. If the injury occurred on or after April 8, 2003, R.C. § 2307.22 is applicable instead.
R.C. § 2315.20  
Collateral Benefits

A defendant in a tort action may introduce evidence of certain collateral benefits for the plaintiff, with stated exceptions. One such exception is if the source of collateral benefits has a federal, contractual or statutory right of subrogation.

R.C. § 2315.21  
Punitive or Exemplary Damages

Effective April, 2005, a defendant now has an absolute right to bifurcate a trial on a punitive damage claim.

Punitive damages are capped at one to two times the amount of any compensatory damage award. In the case of a small employer or private individual, punitive damages are capped at two times the amount of damages or ten percent of their net worth.

R.C. § 2317.02  
Waiver of Physician-Patient Privilege

By filing a tort action, a plaintiff waives any physician-patient privilege and the defendant is entitled to obtain the entirety of the plaintiff’s medical records.

R.C. § 2745.01  
Workplace Substantial Certainty Torts

This statute took effect April 7, 2005. It reflects the latest legislative effort to codify workplace substantial certainty torts. An employee making such a claim must now either prove the employer intended to injure them or that the employer acted with the belief that injury was substantially certain to occur. Substantial certainty is considered a deliberate intent to cause injury, disease, or death. The statute goes on to provide that the deliberate removal of a safety guard or any misrepresentation of a toxic or hazardous substance creates a rebuttable presumption of an intent to injure.

R.C. § 3109.09 and § 3109.10  
Parental Liability

Liability of the parents is limited to $10,000.00 where their child willfully damages property or commits a theft offense (R.C. § 3109.09) and where their child has assaulted someone (R.C. § 3109.10).

R.C. § 3929.06  
Insurance Money Applied to Judgment

Once a final judgment is entered in favor of a plaintiff against a person insured against such liability, after thirty (30) days the judgment creditor may file a supplemental complaint directly against the insurer to pay the amount of the unpaid judgment against the insured.
R.C. § 3929.25  
**Extent of Liability under Policy (Valued Policy Statute)**  
The valued policy statute applies to any structure insured against loss by fire or lightning. In case of a total loss the insurer shall pay the amount of the policy; however, if the policy requires actual repair or replacement of the structure, then the amount paid shall be as prescribed by the policy.

R.C. § 3929.86  
**Fire Loss Claim – Payment of Property Taxes**  
Where fire damage to a structure exceeds $5,000.00, the statute sets forth procedures for payment of delinquent property taxes from the insurance proceeds.

R.C. § 3937.182  
**No Insurance for Punitive Damages**  
Motor vehicle policies cannot insure against punitive damages.

R.C. § 4123.741  
**Fellow Employee Tort Immunity**  
An employee may not bring suit against an employer or fellow employee for injuries sustained as a result of the negligence of the employer or fellow employee.

The injury must have occurred within the scope and course of employment and be compensable under Workers’ Compensation laws.

The statutory immunity does not apply to intentional torts.

R.C. § 4319.18  
**Liquor Liability Claims**  
This statute limits the scope of claims against a tavern due to actions of an intoxicated person resulting in injury to a third party.

R.C. § 4513.263  
**Seatbelt Defense**  
This statute became effective April 2005. A defendant may now interject evidence the plaintiff failed to wear a seatbelt. This evidence is not admissible for the purposes of establishing liability but can be utilized to establish a plaintiff’s injuries would not have occurred or not have been as severe, had a seatbelt been worn.
F. Insurance Fraud

R.C. § 2913.47(B)(1)
Presenting Fraudulent Claims

A person commits insurance fraud if, while acting with purpose to defraud or knowing the person is facilitating a fraud, the person presents or causes to be presented any written or oral statement that is part or in support of an application for insurance or a claim for a benefit under a policy of insurance, knowing the statement, in whole or in part, is false or deceptive.

R.C. § 2913.47(B)(2)
Fraud in the Application or Claim for Insurance

It is illegal to assist, aid, abet, solicit, procure, or conspire with another to prepare or make any written or oral statement intended to be presented to an insurer as part or in support of an application for insurance or a claim for a benefit under a policy of insurance, knowing the statement, in whole or in part, is false or deceptive.

R.C. § 2913.47(C)
Penalties

First Degree Misdemeanor—Fraudulent claims in an amount less than $500.00.

Fifth Degree Felony—Fraudulent claims between $500.00 and $4,999.99.

Fourth Degree Felony—Fraudulent claims between $5,000.00 and $99,999.99.

Third Degree Felony—Fraudulent claims of $100,000.00 or more.

R.C. § 3904.01(T) and § 3904.03
Pretext Interviews

A “pretext interview,” as defined in R.C. § 3904.01(T), is an interview whereby a person, in an attempt to obtain information about a natural person, performs one or more of the following:

1. Pretends to be someone else;
2. Pretends to represent another entity;
3. Misrepresents the true purpose of the interview; and/or
4. Refuses to identify himself/herself.

An insurer is generally prohibited from using pretext interviews to obtain information in connection with an insurance transaction; however, a pretext interview may be undertaken to obtain information for the purpose of investigating suspected criminal activity, fraud, material misrepresentation, or a material non-disclosure in connection with an insurance claim.
**R.C. § 3904.13**  
**Disclosure of Personal or Privileged Information by an Insurance Carrier**

An insurer is prohibited from disclosing any personal or privileged information about an individual collected or received in connection with an insurance transaction, unless the disclosure is necessary for detecting or preventing criminal activity, fraud, material misrepresentation, or a material non-disclosure in connection with an insurance action.

Disclosed information must be limited to that which is reasonably necessary to detect or prevent criminal activity, fraud, material misrepresentation, or a material non-disclosure in connection with insurance transactions.

When the above conditions are met, disclosure may be made to law enforcement or other governmental agencies to protect the interest of the insurer in preventing and/or prosecuting fraudulent claims or if the insurer reasonably believes illegal activities have already been conducted by the individual.

**R.C. § 3911.06**  
**False Answer in Application for Insurance**

An insurer is prohibited from denying recovery under a policy of insurance on the basis the applicant gave false answers in his application, unless it is proved the answer was willfully false, fraudulently made, material, and induced the company to issue the policy.

The agent or insurance company must have no prior knowledge of the application’s falsity or fraudulent nature prior to issuing the policy of insurance.

**R.C. § 3929.87**  
**Time for Determination in Arson Investigation**

The Fire Marshall has 90 days after a fire loss in excess of $5,000.00 to determine whether the loss was caused by arson.

**R.C. § 3937.42 and § 3937.99**  
**Exchange of Information with Law Enforcement and Prosecuting Agencies**

An insurer has a legal obligation to notify law enforcement authorities when it has reason to suspect its insured has submitted a fraudulent motor vehicle claim.

Failure to notify the proper authorities constitutes a fourth degree misdemeanor.

**R.C. § 3999.21**  
**Insurance Fraud Warnings**

All application and claim forms issued by an insurer must contain the following warning: *Any person who, with intent to defraud or knowing he is facilitating a fraud against an insurer, submits an application or files a claim containing a false or deceptive statement is guilty of insurance fraud.*

Failure to include the warning is not a valid defense for insurance fraud.
R.C. § 3999.31
Immunity for Providing or Receiving Information Relating to Suspected Fraudulent Insurance Acts

No person is subject to liability for libel or slander by furnishing information to the Superintendent of Insurance relating to suspected fraudulent insurance acts. This immunity extends to any such information provided to any law enforcement official and any other person involved in the detection or prevention of fraudulent insurance acts.

R.C. § 3999.41
Anti-Fraud Programs

Every insurer is now required to adopt a written anti-fraud program. This program must include procedures for detecting insurance fraud.

Additionally, this program is to identify the person(s) responsible for the anti-fraud program.

Those not yet engaged in the business of insurance must submit a written plan within ninety (90) days after beginning to engage in the business of selling insurance.

R.C. § 3999.42
Notice to Department of Insurance of Suspected Fraud

Requires an insurer to notify the Ohio Department of Insurance whenever it suspects insurance fraud (as established in the Theft Fraud Law under R.C. § 3917.47) involving a claim of $1,000.00 or more.
IV. FREQUENTLY CITED KENTUCKY STATUTES

K.R.S. § 44.072
Limited Waiver of Sovereign Immunity in Negligence Claims

It is the intent of the General Assembly to preserve the sovereign immunity of the commonwealth, except in limited situations set forth in the statute. Except as specifically indicated otherwise, the Board of Claims shall have exclusive jurisdiction to hear claims for damages against the commonwealth.

K.R.S. § 227.220
Duties of State Fire Marshal and Chief State Building Official Relating to Fire Loss

Details actions the State Fire Marshal shall or may take in the event of a fire loss.

K.R.S. § 227.260
Records of Fire Inspections, Investigations and Losses

State Fire Marshal shall keep a record of all fire inspections, investigations and fire losses occurring in this state and of facts concerning them. The records shall be public except for limited circumstances.

K.R.S. § 227.370
Inspection of Property by Fire Chief or Other Department Personnel - Inspection and Investigation Reports

Fire department is authorized to inspect all property for the purpose of ascertaining and causing to be corrected any conditions likely to cause fire loss, or determining the cause or origin of any fire loss, or discovering any violation of a law or ordinance relating to fire prevention and protection.

K.R.S. § 304.12-230
Unfair Claims Practices Act

This statute imposes duties on insurers on both first-party and third-party insurance claims. Under the statute, claims are to be paid within thirty (30) days upon notice and proof of claim unless the insurer is able to demonstrate why the claim cannot or should not be paid. The statute imposes interest at an annual rate of twelve percent (12%) after the expiration of the thirty (30) day period. The statute also allows an insured to recover attorneys’ fees for violations of this statute.
K.R.S. § 304.20-160
Power of Authorized Agency to Require Insurer to Furnish Information Concerning Fire Loss

An authorized agency may require an insurer to release information or evidence in the insurer’s possession deemed important to the investigation of a fire loss of suspicious origin. Such information may include, but is not limited to:

1. Pertinent insurance policy information pertaining to such fire loss and any application for such a policy;
2. Policy premium payment records;
3. History of previous claims made by the insured;
4. Material relating to such loss or potential loss.

Furthermore, when an insurer has reason to believe a fire loss may be of other than accidental cause, the insurer shall notify, in writing, an authorized agency.

Any insurer, or person acting in its behalf, or authorized agency who in good faith releases information in compliance with this section, shall not be held civilly or criminally liable.

K.R.S. § 304.20-020
Uninsured Vehicle Coverage

No automobile insurance policy shall be issued unless it provides coverage for injuries caused by the owners or operators of uninsured motor vehicles. An insured shall have the right to reject such coverage in writing. The term “uninsured motor vehicle” shall be deemed to include an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability of its insured due to insolvency.

K.R.S. § 304.39-320
Underinsured Motorist Coverage

A tortfeasor’s liability insurance is the primary coverage and the underinsured motorist coverage insurance is the secondary or excess coverage. Therefore, UIM coverage is payable only to the extent that judgment exceeds the tortfeasor’s liability coverage. Kentucky Farm Bureau Mut. Ins. Co. v. Rogers, 179 S.W.3d 815, 818 (Ky. 2005).

1. Every insurer shall make available upon request to its insureds underinsured motorist coverage.

2. If an injured person agrees to settle a claim with the liability insurer and the settlement would not fully satisfy the claim for personal injuries so as to create an uninsured motorist claim, then written notice of the proposed settlement must be submitted by certified or registered mail to all underinsured motorist insurers that provide coverage.

3. The underinsured motorist insurer then has a period of 30 days to consent to the settlement or retention of subrogation rights.
(4) The underinsured motorist insurer is entitled to a credit against total damages in the amounts of the limits of the underinsured motorist liability policies in all cases. Nothing, however, including any payments or credits, reduces or affects the total amount of underinsured motorist coverage available to the injured party.

**K.R.S. § 304.47-060**  
Immunity for Cooperation with Law Enforcement

Under this statute an insurer is immune from civil liability if it notifies law enforcement authorities of suspected insurance fraud.

**K.R.S. § 304.47-080**  
Special Investigative Units

All insurers licensed in Kentucky must have a special investigative unit to investigate possible insurance fraud. The unit may be staffed either by employees of the insurer or individuals specifically contracted by the insurer to investigate.

**K.R.S. § 342.690**  
Exclusiveness of Workers’ Compensation Remedy

If an employer secures payments of Workers’ Compensation for his employees, the liability of the employer shall be limited to such Workers’ Compensation payments and shall be exclusive and in place of all other liability.

**K.R.S. § 405.025**  
Parent or Guardian Liable for Willful Damage to Property Caused by Minor

The parent or guardian of any minor, in his care and custody, against whom judgment has been rendered for the willful marking upon, defacing or damaging of any property, shall be liable for the payment of that judgment up to an amount not to exceed $2,500.00 and not to exceed $10,000.00 in a cumulative amount.

**K.R.S. § 411.186**  
Assessment of Punitive Damages

In any civil action where claims for punitive damages are included, the jury, or judge if the jury trial has been waived, shall determine concurrently with all the other issues presented whether punitive damages may be assessed.

In determining the amount of punitive damages to be assessed, the trier of fact should consider the following factors:

1. The likelihood at the relevant time that serious harm would arise from the defendant’s misconduct;
2. The degree of the defendant’s awareness of that likelihood;
3. The profitability of the misconduct to the defendant;
(4) The duration of the misconduct and any concealment of it by the defendant; and

(5) Actions by the defendant to remedy the misconduct once it became known to the defendant.

K.R.S. § 411.188
Collateral Source Payment Rule

Collateral source payments, except life insurance, the value of any premiums paid by or on behalf of the plaintiff for same, and known subrogation rights shall be an admissible fact in any civil trial.

K.R.S. § 411.190
Obligations of Owner to Persons Using Land for Recreation

An owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on the premises to persons entering for such purposes.

Nothing in this section limits in any way any liability which otherwise exists for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.

K.R.S. § 411.310
Statute of Repose

(1) In any product liability action it shall be presumed that the subject product was not defective if the injury occurred more than five years after the date of sale to the first consumer or more than eight years after the date of manufacture.

(2) In any product liability action it shall be presumed that the product was not defective if the design, methods of manufacture and testing conform to the generally recognized and prevailing standards or the state-of-the-art in existence at the time the design was prepared and the product was manufactured.

K.R.S. § 411.310
Presumptions in Product Liability Actions

(1) In any product liability action, it shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the subject product was not defective if the injury, death or property damage occurred either more than five years after the date of sale to the first consumer or more than eight years after the date of manufacture.

(2) State of the Art Defense.

K.R.S. § 411.82
Apportionment of Fault

In cases involving more than one alleged wrongdoer, the jury is to consider the fault not only of the defendants remaining in the case but also of any parties who may have been dismissed or were never joined as parties. Each defendant is liable only for their proportionate share of fault.
**K.R.S. § 413.120**  
**Actions to be Brought within Five Years**

The following actions shall be commenced within five years after the cause of action accrued:

1. An action upon a contract not in writing, express or implied.

2. An action for personal injuries suffered by any person against the builder of a home or other improvements. This cause of action shall be deemed to accrue at the time of original occupancy of the improvements which the builder caused to be erected.

**K.R.S. § 413.241**  
**Liquor Liability**

The consumption of intoxicating beverages, rather than the serving, furnishing, or sale of such beverages, is the proximate cause of any injury, including death and property damage, inflicted by an intoxicated person upon himself or another person.

No person holding a permit under KRS 243.030, 243.040, 243.050, nor any agent, servant, or employee of the person, who sells or serves intoxicating beverages to a person over the age for the lawful purchase thereof, shall be liable to that person or to any other person or to the estate, successors, or survivors of either for any injury suffered off the premises including, but not limited to, wrongful death and property damage.
V. FREQUENTLY CITED INDIANA STATUTES

A. Automobile Insurance

I.C. § 9-25-2-3
Financial Responsibility

Requires insurance in the following amounts:

(1) $25,000.00 per person;
(2) $50,000.00 per accident; and
(3) $10,000.00 property coverage per accident.

I.C. § 27-7-5-2(a)
UM/UIM Coverage

Requires insurers to offer UM/UIM coverage with every bodily injury liability policy of insurance in an amount not less than $50,000.00 or the limit of liability insurance, whichever is greater and which can only be rejected in writing.

I.C. § 27-7-5-4(a)
Uninsured Motor Vehicles

An uninsured motor vehicle is one without liability insurance or not otherwise compliant with the financial responsibility requirements of such laws of this or another state or where the insurer is unable to make payments to the limit of liability due to insolvency.

I.C. § 27-7-5-4(b)
Underinsured Motor Vehicles

An underinsured motor vehicle is one where the limits of coverage available for payment to the insured under all bodily injury liability policies covering persons liable to the insured are less than the limits of the insured’s underinsured motorist coverage.

I.C. § 27-7-6-2
Definitions

This statute contains the definitions for “automobile insurance policy”, and “automobile liability coverage”.

B. Negligence, Other Torts and Contribution

I.C. § 7.1-5-10-15.5
Civil Liability for Furnishing Alcohol

A person who furnishes alcohol is not liable for civil action for damages caused by the intoxicated person, unless they actually knew the person was visibly intoxicated, and the intoxication of the person was the proximate cause of the injury or damage.

If a person, who is 21, suffers an injury or death, caused by voluntary intoxication, the person, the person’s heirs, dependants or representative may not make a claim against the person who furnished the alcohol.
I.C. § 12-15-29-4.5

Medicaid Claim

Insurer must accept a Medicaid claim for a Medicaid recipient for three years from the date of service. An insurer cannot deny a Medicaid claim solely based on the date of submission, type or format of the claim, method of submission or failure to provide proper documentation.

Insurer cannot deny a Medicaid claim solely due to lack of prior authorization. Insurer will conduct the prior authorization retrospectively when prior authorization is necessary. Insurer must adjudicate such claim as if it received prior authorization.

I.C. § 14-22-10-2.5

Entry onto Premises of Another

A person, who enters a premise, without permission or monetary compensation, for the purposes of hunting or fishing, does not have an assurance that the premise is safe.

The owner of a premise does not assume responsibility or incur liability for damage or injury caused by others persons using the premises.

I.C. § 34-20-1-1

Products Liability Actions

The article governs all actions that are brought by a user or consumer against a manufacturer or seller for physical harm caused by a product regardless of the substantive legal theory or theories upon which the action is brought.

I.C. § 34-20-2-1

Product Liability

Liability exists for an unreasonably dangerous or defective product if the seller should reasonably foresee the consumer or class of persons being exposed to the harm caused by the defective condition, the seller is engaged in the business of selling the product and the product reaches the user or consumer without substantial alteration.

I.C. § 34-20-2-2

Product Liability

An action can be maintained even though reasonable care was used in the manufacture and preparation of the product and there is no privity of contract. However, reasonable care is a defense to design defect claims and those for failure to provide adequate warnings.

I.C. § 34-20-2-3

Strict Product Liability

An action for strict product liability for an unreasonably dangerous defective condition may only be brought against the manufacturer.
I.C. § 34-20-2-4
Product Manufacturers
If a court cannot gain jurisdiction over a manufacturer, then the manufacturer’s principal
distributor or seller over whom the court can gain jurisdiction will be deemed the manufacturer
of the product.

I.C. § 34-20-3-1
Product Liability
A product liability action in negligence or strict liability must be commenced within two years
from the cause of action or within ten years after the delivery to the initial user or customer. If
the cause of action happens after eight years but before ten years of the date of delivery, the
action may be commenced within two years after the cause of action.

I.C. § 34-20-9-1
Indemnity in Product Liability Actions
A party held liable may seek indemnity from other persons whose actual fault caused the product
to be defective.

