Dear Insurance Professional:

The year 2006 now moves us into the second half of the first decade of the new millennium. As we reflect back on the past five years across the states in which we practice, a number of important developments which affect our profession have presented themselves.

Although there will always be exceptions, we are seeing personal injury jury verdicts in favor of the defense on the rise, and jury verdict amounts generally moving lower. We have especially seen this trend move in a positive direction in defense of low impact automobile accidents and in insurance fraud litigation.

From a legislative perspective, many states, including Ohio, have once again adopted meaningful tort reform and other legislative measures either limiting damages, improving the efficiency of the judicial system, or aiding in the fight against insurance fraud.

In many states 2006 will bring judicial elections and what may be a record number of federal judicial appointments. We continue to believe the election and appointment of qualified and impartial judges at all levels of the judiciary remains crucial to creating a judicial environment where judges are willing to take decisive action in cases which lack merit.

On behalf of our firm we remain committed to being of service to you, your companies and your insureds in the year ahead. In this, our seventeenth year, we also remain committed to doing our best to make certain in all we do we advance the integrity and quality of the legal system and the insurance profession within which we are privileged to practice.

Sincerely yours,

Matthew J. Smith
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I. INTENTIONAL ACTS EXCLUSIONS IN OHIO

Imagine you are investigating coverage on a claim potentially involving an intentional acts exclusion, and are taking a statement of the insured. What is the likelihood they will blurt out they actually intended to harm the claimant? Nothing is ever that easy. Gunshots, stabbings, and punches seem to morph into mere “accidents”, and clever plaintiffs’ attorneys are often quick to agree. How do you prove intent in such a context? How do you prove intent when the underlying complaint is simply couched in terms of negligence?

A Historical Perspective

In Preferred Risk Ins. Co. v. Gill, (1987), 30 Ohio St.3d 108, the insured pled guilty to and was convicted of aggravated murder. The victim’s family argued the insurer’s declaratory judgment action failed to state a claim upon which relief could be granted, as it sought to invoke an intentional acts exclusion, even though the underlying tort suit only alleged negligence. The Supreme Court disagreed, holding the duty to defend is not solely dependent upon what was pled in the underlying action, and that there is no duty to defend if the true facts establish the insured’s conduct falls beyond the policy’s coverage; i.e. was intentional and not negligent. The Supreme Court concluded the requisite intent for aggravated murder established the insured “expected or intended” harm to result from their actions.

The Supreme Court attempted to parse the meaning of intend in Physicians Ins. Co. v. Swanson (1991), 58 Ohio St.3d 189. Swanson shot another boy in the eye with a BB gun, partially blinding him. Swanson claimed he never intended to shoot or harm the injured boy, but merely intended to shoot at a nearby sign to scare the boy and his friends. The decision does indicate whether any criminal charges ensued.

The PICO policy excluded bodily injury “which is expected or intended by the insured[.]” Cincinnati Insurance also had a policy, and it stated “We will not cover Personal Injury or Property Damage caused intentionally.” The Supreme Court held coverage was not excluded, as only the gunshot was intended by Swanson, and not the resulting injury.

Nationwide Ins. Co. v. Estate of Kollstedt, 71 Ohio St.3d 624, 1996-Ohio-245, involved a homicide without a final adjudication of guilt. Kollstedt was found incompetent to stand trial due to Alzheimer-related dementia and senility. He died before the civil actions commenced so there was no testimony. Expert medical testimony established he lacked the ability to act intentionally. The Supreme Court held the intentional acts exclusion in Kollstedt’s homeowner’s policy did not apply as he lacked the mental capacity to act intentionally.

A series of Supreme Court decisions addressed coverage on sexual molestation claims. The first such decision was Gearing v. Nationwide Ins. Co., 76 Ohio St.3d 34, 1996-Ohio-113. Three minor sisters were molested by an older neighbor over a three year period. The decision does not indicate whether any criminal charges ensued. Gearing testified he intended to touch the girls sexually, and that he knew it was morally wrong to do so, but that at the time he did not know his actions could harm them.
The Supreme Court deliberately chose not to address the application of the intentional acts exclusion in Gearing’s homeowner’s policy, and instead focused on determining Gearing’s conduct constituted an “occurrence.” They concluded an occurrence required an accidental event, and not an intentional one. The Supreme Court held his conduct did not constitute an occurrence, as despite his professed ignorance, harm was so inherent in an act of sexual molestation. They also recognized strong public policy against insuring intentional misconduct.

On that same date, the Supreme Court decided *Cuervo v. Cincinnati. Ins. Co.*, 76 Ohio St.3d 41, 1996-Ohio-99, and reached the same conclusion. The tortfeasor was a sixteen year old boy who molested two children while babysitting. Even though the tortfeasor was a juvenile at the time of the abuse, *Gearing* was still applied; his capacity was never raised as an issue. The victims and their parents obtained a default judgment against the boy’s father on negligence claims. The Supreme Court held *Gearing* barred coverage for those claims since they flowed from the boy’s intentional acts.

The Supreme Court reconsidered its position on the last point of *Cuervo* in *Doe v. Shaffer*, 90 Ohio St.3d 388, 2000-Ohio-186. The plaintiff in Doe was the estate of a mentally retarded man who died of AIDS after being infected through sexual abuse at a religious order’s residential care facility. The underlying suit involved allegations of negligence against the order and supervisory personnel. The defendants did not commit the actual sexual abuse, but it was alleged their negligence enabled it to occur. The Supreme Court held there was coverage for a non-molester for claims of negligence relating to an act of sexual molestation.

**Effect of a Criminal Conviction**

The prevailing trend in recent years has been to enforce intentional act exclusions when the insured was convicted of a criminal offense with a requisite intent of acting at least *knowingly*. A good illustration of this is a decision our firm won in the Twelfth District in *Farmers Insurance of Columbus, Inc. v. Martin*, 2005-Ohio-556.

Martin shot and severely injured a police officer while trespassing on his estranged wife’s property. He had been drinking beer, took several Xanax and Zoloft pills, and thought he was acting in self-defense. (Incidentally voluntary intoxication is not a defense to an intentional acts exclusion. *Grange Mut. Cas. Co. v. Gore* (May 12, 1997), Court of Appeals for Warren County, Case No. CA96-08-0706.) Martin pled guilty to felonious assault, which requires *knowingly* causing serious physical harm; See R.C. 2903.11(A)(1). The complaint filed against him only alleged negligence.

The Farmers policy contained broader language on intentional acts as compared to the earlier cases. The policy excluded coverage for bodily injury, “(a) caused intentionally by or at the direction of an insured; or (b) results from any occurrence caused by an intentional act of any insured where the results are reasonably foreseeable.” The second clause avoids *Swanson*, as it requires only the act to be intentional, and eliminates the need to prove any intent to injure.

The instrumentality causing harm also bears significance. Some acts by their very nature establish intent. This was the basis for the Supreme Court’s decision in Gearing. In a number of shooting cases decided since Swanson, appellate courts have held shooting someone at close range establishes intent based upon the inherently dangerous nature of firearms and the inevitability of injury. Moler v. Beach (1995), 102 Ohio App.3d 332; Adkins v. Ferguson, 2003-Ohio-403. Familiarity with firearms can also serve as a basis for establishing intent. Western Reserve Mut. Cas. Co. v. Macaluso (1993), 91 Ohio App.3d 93.

Substance Over Form

One final case of note is State Farm v. Totarella, 2003-Ohio-5229. Totarella chased several people who knocked on his door and ran away. He caught one of the men and punched him repeatedly. Totarella claimed he thought the man was an intruder and that he feared for his safety and only meant to restrain him until the police arrived. The complaint alleged both negligent and intentional conduct. The appellate court rejected the argument that the mere pleading of negligence created a factual issue as to intent. They ruled alleging an act was negligent could not transform the act from one of intent to one accidental in nature.

Final Considerations

The Ohio Senate passed S.B. 117 in the latter portion of 2005 and it is currently pending before the House. This legislation, if passed, would allow a plaintiff to use a conviction stemming from either a jury verdict or guilty plea to preclude a defendant from challenging their culpability in a subsequent civil action. Convictions stemming from a no contest plea would not be affected by the legislation. This legislation would only apply to offenses punishable by death or imprisonment of more than one year.

The mere fact a complaint alleges only negligence does not preclude an insurer from asserting an intentional acts exclusion. In addition to reviewing the records from a criminal case, consider other factors like the insured’s life experience, the instrumentality causing harm, and whether they have engaged in similar behavior in the past. In Martin, the court noted his extensive experience with firearms, as he was an avid hunter and taught his son to hunt. An insured with a history of getting into fights is more likely to appreciate the consequences of a punch. The courts are showing an increasing trend of upholding these types of exclusions, and are becoming more sensitive to the actual facts as opposed convenient (and in some cases coached) assertions of benign intent.
II. FREQUENTLY CITED OHIO STATUTES

A. General Considerations in Insurance Claims Management

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

This section is not state law, 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. § 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. § 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 exceed $10,000, a guardianship must be established until the minor turns 18 or the balance of funds no longer exceeds $10,000.