I.C. § 34-23-1-1
Wrongful Death
Requires an action in wrongful death to be maintained by the personal representative of the
decedent and to have been able to have been prosecuted by the decedent had the decedent lived.

I.C. § 34-23-1-2(d)
Limitation of Certain Wrongful Death Damages
The type of damages in subsection (c)(3)(A) (reasonable medical, hospital, funeral and burial
expenses) are limited to $300,000.00.

I.C. § 34-31-4-1
Parental Liability
A parent is liable for no more than $5,000.00 in actual damages from damage cause by their
child, if the parent has custody and the child is living with the parent.

I.C. § 34-44-1-3
Payments of Awards
Proof of payments may be considered by trier of fact for determining the amount of any award
and for any court review of awards considered excessive.

I.C. § 34-51-2-2
Comparative Fault of Governmental Subdivisions
Contributory negligence remains a complete defense to claims under the Tort Claims Act.
I.C. § 34-51-2-5
Comparative Fault Set-Off
Contributory fault of a claimant acts to proportionately reduce the total damages for an injury by the claimant’s contributory fault.

I.C. § 34-51-2-6
Contributory Negligence as Complete Defense
Contributory negligence is a complete defense if a claimant’s contributory fault is greater than the fault of all other persons whose fault proximately contributed to the claimant’s damages.

I.C. § 34-51-2-10
Intentional Torts
A plaintiff may recover one-hundred percent of the compensatory damages in a civil action for an intentional tort from a defendant who was convicted after a prosecution based on the same evidence.

I.C. § 34-51-2-12
Contribution and Indemnity
In an action under this chapter, there is no right of contribution among tortfeasors. The right of indemnity is unaffected by this section.

I.C. § 34-51-2-14
Nonparty Defense
In an action based on fault, a defendant may assert that the damages of the claimant were caused in full or in part by a nonparty.

I.C. § 34-51-2-15
Nonparty Defense
The burden of proving a nonparty defense is upon the defendant who must affirmatively plead the defense.

I.C. § 34-51-2-16
Nonparty Defense
A nonparty defense must be pled if known. Nonparty defenses which become known after the filing of the answer must be raised with reasonable promptness. If the summons and complaint were served more than one hundred fifty (150) days prior to the expiration of the claimant’s statute of limitations, nonparty defenses must be pled no later than forty-five (45) days prior to the expiration of that limitation of action; however, the trial court may alter these time limits to allow defendants a reasonable opportunity to discover the existence of a nonparty defense and allow the claimant a reasonable opportunity to add the nonparty as an additional defendant prior to the expiration of the period of limitations applicable to the claim.
C. Subrogation

I.C. § 27-7-5-6(a)
Subrogation for UM/UIM Payments

Provides that payment of UM/UIM coverage for damages operates to subrogate the insurer to any cause of action in tort which payee may have.

I.C. § 27-7-5-6(b)
Exception to the Right of Subrogation for UIM Payments

The insurer providing underinsured motorist coverage does not have the right of subrogation if it is informed of a bona fide offer of settlement which includes a certification of the liability coverage limits of the underinsured motorist and the insurer fails to advance payment in at least the amount of the offer within thirty (30) days.

I.C. § 34-51-2-19
Lien Reduction

Subrogation claims or other liens or claims arising out of the payment of medical expenses or other benefits as the result of personal injuries or death shall be diminished by the claimant’s comparative fault or the uncollectibility of the full value of the claim resulting from limited liability insurance or any other cause in the same proportion as the claimant’s recovery is reduced. The lien or claim shall also bear a pro rata share of the claimant’s attorney fees and litigation expenses.

D. Insurance Fraud

I.C. § 27-2-13-2
Release of Information by Insurer

Insurer must furnish policy information relevant to fire loss, history of claims of claimant, and materials relating to fire investigation, if requested by an authorized agency investigating a fire loss.

I.C. § 27-2-13-3
Arson Reporting

When an insurer has reason to believe a fire loss in which it has an interest is caused by a means that was not accidental, then the company shall notify an authorized agency in writing and provide that agency with all materials developed from the insurer’s investigation of the fire loss. The insurer shall also provide the office of the state fire marshal a copy of any information provided under this section.

I.C. § 27-2-13-4
Arson Reporting

When an authorized agency receives information under this chapter, it may release or provide the same information to any other authorized agency to further its investigation. In addition, an insurer who provides information under this chapter has the reciprocal right to request and receive relevant information from that agency. Finally, an insurer or authorized agency, who
releases or provides evidence or information under this chapter, is immune from any civil or criminal liability for providing the evidence or information.

I.C. § 27-2-13-5
Arson Reporting

When an authorized agency is investigating a fire that it believes to have been caused by arson it may, in writing, order an insurer to withhold payment of any policy proceeds on the damaged or destroyed property for up to thirty (30) days from the date of the order. The insurer may not make a payment during that time, except as follows:

(1) Emergency living expenses;
(2) Emergency action necessary to secure the premises;
(3) To prevent further damage to the premises; or
(4) To a mortgagee who is not the target of the investigation of the authorized agency.

I.C. § 27-2-14-2
Vehicle Theft Reporting

If an insurer has reason to believe that a vehicle theft claim made by an insured is fraudulent, the insurer shall notify, in writing, an authorized agency of the suspected fraudulent claim and provide the agency with all materials developed from the insurer’s investigation.

I.C. § 27-2-14-3
Vehicle Theft Reporting

An authorized agency investigating a vehicle theft may, in writing, require an insurer investigating the loss to release any and all relevant information or evidence considered important to the authorized agency, including:

(1) Pertinent policy information (including a policy application);
(2) Policy premium payment records;
(3) History of prior claims made by the insured; and
(4) Material relating to the investigation, including:
   a) Statements;
   b) Proofs of Loss; and/or
   c) Other relevant evidence.
I.C. § 27-2-14-4
Vehicle Theft Reporting

An authorized agency provided with information under this chapter may release or provide the same information to any other authorized agency to further its investigation. In addition, an insurer who provides information under this section has the reciprocal right to request and receive relevant information from that agency. When requested, the agency shall provide the requested information within a reasonable time, not exceeding thirty (30) days. Finally, an insurer or authorized agency that releases or provides evidence or other information under this chapter is immune from civil or criminal liability for providing that information.

I.C. § 27-2-16-3
Claim Forms

All preprinted claim forms required by an insurer as a condition of payment of a claim must contain a statement which clearly states the following: “A person who knowingly and with intent to defraud an insurer files a statement of claim containing any false, incomplete, or misleading information commits a felony.”

I.C. § 36-8-17-7
Fire Investigation

A fire department must investigate and determine the cause of fire in their territory. If the fire chief believes a crime was committed, he must notify the division and submit a report. The report must include: 1) a statement of facts; 2) the extent of damage; 3) the amount of insurance; and 4) other information required in the commission’s rules. To carry out this section, the fire department may: 1) enter and inspect property; 2) cooperate with prosecuting attorney; 3) subpoena witnesses and documents; 4) give oaths; 5) take depositions and conduct hearings; and 6) separate witnesses and regulate the course of proceedings.

E. Miscellaneous Statutes

I.C. § 34-14-1-1
Declaratory Judgment

A court may declare rights, status, and other legal relations whether or not further relief is or could be claimed.

I.C. § 34-14-1-2
Declaratory Judgment

A person interested under a deed, will, written contract, or other writings or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have questions of construction or validity determined or obtain a declaration of rights, status, or legal relations thereunder.
I.C. § 34-50-1-4
Qualified Settlement Offer

This is essentially a codification of the Trial Rule 68 Offer of Judgment. When a qualified settlement offer is made pursuant to this statute, and not accepted, then the party rejecting the offer must ultimately obtain a more favorable judgment. If the rejecting party fails to obtain a more favorable judgment, the offering party is entitled to attorney’s fees, costs, and expenses in an amount not to exceed $1,000.00. To be valid, a qualified settlement offer must:

(1) Be in writing;
(2) Be signed by the offeror or the offeror’s attorney;
(3) Be designated on its face as a “qualified settlement offer;”
(4) Be delivered to each recipient or the recipient’s attorney by:
   a) Registered or certified mail; or
   b) Any other method that verifies the date of receipt; and
(5) Set forth the complete terms of the settlement proposal in sufficient detail to allow the recipient to decide whether to accept or reject it;
(6) Include the name and address of the offeror and the offeror’s attorney; and
(7) Expressly revoke all prior qualified settlement offers made by the offeror to the recipient.
VI. FREQUENTLY CITED MICHIGAN STATUTES

A. General Considerations in Insurance Claims Management

M.C.L.A. § 29.4
Reporting of Fires; Release of Information by Insurance Companies

Fire investigators and fire prevention officials may request an insurer investigating a fire loss of real or personal property release all information in possession of the agent relative to the loss.

If an insurer has reason to suspect a fire loss was caused by incendiary means, the insurer must notify the fire investigating agency and furnish them with all relevant material acquired during its investigation of the fire loss.

M.C.L.A. § 29.6
Fire Marshal Investigative Authority

State fire marshal may investigate and inquire into fire cause and origin that results in death or property damage, and without restraint or trespass liability.

M.C.L.A. § 257.1106
Death, Injury or Damages Caused by Uninsured Motorist; Application for Payment from Fund

Where the death of or personal injury or property damage to any person or property is occasioned by an uninsured motor vehicle, any person who would have a cause of action against the owner or driver of the uninsured motor vehicle in respect to the death or personal injury or property may make application for payment out of the Motor Vehicle Accident Claims Act fund for all damages in respect to the death or personal injury and for damages in excess of $200.00 in respect to property damage.

M.C.L.A. § 257.1123
Maximum Payments for Death, Injury or Property Damage

In respect to applications under the Motor Vehicle Accident Claims Act for payment of damages arising out of motor vehicle accidents, the secretary shall not pay out of the fund:

(1) More than $20,000.00, exclusive of costs, on account of injury to or the death of one person, and, subject to such limit for any one person so injured or killed, not more than $40,000.00, exclusive of costs, on account of injury to or the death of two or more persons in any one accident; and

(2) More than $10,000.00, exclusive of costs, for loss of or damage to property resulting from any one accident.

M.C.L.A. § 436.1801(3)
Liquor liability

Right of action of person killed, injured, or damaged by unlawful sale or providing of alcohol to minor or visibly intoxicated person, if the unlawful sale is proven to be a proximate cause of the damage, injury or death.
M.C.L.A. § 500.2006
Timely Payment of Claims or Interest; Proof of Loss; Calculation of Interest; Exemptions

An insurer must pay on a timely basis to its insured the benefits provided under the terms of its policy, or, in the alternative, the insurer must pay to its insured twelve percent interest on claims not paid on a timely basis. Failure to pay claims on a timely basis or to pay interest on claims is an unfair trade practice unless the claim is reasonably in dispute.

An insurer shall specify, in writing, the materials that constitute a satisfactory proof of loss not later than thirty (30) days after receipt of a claim, unless the claim is settled within the thirty (30) days. If proof of loss is not supplied as to the entire claim, the amount supported by proof of loss shall be considered paid on a timely basis if paid within sixty (60) days after receipt of proof of loss by the insurer.

M.C.L.A. § 500.2026
Unfair Claims Practices

(1) Unfair or deceptive acts or practices in the business of insurance include, but are not limited to,:

a) Misrepresenting pertinent facts or insurance policy provisions relating to coverage at issue;

b) Failing to acknowledge promptly or to act reasonably and promptly upon communications with respect to claims arising under insurance policies;

c) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

d) Refusing to pay claims without conducting a reasonable investigation based upon the available information;

e) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed; and

f) Failing to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.

(2) The failure of an insurer to maintain a complete record of all the complaints of its insureds which it has received since the date of the last examination is an unfair method of competition and unfair or deceptive act or practice in the business of insurance.

M.C.L.A. § 500.2845
Insured Real Property Fire Proceeds

If a claim is filed for a loss to insured real property due to fire or explosion and a final settlement is reached on the loss to the insured real property, an insurer shall withhold from payment twenty-five percent of the actual cash value of the insured real property at the time of the loss or twenty-five percent of the final settlement, whichever is less. For residential property, the twenty-five percent settlement or judgment withheld shall not exceed $6,000.00 adjusted annually beginning June 1, 1999, in accordance with the Consumer Price Index.
M.C.L.A. § 500.4503
Fraudulent Insurance Acts

A person commits insurance fraud if they present or prepare any oral or written statement supporting an application or claim for insurance while knowing the statement is false, either in whole or in part.

M.C.L.A. § 500.4507
Release of Information to Authorized Agency or Insurer

Upon written request by an authorized agency, an insurer may release to the authorized agency, at the authorized agency's expense, any or all information that is considered important relating to any suspected insurance fraud. An authorized agency may release information on suspected insurance fraud to an insurer upon a showing of good cause. This information may include, but is not limited to, the following:

1. Insurance policy information relevant to an investigation, including any application for a policy;
2. Policy premium payment records that are available;
3. History of previous claims made by the insured; and/or
4. Information relating to the investigation of the suspected insurance fraud, including statements of any person, proofs of loss, and notice of loss.

M.C.L.A. § 500.4509
Report of Information Concerning Insurance Fraud

In the absence of malice in a prosecution for insurance fraud, any person who cooperates with an authorized agency or complies with a court order to provide evidence or testimony is not subject to civil liability with respect to any act concerning the suspected insurance fraud, unless that person knows that the evidence, information, testimony, or matter contains false information pertaining to any material fact or thing.

M.C.L.A. § 500.4511
Violations; Penalties

A person who commits insurance fraud is guilty of a felony punishable by imprisonment for not more than four years or a fine of not more than $50,000.00, or both, and restitution. A person who enters into an agreement or conspiracy to commit insurance fraud is guilty of a felony punishable by imprisonment for not more than ten years or by a fine of not more than $50,000.00, or both, and shall be ordered to pay restitution.
B.  Automobile Insurance

M.C.L.A. § 500.3009  
Minimum Auto Insurance Limits

An automobile liability policy insuring against loss resulting from liability imposed by law for property damage, bodily injury, or death suffered by any person arising out of the ownership, operation, maintenance, or use of a motor vehicle shall not be issued to any motor vehicle unless the liability coverage is subject to a limit, exclusive of interest and costs of:

1. Not less than $20,000.00 because of bodily injury to or death of one person in any one accident, and subject to that limit for one person;

2. To a limit of not less than $40,000.00 because of bodily injury to or death of two or more persons in any one accident; and

3. To a limit of not less than $10,000.00 because of injury to or destruction of property of others in any accident.

M.C.L.A. § 500.3010  
Loss or Damage Caused by Fire or Explosion to Motor Vehicle

An automobile insurer shall not pay a claim of $2,000.00 or more for loss or damage caused by fire or explosion to an insured motor vehicle until a report has been submitted to the fire or law enforcement authority designated and the insurer has received from the insured a copy of the report.

This section does not apply to accidental fires or explosions. If the insurer or the fire or law enforcement authority designated determines that the fire or explosion may not be accidental, the insurer shall notify the insured of the requirement for a report under this section by no later than thirty (30) days after the determination.

M.C.L.A. § 500.3105  
Personal Protection Benefits: Accidental Bodily Injury

(1) Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle.

(2) Personal protection insurance benefits are due without regard to fault.

(3) Bodily injury includes death resulting therefrom and damage to or loss of a person's prosthetic devices in connection with the injury.

(4) Bodily injury is accidental as to a person claiming personal protection insurance benefits unless suffered intentionally by the injured person or caused intentionally by the claimant. Even though a person knows that bodily injury is substantially certain to be caused by his act or omission, he does not cause or suffer injury intentionally if he acts or refrains from acting for the purpose of averting injury to property or to any person, including himself.
M.C.L.A. § 500.3107
Allowable Medical Expenses and Accommodations

Personal protection insurance benefits are payable for the following:

(1) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services, and accommodations for an injured person's care, recovery, or rehabilitation;

(2) Work loss consisting of loss of income from work an injured person would have performed during the first three years after the date of the accident if he or she had not been injured. The statutory maximum is based upon a schedule which is periodically adjusted for inflation; and

(3) Replacement services or expenses, not exceeding $20.00 per day, reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he or she had not been injured, an injured person would have performed during the first three years after the date of the accident, not for income but for the benefit of himself or herself or of his or her dependent.

M.C.L.A. § 500.3112
Payees of Personal Protection Benefits; Payments as Discharge of Liability

Personal protection insurance benefits are payable to or for the benefit of an injured person or, in case of his death, to or for the benefit of his dependents. Payment by an insurer of personal protection insurance benefits discharges the insurer's liability to the extent of the payments unless the insurer has been notified in writing of the claim of some other person. If there is doubt about the proper person to receive the benefits or the proper apportionment, the insurer and the claimant may apply to the circuit court for an appropriate order. In the absence of a court order the insurer may pay:

(1) To the dependents of the injured person, the personal protection insurance benefits accrued before his death without appointment of an administrator or executor; and

(2) To the surviving spouse, the personal protection insurance benefits due any dependent children living with the spouse.

M.C.L.A. § 500.3113
Persons Not Entitled to Personal Protection Benefits

A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident:

(1) The person was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle;

(2) The person was the owner or registrant of a motor vehicle involved in the accident and failed to maintain the security for payment of benefits under personal and property protection insurance; and/or
(3) The person was not a resident of Michigan, was an occupant of a motor vehicle not registered in Michigan, and was not insured by an insurer which has filed a certification for nonresidents.

C. General Liability Considerations

M.C.L.A. § 418.131
Employer-Employee Recovery; Remedies

The right to the recovery of workers’ compensation benefits shall be the employee’s exclusive remedy against the employer for a personal injury or medical condition resulting from the employment. An employer can be held liable for an intentional tort where an employee is injured as a result of a deliberate act of the employer and the employer specifically intended the injury. An employer is presumed to have intended to injure the employee if the employer had knowledge that an injury was certain to occur and willfully disregarded that knowledge.

M.C.L.A. § 600.1483
Medical Malpractice Damages Cap

In a medical liability action, total noneconomic damages recoverable by all plaintiffs against all defendants are limited to $280,000.00, adjusted annually for inflation, except in cases where the plaintiff is hemiplegic, paraplegic, or quadriplegic due to an injury to the brain or spinal cord, or where the plaintiff had permanently impaired cognitive capacity, or the plaintiff has had a permanent loss of or damage to a reproductive organ, then noneconomic damages shall not exceed $500,000.00.

M.C.L.A. § 600.2913
Parental Liability for Minor Child’s Willful Injury or Damage

Person can recover damages for maximum of $2,500.00 from parents of resident minor child of parents when the minor has willfully or maliciously caused injury or damaged property.

M.C.L.A. § 600.2922
Wrongful Death Actions

Whenever the death of a person is caused by a wrongful act, neglect, or fault of another and the act would have entitled the party injured to maintain an action and recover damages if death had not ensued, the party that would have been liable shall be liable to an action for damages. Every action under this section shall be brought by, and in the name of, the personal representative of the estate of the deceased. The people entitled to damages by being damaged by the death only include the decedent’s spouse, parents, children, descendants, grandchildren, brothers and sisters, grandparents, the children of the decedent’s spouse, and those who are devisees under the will of the deceased.
M.C.L.A. § 600.2925a
Contribution Between Tortfeasors
When two or more persons become jointly or severally liable in tort for the same injury to a person or property, there is a right of contribution among them even if a judgment has not been recovered against all or any of them.

The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. A tortfeasor against whom contribution is sought shall not be compelled to make contribution beyond his own pro rata share of the entire liability.

M.C.L.A. § 600.2946
Product Liability Actions
A manufacturer or seller is not liable unless a plaintiff establishes that the product was not reasonably safe at the time the specific unit of the product left the control of the manufacturer or seller and, according to generally accepted production practices at the time, a practical and technically feasible alternative production practice was available that would have prevented the harm without significantly impairing the usefulness or desirability of the product to users and without creating equal or greater risk of harm to others.

There is a rebuttable presumption that the manufacturer or seller is not liable if the aspect of the product allegedly causing the harm was in compliance with federal or state standards, or was in compliance with regulations or standards relevant to the event causing the death or injury promulgated by a federal or state agency responsible for reviewing the safety of the product.

M.C.L.A. § 600.2946a
Product Liability Actions; Caps on Damages
In an action for product liability, the total noneconomic damages shall not exceed $280,000.00, adjusted annually for inflation, unless the defect in the product caused either the person’s death or permanent loss of a vital bodily function, in which case the total amount of damages for noneconomic loss shall not exceed $500,000.00.

In awarding damages in a product liability action, the trier of fact shall itemize damages into economic and noneconomic losses. Neither the court nor counsel for a party shall inform the jury of the limitations. The court shall adjust an award of noneconomic loss to conform to the limitations.

M.C.L.A. § 600.2959
Comparative Fault
In a tort action, the court shall reduce the damages by the percentage of comparative fault of the person upon whose injury or death the damages are based. If the plaintiff’s percentage of fault is greater than the aggregate fault of the other person or persons, whether or not parties to the action, the court shall reduce economic damages by the percentage of comparative fault of the person upon whose injury or death the damages are based, and noneconomic damages shall not be awarded.
M.C.L.A. § 600.6304
Joint and Several Liability
The trier of fact must allocate liability among nonparties, even in medical malpractice cases where the plaintiff is not at fault, before joint and several liability is imposed on each defendant. Once joint and several liability is determined to apply, joint and several liability prohibits the limitation of damages to each defendant’s respective percentage of fault.

M.C.L.A. § 691.1407
Governmental Immunity from Tort Liability
A governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function.

An officer, employee, member, or volunteer of the governmental agency is immune from tort liability caused while acting on behalf of the government agency if the following three conditions are met:

1. The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority;
2. The governmental agency is engaged in the exercise or discharge of a governmental function; and
3. The officer's, employee's, member's, or volunteer's conduct does not amount to negligence that is the proximate cause of the injury or damage.

D. Miscellaneous Statutes

M.C.L.A. § 24.264
Declaratory Judgment Actions
Unless an exclusive procedure or remedy is provided by a statute governing the agency, the validity or applicability of a rule may be determined in an action for declaratory judgment when the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff.

M.C.L.A. § 600.2157
Waiver of Physician-Patient Privilege
In any personal injury suit, if the plaintiff produces a physician as a witness who has treated the patient for the injury or for any disease or condition for which the malpractice is alleged, that patient is considered to have waived the privilege provided in this section as to another physician who has treated the patient for the injuries, disease, or condition.
M.C.L.A. § 600.6303  
Collateral Source Benefits; Subrogation

In a personal injury action in which the plaintiff seeks to recover expenses, evidence that the expense or loss was paid or is payable by collateral source is admissible. The collateral source provider is joined after a verdict for the plaintiff is rendered and before a judgment is entered on the verdict. If the court determines that all or part of the plaintiff’s economic damages are payable by a collateral source, the court will reduce the part of the judgment which represents damages paid or payable. This reduction shall not exceed the amount of the judgment for economic loss or that portion of the verdict which represents damages paid or payable by a collateral source.

Within ten (10) days after a verdict for the plaintiff, plaintiff's attorney shall send notice of the verdict to all persons entitled by contract to a lien against the proceeds of plaintiff’s recovery. If a contractual lienholder does not exercise the lienholder’s right of subrogation within twenty (20) days after receipt of the notice of the verdict, the lienholder shall lose the right of subrogation.
### VII. STATUTES OF LIMITATIONS TABLE – STATE BY STATE COMPARISON

<table>
<thead>
<tr>
<th>Claim Type</th>
<th>Ohio</th>
<th>Kentucky</th>
<th>Indiana</th>
<th>Michigan</th>
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</thead>
<tbody>
<tr>
<td>Assault &amp; Battery</td>
<td>1 year R.C. §2305.111</td>
<td>1 year K.R.S. §413.140</td>
<td>2 years I.C. §34-11-2-4(1)</td>
<td>2 years M.C.L.A. §600.5805(2)–(4)</td>
</tr>
<tr>
<td>Bodily Injury Due to Negligence</td>
<td>2 years R.C. §2305.10</td>
<td>Auto Acc. – 2 yrs. K.R.S. §304.39-230</td>
<td>2 years I.C. §34-11-2-4(2)</td>
<td>3 years M.C.L.A. §600.5805(10)</td>
</tr>
<tr>
<td>Personal Property Damage Due to Negligence</td>
<td>2 years R.C. §2305.10</td>
<td>2 years K.R.S. §413.125</td>
<td>2 years I.C. §34-11-2-4(2)</td>
<td>3 years M.C.L.A. §600.5805(10)</td>
</tr>
<tr>
<td>Wrongful Death</td>
<td>2 years R.C. §2125.02</td>
<td>1 year (from appt.) K.R.S. §413.180</td>
<td>2 years I.C. §34-11-2-4(2)</td>
<td>3 years M.C.L.A. §600.5805(10)</td>
</tr>
<tr>
<td>Libel, Slander, Defamation</td>
<td>1 year R.C. §2305.11</td>
<td>1 year K.R.S. §413.140</td>
<td>2 years I.C. §34-11-2-4</td>
<td>1 year M.C.L.A. §600.5805(9)</td>
</tr>
<tr>
<td>Tort of Bad Faith</td>
<td>4 years R.C. §2305.09(D)</td>
<td>5 years K.R.S. §413.120</td>
<td>2 years I.C. §34-11-2-4(2)</td>
<td>Bad faith N/A</td>
</tr>
<tr>
<td>Contract in Writing</td>
<td>15 years R.C. §2305.06</td>
<td>15 years K.R.S. §413.090(2)</td>
<td>10 years I.C. §34-11-2-11</td>
<td>6 years M.C.L.A. §600.5807(8)</td>
</tr>
<tr>
<td>Contract not in Writing</td>
<td>6 years R.C. §2305.07</td>
<td>5 years K.R.S. §413.120(1)</td>
<td>6 years I.C. §34-11-2-7(1)</td>
<td>6 years M.C.L.A. §600.5807(8)</td>
</tr>
<tr>
<td>Fraud</td>
<td>4 years R.C. §2305.01(C)</td>
<td>5 years K.R.S. §413.120(12)</td>
<td>6 years I.C. §34-11-2-7(4)</td>
<td>6 years M.C.L.A. §600.5813</td>
</tr>
</tbody>
</table>
## VIII. OHIO STATUTES OF LIMITATIONS

<table>
<thead>
<tr>
<th>Claim Type/Section</th>
<th>Statute Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assault and Battery R.C. § 2305.111</td>
<td>One year from the date of assault or battery. If the identity of the person committing the assault or battery is unknown, the statute of limitations begins on the date plaintiff either learns the identity of the person or should have learned the identity of the person, whichever comes first.</td>
</tr>
<tr>
<td>Medical Malpractice R.C. § 2305.11</td>
<td>One year from the date of the malpractice incident. If the act of medical malpractice is not discoverable within one year, the plaintiff has one year from the date plaintiff knew or should have known of the malpractice, not to exceed four years from the date of malpractice.</td>
</tr>
<tr>
<td>Libel, Slander, Defamation R.C. § 2305.11</td>
<td>One year from the publication of the defamatory act.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Claim Type/Section</th>
<th>Statute Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bodily Injury Due to Negligence R.C. § 2305.10</td>
<td>Two years from the date of incident.</td>
</tr>
<tr>
<td>Wrongful Death R.C. § 2125.02</td>
<td>Two years from the date of death.</td>
</tr>
<tr>
<td>Personal Property Damage Due to Negligence R.C. § 2305.10</td>
<td>Two years from the date of incident.</td>
</tr>
<tr>
<td>Product Liability Claims R.C. § 2305.10</td>
<td>Two years from the date of injury.</td>
</tr>
<tr>
<td>Claim Type/Section</td>
<td>Statute Period</td>
</tr>
<tr>
<td>--------------------------------------------------------</td>
<td>--------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>UM/UIM Claims</td>
<td>Three years from the date of the accident. If the wrongdoer’s insurer becomes</td>
</tr>
<tr>
<td>R.C. § 3937.18</td>
<td>insolvent, then the plaintiff has one year from the date of insolvency to make</td>
</tr>
<tr>
<td></td>
<td>the UM/UIM claim, even if it is more than three years after the accident.</td>
</tr>
<tr>
<td>Intentional Infliction of Emotional Distress</td>
<td>Four years from the date of incident.</td>
</tr>
<tr>
<td>R.C. § 2305.09</td>
<td></td>
</tr>
<tr>
<td>Damage to Real Estate</td>
<td>Four years from the date the damage occurred.</td>
</tr>
<tr>
<td>R.C. § 2305.09</td>
<td></td>
</tr>
<tr>
<td>Fraud</td>
<td>Four years from the alleged act of fraud.</td>
</tr>
<tr>
<td>R.C. § 2305.09</td>
<td></td>
</tr>
<tr>
<td>Breach of Covenant to Provide Adequate Insurance</td>
<td>Four years from the date inadequate insurance is discovered.</td>
</tr>
<tr>
<td>R.C. § 2305.09</td>
<td></td>
</tr>
<tr>
<td>Tort of Bad Faith</td>
<td>Four years from the alleged act of bad faith.</td>
</tr>
<tr>
<td>R.C. § 2305.09</td>
<td></td>
</tr>
<tr>
<td>Torts, Rights not Otherwise Enumerated</td>
<td>Four years after the cause thereof accrued.</td>
</tr>
<tr>
<td>R.C. § 2305.09</td>
<td></td>
</tr>
<tr>
<td><strong>Claim Type/Section</strong></td>
<td><strong>Statute Period</strong></td>
</tr>
<tr>
<td>------------------------</td>
<td>--------------------</td>
</tr>
<tr>
<td>Appeals</td>
<td>Unless otherwise provided by law, 30 days after the entry of the judgment or appealable order, whichever comes last. In a civil case, 30 days after service of notice of judgment and its entry.</td>
</tr>
<tr>
<td>R.C. § 2305.10</td>
<td></td>
</tr>
<tr>
<td>Statutorily Created Actions</td>
<td>A liability created by statute, other than forfeiture or penalty, must be brought within six years of the date the claim arose.</td>
</tr>
<tr>
<td>R.C. § 2305.07</td>
<td></td>
</tr>
<tr>
<td>Breach of Contracts Not in Writing</td>
<td>Six years from the date plaintiff’s claim first arose.</td>
</tr>
<tr>
<td>R.C. § 2305.07</td>
<td></td>
</tr>
<tr>
<td>Breach of Contracts in Writing</td>
<td>Fifteen years from the date of the breach, unless there is a specific provision in the contract allowing for a shorter period.</td>
</tr>
<tr>
<td>R.C. § 2305.07</td>
<td></td>
</tr>
<tr>
<td>Minor’s Claims - Claims of Incompetent Persons</td>
<td>The limitation period for any minor’s claim does not begin until the minor reaches age 18. If a plaintiff is incompetent when injured, the limitation period does not begin until plaintiff is found competent.</td>
</tr>
<tr>
<td>R.C. § 2305.16</td>
<td></td>
</tr>
</tbody>
</table>
### IX. KENTUCKY STATUTES OF LIMITATIONS

<table>
<thead>
<tr>
<th>Claim Type/Section</th>
<th>Statute Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assault and Battery</td>
<td>One year from the date of assault and battery.</td>
</tr>
<tr>
<td>K.R.S. § 413.140</td>
<td></td>
</tr>
<tr>
<td>Bodily Injury Claims Other than from Automobile Accidents</td>
<td>One year from the date of injury. This statute applies to injuries caused by acts of negligence as well as those caused by intentional acts. This statute does not apply to bodily injuries stemming from automobile accidents.</td>
</tr>
<tr>
<td>K.R.S. § 413.140</td>
<td></td>
</tr>
<tr>
<td>Loss of Consortium</td>
<td>One year from the date of the incident.</td>
</tr>
<tr>
<td>K.R.S. § 413.140</td>
<td></td>
</tr>
<tr>
<td>Medical Malpractice</td>
<td>One year from the time the injury is first discovered or in the exercise of reasonable care should have been discovered. Any action must still be commenced within five years from the date the alleged act of negligence occurred.</td>
</tr>
<tr>
<td>K.R.S. § 413.140</td>
<td></td>
</tr>
<tr>
<td>Malicious Prosecution</td>
<td>One year from the date of the incident.</td>
</tr>
<tr>
<td>K.R.S. § 413.140</td>
<td></td>
</tr>
<tr>
<td>Libel, Defamation, or Slander</td>
<td>One year from the date of the incident.</td>
</tr>
<tr>
<td>K.R.S. § 413.140</td>
<td></td>
</tr>
<tr>
<td>Wrongful Death</td>
<td>If a person dies before the expiration of the applicable statute of limitations, the action may still be brought by their personal representative so long as it is commenced within one year of the appointment of the representative.</td>
</tr>
<tr>
<td>K.R.S. § 413.180</td>
<td></td>
</tr>
<tr>
<td>Product Liability</td>
<td>One year from the date of the bodily injury.</td>
</tr>
<tr>
<td>K.R.S. § 413.140</td>
<td></td>
</tr>
<tr>
<td>Claim Type/Section</td>
<td>Statute Period</td>
</tr>
<tr>
<td>----------------------------------------</td>
<td>-------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Bodily Injuries from Automobile Accident</td>
<td>Two years from the date of the accident or two years from the date of the last no-fault payment. Survivors and beneficiaries of a decedent have two years to make a claim for wrongful death.</td>
</tr>
<tr>
<td>Damage to Personal Property</td>
<td>Two years from the date of injury or damage.</td>
</tr>
<tr>
<td>Product Liability</td>
<td>Four years from when the breach occurs, regardless of the aggrieved party’s lack of knowledge of the breach if brought under a theory of breach of warranty.</td>
</tr>
<tr>
<td>Claim Type/Section</td>
<td>Statute Period</td>
</tr>
<tr>
<td>--------------------</td>
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</tr>
<tr>
<td>Breach of Contracts Not in Writing</td>
<td>Five years from the date the contract was breached. K.R.S. § 2305.10</td>
</tr>
<tr>
<td>Trespass on Real or Personal Property</td>
<td>Five years from the date of injury or damage. K.R.S. § 413.120</td>
</tr>
<tr>
<td>Fraud</td>
<td>Five years from the date the fraud was discovered, but per K.R.S. § 413.130 no more than ten years after the date the fraud was perpetuated. K.R.S. § 413.120</td>
</tr>
<tr>
<td>Intentional Infliction of Emotional Distress</td>
<td>Five years from the date of the incident. K.R.S. § 413.120</td>
</tr>
<tr>
<td>Bodily Injury Claims Against the Builder of a Home or a Person Making Improvements to a Home</td>
<td>This cause of action accrues at the time of original occupancy of the home, or occupancy after the improvements in question were made. K.R.S. § 413.120</td>
</tr>
<tr>
<td>Statutory Claims</td>
<td>This applies to all claims for liability based upon a statute where no statute of limitations is provided by statute. K.R.S. § 413.120</td>
</tr>
<tr>
<td>Bad Faith</td>
<td>Five years from the alleged act of bad faith. K.R.S. § 413.120(7)</td>
</tr>
<tr>
<td>Claim Type/Section</td>
<td>Statute Period</td>
</tr>
<tr>
<td>--------------------</td>
<td>---------------</td>
</tr>
<tr>
<td>Breach of Written Contracts K.R.S. § 413.090</td>
<td>Fifteen years from the date of the breach.</td>
</tr>
<tr>
<td>Claims of Minors and Incompetents K.R.S. § 413.170</td>
<td>The statute of limitations does not begin to run until the minor reaches the age of majority or the incompetent plaintiff becomes competent.</td>
</tr>
<tr>
<td>Claim Type/Section</td>
<td>Statute Period</td>
</tr>
<tr>
<td>--------------------</td>
<td>----------------</td>
</tr>
<tr>
<td>Employment</td>
<td>Except those based upon a written contract, within two years of the date of the act or omission complained of.</td>
</tr>
<tr>
<td>I.C. § 34-11-2-1</td>
<td></td>
</tr>
<tr>
<td>Medical Malpractice</td>
<td>Within two years from the date of the act, omission or neglect complained of.</td>
</tr>
<tr>
<td>I.C. § 34-11-2-3</td>
<td></td>
</tr>
<tr>
<td>Personal Injury, Injury to Character and Injury to Property</td>
<td>Within two years after the cause of action arises.</td>
</tr>
<tr>
<td>I.C. § 34-11-2-4(2)</td>
<td></td>
</tr>
<tr>
<td>Product Liability</td>
<td>Within two years after the cause of action accrues; or not more than ten years after the delivery of the product to the initial user or consumer. However, if the cause of action accrues at least eight years but less than ten years after that initial delivery, the action may be commenced at any time within two years after the cause of action accrues.</td>
</tr>
<tr>
<td>I.C. § 34-20-3-1(b)</td>
<td></td>
</tr>
<tr>
<td>Wrongful Death</td>
<td>Within two years after the death of the decedent.</td>
</tr>
<tr>
<td>I.C. § 34-23-1-1</td>
<td></td>
</tr>
<tr>
<td>Bad Faith</td>
<td>Two years from alleged act of bad faith.</td>
</tr>
<tr>
<td>I.C. § 34-11-2-4(2)</td>
<td></td>
</tr>
</tbody>
</table>
## XI. MICHIGAN STATUTES OF LIMITATIONS