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 may bring an action for discovery. A discovery action allows a party to explore the strength of a case without subjecting the party to the potential penalties associated with frivolous lawsuits.

R.C. § 2721.01 et. seq.
Declaratory Judgment Actions

This section 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.

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 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. Negligence and Joint Tortfeasors

R.C. § 2315.18
Caps on Compensatory Damages

This statute takes effect in April, 2005.

There is no cap on economic damages. Non-economic damages are capped at $250,000.00 or three times the amount of the economic damages, with an absolute maximum of $350,000.00 per plaintiff or $500,000.00 per occurrence. Exceptions are recognized for certain types of profound and catastrophic injuries. These caps do not pertain to claims against governmental entities, which are governed by Chapter 27.

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. § 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 50% 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 50% 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. § 2307.32
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. § 2307.25
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 2 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 Fidoleholtz 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. § 2307.711
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 any service proportionate basis for reducing damages and liability. This statute takes effect in April, 2005.
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.

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.

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.

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 (2) times the amount of damages or ten percent of their net worth.

Seatbelt Defense

This statute is 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. § 3904.13
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. § 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;
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. § 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. § 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. § 3999.41
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 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 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 or more.

R.C. §§ 3905.49(A) (13) and § 3905.491
Insurance Agents and Solicitors Must Report Felony Convictions to the Superintendent
Requires licensed insurance agents or solicitors convicted of felonies to report the convictions to the Superintendent of Insurance within 30 days of the judgment or conviction entry date.
III. FREQUENTLY CITED KENTUCKY STATUTES

K.R.S. § 304.39–045  
Excluded Operators in Insurance Policies

An insurer and its named insured may agree to exclude certain drivers from coverage as an operator of the insured vehicle. The names of the excluded persons must be set forth in the policy or in an endorsement signed by all parties.

K.R.S. § 304.39–050  
Duty to Provide Primary No-Fault Coverage

The duty to provide primary no-fault coverage falls on the insurer of the vehicle occupied by the claimant at the time of the accident.

K.R.S. § 304.39–110  
Minimum Automobile Liability Coverage

Bodily injury liability limits of $25,000 per person, $50,000 per occurrence and $10,000 for damage or destruction of property per accident. Alternatively, a policy can provide a single limit liability coverage of $60,000 for all damages.

K.R.S. § 304.39–241  
Claimant’s Right to Allocate PIP Payments

A no-fault claimant has the right to direct how those payments are to be allocated. In other words, they can determine what portion of the available funds may be used to compensate them for lost wages as compared to medical expenses. A savvy claimant can use this provision in conjunction with health insurance coverage to maximize their recovery.

K.R.S. § 304.39–270  
Independent Medical Examinations on No-Fault Claims

An insurer has a right to request an independent medical examination of a no-fault claimant.

K.R.S. § 304.39–280  
Claimant’s Duty to Disclose Information

A claimant has a duty to provide the no-fault insurer with complete medical documentation of the claim. The claimant also has a duty to give authorization to the insurer to inspect and copy relevant medical records.
K.R.S. § 411.82
Apportionment of Fault
In cases involving more than one wrongdoer, including third-party defendants or parties who have already been released from the case, the degree of fault of the remaining defendants are to be considered proportionally with that of the other parties.

K.R.S. § 381.232
Duty to Trespassers
The owner of real estate is not ordinarily liable to injured trespassers unless the injuries were intentionally caused by the owner or someone acting on their behalf.

K.R.S. § 411.148
Good Samaritan Act
Any physician, nurse, or other medical professional who provides emergency medical treatment shall not be held liable in a civil action for damages unless it can be shown they engaged in willful and wanton misconduct.

K.R.S. § 304.47-080
Special Investigative Units
Every insurer licensed to transact business in Kentucky must have a special investigative unit to investigate possible insurance fraud. This unit can be comprised either of employees of the insurer or by others specifically contracted by the insurer for this purpose.

K.R.S. § 304.47-060
Informant Immunity
Absent a finding of malice, fraud, or gross negligence, a person will not be subject to civil liability for making a report or providing information regarding a suspected claim of insurance fraud.

K.R.S. § 413.241
Liability of Servers and Sellers of Alcohol
One who serves or sells alcoholic beverages is liable to those who suffer injuries off of the premises only if it can be shown at the time of serving or sale a reasonable person under similar circumstances should have known the person served or sold to was intoxicated.
IV. FREQUENTLY CITED INDIANA STATUTES

A. Automobile Insurance

I.C. § 9-25-2-3
Financial Responsibility
Requires insurance in the following amounts:
(1) $25,000 per person;
(2) $50,000 per accident; and
(3) $10,000 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 or the limit of liability insurance, whichever is greater and 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 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.

B. Negligence, Other Torts and Contribution

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.
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.

Intentional Torts

A plaintiff may recover 100% 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.

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.

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.

The burden of proving a nonparty defense is upon the defendant who must affirmatively plead the defense.

Nonparty Defense

A nonparty defense must be pled if known. Nonparty defenses which become known must be raised with reasonable promptness. If the summons and complaint was served more than 150 days prior to the expiration of the claimant’s statute of limitations, nonparty defenses must be pled no later than 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.

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 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 it reaches the user or consumer without substantial alteration.

I.C. § 34-20-2-2
Products 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 a 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 who the court can gain jurisdiction will be deemed the manufacturer of the product.

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.
C. Subrogation

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.

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 30 days.

D. Insurance Fraud

I.C. § 27-2-3-2
Arson Reporting

When requested by an authorized agency charged with the responsibility of investigating a fire loss, an insurer shall furnish information to the agency consisting of any and all relevant information or evidence considered important to the authorized agency. This includes but is not limited to any and all policy information, policy premium payment records, history of prior claims made by the insured, any material relating to the investigation of the loss including statements, proof of loss, or other relevant evidence.

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;
4. Material relating to the investigation, including:
   A. Statements;
   B. Proofs of Loss;
   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.”

E. Other

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.
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.
# V. OHIO STATUTE OF LIMITATIONS

<table>
<thead>
<tr>
<th>Claim Type/Section</th>
<th>Statute Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assault and Battery R.C. § 2305.11.1</td>
<td>One year from 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>Bodily Injury Due to Negligence R.C. § 2305.10</td>
<td>Two years from date of incident.</td>
</tr>
<tr>
<td>Wrongful Death R.C. § 2125.02</td>
<td>Two years from date of death.</td>
</tr>
<tr>
<td>Personal Property Damage Due to Negligence R.C. § 2305.10</td>
<td>Two years from 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 insolvent, then the plaintiff has one year from the date of insolvency to make the UM/UIM claim, even if it is more than three years after the accident.</td>
</tr>
<tr>
<td>R.C. § 3937.18</td>
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</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Claim Type/Section</th>
<th>Statute Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intentional Infliction of Emotional Distress</td>
<td>Four years from date of incident.</td>
</tr>
<tr>
<td>R.C. § 2305.09</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Claim Type/Section</th>
<th>Statute Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Damage to Real Estate</td>
<td>Four years after the cause.</td>
</tr>
<tr>
<td>R.C. § 2305.09</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Claim Type/Section</th>
<th>Statute Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fraud</td>
<td>Four years from occurrence of the alleged act of bad faith.</td>
</tr>
<tr>
<td>R.C. § 2305.09</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Claim Type/Section</th>
<th>Statute Period</th>
</tr>
</thead>
<tbody>
<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>Claim Type/Section</td>
<td>Statute Period</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</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>Actions</td>
<td>R.C. § 2305.07</td>
</tr>
<tr>
<td>Breach of Contracts</td>
<td>Six years from the date plaintiff’s claim first arose.</td>
</tr>
<tr>
<td>Not in Writing</td>
<td>R.C. § 2305.07</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>
# VI. Kentucky Statute 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 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>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>Breach of Contracts Not in Writing</td>
<td>Five years from the date the contract was breached.</td>
</tr>
<tr>
<td>Trespass on Real or Personal Property</td>
<td>Five years from the date of injury or damage.</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.</td>
</tr>
<tr>
<td>Intentional Infliction of Emotional Distress</td>
<td>Five years from the date of the incident.</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.</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.</td>
</tr>
<tr>
<td><strong>Claim Type/Section</strong></td>
<td><strong>Statute Period</strong></td>
</tr>
<tr>
<td>------------------------</td>
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</tr>
<tr>
<td>Breach of Written</td>
<td>Fifteen years from the date of the breach.</td>
</tr>
<tr>
<td>Contracts K.R.S. § 413.090</td>
<td></td>
</tr>
<tr>
<td>Claims of Minors and</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>Incompetents K.R.S. § 413.170</td>
<td></td>
</tr>
</tbody>
</table>