<table>
<thead>
<tr>
<th>Claim Type/Section</th>
<th>Statute Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Libel, Defamation, or Slander</td>
<td>One year for an action charging libel or slander.</td>
</tr>
<tr>
<td>M.C.L.A. § 600.5805(9)</td>
<td></td>
</tr>
<tr>
<td>Disability of Infancy or Insanity at Accrual of Claim</td>
<td>If the person entitled to bring an action is under eighteen years of age or not mentally competent at the time the claim accrues, the person shall have one year after the disability is removed, through death or otherwise, to make the entry or bring the action.</td>
</tr>
<tr>
<td>M.C.L.A. § 600.5851</td>
<td></td>
</tr>
<tr>
<td>Actions for Personal or Property Protection Benefits; Notice of Injury</td>
<td>An action for recovery of personal protection insurance benefits for accidental bodily injury may not be commenced later than one year after the date of the automobile accident causing the injury unless written notice of injury has been given to the insurer within one year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. An action for recovery of property protection insurance benefits shall not be commenced later than one year after the accident.</td>
</tr>
<tr>
<td>M.C.L.A. § 500.3145</td>
<td></td>
</tr>
<tr>
<td>Claim Type/Section</td>
<td>Statute Period</td>
</tr>
<tr>
<td>--------------------------------------------------------</td>
<td>-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Assault, Battery, or False Imprisonment</td>
<td>Two years for a person charging assault, battery, or false imprisonment. Five years for a person charging assault or battery against: his or her spouse or former spouse, an individual with whom he or she has a child in common, an individual with whom he or she has had a dating relationship, or a person with whom he or she resides or formerly resided.</td>
</tr>
<tr>
<td>Malicious Prosecution</td>
<td>Two years from the date of the underlying criminal action being terminated in favor of the accused.</td>
</tr>
<tr>
<td>Medical Malpractice</td>
<td>Two years for an action charging malpractice, or within six months after the plaintiff discovers, or should have discovered, the existence of the claim, whichever is later. However, except as otherwise provided in section 600.5851(7) or (8) regarding minors, the claim shall not be commenced later than six years after the date of the act or omission that is the basis of the claim.</td>
</tr>
<tr>
<td>Fraudulent Concealment of Claim or Identity of Person Liable, Discovery</td>
<td>If a person who is or may be liable for any claim fraudulently conceals the existence of the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within two years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim, although the action would otherwise be barred by the period of limitations.</td>
</tr>
<tr>
<td>Claim Type/Section</td>
<td>Statute Period</td>
</tr>
<tr>
<td>--------------------------------------------------------</td>
<td>-----------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Bodily Injuries for Claims Not Otherwise Specified by Statute</strong></td>
<td>Three years after the time of the death for all actions to recover damages for the death of a person.</td>
</tr>
<tr>
<td>M.C.L.A. § 600.5805(10)</td>
<td></td>
</tr>
<tr>
<td><strong>Wrongful Death</strong></td>
<td>Three years from when the cause of action accrues. The cause of action accrues when a plaintiff by exercise of reasonable diligence discovers, or should have discovered, that he or she has a possible cause of action. However, in the case of a product that has been in use for not less than ten years, the plaintiff, in proving a <em>prima facie</em> case, shall be required to do so without benefit of any presumption.</td>
</tr>
<tr>
<td>M.C.L.A. § 600.5805(10)</td>
<td></td>
</tr>
<tr>
<td><strong>Product Liability Claims</strong></td>
<td>Three years from when the cause of action accrues. The cause of action accrues when a plaintiff by exercise of reasonable diligence discovers, or should have discovered, that he or she has a possible cause of action. However, in the case of a product that has been in use for not less than ten years, the plaintiff, in proving a <em>prima facie</em> case, shall be required to do so without benefit of any presumption.</td>
</tr>
<tr>
<td>M.C.L.A. § 600.5805(13)</td>
<td></td>
</tr>
<tr>
<td><strong>Breach of Contract for Written or Oral Sale</strong></td>
<td>Four years from when the cause of action has accrued. A cause of action accrues when the breach occurs, regardless of the aggrieved party’s lack of knowledge of the breach. By the original agreement the parties may reduce the period of limitation to not less than one year, but may not extend it.</td>
</tr>
<tr>
<td>M.C.L.A. § 440.2725</td>
<td></td>
</tr>
<tr>
<td>Claim Type/Section</td>
<td>Statute Period</td>
</tr>
<tr>
<td>--------------------------------------------------------</td>
<td>-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Damages for Breach of Contract</td>
<td>Six years for actions to recover damages or sums due for breach of contract, starting from the date that the claim accrued.</td>
</tr>
<tr>
<td>M.C.L.A. § 600.5807(8)</td>
<td></td>
</tr>
<tr>
<td>Damage to Property by Engineers, Contractors, Architects</td>
<td>Six years for actions against architects, professional engineers, or contractors arising from improvements to real property.</td>
</tr>
<tr>
<td>M.C.L.A. § 600.5839(1)</td>
<td></td>
</tr>
<tr>
<td>Death or Injury Arising from Improvements to Real Property</td>
<td>Six years after the time of occupancy of the completed improvement, use, or acceptance of the improvement, or one year after the defect is discovered, or should have been discovered, provided the defect constitutes the proximate cause of the injury or damage and is the result of gross negligence. No such action shall be maintained for more than ten years after the time of occupancy of the completed improvement, use or acceptance of the improvement.</td>
</tr>
<tr>
<td>M.C.L.A. § 600.5839</td>
<td></td>
</tr>
<tr>
<td>Uninsured/Underinsured Motorist Coverage</td>
<td>In the absence of a contractual limitations provision, suit for UM/UIM benefits is governed by the six-year statute of limitations applicable to contract actions, not the three-year period applicable to claims for injury to person or property.</td>
</tr>
<tr>
<td>M.C.L.A. § 600.5807(8)</td>
<td></td>
</tr>
<tr>
<td>Claim Type/Section</td>
<td>Statute Period</td>
</tr>
<tr>
<td>--------------------</td>
<td>---------------</td>
</tr>
<tr>
<td>Foreclosure of Mortgages M.C.L.A. § 600.5803</td>
<td>No person shall bring or maintain any action or proceeding to foreclose a mortgage on real estate unless he commences the action or proceeding within fifteen years after the mortgage becomes due or within fifteen years after the last payment was made on the mortgage.</td>
</tr>
</tbody>
</table>
XII. SIGNIFICANT OHIO COURT DECISIONS

A. SUPREME COURT DECISIONS

1. Insurance Coverage Decisions

*Safeco Ins. Co. v White*, 122 Ohio St.3d 562, 2009-Ohio-3718

Interpretation of “Occurrence”

13-year-old Casey Hilmer was stabbed by 17-year-old Benjamin White. Benjamin, who lived at home with his parents, was convicted on several criminal counts. The Whites were insured under four policies, including two Safeco policies. The Hilmers filed suit against Benjamin for battery, and against his parents for negligent supervision, negligent entrustment and negligent infliction of emotional distress. The other insurance companies agreed to indemnify the Whites under the terms of their policies, and sought to have Safeco pay its share when Safeco refused to defend or indemnify the Whites. The trial court held, and the appellate court affirmed, that Safeco must share the costs. Safeco argued that coverage is denied because the injury resulted from an intentional act by Benjamin, and is therefore not an “occurrence,” which is defined in the policy as an “accident.” Safeco also contended that “the policies explicitly exclude coverage for the intentional acts of an insured and the severability clause in both policies does not render the language in the exclusionary clauses ambiguous.”

The Supreme Court held “when a liability insurance policy defines an ‘occurrence’ as an ‘accident,’ a negligent act committed by an insured that is predicated on the commission of an intentional tort by another person, e.g. negligent hiring or negligent supervision, qualifies as an occurrence.” The Supreme Court also held policy exclusions precluding coverage for injuries expected or intended by an insured, or resulting from insureds intentional or illegal acts, “do not preclude coverage for the negligent actions of other insureds under the same policy that are predicated on the commission of those intentional acts.”

*Walburn v. Dunlap*, 121 Ohio St.3d 373, 2009-Ohio-1221

Appellate Procedure- Final Orders

Plaintiffs sued defendant Dunlap for negligence and loss of consortium after an automobile accident involving one of the plaintiffs and Dunlap. As Dunlap was uninsured, plaintiffs also asserted claims for UM coverage under their own insurance policy and plaintiff’s employer’s insurance policies. Plaintiffs requested an order determining the rights and responsibilities of the parties, and an award of damages. The trial court determined the plaintiffs were entitled to UM coverage under plaintiff’s employer’s insurance policies. The appellate court concluded such an order constituted a “final, appealable order” as defined in R.C. § 2505.02(B)(2), even though this decision conflicted with the rulings of other appellate courts. On review, the Supreme Court held an order declaring an insured is entitled to coverage, but does not address a plaintiff’s claimed damages, is not a “final, appealable order,” even if the order includes a Civil Rule 54(B) certification.
2. UM/UIM Decisions

State Farm Mutual Automobile Ins. Co. v. Grace, 2009-Ohio-5934

Ability to Contractually Limit UM/UIM Coverage

The insured drivers filed a class action lawsuit against State Farm challenging the enforceability of nonduplication clauses, which were expressly provided in the insured’s policies. These clauses precluded payment under the uninsured/underinsured motorist (UM/UIM) coverage for medical expenses that were paid or payable under the medical payment (Med Pay) coverage in the same policies.

The Supreme Court answered in the affirmative, holding under Ohio R.C. § 3937.18, as amended by S.B. 97, the language “including but not limited to” permits an insurer to contractually preclude payment pursuant to UM/UIM coverage for medical expenses that have previously been paid under the Med Pay portion of the same policy. More generally, the plain language of the amended statute displays an express legislative intent to grant insurance providers the privilege of including terms and conditions in their policies that limit or exclude UM/UIM coverage.

3. Employment Decisions

Nat’l Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth, 122 Ohio St.3d 594, 2009-Ohio-3601

Professional Negligence; Vicarious Liability

National Union lost a suit against Nationwide after its attorney, Richard Wuerth, from the law firm of Lane, Alton, fell ill and became incapacitated in the midst of the lawsuit. Following the loss, National Union filed a malpractice suit against Wuerth and Lane, Alton. Wuerth was removed from the case due to the passing of the statute of limitations, but National Union pursued a claim against Lane, Alton for vicarious liability. The Supreme Court held that a law firm cannot be directly liable for legal malpractice because it is the business entity under which attorneys practice law, not an entity through which attorneys practice law. Ultimately, a law firm does not engage in the practice of law, it is the attorneys who engage in the practice of law. In addition, the Supreme Court held a law firm cannot be vicariously liable for legal malpractice when no individual attorneys are liable. The only time a law firm can be vicariously liable for legal malpractice is "when one or more of its principals or associates are liable for legal malpractice."

Schelling v. Humphrey; Community Hospital of Williams County, 2009-Ohio-4175

Negligent Credentialing; Medical Malpractice

The plaintiff sued a doctor for medical malpractice and the hospital for negligent-credentialing following surgeries that were performed on the plaintiff’s feet. “To prove a negligent-credentialing claim, a plaintiff injured by the negligence of a staff doctor must show that but for the lack of care in the selection or retention of the doctor, the doctor would not have been granted staff privileges and the plaintiff would not have been injured.” The doctor filed for bankruptcy, and the suit against him was dismissed. The hospital then claimed the case against them must also be dismissed because the doctor was not a party to the action and there was not a prior finding that the doctor was negligent in treating the plaintiff.
The Supreme Court acknowledged the plaintiff’s claim against the physician was impeded through no fault of her own. The Court stated that usually a plaintiff must either make a doctor party to the case against the hospital, or obtain a prior determination that the “doctor committed medical malpractice and that the malpractice proximately caused the plaintiff’s injury.” But, due to the unusual circumstances of this case, the Court held the plaintiff could pursue her “negligent-credentialing claim against the hospital by first proving [the doctor] was negligent and that his negligence was the proximate cause of [plaintiff’s] injury.”

4. Premises Liability Decisions

*Lang v. Holly Hill Motel, Inc.*, 122 Ohio St.3d 120, 2009-Ohio-2495

Premises Liability; Open and Obvious Doctrine; Building Code Violations

A 78-year-old man and his wife rented a room at the Holly Hill Motel. To get to their room, the couple had to climb two steps that did not have handrails. The man attempted to climb the steps with his wife’s assistance, and as he tried to make it up the second step, he fell and broke his hip. He died three months later and his wife, as executor of his estate, brought suit against the motel for negligence. Under the Building Code, the first step was 3.5 inches higher than permissible and the second step was 2.375 inches higher than permissible. The motel argued that even if the step violated the Building Code, it was an open and obvious condition so it did not owe a duty of care.

The Supreme Court stated the open and obvious doctrine can be avoided “only with a per se finding of negligence.” In *Chambers v. St. Mary’s School* (1998), 82 Ohio St.3d 563, the Court “declined to extend negligence per se to administrative-rule violations.” Since the Building Code is an administrative rule, it does not create a per se finding, so the open-and-obvious defense can be used. Accordingly, the Supreme Court agreed, holding that in a premises liability action, the open-and-obvious doctrine applies even “when the condition that causes the injury violates the Ohio Basic Building Code.”

*Torchik v. Boyce*, 121 Ohio St.3d 440, 2009-Ohio-1248

Torts; Premises Liability; Fireman’s Rule

Plaintiff, a deputy sheriff, was injured walking down a set of deck steps when responding to a home burglar alarm. Plaintiff sued the homeowner and contractor who built the deck; and both defendants filed motions for summary judgment, asserting plaintiff’s claims were barred by the fireman’s rule. The fireman’s rule relieves a landowner’s duty (and thus, liability) to police officers and firefighters in most cases. The trial court granted both defendants’ motions for summary judgment, and the appellate court affirmed that judgment. On review, the Ohio Supreme Court held the fireman’s rule does not apply to an independent contractor’s negligence that causes injury to a police officer or firefighter acting within the scope of their official duties.
5. Governmental Immunity

*Doe v. Marlington Local School District Bd. of Education*, 122 Ohio St.3d 12, 2009-Ohio-1360

**Political Subdivision Immunity; Negligent Operation of a Motor Vehicle**

The court-appointed custodians of a minor sued the defendants after another child on a school bus sexually molested the minor. The Board of Education raised the defense of political subdivision immunity under Ohio Revised Code Chapter 2744 and moved for summary judgment. After the trial court denied the motion and the appellate court reversed, the Ohio Supreme Court affirmed the appellate court’s decision. The Supreme Court held R.C. § 2744.02(B)(1)’s exception to political subdivision immunity for injuries sustained as a result of “the negligent operation of any motor vehicle” does not apply to a school district’s liability for negligent supervision of children’s conduct on a school bus. In doing so, the Court construed the word “operation” in R.C. § 2744.02(B)(1) to encompass only the “controlling or directing the functioning of the motor vehicle itself as opposed to directing the occupants within the [vehicle].” Thus, the school district could successfully assert the defense of political subdivision immunity. Judge Pfeifer wrote a dissent stating that “operation” of a school bus under R.C. § 2744.02(B)(1) should include driving and “other activities relevant to the general purpose of the vehicle.”

*Moore v. Lorain Metro. Hous. Auth.*, 121 Ohio St.3d 455, 2009-Ohio-1250

**Political Subdivision Immunity; Housing Authority**

Plaintiffs sued defendants for the wrongful deaths of two children in a fire in an apartment owned by defendant Lorain Metropolitan Housing Authority (LMHA). LMHA moved for summary judgment on the grounds it was a political subdivision entitled to sovereign immunity under R.C. Chapter 2744. The trial court granted LMHA’s motion, but the Court of Appeals reversed the trial court’s decision. On review, the Ohio Supreme Court held that because the operation of a metropolitan housing authority is considered a “government function,” a metropolitan housing authority is a “political subdivision” for the purpose of asserting sovereign immunity. The Supreme Court remanded the case to the trial court to determine if one of the exceptions to sovereign immunity applied.

*Sullivan v. Anderson Township*, 122 Ohio St.3d 83, 2009-Ohio-1971

**Appeals; Jurisdiction; Government Immunity**

Plaintiff filed suit against Anderson Township and other defendants alleging that his property was damaged by the Township’s road-widening project. Anderson Township answered by asserting political subdivision immunity, and then moved for a judgment on the pleadings. The trial court granted the Township’s motion in part, and denied it in part. Anderson Township then appealed to the First District Court of Appeals. The First District held that it lacked jurisdiction to hear the appeal. R.C. § 2744.02 states “an order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order.” But, for the court’s order to be considered final and appealable when a trial court disposes of less than all the claims against all the parties, Civ. R. 54(B) ordinarily requires the trial court to include a determination that “there is no just reason for delay.” Since there was no determination included, the First District held that it did not have jurisdiction to hear the appeal.
The Supreme Court reversed, holding “an order that denies the benefit of an alleged immunity to a political subdivision is a final, appealable order under R.C. § 2744.02(C) in a multi claim, multi-party lawsuit, when it lacks the Civ. R. 54(B) certification that ‘there is no just reason for delay.’”

6. **Other Significant Decisions**


**Wrongful Death Actions; Saving Statute; Statute of Limitations**

A passenger died in an automobile accident on November 26, 2003. The passenger was a student in the Tri-Valley Local School district. The administrator of the student’s estate filed a complaint on August 3, 2005 against the school for wrongful death. The plaintiff dismissed the case without prejudice on September 15, 2005. Less than a year later, on September 7, 2006, plaintiff refilled the complaint alleging the school was willful, wanton and reckless when it allowed the driver to remove the student from school premises without the permission of the student’s parents. The wrongful death saving statute, R.C. § 2125.04, articulates the circumstances under which a plaintiff can extend the statute of limitations one year. The school argued that the statute of limitations had run, and that R.C. § 2125.04 did not provide plaintiff with an additional year.

The Supreme Court held R.C. § 2125.04 is constitutional and grants a plaintiff an additional year “to refile an action dismissed without prejudice only if dismissal occurred after the original statute of limitations had run.” The two-year statute of limitations for this case meant the deadline was November 26, 2005. Thus, for the plaintiff to have been granted an additional year under R.C. § 2125.04, the dismissal needed to occur after that deadline. Since the plaintiff dismissed his case before November 26, 2005, the court found the statute did not provide him with an additional year.

*Estate of Stevic v. Bio-Medical Application of Ohio, Inc.*, 121 Ohio St.3d 488, 2009-Ohio-1525

**Statute of Limitations; Medical Claims**

In October of 2003, a patient was at the Richland County Kidney Dialysis Center for dialysis treatment. While at the center, the patient fell, suffering various injuries. The patient died in 2004. Almost two years after the accident, a complaint was filed alleging that employees of the center either dropped the patient or allowed him to fall from a device that was being used to move him into position for dialysis. Generally, an action for bodily injury must be brought within two years. But, the defendant argued the claim was time-barred under R.C. § 2305.113(A), which states that certain “medical claims” are subject to a shorter one-year statute of limitations. R.C. § 2305.113(E)(3) provides the definition for those “medical claims.”

The Supreme Court held that to be a medical claim under R.C. § 2305.113(E)(3), and thus be subject to a one-year statute of limitations, two conditions must be met. First, the claim must “arise out of the medical diagnosis, care, or treatment of any person.” In addition, it must be “asserted against one or more of the medical providers” enumerated in R.C. § 2305.113(E)(3). The case was then remanded to the trial court to determine whether the two conditions were met.
Disclosure of Mary Carter Agreements at Trial

Plaintiff Hodesh, injured from a surgical error, sued both Dr. Korelitz and Jewish Hospital of Cincinnati for medical malpractice. Prior to trial, Hodesh and the hospital entered into an agreement, which stated the hospital would pay Appellee at least $175,000.00 in damages but no more than $250,000.00. On the first day of trial, Dr. Korelitz’s attorney requested disclosure of any agreements between Hodesh and the hospital. Hodesh turned over the agreement to the court, but the judge did not disclose the agreement until after trial. At trial, the jury found for Mr. Hodesh and awarded him $0.00 from the hospital and $750,000.00 from Dr. Korelitz. Appellant contended the agreement was a Mary Carter agreement (an agreement between a plaintiff and one defendant allying them against another defendant at trial) and therefore should have been disclosed to Dr. Korelitz prior to trial. The court found the agreement was not a Mary Carter agreement because: 1) The contract gave the hospital a financial interest in incurring a lower verdict; 2) The hospital had to pay $175,000.00 even if the verdict against Korelitz exceeded $250,000.00; and 3) The judge saw no signs of collusion between Hodesh and the hospital. The judge, even though he hadn’t read the agreement, was aware Hodesh was afraid it was conclusive. As such, the judge was “looking out” for trial tactics evidencing collusion between Hodesh and the hospital. Therefore, it was not error to refrain from disclosing the agreement to Dr. Korelitz until after trial.

Diminution of Market Value of Property

Plaintiffs sued defendant home construction company over defects in a home stemming from faulty construction. The jury returned a general verdict for plaintiffs, but also responded in an interrogatory that plaintiffs had not proven a diminution in the value of their home due to defendant’s construction defects. The Ninth Circuit Court of Appeals held proof of the diminution in value of plaintiffs’ home was required for a claim of temporary damage to property, e.g., damage that can be repaired. The Ohio Supreme Court reversed the appellate court, holding a property owner seeking recovery for temporary damages to non-commercial real estate can recover the reasonable costs of restoration without proving the damage caused a diminution (reduction) in the fair market value of the property. Either the plaintiff or the defendant may offer evidence of diminution in the fair market value of the property as a factor bearing on the reasonableness of the cost of restoration.