VII. **INDIANA STATUTE OF LIMITATIONS**

<table>
<thead>
<tr>
<th><strong>Claim Type/Section</strong></th>
<th><strong>Statute Period</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Employment I.C. § 34-11-2-1</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>Medical Malpractice I.C. § 34-11-2-3</td>
<td>Within two years from the date of the act, omission or neglect complained of.</td>
</tr>
<tr>
<td>Personal Injury and</td>
<td>Within two years after the cause of action arises.</td>
</tr>
<tr>
<td>Injury to Character I.C. § 34-11-2-4(2)</td>
<td></td>
</tr>
<tr>
<td>Products Liability I.C. § 34-20-3-1(b)</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 two years after the cause of action accrues.</td>
</tr>
<tr>
<td>Wrongful Death I.C. § 34-23-1-1</td>
<td>Within two years after death of the decedent.</td>
</tr>
<tr>
<td>Claim Type/Section</td>
<td>Statute Period</td>
</tr>
<tr>
<td>----------------------------------------</td>
<td>-----------------------------------------------------</td>
</tr>
<tr>
<td>Accounts and Contracts</td>
<td>Within six years after the cause of action accrues.</td>
</tr>
<tr>
<td>Not in Writing</td>
<td>I.C. § 34-11-2-7(1)</td>
</tr>
<tr>
<td>Other Property Damage</td>
<td>Within six years after the cause of action accrues.</td>
</tr>
<tr>
<td>I.C. § 34-11-2-7(3)</td>
<td></td>
</tr>
<tr>
<td>Fraud</td>
<td>Within six years after the cause of action accrues.</td>
</tr>
<tr>
<td>I.C. § 34-11-2-7(4)</td>
<td></td>
</tr>
<tr>
<td>Written Contracts for the Payment of Money</td>
<td>Within ten years after the cause of action accrues.</td>
</tr>
<tr>
<td>I.C. § 34-11-2-9</td>
<td></td>
</tr>
<tr>
<td>Written Contracts with an Interest in Land</td>
<td>Within ten years after the cause of action accrues.</td>
</tr>
<tr>
<td>I.C. § 34-11-2-11</td>
<td></td>
</tr>
<tr>
<td>Written Contracts other Than for the Payment of Money</td>
<td>Within ten years after the cause of action accrues.</td>
</tr>
<tr>
<td>I.C. § 34-11-2-11</td>
<td></td>
</tr>
<tr>
<td>Any Other Cause of Action Not Limited by Another Statute</td>
<td>Ten years from when the cause of action arises.</td>
</tr>
<tr>
<td>I.C. § 34-11-1-2</td>
<td></td>
</tr>
<tr>
<td>Claim Type/Section</td>
<td>Statute Period</td>
</tr>
<tr>
<td>--------------------</td>
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</tr>
<tr>
<td>Judgments</td>
<td>All judgments and decrees of any court shall be considered satisfied after the expiration of twenty years.</td>
</tr>
<tr>
<td>I.C. § 34-11-2-12</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Claim Type/Section</th>
<th>Statute Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Answers Trial Rule 6(C)</td>
<td>Twenty days after service of the pleading.</td>
</tr>
<tr>
<td>Appeals App. Rule 9A.(1)</td>
<td>Within thirty days after entry of judgment.</td>
</tr>
</tbody>
</table>
VIII. SIGNIFICANT OHIO COURT DECISIONS

A. Insurance Coverage Decisions

Walker v. McKinnis, 2005-Ohio-4058

Water Damage

Plaintiffs’ basement sustained water damage following heavy rain. The water infiltration was caused by the design of their roof and gutter system; the gutters overflowed diverting water to the ground and into the basement. The appellate court held there was no coverage under the plaintiffs’ policy, for several reasons. First, the court determined the roof and gutter system had latent defects which were specifically excluded under the policy. The court also held damage to personal property in the basement was caused by a flood and/or an overflow of water, both of which were excluded under the policy.


Duty to Defend

Plaintiff owned a bar and claims were asserted against it by patrons who were allegedly assaulted on the premises. The policy contained an exclusion for any claims stemming from an assault and battery committed by any person, including employees of the bar. The policy also contained an intentional act exclusion, but removed from the exclusion claims for bodily injury stemming from the use of reasonable force to protect persons or property. The employees of the bar who were named as defendants submitted affidavits that they were acting to defend a patron from being assaulted by her husband, during the altercation in question. The appellate court held these affidavits, combined with the policy provisions, created issues of fact as to whether the employees were acting reasonably to protect other persons, and that therefore the insurer owed the bar and its employees a duty to defend until there was a factual finding to the contrary.

Farmers Insurance of Columbus, Inc. v. Martin, 2005-Ohio-556

Intentional Acts Exclusion

Farmers’ named insured shot and seriously injured a police officer. The insured subsequently pled guilty to felonious assault. The police officer sued the insured, claiming he negligently caused him bodily injury. Farmers filed a declaratory judgment action based upon its policy’s intentional acts exclusion. Both the officer and the insured argued the insured simply acted negligently and the exclusion did not apply. The Court of Appeals upheld summary judgment in favor of Farmers, as the insured’s conviction for felonious assault was dispositive of the intentional act issues. Felonious assault requires one to have acted “knowingly” in causing injury to another, and the court determined the level of intent required to act knowingly rose to a sufficient level to satisfy the intentional act exclusion.
Billow v. Whitesell, 2005-Ohio-904
Permissive Use

Plaintiff was a passenger in a car driven by his friend. The vehicle was owned by the car dealership where the friend worked as a manager. Auto-Owners insured the dealership and their policy specifically required the permission of the named insured in order for liability coverage to be available. The appellate court held it was plaintiff’s burden to establish permissive use. Plaintiff’s assertion that he saw his friend previously drive other vehicles which he thought belonged to the dealership, along with the friend’s status as a manager, was insufficient based upon the testimony of the employer and other employees that the manager had never driven company owned vehicles, was not permitted to drive company owned vehicles, and in fact had a suspended driver’s license. The court concluded there was no evidence of actual permission.

McKean v. Howell, 2005-Ohio-721
Late Notice

The defendant did not notify his insurer of a suit filed against him, and a default judgment was taken against him. In plaintiff’s supplemental action the insurer argued the defendant’s failure to notify them of the suit should preclude coverage and any recovery by the plaintiff. The appellate court disagreed, based upon the Ferrando decision and that unless the insurer could establish it was somehow prejudiced, coverage would not be precluded.

Late Notice

An insurer brought a declaratory judgment action claiming it had no duty to defend or indemnify its insured because of a three year delay in being notified of an incident. The appellate court upheld summary judgment in the insurer’s favor, noting the insured failed to rebut the presumption of prejudice in favor of the insurer based upon the late notice. The court felt the insured’s delay was unreasonable and the insured failed to demonstrate that information had not been lost, or that witnesses were still available and had reliable memories.

Green v. Henderson, 2005-Ohio-284
Permissive Use

The defendant was driving a vehicle insured through a policy issued to his girlfriend’s parents. He was given permission to drive the vehicle by his girlfriend. The policy stated only a named insured could give permission to operate the vehicle. As a result there was no coverage for the defendant on a claim brought by a passenger injured in a one vehicle accident.

Medical Protective Company v. Watson, 2005-Ohio-1452
Pre-judgment Interest

A policy’s stated liability limit was held not to include pre-judgment interest. The court’s rationale was pre-judgment interest in large part is dictated by an insurer’s good faith efforts to settle a matter, and that any award of pre-judgment interest should still be paid by the insurer, but should not be subject to the liability limit.
Condon was convicted of multiple counts of gross abuse of a corpse after taking photographs of corpses in a county morgue, allegedly for artistic purposes. He was subsequently sued by a number of families of the deceased and he sought coverage under his business policy with State Farm. State Farm’s policy excluded “willful violation[s] of a penal statute or ordinance committed by or with the consent of the insured.” The criminal statute for gross abuse of a corpse requires one to have acted recklessly. The court determined since recklessness had already been adjudicated, it was akin to acting willfully in a civil context, and therefore a willful violation was established and there was no coverage under the State Farm policy.

While Nationwide’s insureds were out of town on vacation their son house sat for them. He brought his dogs with him while he house sat. During this time the dogs attacked plaintiff. The son sought coverage under his parents’ homeowner’s policy with Nationwide. The Court of Appeals ruled he was not covered by the Nationwide policy because he was not living in the household at the time of the attack and he and his parents were not living together as a family unit. Since his stay at the home was only temporary, residency was not established.

B. UM/UIM Decisions

Plaintiff’s decedent was being transported to a hospital in an ambulance when an EMT dropped a syringe, injuring his eye. Plaintiff’s decedent subsequently died due to an unrelated cause. The ambulance was operated by the City of Cleveland, and accordingly there was immunity under R.C. 2744.02. Instead, plaintiff made a UM claim, based upon the fact the injury occurred in a motor vehicle, while the motor vehicle was being used for transportation purposes. The policy required any liability of a supposed tortfeasor to arise out of the ownership, maintenance, or use of an uninsured motor vehicle. The Supreme Court unanimously concluded any negligence on the part of the EMT was unrelated to the ownership, maintenance, or use of the motor vehicle and there was no causal link, therefore there was no UM coverage available.