Patient Consent to Release Medical Information; Physician-Patient Privilege

Medical Mutual filed a civil fraud action against a physician. The policies that were issued to the physician’s patients who were insured by Medical Mutual included language that stated “you consent to the release of medical information to Medical Mutual when you enroll and/or sign an Application” and “when you present your identification card for Covered Services, you are also giving your consent to release medical information to Medical Mutual.” Medical Mutual filed a motion for the patient records to be turned over by the physician, who opposed the motion based on physician-patient privilege.

A consent to release “medical information is valid and waives the physician-patient privilege if it is voluntary, express, and reasonably specific in identifying to whom the information is to be
delivered.” The physician argued the patients’ consent did not specify Medical Mutual’s attorneys as authorized to receive the information. But, the court held “the release to Medical Mutual in this case also permits disclosure to its attorneys who are seeking disclosure on its behalf.” Thus, in this case, disclosure to Medical Mutual’s attorneys is permitted because the physician refused to provide the medical records directly to Medical Mutual.

**Minno v. Pro-Fab, Inc., 121 Ohio St.3d 464, 2009-Ohio-1247**  
**Corporate Veil Piercing**

Plaintiffs sued defendants, two “sister” corporations, alleging one of the corporations negligently failed to provide a safe work environment. As the allegedly negligent corporation carried no general liability insurance, the plaintiffs attempted to pierce the corporate veil of the non-negligent corporation to reach that corporation’s general liability insurance. The trial court granted the non-negligent corporation’s motion for summary judgment, but the appellate court reversed, stating the plaintiffs had presented sufficient evidence to see if the corporations were “fundamentally indistinguishable,” and thus, whether plaintiffs could pierce the corporate veil under **Belvedere Condominium Unit Owners’ Ass’n v. R.E. Roark Cos., Inc.** (1993), 67 Ohio St.3d 274. The Ohio Supreme Court reversed the appellate court, holding that when two corporations have common individual shareholders, but neither corporation has any ownership interest in the other corporation, a plaintiff cannot pierce the corporate veil of the second corporation for the misdeeds of the first corporation.

**Mynes v. Brooks, 2009-Ohio-5946**  
**Arbitration Agreement; Final, Appealable Orders**

Mr. and Mrs. Mynes filed suit claiming they purchased a home containing mold and structural defects that were knowingly concealed or negligently undiscovered and unreported. There was a contract between the Myneses and the home inspectors which contained an arbitration provision. The trial court declined to stay the matter pending arbitration, and ordered the home inspectors to participate in the lawsuit. The Court of Appeals dismissed the appeal of the home inspectors on jurisdictional grounds because although the trial court’s order was “final” under R.C. § 2711.02(C), it did not meet the requirements of Civ.R. 54(B).

The Supreme Court held that under R.C. § 2711.02(C), a party is permitted to appeal the granting or denial of “a stay of trial pending arbitration, even when the order makes no determination pursuant to Civ.R 54(B).” Therefore, the court reversed the decision of the Court of Appeals.

**Niskanen v. Giant Eagle, Inc., 122 Ohio St.3d 486, 2009-Ohio-3626**  
**Negligence- Punitive Damages; Self-Defense**

Plaintiff Paul Niskanen left a Giant Eagle store without paying, and began putting the bags in his car. The store manager followed Mr. Niskanen and tried to stop him. An altercation ensued, in which four men eventually pinned Mr. Niskanen to the ground and restrained him. Shortly thereafter, the police arrived and asked the men to get off Mr. Niskanen. At this point, it was discovered that Mr. Niskanen did not have a pulse. He was later pronounced dead, and the cause of death was asphyxiation. Mr. Niskanen’s mother brought suit against Giant Eagle, and her causes of action were based only in negligence. A jury found that Giant Eagle was negligent in
failing to properly train its employees, but that Mr. Niskanen was most at fault for his injuries. Therefore, no compensatory damages were awarded.

The Supreme Court held that “punitive damages are available in negligence actions only if compensatory damages are awarded.” The Court also held that self-defense can be raised “as an affirmative defense to a negligence cause of action.” But, whether it applies will be “determined on a case-by-case basis by examining whether the evidence supports the defense.”

Oliver v. Cleveland Indians Baseball Co. Ltd. Partnership, 123 Ohio St.3d 278, 2009-Ohio-5030

Two plaintiffs each won a jury verdict against the city of Cleveland, and each was awarded $400,000.00 in compensatory damages. Cleveland submitted a motion to have the compensatory damages reduced for each plaintiff pursuant to R.C. § 2744.05(C)(1), which states there is a $250,000.00 limit on damages awarded against political subdivisions that do not represent actual loss to an injured party (noneconomic compensatory damages). The plaintiffs responded, claiming the statute violated their right to a jury trial and the Equal Protection Clause of the United States Constitution.

The Ohio Supreme Court stated that a jury’s fact-finding is not intruded upon when a court applies R.C. § 2744.05(C)(1). The Court also declared that the statute is not unreasonable or arbitrary in its application “to persons suffering non-catastrophic injuries.” Accordingly, the Court held R.C. § 2744.05(C)(1) does not violate either a plaintiff’s right to a jury trial or the Equal Protection Clause.

Olympic Holding Co. v. ACE Limited, 122 Ohio St.3d 89, 2009-Ohio-2057

Plaintiff and defendants were involved in contractual negotiations to enter into a joint venture. After the defendants informed the plaintiff they would not proceed with the agreement, the plaintiff filed suit. Defendant filed a motion for summary judgment that claimed the agreement did not satisfy the statute of frauds, R.C. § 1335.05.

The Supreme Court held “a party may not use promissory estoppel to bar the opposing party from asserting the affirmative defense of the statute of frauds, which requires that an enforceable contract be in writing and signed by the party to be charged, but may pursue promissory estoppel as a separate remedy for damages.” It also held a joint-venture agreement is unenforceable if it does not satisfy the statute of frauds, so it “cannot impose any fiduciary duties on the parties.”

Roe v. Planned Parenthood Southwest Ohio Region, 122 Ohio St.3d 399, 2009-Ohio-2973

The Roes sought to obtain nonparty medical records from Planned Parenthood of suspected abuse and abortions performed on minors. They intended to use this evidence in their claim against Planned Parenthood for not reporting child abuse after their 14-year-old daughter received an abortion. The Roes cited to Biddle, claiming the disclosure would further a counterveiling interest and thus outweighs the patients’ need for confidentiality. The Supreme Court found that although the Roes had identifying information removed from the medical records, it
did not change the records’ status as confidential and privileged. The Court also held the test in *Biddle* only applies as a defense to the tort of unauthorized disclosure of medical information, and does not create a right to discover confidential medical records of nonparties in a private lawsuit.

*Sisk & Assoc., Inc. v. Commit. to Elect Timothy Grendell*, 2009-Ohio-5591

**Voluntary Dismissals; Service of a Complaint**

Plaintiff filed a complaint on September 23, 2004, but failed to obtain service on the defendant within one year, so plaintiff voluntarily dismissed the complaint. Plaintiff re-filed the complaint on October 19, 2005, but again failed to serve the defendant within one year. Plaintiff then requested the clerk to serve the defendant on March 26, 2007, which was outside of the one-year time limit. The Supreme Court held the “instruction for a clerk to attempt service of a complaint that was filed more than a year prior... by operation of law is a notice of dismissal of the claims....” Since the plaintiff had previously voluntarily dismissed a complaint which made the same claims, the second notice of dismissal resulted in a dismissal of the claims with prejudice.

*West Broad Chiropractic v American Family Ins.*, 122 Ohio St.3d 497, 2009-Ohio-3506

**Assignment of Future Settlement Proceeds**

After being injured in an automobile accident, non-party Kristy Norregard assigned her right to proceeds from a prospective settlement or judgment to appellant, West Broad Chiropractic when she received treatment there following her injury. Norregard executed an assignment to West Broad that stated West Broad was to be paid from the settlement before she received any settlement proceeds. West Broad notified American Family Ins. and requested to be included as a co-endorser on any disbursement check, or issued a separate check. But, the notice did not specify the amount due to West Broad. American Family Ins. disbursed all of the proceeds from the settlement directly to Norregard. The 10th District Court of Appeals refused to enforce the assignment of the proceeds and held “Norregard had no enforceable rights against AFI under R.C. § 3929.06 until she obtained a judgment.” The Supreme Court held a person injured in an accident “may not assign the right to future prospective proceeds of a settlement if the right does not exist at the time of the assignment” when such person “has not yet established liability for the accident and a present right to settlement proceeds.” Additionally, this Court held R.C. § 3929.06 “precludes an assignee of prospective settlement proceeds from bringing a direct action against a third-party insurer after the insurer distributed settlement proceeds.”
B. APPELLATE COURT DECISIONS

1. Insurance Coverage Decisions

*Alexander v. Yackee*, 2009-Ohio-1387
Insurance Policy Mistakes; Partnerships

Plaintiff and his father owned an apartment building. The father paid the mortgage and made the business decisions, while plaintiff did all the maintenance and repairs. Due to costs, the father cancelled the previous insurance policy and took out a general liability policy on the property. The insurance agent mistakenly listed the father and his wife as the named insureds. Before the new insurance was secured, a fire destroyed the building. Plaintiff owner filed suit, alleging he was not properly notified of cancellation of property insurance and not properly named on the new policy. The trial court granted summary judgment for the agency and agent. The appellate court also found since there was a partnership, and the father’s knowledge of the insurance issues was imputed to the plaintiff owner. Therefore, the appellate court affirmed the trial court’s ruling.

Res Judicata; Breach of Contract and Insurance Policy

The insurance company brought an action for declaratory judgment that it had no duty to defend or cover an insured under a commercial general liability policy in an underlying suit against the insured. The trial court granted summary judgment to the insurer. A trustee of the bankrupt estates of the parties who sued the insured appealed. Damages were awarded in the underlying case against the insured for breach of contract. The trustee agreed that the policy did not cover breach of contract claims based on the insured’s workmanship, but argued coverage was provided under an exception to an exclusion for work done by subcontractors, and most of the work was done by subcontractors. On appeal, the court found that after damages were awarded in the underlying breach of contract case, the only matter pending was a determination of those damages since there were no other pending claims against the insured or his subcontractors. Under the doctrine of *res judicata*, the trustee could not raise fact issues regarding the subcontractors’ failure to adequately perform their work. The breach of contract claim was not an “occurrence” under the general liability policy, so the insured was not entitled to coverage.

*Cawrse v. Allstate Ins. Co.*, 2009-Ohio-2843
Insured’s Burden of Proof

Plaintiff claimed that his estranged daughter vandalized and caused damage to his vehicle when he lent it to her. The trial court found that the insurer never investigated the reported vandalism, and therefore held in favor of the insured, awarding him damages. The appellate court found the trial court erred, because the forensic mechanic’s report, submitted by the insurer, proved the insurer investigated the claim and found the damages to the car were not related to a collision. Therefore, the insured failed to meet his burden of proof, as there was no other evidence to support his claim.
**Erie Ins. Co. v. Paradise, 2009-Ohio-4005**  
**Permissive Use**

Ms. Paradise was involved in an accident while using a truck owned by Terry Gates. Her passenger was killed in the accident. Terry’s son, Danny, was Ms. Paradise’s boyfriend. Terry had given permission to Danny to drive the truck with the understanding Danny would buy the truck. Terry specifically told Danny no one else could drive the truck. Danny had initially told Ms. Paradise she could drive the truck for emergency purposes only; however, when Danny began commuting to Michigan for his work, he became aware Ms. Paradise would sometimes use the truck. Terry, the owner of the truck, later learned from other relatives Ms. Paradise was driving the truck, at which point he called his son, Danny, to remind him no one else was to drive the truck. Under these facts, the court determined Terry Gates, the vehicle owner, had not impliedly consented to Ms. Paradise’s operation of the truck. The court ruled Ms. Paradise was not an insured under the terms of the auto liability policy issued to Terry Gates.

**Insurance Policy Language; Insurance Coverage; Summary Judgment**

The victim of a car accident sued the driver of the car, her insurer, the city’s insurer and a self-insured pool comprised of various political agencies and subdivisions. The trial court granted summary judgment in favor of the victim’s insurer, but denied summary judgment for the city’s insurer. The appellate court affirmed, because pursuant to R.C. § 2744.08, the coverage afforded by the joint self-insurance pool was in the nature of insurance coverage.

**Roeser v. State Farm Ins. Cos., 2009-Ohio-3395**  
**Insurance Coverage Decision**

An auto mechanic, the insured, was hit while driving a vehicle he had just repaired. The mechanic’s insurer argued underinsured coverage was excluded because it did not insure the vehicle and the vehicle was provided for the mechanic’s “regular use.” The appellate court focused on the five “signpost” analytical framework for whether a vehicle is provided for an insured’s regular use: 1) whether the vehicle was available most of the time to the insured; 2) whether the insured made more than mere occasional use of the vehicle; 3) whether the insured needed to obtain permission to use the vehicle; 4) whether there was an express purpose conditioning the use of the vehicle; or 5) whether the vehicle was being used in an area where its use would be expected.

Applying this test to the facts, the court found the mechanic was entitled to coverage. First, neither this vehicle nor any other vehicle at the dealership was available to the mechanic most of the time. Second, the mechanic’s use of the vehicle was, at best, occasional. Third, the mechanic’s use of the vehicle, or any other owned by the dealership, was within the scope of his duties as a mechanic. Last, there was nothing to suggest the mechanic was on a folic or detour for his own purposes.
2. UM/UIM Decisions

*Allen v. Binckett*, 2009-Ohio-2969
Settlement; Insurance Contracts; Conflict of Interest; “Make Whole” Rule

Plaintiffs sued for personal injury and loss of consortium arising from an automobile collision against defendant driver and their insurance company for UM/UIM coverage. The insurer filed a cross-claim against the other driver. At mediation, the parties entered into a settlement that encompassed the insurance company’s subrogation/reimbursement interest, but left the validity of that interest for judicial determination. Plaintiffs dismissed their UM/UIM claim against the insurer and the insurer dismissed its cross-claim against the other driver as a result of the mediation. The issue of whether the insurance company was entitled to the funds pursuant to the subrogation and/or reimbursement provisions of its policy was litigated. The trial court found that the insurer had a valid claim. Plaintiffs appealed, arguing that the insurer had a conflict of interest since it insured both drivers. The appellate court held there was no conflict of interest, because it was the plaintiffs who made the insurer a party in the case, and they shouldn’t be permitted to disregard the terms of the insurance contract without any action by the insurer. The plaintiffs also argued the trial court erred in not applying the “make whole rule.” The appellate court found that the voluntary settlement is persuasive evidence of the value of the insured’s losses.

*Mosley v. Personal Serv. Ins.*, 2009-Ohio-419
UM Coverage; Hit and Run Testimonial Evidence

Insured plaintiff alleged that she swerved off the road and hit a telephone pole to avoid a van traveling towards her. She later submitted a UM claim that was denied on the grounds that she had failed to comply with the policy requirement to provide independent evidence that the negligence of an unidentified driver caused her accident. In the lawsuit, the insured presented testimony of a firefighter who stated that after the accident, a van drove through the scene at a high rate of speed and nearly struck several firefighters. The trial court denied a directed verdict, and the appellate court affirmed. The courts held while the descriptions of the van given by the insured and the firefighter witness were not exact, they were similar enough. Further, the fact there was no evidence of when the van drove by the scene did not mean that the testimony could not support the insured’s claim.

*Shenyey v. Glasgow et al.*, 2009-Ohio-1366
Duplication Clauses in Uninsured Motorists Coverage

The plaintiff was involved in an accident with the uninsured defendant and claimed and recovered medical expenses under his medical payments coverage with State Farm Mutual Auto Ins. Co. in the amount of $14,000.00. Plaintiff then sought to recover the same $14,000.00 under his UM policy, which State Farm did not pay.

The court found the non-duplication clause within the UM policy is valid under the October 1, 2003, amendments to R.C. § 3937.18, which permits policies with UM coverage to limit or exclude coverage under specific circumstances. The plaintiff recovered his full amount of medical expenses, the goal of insurance, and was not allowed to recover double payment under the UM coverage.
3. **Employment Decisions**

*Wendel v. Omni Mfg., Inc.*, 2009-Ohio-912

**Employer Intentional Tort**

The plaintiff was injured while repairing a stamping press, which he believed to be in the “off” position. The press was, however, on, and pulled the plaintiff into the machine, causing serious injuries. The plaintiff alleged his employer was substantially certain serious bodily harm could occur.

The Court of Appeals did not find the defendant employer had committed a “substantially certain” employer-employee intentional tort. The defendant employer had in place extensive “lockout” and “tag” procedures for the repair process, and provided these lockouts and tags to the plaintiff employee. Simply knowing a dangerous condition exists during the course of employment is not evidence enough to demonstrate an employer was intentionally or substantially certain that serious harm would occur.

4. **Premises Liability Decisions**

*Burckholter v. Dentistry For You*, 2009-Ohio-1654

**Slip and Fall During Winter Accumulation**

The plaintiff slipped and fell, injuring her back, after exiting her car for a dentist appointment at the defendant’s office. The parking lot had been plowed, with piles of snow in the four corners of the lot. The plaintiff saw these piles, and was aware of the possibility of melting and refreezing. The trial court found the defendant did not create a dangerous or hazardous condition, but the melting and refreezing of the snow piles was a natural and obvious condition, under which no duty was owed.

The Court of Appeals agreed. In Ohio, there is generally no duty of a business owner to its patrons when snow and ice has naturally accumulated. The court found plowing a parking lot does not necessarily make the condition unnatural, where a duty would arise. Further, the defendant did not have superior knowledge that plowing the lot would create a hazard, as the plaintiff was aware of the natural condition of snow melting and refreezing. Therefore, summary judgment in favor of the defendant was appropriate, as no duty was owed to the plaintiff.


**Open and Obvious Doctrine**

A restaurant patron sued for personal injuries she sustained from tripping and falling on a step leading from a booth where she had been seated. The booth was elevated on a six inch platform. She was initially aware of this, but during the course of her meal, she forgot about the platform and tripped and fell as she was leaving. The trial court granted summary judgment for the defendant restaurant, finding that the condition was open and obvious and therefore the restaurant had no duty to warn. On appeal, the court found the fact the patron forgot about the step did not create an issue of fact. It was undisputed that the patron saw and was aware of the step before entering the booth. She also testified there was nothing to distract her as she was leaving, and so there were no attendant circumstances that would have created a fact issue. Further, the court found the restaurant was not negligent for seating the patron at a platform
booth, because there was no evidence it should have foreseen any danger to her by doing so. Therefore, the appellate court affirmed summary judgment.

5. Governmental Immunity

*Holbrook v. Brandenburg*, 2009-Ohio-2320

Sovereign Immunity; Summary Judgment

Defendant’s house was built in the drainage path above the plaintiff’s house. Defendant blocked the culvert pipes from the road to stop the natural drainage which caused flooding and damage to the plaintiff’s house. In addition to suing the defendant neighbors, plaintiff sued Bethel Township for negligently maintaining a drainage system and allowing the neighbors to tamper with the system. The lower court granted summary judgment, holding the township had sovereign immunity. The appellate court reversed, however, finding that whether the township’s decision to ignore years of complaints and requests by the plaintiff constituted the exercise of “judgment or discretion” was a question of fact. Further, the court held that whether or not that judgment or discretion was malicious, in bad faith, or was wanton and/or reckless was also a question of fact.