Plaintiffs were injured in an accident in New Mexico, caused by an uninsured driver. They made a UM claim to Grange. The Grange policy had a two year limitation period for the filing of suit. Some of the plaintiffs were minors. Under New Mexico law there was a three year statute of limitations for filing suit. Within that period plaintiffs sued the uninsured driver, thereby protecting Grange’s subrogation rights. Approximately three years after the accident plaintiffs filed suit against Grange, in Ohio, for their UM claim.
Grange moved for summary judgment on the basis the lawsuit was filed outside of the two year limitation period imposed by their policy. Plaintiffs argued they should be entitled to the three year period allowed under New Mexico law, and/or the claims of the minors should be tolled until the minors reached age eighteen.

The Supreme Court ruled in favor of Grange holding the two year limitation period was enforceable, regardless of what the statute of limitations was under New Mexico law. The court determined Grange had a right to impose a shorter limitation period, so long as it was reasonable. The Supreme Court also held that R.C. 2305.16, which ordinarily tolls a statute of limitations for claims involving minors, did not apply to contractually imposed limitations periods, and instead merely applied if the limitations period in question was imposed by statute, and not contract. As a result, the policy’s limitation period pertained to all plaintiffs, regardless of age.

_Fazio v. Hamilton Mutual Insurance Company_, 106 Ohio St. 3d 327, 2005-Ohio-5126

**Coverage for Accidents in other Countries**

Plaintiff was injured when she was struck by a dune buggy while walking on a beach in Mexico. She made a UM claim under her personal policy. Her insurer contested the claim based upon a provision in the policy limiting coverage to accidents occurring in the U.S. and Canada. Plaintiff contended such an exclusion violated R.C. 3937.18. The Supreme Court disagreed and held this geographic restriction on coverage to be valid.

_Rogers v. Owners Insurance Company_, 2005-Ohio-3514

**Late Notice**

Plaintiff’s decedent was killed in a one vehicle accident in 1994. Within a year of the accident plaintiff filed separate suits for UM coverage and medical malpractice. The UM suit settled, and the malpractice suit was ultimately abandoned. Eight and a half years after the accident plaintiff contacted Owners, her UM insurer, and gave them their first notice of both the accident and her intent to make a UM claim. Owners denied the claim based upon late notice and plaintiff’s failure to protect its right of subrogation. Plaintiff contended the insurer was not prejudiced as the driver (a close relative of both plaintiff and her decedent) was uncollectible. Owners contended it was prejudiced from conducting its own investigation into such issues as drunk driving, negligent entrustment, and vehicle defects. The Court of Appeals concluded plaintiff’s delay was unreasonable in that plaintiff failed to rebut the presumption of prejudice on these other sources of subrogation recovery. This case is an excellent example of how insurers can use the _Ferrando_ decision to their advantage in cases of late notice or an uncollectible at-fault driver. The insurer was successful due to the thoroughness and creativity in exploring all possible avenues of recovery.
**Westfield Insurance Company v. Russo, 2005-Ohio-5942**  
**Late Notice**  
Plaintiff tried to make a UIM claim eight years after her accident. The policy she was claiming under had a prompt notice requirement. The appellate court upheld summary judgment in favor of the insurer, finding plaintiff did not rebut the presumption of prejudice in favor of the insurer. In particular the court noted the delay prevented the insurer from meaningfully investigating the alleged injuries.

**Kynard v. Honaker, 2005-Ohio-3205**  
**Rejection of Coverage**  
This appeal involved a UM/UIM claim which arose prior to House Bill 261. The claimant initially opted to purchase UM/UIM coverage from his insurer. Subsequently he cancelled that coverage to save money on his premiums. He later had an accident and argued under Linko his cancellation was not valid, as the information mandated by Linko was not provided to him. The appellate court rejected this contention as the original policy issued to the plaintiff contained all of the information required by Linko – i.e. an explanation of the coverage, as well as a specification of the premiums charged.

**Available Coverage**  
Plaintiff’s son was killed in an accident caused by an underinsured motorist. Plaintiff was a West American insured. The West American policy had UM/UIM coverage. The declarations page stated the UM coverage had limits of $100,000.00/$300,000.00. While the declarations page indicated the policy also included UIM coverage, it did not state an amount for such coverage. West American paid to its insured $75,000.00 (the underinsured motorist had $25,000.00 limits). Plaintiff contended the West American policy was ambiguous since it did not state a specific amount for UIM coverage, and therefore the limits had to be more than $100,000.00/$300,000.00. The Court of Appeals disagreed and held the policy was not ambiguous. The court held the definitions section of the policy made it clear that the policy’s UIM coverage amounts would track the UM coverage amounts.

**Tenhundfeld v. State Farm Mutual Automobile Insurance Company, 2005-Ohio-1874**  
**Stacking of Policies**  
Plaintiff claimed her son was killed due to the negligence of two other drivers. Plaintiff was the named insured under two separate policies issued to her by State Farm. Both policies contained UM coverage. State Farm paid her the UM policy limits for one policy, and denied coverage under the other policy based upon their anti-stacking language. Although plaintiff was the named insured under both policies, she contends the second policy was actually for her son and his car, but simply listed as the named insured as her son was a minor at the time she purchased the policy. The appellate court rejected this argument as the policies were clear and unambiguous in designating her as the sole named insured.

Each policy had a UM limit of $250,000.00/$500,000.00. Plaintiff claimed she should be allowed to recover up to the per accident limit since the accident was allegedly caused by the
negligence of more than one tortfeasor. The appellate court also rejected this argument, noting at issue was only one injury and one accident.


“Other Owned Vehicle”

The Court of Appeals held an “other owned vehicle” clause/exclusion in a UM policy was valid.


Using a Motor Vehicle

Plaintiff was a salt truck driver for a city. He was instructed by his supervisor to park and position his truck so that its lights illuminated a salt spill from another truck. After he positioned his truck he began directing traffic and he was ultimately struck by another vehicle and injured. He made a UM claim to the city’s insurer and they denied his claim on the basis that he was not using an insured vehicle at the time he was injured. This particular policy had a requirement of using the vehicle as opposed to occupying it. The Court of Appeals held he was not entitled to coverage as his conduct was not foreseeably identifiable with the normal use of the vehicle.

_Burgio v. Allstate Insurance Company_, 2005-Ohio-387

Limitations Period

Plaintiff was injured by an uninsured motorist in 2000. He sued his UM insurer in 2003. The policy contained a two year limitations period. Plaintiff argued the insurer waived the limitations period by continuing to communicate with him on his claim after the two year period ran, thanking him for his continued cooperation. The Court of Appeals disagreed and enforced the two year period, finding there was no waiver or estoppel.

_C. Employment Decisions_

_McCrone v. Bank One Corp.,_ 107 Ohio St.3d 272, 2005-Ohio-6505

Workers Compensation Recovery for Psychological Injuries

Plaintiff was a teller at a bank which was robbed twice in eight months. She did not suffer a bodily injury as a result of either robbery. She was diagnosed with Post Traumatic Stress Disorder after the second robbery and made a Workers Compensation claim. Her claim was denied as R.C. 4123.01(C)(1) excludes purely psychological injuries from recovery under Workers Compensation. Plaintiff contended the statute was unconstitutional. The Supreme Court upheld the statute and ruled the state had a valid and legitimate interest in precluding purely psychological injuries from recovery.
DiPietro v. Lighthouse Ministries, 159 Ohio App. 3d 766, 2005-Ohio-639  
Vicarious Liability for Sexual Misconduct

Plaintiff sued her church for negligence, following a consensual relationship with her pastor. The relationship began after the pastor counseled her on several occasions for her marital problems. Plaintiff alleged the church was negligent in its hiring and retention of the pastor. Plaintiff also alleged the church was vicariously liable for his conduct.

The appellate court held there was no vicarious liability as the conduct of the pastor was clearly outside of the course and scope of his employment and had no religious motivation. The court specifically held the pastor’s conduct had no relation to his work duties nor did it further the church’s interests in any respect. Additionally, plaintiff presented no evidence that the church knew or should have known of any prior propensity the pastor had for engaging in such activity.

Course and Scope of Employment

The appellate court held an employer is not ordinarily liable for the negligence of their employee while driving to and from work, unless doing so bestows some sort of special benefit to the employer.

Contrill v. Wayne Mutual Insurance Company, 2005-Ohio-4937  
Course and Scope of Employment

Plaintiff was injured in an accident in a company owned parking lot, when struck by a car driven by a fellow employee. The appellate court held the fellow employee was immune under the fellow servant doctrine. It was further held plaintiff could not make an uninsured motorist claim.

Tressler v. Specialty Transportation Services, Inc., 2005-Ohio-4866  
Course and Scope of Employment

Plaintiff was a van driver for a company responsible for transporting children to school. She picked up her van in the morning at the company’s garage and then drove back home to prepare for her route. Later in the day, while at home, she was injured while cleaning snow from the van. It was determined she was acting within the course and scope of her employment, and her injury was therefore compensable through Workers’ Compensation.