*Lucchesi v. Fischer*, 2008-Ohio-5934

Edge Drops and Public Roads; Summary Judgment and Res Judicata

A negligence action was brought on behalf of decedent Lucchesi who was killed in a car accident when the driver swerved to avoid an oncoming car. The accident was allegedly caused by an “edge drop” or drop-off edge at the shoulder or berm of the road. The Administrator of the Estate sued the Clermont County Board of Commissioners, claiming it was negligent for failing to keep the road “open, in repair and free from nuisance.” The appellate court affirmed summary judgment for the Board on the ground of political subdivision immunity. The court held the exception to immunity for failure to keep “public roads” in repair did not apply, because the edge drop was a part of the shoulder or berm, which the legislation did not intend to be considered part of the public road. The court further held the trial court’s denial of the Board’s first motion for immunity was not a final judgment rendered on the merits of the negligence action, and therefore *res judicata* did not preclude the trial court from granting the Board’s second motion.


Immunity and Recreational Users

The plaintiff attended a fireworks display on property owned by the defendant municipality. During the display, the plaintiff’s hand was on a fence with a gate operated by rolling across the top of the fence. An employee of the defendant opened the gate, injuring the plaintiff’s finger. The trial court granted the defendant immunity.

The Court of Appeals agreed. Under R.C. § 1533.181, “recreational users” who have permission to use a premises for recreational purposes without paying a fee are owed no duty of care by the tenant or owner of the land. The court found the plaintiff was at the premises for the recreational enjoyment of the fireworks, and therefore not owed any duty of reasonable care by the defendant’s employees.
Spain v. Village of Bentleyville, 2009-Ohio-3898

Governmental Immunity

A pedestrian was walking down the road when he was struck by a police vehicle operated by a police officer. Generally, a political subdivision is not civilly liable for the negligent acts of its employees acting in connection with a government function. However, an exception to this sovereign immunity applies when an employee engaged in the scope of his or her employment negligently operates a motor vehicle, causing injury. It is a full defense to this liability if a member of the police department was operating the vehicle was responding to an “emergency call” and the operation of the vehicle did not constitute willful or wanton misconduct. “Emergency call” is defined as “a call to duty, including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer.” The court refused to extend this definition to include the performance of basic patrol duties, which the officer in question was performing at the time of the incident.

Stanton-King v. Montgomery Cty. Bd. of Commrs., 2009-Ohio-428

Slip and Fall; Governmental Immunity

The plaintiff slipped and fell in an above ground parking lot owned and maintained by the defendant. The plaintiff alleged the defendant was negligent in maintaining the parking garage, which led to her fall and injuries. The defendant argued the plaintiff was a licensee while in the garage, and, therefore, sovereign immunity barred a claim against the defendant. The plaintiff asserted she was a business invitee at the time of the fall, disallowing an immunity claim.

The Court of Appeals remanded the case back to the trial court, finding the trial court did not properly determine the status of the plaintiff as either a licensee or invitee. Without a determination of status, the Court of Appeals found the sovereign immunity doctrine could not be applied and analyzed.

Swint v. Auld, 2008-Ohio-5381

Appeals; Governmental Immunity; Jurisdiction

The Village of Golf Manor appealed the trial court’s denial of governmental immunity under Civ.R. 12(B)(6) when it was sued for a police officer’s actions during a dog attack. The trial court did not include a Civ.R. 54(B) certification in its decision. The appellate court dismissed the appeal for lack of jurisdiction. Although the court found that pursuant to R.C. § 2744.02(C) the trial court’s order was a final decision, it did not automatically follow that it was an appealable decision. The court followed Sullivan v. Anderson Twp., 2008-Ohio-1438, holding a court has no jurisdiction to hear an appeal from a judgment of fewer than all the claims or all the parties in a multi-claim, multi-party case in the absence of the trial court’s determination of all claims. The trial court stated that the case had been dismissed “other than on the merits and without prejudice” on the grounds that an appeal would “indefinitely stay further proceedings.” Further, the trial court held the case could be reactivated upon either party’s motion for good cause shown or upon order of the Appellate Court. Golf Manor therefore asserted there were no other claims or parties below. However, the appellate court held the dismissal was not legitimate since there is no civil rule allowing a court to dismiss a case because an appeal will indefinitely stay further proceedings, and no rule allows a trial court to dismiss a case subject to reactivation. Therefore, the appeal was dismissed.
6. Other Significant Decisions

Adkins v. Estate of Place, 2009-Ohio-526
Actual Authority Required for Settlement

The attorney for an injured plaintiff mistakenly believed his client instructed him to accept a settlement offer, which he did. The party offering settlement attempted to enforce the settlement while plaintiff appealed and attempted to move to trial. The court held an attorney who is without specific authorization has no implied power by virtue of his general retainer to compromise and settle his client’s claim or cause of action. Furthermore, an attorney’s authority to negotiate does not imply the authority to enter into a settlement agreement. Defense attorneys should be aware that simply because a plaintiff’s attorney is negotiating does not mean the attorney has the actual authority to settle the claim.

Bouher v. Aramark Servs., 2009-Ohio-1597
Product Liability; Consumer Expectation Test; Failure to Warn; Summary Judgment

Plaintiff used a FETCO coffee maker to get hot water for brewing tea at work as she had done many times before. She suffered second degree burns when her finger pressed through the cup and stuck, causing her to shake her hand and splash the hot water onto her. The trial court denied summary judgment under the consumer expectation test, because the degree of burns the plaintiff suffered is enough to raise a factual issue as to whether the water was unreasonably hot. The appellate court reversed, granting summary judgment because plaintiff presented no evidence to show there was a material issue of fact regarding a defective design of the coffee maker and the temperature of the water was below industry standard. Further, the appellate court found the hot water was an open and obvious risk, therefore there was no failure to warn. The court’s decision overruled Nadel v. Burger King (1997), 119 Ohio App. 3d 578.

Cargile v. Barrow, 2009-Ohio-371
Discovery of Medical Records

The plaintiff filed an action for personal injuries in an automobile accident. The defendant requested the release of all the plaintiff’s medical records for the previous five years. The plaintiff refused, claiming doctor-client privilege, and that some of the records were not related to the accident.

The trial court ordered the release of all records, without review. The appellate court reversed, and determined when there is a dispute over whether a medical record is sufficiently related to a pending civil action, the judge must review the medical record to determine if the record is privileged before ordering the release of the record.
**Hanners v. Ho Wah Genting Wire & Cable SDN BHD, 2009-Ohio-6481**
Bifurcation of Punitive Damages Claims in a Tort Action

R.C. § 2315.21(B) provides in a tort action tried to a jury in which a plaintiff makes claims for compensatory and punitive damages, upon the motion of any party, the trial of the tort action shall be bifurcated. The trial court refused to apply the statute, and instead applied Civil Rule 42(B), which gives the court discretion to bifurcate. The court of appeals reversed the decision of the trial court, and held in a tort action tried to a jury, upon the motion of any party, the trial of the action for compensatory damages must be bifurcated from the punitive damages action. The court of appeals also held where a trial court denies a defendant’s motion to bifurcate the plaintiff’s claims for compensatory damages from the claims for punitive damages in a tort action, the decision of the trial court is a final, appealable order.

**Jacques v. Manton, 2009-Ohio-1468**
Collateral Source Rule

This case arose as a personal injury action following a traffic accident. At trial, the defendant attempted to introduce evidence the plaintiff’s medical providers accepted reduced payments pursuant to a contract with the plaintiff’s insurer that reduced the reasonable value of his medical expenses. The lower court denied the request to introduce this evidence under R.C. § 2315.20, which states in relevant part that “(A) In any tort action, the defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the damages that result from an injury, death, or loss to person or property that is the subject of the claim upon which the action is based, except if the source of collateral benefits has a * * * contractual right of subrogation * * *.” Because the source of medical payments the defendant attempted to introduce into evidence was subject to the contractual right of subrogation, the appellate court held the application of the collateral source rule is governed by R.C. § 2315.20 and affirmed the trial court’s decision. Specifically, the court refused to apply Robinson v. Bates, because the accident occurred after the effective date of R.C. § 2315.20.

The Ohio Supreme Court has accepted jurisdiction of this case, and its decision is pending.

**McCoy v. Murray, 2009-Ohio-1658**
Sudden Medical Emergency

The defendant was driving a motor vehicle when he suffered sudden loss of vision and consciousness, and was determined to have suffered a heart attack. His vehicle ran off the road and into the plaintiffs’ kitchen. The plaintiffs brought suit, but lost on summary judgment, due to the sudden emergency doctrine that alleviated the defendant’s liability to the plaintiffs. The issue was brought to appeal.

The Court of Appeals agreed, dismissing the plaintiffs’ argument that the defendant had a history of heart issues that would lead to a heart attack. The court did not agree that a family history of heart attacks and other factors made a heart attack foreseeable. There was no positive way for the defendant to have foreseen a heart attack to occur at any given moment, much less while he was driving a motor vehicle. Therefore, the sudden emergency doctrine created a bar from liability for the defendant.
McDougal v. Ditmore, 2009-Ohio-2019
Settlement; Loss of Jurisdiction

One of the plaintiffs in a personal injury dispute and the attorney signed a settlement agreement that required the plaintiff to pay a medical lien held by an insurance company from the proceeds of the settlement. An agreed order of dismissal with prejudice was filed. The plaintiff failed to pay the lien from the settlement proceeds, and so the appellee filed a motion to enforce the settlement. The trial court granted this motion. The appellate court held that since the trial court unconditionally dismissed the case, it no longer had jurisdiction to take any further action, including the enforcement of the settlement agreement. Therefore, the trial court’s judgment was void and the appellate court vacated the judgment.

Indemnification after Settled Claims

An insurance agency and insurance company were sued in a medical malpractice case. The insurance company settled and then sought indemnification from the insurance agency because there was evidence the agent wrongly completed the application. The trial court did not allow indemnification.

The Court of Appeals, however, held there were issues of material fact. Indemnity is allowed in Ohio after a party settles a lawsuit instead of litigating as long as: 1) proper and timely notice is given to the indemnitor; 2) the non-settling party was legally liable to respond; and 3) the settlement was fair and reasonable. The court found the settlement to be fair, so issues remained as to whether the insurance agency was legally liable to respond to the suit.

Ray v. Ramada Inn N., 2009-Ohio-1278
Expert Testimony

Plaintiff sued the defendant for injuries sustained from slipping and falling on defendant’s hotel premises. Initially, the trial court granted summary judgment against him. On the initial appeal, the ruling was reversed and the matter remanded. In the second trial, the court relied on R.C. § 2743.43 in determining that plaintiff’s expert could not testify while his medical license was suspended. Therefore, due to his lack of expert testimony, a stipulated directed verdict was entered against the plaintiff. On appeal, the court held the trial court abused its discretion by relying on R.C. § 2743.43, because it was only applicable in medical malpractice actions. Instead, the court should have determined whether plaintiff’s expert was qualified to testify under Evid. R. 702.

Impeachment of Expert Witness

This was a wrongful death action against a heart surgeon. The plaintiff’s expert witness testified the defendant released the patient from the operating room before she was stable, proximately causing her death. On cross-examination, the witness admitted there was no way to be medically certain that the deceased would have lived if she had been kept in the operating room longer.

The court stated in order for an expert witness’s testimony to be considered “recanted” and not available to the jury to use in its decision, the witness must publically withdraw or definitively
repudiate his prior testimony. The court found the cross-examination did not lead the witness to formally repudiate any prior statements, as the witness refused to speculate about whether the deceased would have lived. Therefore, no reversible error was found.

*Stark Commons, Ltd. V. Landry’s Seafood House – Ohio, Inc.*, 2009-Ohio-3847

**Declaratory Judgments; Attorney Fees**

In a lessor/lessee dispute, the lessor brought a declaratory judgment action. The trial court granted summary judgment to the lessor on the declaratory judgment action. In a separate action, a judgment for damages due to breach of lease was entered for the lessor. The award of attorney fees was at issue on appeal. The appellate court held that the award of attorney fees was not ripe for determination in the breach of lease action as the attorneys fee award was based on the declaratory judgment action. Furthermore, the award of attorney fees in a declaratory judgment action was improper as the Declaratory Judgment Statute, R.C. § 2721.16(A), bars attorney fees and none of the statute’s exceptions applied.

*State ex rel. Findlay Industries v. Industrial Commission of Ohio*, 2009-Ohio-1674

**Failure to Object to Magistrate’s Conclusions of Law**

Plaintiff filed a complaint in mandamus in the Tenth District Court of Appeals regarding a woman’s application for disability compensation. The matter was referred to a magistrate who issued a decision including findings of fact and conclusions of law. The plaintiff filed no objections to the magistrate’s report, and the appellate court accepted the decision as its own. On appeal, the plaintiff’s arguments arose from the magistrate’s conclusions of law, but since plaintiff did not object to those conclusions, the court could proceed no further and affirmed.

*Wolfe v. Priano*, 2009-Ohio-2208

**Dismissal and Refiling**

Plaintiffs voluntarily dismissed and refilled their medical malpractice action against the defendants, a physician and a medical practice. The trial court dismissed the case without prejudice, and the plaintiffs refilled again. The trial court then granted summary judgment for the defendants. The appellate court affirmed, finding that R.C. § 2305.19 only allowed plaintiffs to refile their claim once after voluntarily dismissing it. No authority supported plaintiffs’ argument that the legislature had eliminated this rule. The fact that the complaint was dismissed without prejudice only meant that it had no *res judicata* effect, but did not allow the plaintiffs to refile. As a matter of law, the plaintiffs were barred from filing their action a third time.
Plaintiff sued for injuries suffered in a motor vehicle accident. During discovery, she refused to sign medical release authorizations and filed a motion for a protective order. On appeal, the court held that the trial court erred in denying the motion. The authorizations were blanket ones that sought “all” of the plaintiffs’ medical and pharmaceutical records with no limitation beyond time. R.C. § 2317.02(B)(3)(a) limits discovery in personal injury cases to medical records causally or historically related to the physical or mental injuries relevant to the case. Under Civ. R. 26(C), the trial court had authority to order an in camera inspection of the medical records at issue. Therefore, on remand, the appellate court ordered the trial court to conduct an in camera inspection of the medical records requested to determine whether they were discoverable.
XIII. **SIGNIFICANT KENTUCKY COURT DECISIONS**

A. **SUPREME COURT DECISIONS**

1. **Insurance Coverage Decisions**

*Coleman v. Bee Line Courier Services, Inc.*, 2009 WL 1439788 (Ky. 2009)

**Release Agreements and Effect on Indemnification Claims**

The plaintiff was injured in a motor vehicle accident by a vehicle owned by the defendant and operated by the defendant’s employee. The plaintiff’s insurance carrier, Nationwide Insurance Company, paid a portion of her medical bills under the Motor Vehicle Reparations Act. The plaintiff then settled her personal injury claim for an amount paid by the defendant’s insurance carrier, Zurich American Insurance, and signed a release and hold harmless agreement. Nationwide then sought indemnification against Zurich, who cited the release, demanding the plaintiff defend against the indemnification claim.

The court of appeals upheld the trial court’s summary judgment for defendant Bee Line. However, the Supreme Court reversed, finding the release agreement was only intended to relate to the personal injury claims, and not to any other forms of recoupment claims such as for the separate and distinct recoupment of “no-fault” (basic reparations) benefits paid. Therefore, the plaintiff was not contractually bound to defend Zurich against Nationwide’s indemnity claim.

*Gilbert v. Nationwide*, 275 S.W. 3d 690 (Ky. 2009)

**Preserving Insurer’s Subrogation Rights**

Plaintiff’s daughter was involved in an auto accident and promptly notified her own insurance provider, Nationwide. On assurances by the offender’s insurer, plaintiff waited to collect collision damages while there was pending litigation for her daughter’s personal injuries. The daughter’s personal injury case was settled and plaintiff tried to collect from the offender’s insurance company, which denied her claim because the two year statute of limitations had run. Plaintiff then sought damages from her own insurer, Nationwide. The issue before the court was whether the insurer’s subrogation rights had been violated since the plaintiff failed to file before the two year statute of limitations.

The court determined that because the plaintiff promptly notified her insurer, she satisfied her contractual duty not to interfere with insurer’s right to protect its subrogation rights and therefore preserved her right to collision coverage.


**UIM Coverage and Proper Notice Under the Policy**

The plaintiff was involved in a motor vehicle collision, and brought suit against the other driver and against Kentucky Farm Bureau (KFB) as plaintiff’s UIM carrier. Plaintiff advised KFB that plaintiff was considering accepting an offer. The plaintiff then accepted a settlement offer from the other driver’s insurance, notifying KFB thereafter that the settlement was accepted and a release was already signed. KFB was then awarded summary judgment due to the fact that the lack of proper notice of the settlement violated the UIM policy, and KRS § 304.39-320.
The Supreme Court affirmed the summary judgment. The UIM policy clearly set forth the insured’s duty to notify the defendant before any agreement to settle was accepted by the insured. In *Coots v. Allstate Ins. Co.*, the Supreme Court held a UIM insurer is entitled to notice in order to preserve its subrogation rights. Without the proper notice given to KFB to protect its subrogation interests, KFB was properly granted summary judgment.

*Mattingly v. Stinson*, 281 S.W.3d 796 (Ky. 2009)

**Identifying the UIM Carrier at Trial**

The plaintiff and the defendant were involved in a motor vehicle collision. The plaintiff brought suit against the defendant as driver of the other vehicle and against Kentucky Farm Bureau (KFB) as his own UIM carrier, while the defendant counterclaimed. The claim brought by the plaintiff was settled, whereas the counterclaim proceeded to trial. The trial jury found the defendant 100% liable.

The defendant claimed the trial court erred by not identifying KFB to the jury as a party at trial, because they carried the UIM insurance for the plaintiff. The Supreme Court, however, found no error. The UIM carrier must only be named when there is a *Coots v. Allstate Ins. Co.* type settlement; in other words, only when the UIM carrier has a subrogation interest preserved by paying the plaintiff the amount of the tortfeasor’s policy. Here the subrogation interest was not at issue, because KFB had not entered into any settlement with the injured plaintiff.

**2. Damages Decisions**

*Tennill v. Talai*, 277 S.W.3d 248 (Ky. 2009)

**Proof of Unliquidated Damages after Default Judgment**

Plaintiff sued for personal injuries arising out of an automobile accident. Neither the defendant nor his insurance company defended, and a default judgment was entered in favor of the plaintiff.

The defendant submitted written interrogatories that were not answered by the plaintiff, but the plaintiff was fully deposed by the defendant. The defendant attempted to bar the plaintiff from claiming unliquidated damages due to the failure to respond to the interrogatories, but the Supreme Court of Kentucky found that because the plaintiff was fully deposed on the issue of damages, the failure to answer the interrogatories was harmless, and allowed the claim for unliquidated damages.
3. **Negligence Decisions**

*Morgan v. Scott, 2009 WL 1438905 (Ky. 2009)*

*Car Dealership Test Drives and Dealership Negligence*

The plaintiff test drove a car from a local dealership. The dealer went in the car with the plaintiff, but soon realized the car was running out of gas, and returned to the dealership to refuel. After refueling, the dealer asked the plaintiff to wait in the parking lot while the dealer went inside, but the plaintiff drove the car off the lot. The plaintiff testified he had permission to drive off the lot. The plaintiff then lost control of the vehicle, injuring the defendants.