Loaned Servant Doctrine

An unskilled labor agency provided plaintiff to a roofing contractor for a job project. Plaintiff was injured on the job and brought a workplace intentional tort suit. An issue arose as to whether plaintiff was an employee of the roofing contractor and/or the labor agency. The appellate court determined that under the loaned servant doctrine plaintiff was an employee only of the roofing contractor and not the labor agency. Accordingly the labor agency had no liability. The court based this ruling on the fact that while on the job plaintiff was under the exclusive direction and control of the roofing contractor.
D. Premises Liability Decisions

*Nuemeier v. Lima, 2005-Ohio-5376*

**Minor Imperfection**

Plaintiff sued the City of Lima after slipping and falling on a sunken parking lot sewer grate. The Court of Appeals upheld summary judgment in favor of the City on the basis that the sunken condition of the grate, along with the slight disrepair of the surrounding area, were minor imperfections and did not trigger any duty to plaintiff.

*Maier v. Northern Ohio Food Terminal, 2005-Ohio-5342*

**Duty to Illuminate**

A delivery driver sued a business and their landlord after falling on their premises, alleging they had a duty to illuminate their parking lot. The Court of Appeals disagreed, noting among other things that darkness was an open and obvious condition.

*Oliver v. Leaf & Vine, 2005-Ohio-1910*

**Open and Obvious Defense**

Plaintiff sued a restaurant after falling while leaving her table. The table was on a platform approximately eleven inches above the floor. There were no handrails or signs indicating any difference in height. The appellate court upheld summary judgment in favor of the landlord, on the basis this difference in height was an open and obvious condition.

*Scruggs v. Cherry Tree Village, 2005-Ohio-1167*

**Duty to Protect**

Plaintiff sued an apartment complex after being attacked on the premises. In upholding summary judgment in favor of the defendant, the court noted the foreseeability of a criminal attack depended upon the knowledge of the landlord, as established by the totality of the circumstances. Although plaintiff identified five different safety precautions the landlord should have undertaken, there was still no evidence presented that an attack of this nature was reasonably foreseeable.

*Lehman v. Cracker Barrel, 2005-Ohio-370*

**Snow and Ice**

In response to bad weather Cracker Barrel salted the sidewalks outside the restaurant. This resulted in the ice melting and then later refreezing. Plaintiff contended this created “black ice” and therefore the ice was no longer a natural accumulation. The Court of Appeals disagreed and held the efforts of Cracker Barrel to remove snow and ice from the sidewalk did not convert a natural accumulation into a non-natural one, and as a result there was no obligation on the part of the restaurant to remove any black ice which was present.
Lawrence v. Jiffy Print, Inc., 2005-Ohio-4043
Snow and Ice

Plaintiff slipped and fell on ice on a walkway. The ice allegedly came from water which leaked or dripped from an overhang and then froze. The water in the overhang itself was the result of a natural accumulation. There was no evidence presented that either the roof or the overhang was defective. As a result the appellate court held the ice on the walk was a natural accumulation and that the property owner had no duty to remove it.

Brown v. Classic Ventures Food Division, Inc., 2005-Ohio-112
Open and Obvious

While driving in the defendant’s parking lot the plaintiffs struck a six foot long section of curb which was painted yellow. The Court of Appeals held a barrier such as this was open and obvious as to both motorists and pedestrians.

Hensley v. Salamone, 2005-Ohio-187
Exceeding the Scope of Invitation

Plaintiff entered the defendant’s barn, with the defendant’s permission, to get a piece of equipment. While in the barn plaintiff decided to go up into the loft to look at other items, and while up there he fell through the floor. The defendant argued the plaintiff was no longer an invitee when he was up in the loft as he exceeded the scope of his invitation. The Court of Appeals agreed and found the plaintiff was only a licensee, and therefore the defendant, even if negligent, had no liability, as the only duty owed to a licensee is to refrain from willful or wantonly injuring them.

Pine v. Hall, 2005-Ohio-3488
Trivial Defects

Plaintiff sued the defendant landlord after falling on a flight of stairs. Plaintiff contended the carpeting was worn and defective, thereby posing an unsafe condition. The appellate court disagreed and upheld summary judgment in favor of the landlord as the only evidence was that there were slight rips and tears in the carpet and those were nothing more than a trivial defect.

Terakedis v. Lin Family Limited Partnership, 2005-Ohio-3985
Open and Obvious

Plaintiff slipped and fell on a wooden ramp while exiting a building. He claims anti-slip strips on the ramp had been worn away and no longer provided any traction, leading to a dangerous condition. Summary judgment was upheld in favor of the property owner as this condition was open and obvious and there was nothing preventing plaintiff from observing the actual condition of the strips.
Open and Obvious
Plaintiff tripped and fell at a shopping center, due to a black vinyl strip dividing a landscaped area from a walkway. The appellate court held this condition was open and obvious and therefore summary judgment in favor of the landscaping company was proper.

E. Miscellaneous Decisions

Schuerger v. Clevenger, 2005-Ohio-5333
Dram Shop
Plaintiff brought suit after being assaulted at a bar. Plaintiff’s assailant was at the bar for a company party, and the employer kept an open tab at the party for the employees. Plaintiff argued by keeping an open tab the employer was encouraging consumption of alcohol and was somehow acting in conjunction with the bar owner and therefore should be subject to liability as well. The appellate court disagreed and held the employer could not be found liable for the actions of its intoxicated employee.

Sullivan v. Heritage Lounge, 2005-Ohio-4675
Dram Shop
Plaintiff was injured in an unprovoked assault at a bar. He sued the bar for allegedly over-serving his assailant. The assailant had been at the bar for approximately three hours, and during that time drank six beers, all of which he ordered at the actual bar area. During this three hour period the alleged assailant did not behave violently or aggressively nor did he display any visible signs of intoxication. The appellate court upheld summary judgment in favor of the bar as there was no evidence the alleged assailant was noticeably intoxicated.

Dram Shop
Plaintiff sued the Cleveland Indians after he fell over a railing at a baseball game. Plaintiff had become intoxicated while drinking beer at the game. He claimed the team and/or their vendor were liable for over serving him. The appellate court felt differently, holding a voluntarily intoxicated adult has no civil recourse against the alcohol provider.

Ellery v. The Ridge Club, 2005-Ohio-1873
Assumption of Risk
Plaintiff lived adjacent to a golf course. Two of her vehicles were damaged by golf balls and she sued the course for not taking adequate precautions to protect surrounding property owners. The appellate court ruled in favor of the golf course, noting plaintiff was aware she was moving next door to a golf course when she bought her home. Furthermore, in a twenty year period there had only been four other instances where golf balls damaged adjacent property.
**Thompson v. Bagley**, 2005-Ohio-1921

**Sovereign Immunity**

Plaintiff sued a school district after his decedent drowned in a school swimming pool. The appellate court held pursuant to R.C. 2744.02(B)(4), the district was not entitled to assert any discretionary defenses as the incident in question occurred in a school building, and therefore the district was not entitled to immunity.

**Copeland v. Cincinnati**, 2005-Ohio-1179

Plaintiff was sexually assaulted by other children while attending a city operated day camp. The appellate court held the city was not immune under R.C. 2744.01(A)(2) since the operation of the day camp was a proprietary function and not discretionary.


**Collateral Sources**

At trial there was a dispute as to the amount of medical expenses plaintiff would be able to claim. There was a difference between what the medical providers billed and what plaintiff’s health insurer actually paid. The medical providers wrote off the difference. Plaintiff contended she should be allowed to present the full amount of her bills as allowing a lesser amount to be presented would violate the collateral source rule. The defendant contended plaintiff should only be allowed to present bills in an amount necessary to pay any subrogation lien or to reimburse her for out of pocket expenses, as allowing for anything else would result in a windfall to plaintiff. The appellate court ruled in favor of plaintiff indicating the amount billed by the medical providers was presumed reasonable and under the collateral source rule, a defendant should not be allowed to benefit from the fact a plaintiff may have had health insurance. This case is currently on appeal to the Ohio Supreme Court.


**Claim Assignment**

Following an automobile accident a claimant began treating at the Roselawn Chiropractic Center. She signed an assignment agreement with the chiropractor assigning to the clinic any monies she would recover in her BI claim so as to satisfy the costs of treatment. The chiropractic center sent a copy of this assignment to Allstate. The claimant ultimately settled her injury claim with Allstate. Neither the claimant nor Allstate paid any monies to the chiropractic center. The chiropractic clinic then sued both the claimant and Allstate seeking to enforce the assignment agreement. Allstate contended it was not bound by the assignment agreement since it was not a party to it. The Court of Appeals disagreed based upon the fact the assignment itself was valid and it was undisputed Allstate was on notice of the assignment prior to the settlement. This decision has very broad implications given the fact claim assignments are a very common practice among chiropractors. An argument can be made based upon this decision that any time an insurer is involved in the claim the chiropractic center must be named on any settlement check, unless the insurer is given written direction from the chiropractic clinic itself, indicating it does not need to be named.
Parianos v. Bruegger’s Bagel, 2005-Ohio-113
Foreign Object in Food

Plaintiff sued Bruegger’s, claiming while eating a bagel sandwich she bit on a bonelike object in her sausage. The appellate court ruled in favor of Bruegger’s holding the bone was natural to the sausage and was something plaintiff should have anticipated and guarded against.

Sinclair v. Gram, 2005-Ohio-1096
Emotional Distress

Plaintiff was involved in an accident where the wrongdoer was killed. In a suit against the wrongdoer, plaintiff claimed emotional distress as a result of witnessing the wrongdoer’s death. The court held because plaintiff was not in the same vehicle as the wrongdoer and had no relationship to him, plaintiff was not entitled to make a claim for emotional or psychological distress based upon observing the death.

Cashin v. Cobett, 2005-Ohio-102
Pre-judgment Interest

Plaintiff sued defendant following an automobile accident. Plaintiff subsequently voluntarily dismissed the suit without prejudice and re-filed it nine months later. The case went to trial and plaintiff received a substantial verdict, much more than the insurer previously offered. The trial court awarded plaintiff pre-judgment interest. The defendant argued there should be no pre-judgment interest awarded for the nine months between the dismissal of the first suit and the filing of the second. The appellate court disagreed and held pre-judgment interest would run uninterrupted from the day of the accident.

IX. SIGNIFICANT KENTUCKY SUPREME COURT DECISIONS

A. Insurance Coverage Decisions

Insurance for Pollution Claims

This case arises from low level radioactive waste contamination caused by rainwater penetration into large, unlined trenches at the Maxey Flats Chemical and Nuclear Waste Disposal Facility. Thirty-six insurance companies, members of the American Nuclear Insurers (ANI), raised the defense of “fortuity” and denied an initial defense and indemnity to insureds in connection with administrative proceedings by the Environmental Protection Agency for clean up of the contaminated site and abatement of contamination. ANI filed a declaratory judgment action seeking to establish no coverage liability. Insureds filed counterclaims for coverage under the policies and money damages for ANI’s alleged breach of contractual duties to defend and indemnify them. All parties filed cross-motions for summary judgment and the trial court summarily ruled ANI’s duty to defend the insureds was triggered by the EPA’s notice of proceedings. ANI’s fortuity defense to coverage proceeded to trial and a jury found the insureds
were precluded from recovery since their share of remediation costs were “expected, and intended, anticipated or foreseen” in the ordinary course of operating the facility under regulatory compliance.

The Supreme Court held fortuity must be judged using a subjective standard. The crucial issue is whether the insured was aware of an immediate threat of the injury for which it was ultimately held responsible and for which it now seeks coverage, not the insured’s awareness of its legal liability for that injury. The Supreme Court held ANI was required to reimburse the insureds for their costs in participating in the EPA administrative process, and that the insureds’ costs of site measures are “damages because of property damage” as defined within ANI’s policies. The Supreme Court held ANI’s policies do not cover attorneys fees incurred in the declaratory judgment action. The Supreme Court agreed with the lower courts’ decisions to pro-rate the amount of insurance available to cover the limits of ANI’s policies in effect at any time the property damage at issue was caused.

**B. Kentucky UM/UIM Cases**


**Hit and Run**

Arnold was injured in a chain-reaction automobile accident involving three vehicles; one driven by Arnold, another driven by Lee and a third whose driver immediately left the scene of the accident and was never located. The unidentified vehicle struck Lee’s vehicle propelling it into Arnold’s vehicle. There was no direct contact between the unidentified vehicle and Arnold’s vehicle. Arnold brought an uninsured motorist claim against Shelter Mutual, whose policy provided:

(3) Uninsured motorist vehicle means:

***

(b) a hit and run motor vehicle,

(4) Hit and run motor vehicle means a motor vehicle whose owner or operator cannot be identified and which hits the insured or a motor vehicle the insured is occupying.

The Supreme Court considered whether the “hit” requirement in Shelter’s definition of a “hit and run motor vehicle” is satisfied when a hit and run motorist hits an intermediate vehicle causing it to hit the insured vehicle. The Supreme Court held it is.
Rodgers filed an action against Kentucky Farm Bureau alleging bad faith in negotiating her underinsured motorist claim in violation of the UCSPA. Rodgers claimed Farm Bureau acted in bad faith because it had offered only $10,000.00 of its UM coverage to settle her claim notwithstanding a $50,000.00 limit. In the bad faith lawsuit, Farm Bureau filed a motion in limine to suppress evidence of negotiations by a Farm Bureau representative in another case, the Mabel Raines case. Raines complained Farm Bureau had offered (in a separate action) only $14,000.00 then increased its offer to $31,000.00 prior to trial but eventually paid its policy limits only after her trial testimony. Farm Bureau was the liability insurer of the tort defendant in the Raines case providing primary coverage, but was only the underinsured motorist carrier in the Rodgers case. The claims were negotiated by different adjusters working out of different claim offices. The Supreme Court had to decide whether evidence of the settlement negotiations in a completely separate negligence lawsuit negotiated by the same insurance company were admissible at trial in Rodgers’ bad faith lawsuit against Farm Bureau. The Supreme Court held the testimony was admissible to impeach the credibility of expert testimony by Raines’ attorney regarding how demand letters aid insurance companies to process claims in a more timely and fair manner. However, it was not admissible for the purpose of proving Farm Bureau’s alleged bad faith.

Settlement of Claims

This case presents a certified question from the United State Court of Appeals for the Fourth Circuit. The question pending before the Supreme Court was whether a fiduciary may maintain an action against an insurer for negligently underinsuring its insured, where the fiduciary, the insurer, and the insured have executed an agreement in which: (1) the fiduciary settled a wrongful death claim against the insured for the maximum limit of the insurance policy, which the insurer agreed to pay to the fiduciary in consideration for the insured’s release; (2) the insured assigned to the fiduciary the right to pursue its claim that the insurer negligently underinsured its insured; and (3) the insurer agreed to litigate with the fiduciary the claim that it negligently underinsured its insured. Brewer, National Indemnity, and the Maynards entered into a partial settlement agreement in a wrongful death case. National Indemnity agreed to pay Brewer the policy limits of $100,000.00 in exchange for a release of its insured, the Maynards. National Indemnity agreed to litigate the coverage claim with Brewer and the Maynards assigned to Brewer their rights and claims for indemnification under the policy against National Indemnity as well as all rights and claims against National Indemnity for extra-contractual, statutory or common law liability arising out of the coverage claim. The Supreme Court ultimately concluded that National Indemnity was a party to the agreement including the section that assigned all rights and causes of action that the Maynards possessed at the time of the assignment. The court stated under the circumstances the parties understood the agreement to assign the Maynards’ rights and causes of action to Brewer. The court held National Indemnity agreed to the assignment and in return secured a release in favor of its insured and eliminated the possibility of a bad faith claim from its insured or the plaintiff. The Supreme Court held under the facts presented Kentucky law allows a fiduciary to proceed against an insurer pursuant to the bargained for agreement entered into by the parties.
C. Employment Decisions


Age Discrimination

Williams sued Wal-Mart Stores, Inc. and two individual Wal-Mart management employees alleging wrongful termination based upon unlawful age discrimination. The jury awarded Williams damages of $539,237.00. Evidence presented at trial suggested Williams, a cashier, was forced to resign after she allegedly took two gallons of sodium free water without paying for them. After a 45 minute meeting with managers, and being unable to produce receipts for the water, she resigned, and after leaving the store she paid for the water.

The Supreme Court reviewed the requirements a plaintiff must meet to prevail in a discrimination claim. A *prima facie* case must be shown through direct evidence of discriminatory animus or otherwise through the *McDonnell Douglas* burden shifting approach. A plaintiff can establish a *prima facie* case of age discrimination by circumstantial evidence if he proves 1) she is a member of a protected class, 2) was discharged, 3) was qualified for the position and 4) was replaced by a person outside the protected class. Evidence showed the next 16 hires made by Wal-Mart after Williams’ separation were individuals at least 8 years younger than Williams and she made a *prima facie* case. However, the court further held Wal-Mart articulated a “legitimate non-discriminatory reason” for her termination, namely, that Williams violated its strict policy against employees taking merchandise without first paying for it.

Although the Court held Williams created a weak issue of fact regarding whether the employer’s reason for termination was untrue, there was “abundant and uncontraverted independent evidence that no discrimination had occurred.” The Supreme Court held there was not sufficient evidence to permit a rational trier of fact to conclude Wal-Mart unlawfully discriminated against Williams because of her age. The court cited two uncontraverted facts to support this conclusion. First, Wal-Mart presented evidence two employees under the age of 40 were fired for substantially the same reasons (drinking an Icee and a soft drink which had not been paid for). Second, evidence showed the supervisor responsible for Williams’ termination did not know her age at the time he made the decision.