At trial, the court apportioned liability equally to the plaintiff and to the dealership. The Court of Appeals reversed on behalf of the dealership, and the Supreme Court agreed. The Court states that it has long been the law in the Commonwealth that a vehicle’s owner is not liable for the injuries that the operator of the car causes. The dealership may have been liable for the accident if a dealer had been present in the vehicle when the injuries were sustained, which is not the case here. The injuries were caused by the sole actions of the plaintiff, not the dealership under ideas of vicarious liability or negligence. Therefore, the Supreme Court held the jury should not have been instructed on apportionment because plaintiff was the only party liable.

4. **Employment Decisions**

*Labor Ready, Inc. v. Johnston, 2009 Ky. LEXIS 153*

*Liability of Temporary Labor Service and its Employee While Working for a Contractor to Contractor’s Permanent Employee*

A permanent employee was injured when she was struck by an automobile driven by subcontractor’s temporary employee, who was helping move vehicles during an auction. The injured employee sued the temporary labor service and temporary employee for negligence.

The Kentucky Supreme Court held the permanent employer had no potential workers' compensation liability to the temporary employee because he was not the injured party and therefore the injured employee was not the temporary employee's co-employee. In the event a jury found that the temporary employee's negligence helped to cause the injuries, § 342.690(1) limited the permanent employer's obligation to indemnify the subcontractor to the amount of workers' compensation benefits that it paid unless the parties had contracted otherwise. Ky. Rev. Stat. Ann. § 342.690(1) clearly permitted employers to agree to share an employer's liability for damages in a manner different from that set forth in the statute, provided they do so by written contract.
5. Other Significant Decisions


Subrogation

The suit involved insurance carriers of drivers in an automobile accident, one of whom had a policy through the appellee, the other had an underinsured motorist policy with the appellant. A personal injury action was filed, but the tortfeasor filed bankruptcy and was dismissed from the case. This dismissal terminated the subrogation rights the appellant had against the other driver for payments made to its insured. Appellant then filed a cross claim against the other driver and the appellee seeking subrogation of the payment it made to its insured under the UIM policy.

The Supreme Court reversed the ruling and found the appellant is entitled to seek subrogation from the appellee in the amount paid to its policy holder. The Court found the appellant’s inability to seek subrogation from the tortfeasor has no bearing on its statutory right to seek subrogation from the appellee under § 304.39-3204(4). The appellant can stand in the shoes of the insured to seek a determination of liability and damages and ultimately collect a judgment against the tortfeasor’s carrier.


Damages

The plaintiff filed a suit against a law firm and the insurance company hired by the plaintiff to cover Workers’ Compensation claims and appoint legal representation for them in these disputes. The plaintiff alleged the insurance company breached the contract, fiduciary duties and aided and abetted the law firm in its breach of fiduciary duties and bad faith.

The Supreme Court decided the ruling of summary judgment in favor of the defendants on the issue of the duty of care owed to Kuhlman Electric was inappropriate because they could not decide this as a matter of law. However, the Court upheld the judgment of the trial court because Kuhlman Electric could not show damages in connection with the violation of any duties owed to it by the insurance company. The Court rejected the plaintiff’s argument the insurance company’s negligence impaired the plaintiff’s ability to defend its case because the company was ultimately found liable because of the medical evidence and not because of any procedural difficulties.

Denton v. City of Florence, 2008-SC-000324-DG (Ky. 2009)

Procedure

Plaintiff was injured from a slip and fall on the sidewalk in front of a City building. In the plaintiff’s notice to the defendant, she misstated the date of the accident by stating the accident occurred on or about two days before the accident actually happened.

The Supreme Court disagreed with the lower court’s holding that the plaintiff’s notice to the defendant did not comply with § 411.110, and thus her claim was not barred. The Court reasoned that the plaintiff’s language “on or about” was stated only with approximate accuracy and the facts in this case did not show the plaintiff was outside the window of accuracy. The Court recognized the language of “on or about” could refer to a span of several days but not
longer than a period of 3 to 4 months, and thus plaintiff’s misstatement of two days was clearly within this window.

*Saleba v. Schrand, 2009-SC-000096-MR (Ky. 2009)*

**Evidence**

The executor of an estate filed a wrongful death action on behalf of a woman who was allegedly misdiagnosed and improperly treated for cervical cancer. One of the defendant doctors filed a writ to prohibit the trial judge from requiring them to disclose various peer view documents relating to the defendant’s interpretation of certain tests and the defendant’s proficiency as a cytotechnologist.

The Supreme Court affirmed the lower court’s ruling that the Kentucky statute allowing for production of peer review documents applied, instead of the Ohio statute that would have prohibited this production. The Court applied the Kentucky law because documents that are privileged under the local law of the State, which has the most significant relationship with the communication but which is not privileged under the local law of the forum, will be admitted, unless there is some special reason why the forum policy favoring admission should not be followed. The Court found no policy reason existed and Kentucky has an abundance of case law allowing admission of medical malpractice documents.

*Wilkins v. Kentucky Retirement Systems Bd. of Trustees, 276 S.W.3d 812 (Ky. 2009)*

**Procedure**

The deadline for the petitioner’s appeal fell on a Sunday and the Monday after was a legal holiday (Columbus Day); however, the courthouse was open on that holiday. The petitioner filed on Tuesday. The court concluded that under KRS 446.030 since the Monday was a legal holiday the plaintiff was granted an additional day to file and therefore the petitioner had until Tuesday to file the appeal, even though the courthouse chose to remain open on Columbus Day.

**B. FEDERAL COURT DECISIONS**


**Negligence Standard of Care**

An inmate brought suit under the Federal Tort Claims Act against prison doctors, alleging negligence in the treatment of certain conditions and injuries that the inmate suffered. The plaintiff did not produce any expert testimony as to the proper standard of care for the injuries he claimed.

The court found that the plaintiff did not meet the standard of proving a duty of care in a negligence action. Because this claim allegedly arose out of the negligent conduct of prison doctors, and the injuries suffered by the plaintiff were outside of the “general knowledge” of a jury, then the plaintiff was required to produce expert testimony. Further, the defense submitted extensive medical records and doctors’ affidavits showing that some form of care was provided. The plaintiff’s claim did not survive summary judgment due to his lack of production of expert testimony.
C. APPELLATE COURT DECISIONS

1. Insurance Coverage Decisions


“Automobile” Defined for UIM Coverage

A passenger in a one vehicle automobile accident sought underinsured motorist benefits under her mother’s automobile insurance policy. The coverage extended to “a relative who does not own an automobile” and defined “automobile” as a four-wheel “private passenger or station wagon type automobile” not used in the business of carrying passengers for hire. The passenger owned a vehicle at the time of the accident, but the vehicle was inoperable as it was in need of a new steering column.

The court found the definition of “automobile” under the policy to be ambiguous because the definition was circular, and a reasonable person could interpret the definition as encompassing only four-wheeled vehicles that are operable. The court agreed with the Supreme Court of Kentucky’s determination that “a car that has been retired from service for an indefinite time into the future should not be considered a passenger vehicle.”

*State Farm Mutual Automobile Ins. Co. v. Slusher*, 2009 WL 485027 (Ky. App.)

Recovery of Workers Compensation Benefits Does Not Bar UIM Claim

The decedent was struck by an automobile at his place of employment when a co-worker negligently failed to activate the parking brake. The decedent’s estate collected under the Workers’ Compensation Statutes, but also sought damages from the decedent’s underinsured automobile policy with State Farm (UIM).

The court found that the clear intent of the Kentucky UIM statute is to allow additional coverage so as to be fully compensated from the fault of another individual. Therefore, although fault was attributed to the negligence of another co-worker/employee of plaintiff (who was therefore immune from liability), and the decedent’s damages exceeded the workers’ compensation limits, the estate was still allowed to recover from the decedent’s UIM policy.

2. Damages Decisions

*Jackson v. Beattyville Water Dep’t*, 279 S.W.3d 633 (Ky. App. 2009)

Alleging Damages to Establish Jurisdiction

A cemetery owner filed a complaint against a water department, alleging negligent repair of water lines adjacent to the cemetery, causing damages. The original complaint alleged $7,500.00 in damages, but the water company alleged that the damages were below the $4,000.00 amount in controversy required for Circuit Court jurisdiction. The trial court transferred the action to District Court.

The court of appeals reversed, stating that the circuit court has original jurisdiction in a civil action where the amount in controversy exceeds $4,000.00, pursuant to KRS 23 § A.010(1), 24A.120. Proof of damages in excess of $4,000.00 is not required for circuit court jurisdiction,
they need only to be reasonably alleged, which the cemetery owner did in her supplemental answers to interrogatories.

3. **Negligence Decisions**

_Carroll v. Wright_, 2009 WL 414064 (Ky. App.)

**Sudden Emergency Qualification in Jury Instructions**

The plaintiff was struck by a tractor trailer that was driven by the defendant. The defendant was driving on a highway and approached a blind curve, where two vehicles were stopped at a stop sign. The defendant attempted to stop, his brakes locking out and leaving skid marks for 100 feet. The jury was instructed on the “sudden emergency” qualification, stating that if the stopped vehicles were a sudden emergency the defendant was confronted with and acted in a reasonable and prudent manner in light of that emergency, then the defendant is not held liable.

The Court of Appeals reversed, stating that the scenario of stopped vehicles around a blind curve does not qualify as a “sudden emergency.” The defendant was familiar with the roadway, and knew of the blind curve. There were also adequate warning signs of the blind curve on the roadway, making the stopped vehicles not a true “sudden emergency.”

4. **Employment Decisions**


**Sovereign Immunity for County Officials**

The plaintiff filed a declaratory judgment action against the defendants, who included county sheriffs and county clerks, for erroneous tax collecting procedures. The defendants were granted summary judgment on their behalf due to sovereign immunity of the officials.

The court of appeals upheld summary judgment. Kentucky counties are awarded governmental immunity. This extends to county officials when they are being sued in their official capacities, as long as they were working within the scope of their employment. Here, the sheriffs and clerks were within their official capacities as county tax collectors, and summary judgment based on immunity was appropriate.
XIV. SIGNIFICANT INDIANA COURT DECISIONS

A. SUPREME COURT DECISIONS

1. Insurance Coverage Decisions


_Notice of Claim_

The insured was notified it faced a possible environmental damage claim and began its own process to deal with the claim. Three years later the insured notified the insurer of the claim. After notification the insured demanded that the insurer pay the costs accrued based on the duty to defend. The insurer denied the claim for lack of notice.

The court determined that there is no duty to defend until the insurer has received notice of the claim, therefore the insurer did not have to pay the costs accrued before receipt of notice. Notice must be given to trigger the insurer’s obligation to defend.

2. Negligence Decisions


_Insurance Agent Negligence_

An employee who held a life insurance policy was informed by the insurer that the policy limits would change at the employee’s retirement. Upon notice, the employee completed a conversion application from group life insurance to an individual policy. The employee was directed by his employer to an “agent” who failed to properly file the employee’s application with the insurer to secure the conversion of the life insurance policy. The full amount of the life insurance policy was not paid by insurer upon employee’s death, with the insurer citing the failure to properly file the conversion application as grounds for denial of the pre-retirement coverage.

The Supreme Court found that because negligence involves the application of the facts of the case to the duty owed by the agent, the issue of negligence was best left for a jury to decide, and not summary judgment. The Court further concluded that the “agent” was in fact classified as a broker, rather than an official agent of the insurer. The insurer did not provide the “agent” with a commission for converting the life insurance policies, the “agent” did not sell any insurance policies, and the “agent” had no written agreement with the insurer on his terms for selling the policies. Therefore, any negligence of the “agent” could not be imputed to the insurer.

3. Medical Expenses Decisions

_Butler v. Indiana Dept. of Ins.,_ 904 N.E.2d 198 (Ind. 2009)

_Medical Expense Recovery_

The action was initially brought as a medical malpractice action. The action was settled against the defendant health care providers, permitting the estate to proceed with the balance of its claims against the Indiana Department of Insurance, as administrator of the Patient’s Compensation Fund. The parties entered into a partial settlement, excluding only the estate’s claims for additional medical expenses that were not paid but were billed. The Indiana Supreme Court held that the language of the Indiana wrongful death statute for unmarried persons with no
dependents was plain that the estate could only recover reasonable medical expenses necessitated by the wrongful act, as opposed to the reasonable value of medical care and treatment. As the expense amounts were settled for a lower amount, the difference was not a necessitated expense.

*Stanley v. Walker*, 2009 WL 1477496 (Ind. 2009)

**Reasonable Value of Medical Expenses and Collateral Source Rule**

Plaintiff was injured in an automobile accident. He sued for negligence and sought to recover medical expenses, lost wages, and damages for pain and suffering. The defendant sought to admit evidence of the plaintiff’s discounted medical bills. The Indiana Supreme Court first held that the reasonable value of medical services is the measure used to determine damages to an injured party in a personal injury matter. Second, the Court held that the collateral source rule does not bar evidence of discounted amounts to determine reasonable value of medical services provided to a plaintiff in a personal injury action. Third, the Court held that the defendant’s proffered evidence that the amount accepted by plaintiff’s medical providers in satisfaction of their medical bills was less than the amount originally billed was admissible.

**B. APPELLATE COURT DECISIONS**

**Insurance Coverage Decisions**


**Negligent Failure to Procure a Policy**

The plaintiff contacted the defendant insurance broker seeking a homeowner’s insurance policy that would specifically cover her dogs, earthquake coverage, and coverage for a wood burning stove. The defendant broker informed her of a policy, and checked a “no” box referring to the plaintiff’s ownership of dogs because “they were not vicious.” When the plaintiff’s dog bit her niece, coverage was denied and policy cancelled due to misrepresentation. Suit was brought against the agent and his insurance agency.

The court held that if an agent is negligent in assisting a client to complete an insurance application, then the client can seek to recover damages from the agent if insurance coverage is denied. Although the plaintiff had the opportunity to review and sign the application, stating that all the information was accurate, the defendant broker was informed that the plaintiff did have dogs and that coverage for the dogs was a basis for her seeking a new insurance policy. The defendant insurance broker and insurance agency were liable to the plaintiff for the costs associated with defending the dog bite claim.


**Insurance Exclusions to Workers’ Compensation Coverage**

The Taylors purchased a farm personal liability policy from Everett Mutual Insurance Company and asked that it be “all risk” but the policy still contained certain exclusionary clauses. One of the exclusions was for bodily injury to a domestic employee of the insured who has a workers’ compensation policy. The Taylors subsequently employed Sherlock Painting, whose employee
was electrocuted while painting a grain barn. Sherlock Painting did not carry workers’ compensation insurance, and the employee brought suit against the Taylors.

Indiana Code § 22-3-2-14 provides that any person contracting for performance of work over $1,000.00 without exacting proof of the contractor’s workers’ compensation compliance shall be liable to the same extent as the contractor for any injuries suffered. The Taylors failed to do so, and their analysis would have been different had the employee claimed a tort action against the Taylors. The court also denied a claim of estoppel by the Taylors against Everett.


**Policy Interpretation**

The insureds gave their grandson, a minor, a car and subsequently executed a financial responsibility form agreeing to bear responsibility for any injuries or damages that other persons sustained by reason of the grandson’s operation of the motor vehicle. The grandson was determined to be at fault in an accident and the insureds became legally responsible. The insureds argued that their insurer’s policy covered the incident as it promised to pay for damages for which any insured became legally responsible because of an auto accident. Focusing on the policy’s exclusionary clause, the insurer argued that the grandson’s car was not covered under the policy and no liability existed. The court found that the insurer was not responsible because the grandson owned the car, which was not a covered auto under the policy.
XV. **SIGNIFICANT MICHIGAN COURT DECISIONS**

**A. SUPREME COURT DECISIONS**


**Comparative Negligence Statute Thresholds**

The original case involved a dismissal of a party who owed no legal duty to homeowners under Michigan’s Comparative Fault Statutes. The other defendants sought to reinstate the dismissed party as a non-party at fault, but the trial court denied the motion. The issue on appeal was whether a party could be found as a non-party “at-fault” without the existence of a legal duty.

In a close 4-3 decision, the Supreme Court clarified differing opinions in the Court of Appeals. The Court found there could be no fault found if there was no legally established duty. The Justices reasoned that without a legal duty, that party could not have a causal connection to the harm alleged, and could not be introduced as a non-party at fault. The existence of a duty is a threshold element for negligence liability. The three dissenters interpret Michigan’s Comparative Negligence Statutes to give duty as an element of negligence, not as a threshold requisite.

**B. APPELLATE COURT DECISIONS**

1. **Insurance Coverage Decisions**


**Scope of “Occurrence” and Duty to Defend**

The issue on appeal in this case was whether or not Farm Bureau had a duty to defend the plaintiff in an action under terms contained in a Commercial Umbrella Liability Policy. Plaintiff argued that Farm Bureau breached the insurance contract and had improperly induced the plaintiff into believing that they would be covered if the plaintiff faced a suit due to improper spread of mold during a water restoration work order. The Court of Appeals of Michigan concluded that the negligence claims against the plaintiff, at least arguably, were an “occurrence” within the meaning of the policy, finding that the defendant had a duty to defend.


**Insurance Contract Coverage**

The plaintiff was the insurer of the defendant’s hotel. During repair of an indoor pool’s heating system, a maintenance man failed to turn off the chlorine injector, which caused toxic fumes to be released when the system was turned back on. This caused injuries to a guest family. The insurance policy had an exception to not cover any “pollutants,” but a further endorsement stated pollutants would be covered if released from a heating system.

The court found that there was sufficient evidence for the plaintiff’s claim to survive summary judgment. The pool heating machinery was also the only source of heat for the indoor pool area, possibly making it within the heating endorsement. The court found that the exclusions and
endorsement were generally ambiguous, of which a fact finder would be better suited to decide rather than the judge.


No Fault Automobile Insurance Action

Auxier sustained injuries when he was rear-ended while driving his girlfriend’s van. The issue in dispute was whether Auxier was an “owner” of the van under MCL § 500.3113(b). During his recorded statement Auxier claimed that he had use of the van for more than 30 days. He used the van to go to the store, run errands, go to work, and go to the movies at least once per week for at least one year. Additionally, he paid for gas he used, changed the oil, and replaced the brake pads. Auxier’s girlfriend testified that Auxier usually asked permission to use the van and that she denied him use on three to four occasions. On the basis of Auxier’s recorded statement, Nationwide denied Auxier’s request for no fault benefits because Auxier was an “owner” of the van and was disqualified from recovering benefits pursuant to MCL § 500.3113(b), which precludes a person from recovering benefits when that person is the owner of an uninsured vehicle involved in the accident. The court found Auxier’s use did not rise to the regular or exclusive usage seen in other cases where the court had deemed a party a vehicle’s owner under MCL § 500.301(2)(h)(i).


Dispute of “Ownership” of Motor Vehicle

This case involved an uninsured owner of a vehicle seeking personal injury benefits from defendant based on an insurance policy held by the plaintiff’s sister, who had title to the vehicle. At the trial court, summary disposition was granted to Farm Bureau. On appeal by the plaintiff, Farm Bureau argued the plaintiff was an owner of the car and precluded from benefits because he did not insure the vehicle independently. The Court of Appeals of Michigan noted the plaintiff was an owner of the vehicle under statutory definitions. The Court of Appeals reversed the trial court’s order of summary disposition, holding the plaintiff was not precluded from benefits.


No-Fault Benefits

The decedent was killed when an object fell off a parked trailer and struck him. The plaintiff asserted that the estate had the right to no-fault insurance benefits.