D. Premises Liability Decisions


Open and Obvious Defense

Horne visited an automobile dealership. While Horne was walking around the rear of the car giving his attention to the sales pitch, he tripped on a concrete parking barrier extending outward from under the car, fell, and injured his wrist. Evidence suggested the prior operator of the car parked too far to the left and at an angle so only its right rear wheel was touching the concrete barrier and the left rear wheel was concealing the barrier’s presence from anyone looking at the car from the left side. Horne testified he never previously visited the lot, did not notice any barriers, and did not see the barrier in question before he tripped and fell. The Supreme Court considered whether the barrier was an open or obvious hazard or if the facts were sufficient to proceed to trial on the lot’s alleged negligence. The Supreme Court held the danger was neither
known nor obvious to the plaintiff, and the case should go to trial. The Supreme Court cited to
the fact the barrier was partially concealed from the customer by the manner in which the lot
employee parked the car. The court further stated the lot should “expect that a customer in the
process of examining its wears while they were being pitched by one of its sales staff may be
distracted, so that he will not discover what is obvious, or will forget what he has discovered, or
fail to protect himself against it.”


**Jury Instructions**

Wilkey was a patron of the health club. While entering the pool his foot slipped out from under
him and he fell backwards onto his elbow suffering injuries. Evidence suggested he reported his
shoulder injury occurred during weight lifting instead of the accident at the pool. He also did not
report the incident to the club until two months after a surgery. He later sued the club, alleging
failure to maintain the premises in a safe and sanitary condition and negligent maintenance of the
pool steps was the cause of his injuries. When instructing the jury the court used “bare bones”
instructions regarding the general duty of ordinary care applicable in all negligence cases. The
circuit court rejected the plaintiff’s proposed instructions which added more specific duties to
undertake reasonable inspections of the pool, take reasonable precautions to protect invitees from
foreseeable dangers, and warn business invitees if the club had actual knowledge of the danger.
The jury returned a unanimous verdict in favor of the club. The Supreme Court had to decide
whether the court’s “bare bones instructions” were sufficient. The Supreme Court held the
instructions did not mis-state Kentucky law and the trial court did not abuse its discretion. The
court held Kentucky “bare bones” jury instructions are sufficient in negligence actions and are
proper if they correctly advise what the jury must believe from the evidence in order to return a
verdict in favor of the party who has the burden of proof on that issue. The question to be
considered on appeal of an allegedly erroneous instruction is whether the instruction mis-stated
the law.

**E. Miscellaneous Decisions**

*Previs v. Dailey, Ky., ___ S.W. 3d ___ (2005)*

**Bicyclists**

While riding her bicycle on the right hand side of the road, Previs was injured by a truck driven
by Dailey as she crested the hill. Testimony at trial suggested Previs was not an experienced
cyclist, she may have accelerated while Dailey’s vehicle was passing her and she did not see
Dailey. Testimony also suggested Dailey moved to the left hand lane as he passed Previs and did
not see her as he returned his vehicle to the right hand lane. The trial court denied the parties’
motions for directed verdict. The jury returned a verdict in favor of Dailey. The Supreme Court
reversed, holding Dailey was negligent as a matter of law. The Court held the jury’s verdict
absolving Dailey of liability was “so flagrantly and palpably against the weight of the evidence
as to indicate that it was reached as a result of passion or prejudice.” The Court held the trial
court should have granted Previs a directed verdict on the issue of Dailey’s negligence.
However, a jury is still entitled to consider Previs’ duties in operating her bicycle, and apportion
fault should it find Previs was negligent, as well.
Intra – Family Immunity

The plaintiff, Mr. Bentley, was a passenger in a car insured by his wife which was being driven by his daughter. The car ran off the road and Mr. Bentley was injured. He sued his daughter for negligence and also sued his insurer for bad faith refusal to settle his claim in violation of Kentucky’s Unfair Claims Settlement Practices Act (UCSPA). The insurer refused to settle based upon existing case law which held a parent cannot maintain an action in tort against his or her unemancipated minor child for injuries arising out of the child’s negligent operation of a motor vehicle. The Supreme Court considered whether to overrule existing case law regarding intra family immunity and let the case go forward. The Court also had to decide whether the insurer’s refusal to settle the claim based upon that case law permitted a bad faith cause of action to go forward. The Supreme Court allowed Bentley’s case to go forward against his daughter, but upheld the dismissal of his bad faith claims against the insurance company. The Court noted at least 6 jurisdictions have specifically held a parent can sue his or her unemancipated minor child for damages due to the child’s negligent operation of a motor vehicle and other jurisdictions have abolished parent-child immunity under certain circumstances. The court held with the exception of “common-place incidents in family life” (acts which are not likely to cause harm to the general public) a parent may be able to sue their minor child for negligence. Regarding the bad faith claim, the court held since the insurance company in this case denied the claim in reliance on existing case law which had not been overruled, there was a reasonable basis for denying the claim, and the trial court properly dismissed the bad faith claim.

Settlement

Coomer was injured when her left knee was struck by Phelps’ car. Coomer was treated and released from the emergency room and diagnosed with a bruised knee. The next day a representative of Progressive (Phelps’ insurance company) contacted Coomer and negotiated a $500.00 settlement in exchange for a release. One week later Coomer learned the physician who treated her had misdiagnosed her injury as a bruised knee when in fact her leg had been fractured. She sued Phelps and later she sued Progressive, claiming the company engaged in bad faith during the settlement of her claim.

Coomer argued the release should be ignored under the doctrine of mutual mistake. The Supreme Court noted existing Kentucky law holds a mutual mistake between parties to a release as to the “nature and extent of the plaintiff’s injuries” is insufficient grounds on which to invalidate a general release. The court stated to retreat from this rule would cast great doubt on the finality of releases in this state and unnecessarily complicate settlement considerations. The Supreme Court held absent fraud, incapacity, or other compelling evidence of wrongdoing, an injured party who executes a release of claims is bound by the terms of that release. Coomer also argued the doctrine of constructive fraud should also apply to invalidate her release. The Supreme Court rejected this argument finding Coomer failed to identify a legal duty that either Phelps or Progressive can be said to have violated and noting the case upon which Coomer relied is limited to workers compensation cases. Finally, Coomer alleges the release was ineffective due to her mental incapacity at the time it was executed. Coomer alleged she was prescribed and took more than the recommended dose of a narcotic pain reliever and does not remember reading or executing the release. The Supreme Court found she failed to establish a genuine issue of material fact as to her competence to execute the release.
As for Coomer’s bad faith claim, she alleged the insurer violated the UCSPA by failing to fully investigate the merits of her claim and by providing a settlement that was not “fair and equitable.” The Supreme Court held that while KRS 304.12-203 (4) prohibits any refusal to pay a claim without first conducting a reasonable investigation, no such obligation arises for an insurer that has agreed to the payment demands of an injured party. The court noted such a duty to “double check” the basis of third party claims would significantly and erroneously broaden an insurer’s obligation of good faith as set forth in the statute. Regarding the fairness of the settlement, the Supreme Court also found Coomer’s argument without merit. The court stated the statute only requires that an insurer make a good faith attempt to settle any claim, for which liability is beyond dispute, for a reasonable amount. The Supreme Court stated there was no question of liability, settlement actually occurred within one day of the accident, and Coomer had admitted the settlement was “fair” in light of the information known at the time.

Permissive Use

At the time of a single car accident, Kentucky Farm Bureau provided policies to Neely and York. In defiance of Neely’s wishes York drove away with Prewitt in the passenger’s seat and ultimately wrecked the vehicle. Prewitt sustained injuries as a result and York later pled guilty to reckless driving and unlawful operation of a vehicle. The York and Neely policies contained the following exclusion:

B. We do not provide liability coverage for any person:
   4. Using a vehicle without a reasonable belief that a person is entitled to do so.

Farm Bureau filed a declaratory judgment action seeking to absolve itself of liability coverage under the exclusion. The circuit court concluded the exclusionary language applied to the Neely policy, but did not apply to the York policy. The Supreme Court held no ambiguity existed in the non-permissive user exclusion. The Supreme Court held the non-permissive user exclusion in the York insurance policy unambiguously excluded coverage.

Collateral Source Payments

Miller went to Central Baptist Hospital to have her blood drawn upon the doctor’s orders. The phlebotomist placed a tourniquet on Miller’s arm and left her without supervision for approximately 10 minutes, returning to find her arm swollen. Ms. Miller was 80 years old and experienced medical complications including nerve problems she claims resulted from the incident. Miller brought a negligence action against Central Baptist. Central Baptist argued the trial court should have granted a directed verdict on the issue of Ms. Miller’s medical expenses. Central Baptist sought to limit Ms. Miller’s recovery to the amount actually paid or the amount actually collectable as a matter of law. It asserts that this is not a collateral source issue, but the amount of alleged damages for which there is no obligation to pay is not a valid item to be submitted to the jury and awarded as damages. The jury awarded Ms. Miller $34,000.00 for medical expenses reduced to $22,100.00 by a 35 percent fault apportionment. She had sought $40,922.08 in medical expenses. $31,840.00 was billed by the doctor, but he received only
$3,356.38 from Medicare. Central Baptist claims that Ms. Miller was only responsible for paying $3,356.38 (the amount actually paid by Medicare), and the remaining $28,483.80 was classified as a Medicare adjustment or Medicare write off. Central Baptist alleged that the Medicare adjustment was Ms. Miller’s windfall. The Supreme Court held Medicare benefits are governed by the collateral source rule and are treated the same as other types of medical insurance. The Supreme Court held evidence of collateral source payments or contractual allowances was properly withheld from the jury and Ms. Miller’s award of medical expenses was proper.