The court found there was no need for the insurance company to pay the plaintiff no-fault benefits. Under MCL § 500.3105(1), the insurer must pay the injured benefits for “accidental bodily injury arising out of the ownership, maintenance or use of a motor vehicle as a motor vehicle.” Because the trailer was parked, the court reasoned the vehicle was in the process of being used merely for “storage” and not for the functions of a motor vehicle. Therefore, the insurance company had no obligation to pay no-fault benefits.
This case involved the issue of determination of a person’s place of “domicile” for purposes of insurance coverage. The trial court had granted summary disposition to State Farm. Upon appeal, if it was determined that the plaintiffs were domiciled at a certain residence, Farm Bureau would be liable for protection benefits. The Court of Appeals of Michigan outlined factors relevant to determine a person’s place of domicile, which include: 1) mailing address; 2) place of possessions; 3) driver’s license address; 4) possession of a bedroom at the home; or 5) whether the individual was dependent upon the insured financially. On appeal, it was concluded that under the circumstances of the case, the trial court had correctly determined the place and domicile and the grant of summary disposition to State Farm was affirmed.

The insured brought suit for the payment of PIP coverage after he was injured driving an off-road utility vehicle. The off-road vehicle was exempt from registration and insurance coverage under Michigan statute, but the court allowed the insured to recover PIP benefits, stating that the insurance exemption does not lead to an exemption under the PIP statutes.

The Michigan Legislature amended the definition section of the statute in 2008. Now, the definition of “motor vehicle” expressly excludes “off-road vehicles.” The court, however, denied a retroactive look at the amendments, holding at the time, the off-road vehicle was considered covered under PIP coverage.

2. Premises Liability Decisions

The plaintiff was injured when she tripped and fell over a coaming on defendant’s ship. She argued on appeal that the trial court improperly applied Michigan’s open and obvious danger doctrine when granting defendant’s motion for summary disposition.

The Court of Appeals held the trial court did not err in applying Michigan law to the defendant’s motion for summary disposition because the outcome would have been the same under maritime law. The court noted the open and obvious danger doctrine precludes liability where an invitee or passenger should have discovered and realized a dangerous condition. The court disagreed with plaintiff’s argument that the open and obvious danger doctrine did not apply to the duty of reasonable care in her negligence claims. The court also disagreed with plaintiff’s arguments that her status as an elderly passenger prevented her from realizing the danger of the condition and that maritime law regarding comparative negligence does not negate a defendant’s duty.
Premises Liability – Open and Obvious Doctrine

Plaintiff visited the home of the defendant one night in December, during which there was a rain/snow mix falling outside. The defendant had the sidewalk and driveway shoveled earlier in the day, but the plaintiff slipped and fell on the doorway steps.

The trial court granted summary judgment in favor of the defendant, and the appellate court affirmed. The decision relied on the “open and obvious” doctrine, and that a twelve-year resident of Michigan would have been able to discover the danger of an icy step with reasonable inspection. The court also found there were not other factors that made the condition unreasonably dangerous in order to impose liability on the invitee defendant.

Premises Liability

The plaintiff slipped and fell on black ice that had accumulated outside of the defendant’s business. The weather reports showed there were snow flurries for seven hours leading up to the fall, and temperatures were consistently below zero.

The court found that the defendant business owed no duty to the plaintiff. Although the plaintiff was an invitee, an invitee need only be protected against unknown dangers. The court reasoned that a lifelong citizen of Michigan should have objectively foreseen that these weather conditions in February could have led to the formation of black ice, and no duty was owed.

Premises Liability

Plaintiff suffered injuries when she fell at the apartment of her sister, who was a tenant in defendant’s apartment building. Plaintiff maintained that she lost her balance on an uneven portion of the carpet in the hallway. She admitted she was aware of the uneven condition, and the trial court concluded that as a licensee, the plaintiff’s knowledge of the condition precluded her from liability.

The Court of Appeals reversed and remanded the trial court’s finding that the plaintiff was a licensee based on case precedent which held the duties owed to social guests by landlords was that of an invitee, not a licensee.

### 3. Procedure Decisions

Third-Party Beneficiary Intervention

Auto-Owners denied coverage and defense to Keizer-Morris for a suit by an injured worker due to negligent manufacture of equipment by Keizer-Morris. The injured worked sought to intervene in the declaratory judgment action of Auto-Owners, stating he had a property interest in the insurance coverage issue because Keizer-Morris was otherwise a defunct business.

The Court of Appeals reversed the trial court’s decision, and allowed the injured worker to intervene in Auto-Owners’ action seeking declaratory relief. Although the court recognized the
injured worker as an incidental third-party beneficiary, and not a named beneficiary under the insurance policy, the court did not find this determinative of the injured worker’s standing to sue. The court found it preferable to allow intervention by the injured worker because exclusion would leave the injured worker without recourse.


**Expert Testimony at Trial**

The plaintiff was alleging serious brain injuries, for which she utilized a medical expert witness at trial. The witness was not identified in initial disclosures because the doctor’s EEG’s were performed after the initial disclosures were submitted. The defendant, however, learned of the doctor and the possibility of the doctor being called as a witness well before trial, and failed to provide any opposition to the doctor taking the stand. The court on appeal decided this was not a reversible error and upheld a jury verdict in favor of the plaintiff.


**Medical Malpractice Statute of Limitations**

The decedent allegedly died due to the negligence of the defendants, and the plaintiff became the personal representative of the estate two months later. However, the plaintiff did not file a notice of suit or file her complaint until after the two-year statute of limitations for medical malpractice stated in MCL § 600.5805(6).

The court agreed with the summary disposition in favor of the defendants. The court did not allow the claim because the plaintiff had ample time and notice to be aware of possible medical malpractice, and simply failed to file her complaint in time. The court pointed out that if the notice of suit was filed within the statute of limitations, the time would toll pursuant to MCL § 600.5856(c).


**Serious Impairment of Body Function**

Plaintiff’s left femur was injured when his bicycle was struck by the defendant’s motor vehicle. Plaintiff required surgery and was released from all restrictions by his physician 14 weeks later. He still suffered pain in his left leg and did not return to some of the activities he previously performed.

The court did not allow the plaintiff to recover for non-economic loss because it found no serious impairment of body function. Although the plaintiff did not return to all activities, these restrictions were self-imposed and not mandated by a doctor. The plaintiff also was able to walk without impairment and only suffered a cosmetic scar, not amounting to a serious impairment of body function.

**Serious Impairment of Body Function**

The plaintiff was injured in a motor vehicle accident by a vehicle driven by the defendant. The plaintiff underwent neck surgery, but the defendant contended there was no serious impairment of body function because the plaintiff was already restricted by prior work-related injuries. The trial court granted summary disposition to the defendant.

The court on appeal found the plaintiff had provided enough evidence for the jury to decide whether he suffered a serious impairment of body function. It was enough to survive summary judgment that the plaintiff no longer could sleep in a bed, but was forced to sleep in a recliner, that his intimacy with his wife was severely diminished, and his activity level outdoors was minimal. These impositions were backed by physician testimony that the restrictions were medically imposed, and that CT and MRI evidence depicted severe problems with the plaintiff’s neck.

**4. Negligence Decisions**


**Duty to Protect**

The plaintiff was injured during an “alter call” at a leadership rally at the defendant’s place of worship. The plaintiff became weak, fell, and injured her head. She required medical treatment. Plaintiff testified that ushers were usually present at the altar to catch those congregants that become weak during the calls.

The court recognized there is usually no duty to act on the behalf of another to protect. However, the defendant usually provided protection in the form of having ushers present at the altar who are cognizant of each participant in the altar call. Because plaintiff relied on the presence of the ushers during the altar call, and that others were being caught by the ushers at the leadership rally, the defendant was under the duty to protect those participating in the call.


**Medical Negligence**

Plaintiff alleged the defendant-appellee’s nurses were negligent in their failure to report a worsening condition to physicians and that the negligence was a proximate cause of her injuries.

The Court of Appeals upheld the trial court’s summary judgment finding that since there was no evidence to suggest that plaintiff’s treatment would have been different if the condition had been reported correctly, the trial court had properly granted summary disposition.
XVI. **SIGNIFICANT CASES PENDING BEFORE THE OHIO SUPREME COURT**

**Denial of Coverage After a No Contest Plea to Arson**

The Supreme Court is being asked to determine whether an insured’s no contest plea to arson, which resulted in a conviction, can be relied upon to deny coverage for the property loss claim and negate a claim of bad faith for denying coverage.

*Estate of Heintzelman v. Air Experts, Inc.*  
**Default Judgment**

This appeal addresses the issue of whether a default judgment in a declaratory judgment action precludes recovery by the claimant in a supplemental complaint if the claimant was not a party to the declaratory judgment action.

*Jaques v. Manton*  
**Applicability of Robinson v. Bates**

This appeal addresses the issue of whether *Robinson v. Bates* applies following the enactment of R.C. § 2315.20, which prohibits the introduction of the amount a medical provider accepted as payment from a collateral source which had a right of subrogation.

*Kiminski v. Metal & Wire Products Co.*  
**Constitutionality of R.C. 2745.01**

This appeal asks the Supreme Court to review the constitutionality of R.C. § 2745.01, which codifies workplace intentional tort claims.

*Klaus v. United Equity, Inc.*  
**Interpretation of “Deliberate Intent” in R.C. 2745.01**

This appeal seeks an interpretation of the phrase “deliberate intent” found in R.C. § 2745.01(B), which concerns workplace intentional tort claims.

*Neal-Pettit v. Lahman*  
**Punitive Damages and Attorneys Fees**

This appeal concerns whether an insurance policy is liable to pay for an award of attorney fees, which is accompanied by a punitive damages judgment, even though the policy excludes coverage for punitive damages, fines, or penalties.
“All Sums” Approach to Apportioning Coverage

The Supreme Court is being asked to determine whether the targeted insurer can obtain contribution from the non-targeted insurer when the terms and conditions of the non-targeted insurer’s policy were unfulfilled.

Stetter v. R.J. Corman Derailment Servs.
Constitutionality of R.C. § 2745.01

This is a companion case to Kiminski, and also asks the Supreme Court to review the constitutionality of R.C. § 2745.01.

These cases were pending at the time this summary was printed. To confirm whether the Supreme Court has issued a decision in any of these cases, we invite you to visit our website at http://www.smithrolfes.com.
XVII. SIGNIFICANT CASES PENDING BEFORE THE KENTUCKY SUPREME COURT


Insurance Policy Coverage due to Substandard Work Performance of Subcontractor

A home builder held a commercial insurance policy with Cincinnati Insurance and a general liability policy with Motorists Mutual. The home builder was sued for serious latent structural defects on a home due to the negligence of subcontractors who performed the framing and foundation work. Cincinnati Insurance denied the claim and refused to defend the home builder because the negligent work performance was not an “occurrence” of “property damage” under its policy. Motorists Mutual defended and sought to recover the cost of the settlement from Cincinnati Insurance.

The Supreme Court will review whether the substandard work performed by a subcontractor falls within the Cincinnati Insurance policy limitations.


Assignment of Proceeds from a Malpractice Claim

An attorney allegedly failed to inform a business owner he could not solicit the customers from a third party’s business following a failed purchase of the third party. After suit in federal court by the third party against the business owner, the case settled, with the settlement allocating eighty percent of the proceeds from the business owner’s legal malpractice suit against his attorney.

The Supreme Court will review whether, as a matter of public policy, assignments of legal malpractice claims will be permitted. Further, the Court will review whether, if the proceeds cannot be assigned, if the party can still proceed with the malpractice suit.


Notice of Cancellation of Malpractice Insurance

An insurance company cancelled a medical malpractice policy issued for a doctor’s practices located in both Ohio and Northern Kentucky. The policy included Kentucky endorsements, including a requirement that cancellation required written notice and specified the required time limit for cancelling the policy.

Disputes occurred between the insurance company and the insured, with allegations of non-payment and discovery of willful or reckless actions by the insured, and the policy was cancelled. The insurance company sent the insured notice of the various reasons the insurance company terminated the policy. The reasons of non-payment and discovery of willful or reckless actions, however, have different statutory time requirements.

The Supreme Court will review whether the insurance company provided proper notice for the cancellation of the policy in accordance with KRS § 304.20-320(2)(b), and if the damages awarded to the insured were appropriate.

**Sudden Emergency Doctrine**

The defendant followed the plaintiff on a personal watercraft on Lake Cumberland when the plaintiff abruptly turned left, cutting across the defendant’s path, and stopped. The defendant, who testified he followed at a safe distance, struck the plaintiff’s watercraft after attempting to avoid the collision. At trial, the court instructed the jury on the sudden emergency doctrine, and the jury found in favor of the defendant.

The plaintiff argues that the sudden emergency doctrine is only available to defendants who are exercising reasonable care when an unexpected emergency arises. The plaintiff argues the defendant followed her personal watercraft at an unsafe distance, making the defendant negligent and the jury’s instruction on the sudden emergency doctrine an error.

The Supreme Court will review the jury’s instruction on the sudden emergency doctrine, and if the instruction should have been available to the defendant.

**Kentucky Farm Bureau v. Shelter Mutual Ins. Co., 2008-SC-781-DG, appealed from 971 S.W.2d 807**

**Insurance Coverage of Two Competing Policies**

One insurance company issued a policy to the owner of a vehicle, while the other insurance company issued a policy to the guest driver of the owner’s vehicle. The guest driver was negligent in causing a collision. Both the owner’s and the guest driver’s policies provide coverage for the damages incurred and also contain “excess insurance” clauses.

The Supreme Court will review which policy should provide coverage for the accident, or the proper apportionment of damages between the two policies.


**Open and Obvious Doctrine**

A paramedic transported a patient by ambulance to a hospital. While transferring the patient from the ambulance to a hospital, the paramedic tripped over an unpainted and unmarked curb.

The Supreme Court will review whether the hospital is liable to the paramedic for the injuries sustained, or if the open and obvious doctrine applies, relieving the hospital of liability because the unmarked curb should have been noticed by the paramedic.
Sufficiency of “Coots Notice” to Preserve Subrogation Rights

The UIM insurance carrier sent a “Coots Notice” pursuant to KRS § 304.39-320 to secure subrogation rights. The UIM insurance carrier’s notice, however, overstated the amount plaintiff was to receive from tortfeasor's liability insurer and was not sent by registered or certified mail. The UIM insurance carrier also did not substitute payment of the settlement amount within thirty days after notice, and the plaintiff proceeded with settlement.

The Supreme Court will review whether the notice provided by the UIM insurance carrier is sufficient to preserve the carrier’s subrogation rights.

These cases were pending at the time this summary was printed. To confirm whether the Supreme Court has issued a decision in any of these cases we invite you to visit our website at http://www.smithrolfes.com.
XVIII. **SIGNIFICANT CASES PENDING BEFORE THE INDIANA SUPREME COURT**


**Repayment of Debt and Counterclaim for Unjust Enrichment**

Plaintiff casino brought action for repayment of gambling debts, treble damages, and attorneys fees. The defendant brought a counterclaim for unjust enrichment based on allegations the casino took advantage of her gambling addiction in order to obtain more profits.

The Supreme Court will review the Court of Appeals’ decision that the defendant was not entitled to her counterclaim of unjust enrichment against the casino.


**Insurance Exclusions to Workers’ Compensation Coverage**

A third party brought a Workers’ Compensation claim against the insureds. The insurance company denied coverage, citing an exclusion in the policy for claims by a third party related to Workers’ Compensation.

The Supreme Court will review whether the contractual language in the policy properly excluded this type of Workers’ Compensation claim against the insureds.


**Medical Malpractice and Bystander Doctrine**

A father brought an action for wrongful death under Indiana’s Adult Wrongful Death Statute and negligent infliction of emotional distress under the bystander doctrine, alleging he suffered severe anguish from witnessing the death of his child.

The Supreme Court will review whether, or not, the father was entitled to a negligent infliction of emotional distress claim based on the bystander doctrine.


**Construction Subcontractor Negligence**

A public library brought suit against engineering subcontractors for the design and construction of a new parking garage. The trial court and Court of Appeals found the suit was barred by the “economic loss doctrine” because the library did not have a direct contract with the engineering subcontractors it sued.

The Supreme Court will review the application of the “economic loss doctrine” and determine whether the library can commence in a suit against the engineering subcontractors.
Kroger Co. v. Plonski, appealed from 905 N.E.2d 448 (Ind. App. 2009)
Third Party Liability for Injuries Sustained on Property
The plaintiff was carjacked and assaulted in the grocery store’s parking lot and sought damages from the grocery store for negligence.

The Supreme Court will review whether there was sufficient evidence presented of the grocery store’s breach of duty and proximate cause to the plaintiff to survive summary judgment in favor of the grocery store.

Sibbling v. Cave, 915 N.E.2d 993 (Table), appealed from 901 N.E.2d 1155 (Ind. App. 2009)
Testimony at Personal Injury Trial
A personal injury claim went to trial on the issue of damages only. The trial court allowed the personal injury plaintiff to testify concerning information doctors told her about the extent of her injuries. Further, the trial court did not allow the defendant’s expert witness to testify that some of the medical treatment the plaintiff received was unnecessary.

The Supreme Court will review the Court of Appeals’ determination that the testimonial rulings were harmless, and that no error occurred.

Judgment Lien After Payment of Workers’ Compensation Benefits
The defendant prevailed on a personal injury suit against a third party. The insurance company brought this action to secure a judgment lien against the defendant’s verdict based on Workers’ Compensation benefits the insurance company previously paid on behalf of the injured defendant.

The Supreme Court will review whether the insurance company is entitled to a judgment lien in light of its payment of Workers’ Compensation benefits, as the Court of Appeals held.

These cases were pending at the time this summary was printed. To confirm whether the Supreme Court has issued a decision in any of these cases we invite you to visit our website at http://www.smithrolfes.com.
XIX. **SIGNIFICANT CASES PENDING BEFORE THE MICHIGAN SUPREME COURT**


**UIM Coverage**

A plaintiff in a multi-car accident settled her claim with several of the other parties, but brought a UIM action for damages from a hit and run driver that was not a party to the original settlement. The insurer attempted to deny the coverage based on several theories including exclusions applying to the claim, duplicate payments, and reduction-of-benefits claims.

The Supreme Court will review whether the insured is still entitled to recovery although the insurer denies coverage liability on these several grounds.


**Insurance Administrative Rules Challenge**

The Commissioner promulgated administrative rules disallowing an insurance company from using credit scores to determine insurance rates. Several insurance companies brought an action for declaratory judgment, claiming due process and other violations.

The Supreme Court will review multiple issues in this case, including the right of the insurance companies to bring a declaratory action and the scope of the Commissioner’s administrative rule-making ability.


**Employer Negligence in Injury at Work**

The plaintiff was injured after attempting to clean a large machine during his employment. The machine had been installed and maintained by a third party, who slightly altered the machine during the installation process by removing a guard and scraper.

The Supreme Court will review whether the third party is negligent in its alteration of the machine, or if the employee’s own negligence contributed to his injuries.


**Service of Process Following Motor Vehicle Accident**

A plaintiff attempted service on a defendant by certified mail after a motor vehicle accident. The plaintiff used the address listed on the police report from the accident, and finally needed to serve the defendant’s brother, who was also involved in the accident.

The Supreme Court will review whether service on the defendant’s brother is sufficient, given the failed attempts for proper service.

Enforcement of Liability Release

A young boy attended a birthday party at the defendant’s playground, and sustained injuries when he jumped from the top of an inflatable slide. Prior to the party, the boy’s parent signed a release waiving the facility’s liability. The Court of Appeals found the liability waiver was invalid.

The Supreme Court will determine whether the pre-injury release is valid and enforceable.