**Safety Regulations**

Hargis was killed when a large log rolled off a trailer while he worked as an independent contractor at the Baize Lumber Yard. Hargis’ widow as administratrix of his estate and on behalf of their two minor children brought this action against Baize alleging the fatal accident was caused by Baize’s failure to comply with Kentucky Administrative Regulation 803 KAR 2:317 §2 (now §3), Kentucky Occupational Safety and Health Act (KOSHA). During discovery Baize admitted it was not his company’s policy to comply with certain KOSHA regulations at issue. Baize’s former safety officer testified in a discovery deposition an insurance representative visited the site two weeks before Hargis was killed and recommended implementation the securing procedures required by the KOSHA regulations. Evidence indicated that the recommendation was rejected even though the operations manager had recently been injured in a similar accident. After discovery, the estate moved for partial summary judgment claiming violation of the KOSHA regulations was negligence per se and created a private cause of action for wrongful death. Thus, the jury should be instructed only on Hargis’ contributory fault, if any, and damages. Baize moved for summary judgment claiming the violation did not create a private cause of action and that his only duty to an independent contractor was to warn him of any hidden dangers on the premises. The trial court agreed with Baize and also construed a release signed by Hargis in 1998 to be a valid contract exculpating Baize from any liability for damages to Hargis caused by Baize’s negligence. The trial court overruled the motion for partial summary judgment and entered summary judgment in favor of Baize. The Court of Appeals affirmed. The Supreme Court granted discretionary review and reversed the Court of Appeals and remanded the case to the trial court with directions to vacate the summary judgment granted to Baize, grant partial summary judgment to Hargis on the issue of Baize’s liability and conduct further proceedings as necessary. The Supreme Court noted a party cannot contract away liability for damages caused by a party’s failure to comply with the duty imposed by a safety statute. The Supreme Court held since Hargis was an independent contractor, his death was not within the purview of the Workers Compensation Act. Thus, this civil action is not precluded; but Hargis’ alleged contributory fault, if any, would be a factor to consider in determining causation and whether any damages should be reduced on the basis of comparative fault.
Defamation

This case arises from a defamation action brought by a public figure against a news media defendant. In 1994, five passengers were injured when two cars collided during the operation of Kentucky Kingdom’s indoor steel rollercoaster known as the “Starchaser.” Kentucky Kingdom alleged three statements made during WHAS TV broadcasts were libelous. The alleged libelous statements included the following:

“State inspectors also think the ride is too dangerous.”
“The rollercoaster ride that malfunctioned earlier this week.”
“Kentucky Kingdom removed a key component of the ride.”

At trial, Kentucky Kingdom introduced evidence which in its opinion showed all three statements were false and the defendant made the statements knowing they were false or with reckless disregard as to whether they were false. The trial judge instructed the jury it could find liability for the specific statements and/or the telecasts in which statements were made “taken as a whole.” The jury found each of the statements and each series of telecasts taken as a whole were defamatory. Damages were not broken down to indicate separate damages for the specific statements or telecasts. The jury awarded Kentucky Kingdom $475,000.00 for loss of profits; $1 million for damages to reputation; and $2.5 million in punitive damages. The trial judge granted a judgment notwithstanding the verdict regarding reputation damages determining they were speculative. Defendant appealed and Kentucky Kingdom cross-appealed to regain its $1 million for injury to reputation.

The Supreme Court held the evidence presented by Kentucky Kingdom sufficiently demonstrated there was clear and convincing evidence of actual malice. It held a jury in this type of action must consider the broadcasts in their entirety when determining whether the statements and inferences within it are false and defamatory. A defamatory publication must be considered as a whole because the cumulative effect of the facts may support the finding by the jury of actual malice. The court stated evidence of malice included a failure to correct inaccuracies; continuing commitment to running and re-running the same story line; a significant failure to investigation or verify credibility; and the general make up and presentation of the story exhibited hostility. The Supreme Court agreed the jury verdict regarding loss of reputation was speculative and therefore the judgment notwithstanding the verdict on that issue was upheld.


Vicarious Liability

Patterson sued Blair and Courtesy under several tort theories after Blair drew a pistol and fired two shots in the front and rear tires of the vehicle driven by Patterson. This incident arose after a disagreement between Patterson and Blair regarding the sale and transfer of ownership of the vehicle. He claimed Courtesy was vicariously liable for the tortuous acts of its employee, Blair. A jury awarded Patterson damages of $42,642.18 and found Courtesy was vicariously liable for Blair’s conduct. After a lengthy discussion of vicarious liability under Kentucky law, the Supreme Court held “clearly, in confronting Patterson and shooting out the truck’s tires, Blair was acting to further the business interest of Courtesy. At the very least, his conduct was at least incidental to the conduct that was authorized by Courtesy...Blair was acting to protect his...
employer’s property.” The court stated there was no evidence Blair sought to serve any personal purpose by his actions. The court further held although the act was criminal, it was not so outrageous to indicate the motive was a personal one and therefore the jury’s finding that Blair acted within the scope of his employment imposing vicarious liability on Courtesy was supported by the evidence and Kentucky law.

X. SIGNIFICANT INDIANA COURT DECISIONS


Diminution in Value

Plaintiff’s auto was damaged while insured by Meridian. Meridian paid the cost of repairs under its collision coverage, but did not compensate plaintiff for any diminution in value. Plaintiff argued unless a repair to the automobile restored it to its fair market value the defendant must pay for the decline in market value after the repair to fully indemnify plaintiff for the loss.

The Indiana Supreme Court considered whether an insurance policy that provides coverage for loss limited to the lesser of the actual cash value of the amount necessary to repair or replace property obligates the insurer to compensate for diminution in value after adequate repairs have been made. Here, the court reviewed the “limit of liability” policy language determining it to unambiguously provide for either repair of the vehicle or replacement of the vehicle with that of like kind and quality, but found no obligation to restore the value of the vehicle. The court noted to the extent individual parts were replaced, those parts must be replaced with those of like kind or quality. Therefore, the court held an insurance policy that provides coverage for loss limited to the lesser of the actual cash value of the amount necessary to repair or replace the property with other property of like kind and quality does not obligate the insurer to compensate for diminution in value of the property after adequate repairs have been made.


Diminution in Value

The plaintiff was involved in a motor vehicle accident with an uninsured driver. Plaintiff’s insurer paid for the repairs to his motor vehicle, but did not compensate for any diminution in value of the car based on the “limit of liability” in the collision section of his insurance policy. The plaintiff argued his claim was not subject to the “limit of liability” contained in the collision section of his insurance policy, but rather he claimed a right to indemnity under his UIM coverage giving him the right to recover from his own insurer the total amount for which an uninsured motorist would be liable.

Notwithstanding the Indiana Supreme Court’s prior ruling regarding diminution in value in Allgood v. Meridian Security Ins. Co., here the Supreme Court determined the plaintiff would be entitled to recover diminution in value for his vehicle in this case. The Court distinguished this case from Allgood noting the uninsured tortfeasor has no “limit of liability” comparable to the limitation in the plaintiff’s collision coverage. Therefore, the court determined the plaintiff would be entitled to recover the full amount of his damages from the accident, including the diminution in value of his car after its repair. Stated differently, the Supreme Court held if an insured’s vehicle is damaged by an uninsured motorist and the insurer chooses to repair the
vehicle, the insurer must pay any diminished value of the insured’s vehicle, in addition to any
cost of repair up to the policy limits.

Discovery Rule and Statute of Limitations

A family contracted for a manufactured home. The contract included a warranty requiring any
claims for breach of contract be brought within one year. Two years after the home was
completed, the purchaser experienced foundation damage after substantial rains and sued the
seller for breach of contract. The plaintiffs argued the “discovery rule” should be employed with
respect to contracts to extend warranty agreements contained therein.

The Supreme Court noted Indiana law generally upholds contractual limitation periods
shortening the time frame within which parties may commence litigation, as long as the
contractual limitations are reasonable. The Supreme Court further noted even otherwise valid
limitation provisions can some times be avoided if a party can show fraud, duress,
misrepresentation, or the existence of an illusory contract. Here, the plaintiffs did not challenge
the limitation provision on any of these grounds. The Supreme Court refused to allow the
“discovery rule” to supersede the contractual limitations period contained in the contract since
both parties agreed to the contractual language and the language of the contract was not
ambiguous. Therefore, this case reinforces the fact contractual limitations periods will be upheld
in Indiana.

Monroe Guaranty Ins. Co. v. Magwerks Corp. 829 N.E.2d 968 (Ind. 2005)
Bad Faith

The Supreme Court was asked to decide whether a good faith dispute concerning insurance
coverage automatically precludes a punitive damages claim for bad faith when coverage is
denied. The plaintiff’s business suffered damage after a period of heavy rain and snow causing
several sections of its roof to fall to the floor. As a result, water and moisture caused damage to
several pieces of plaintiff’s equipment. The insurance carrier ultimately denied the plaintiff’s
claim citing several exclusions and limitations in the insurance policy as a refusal to pay for the
loss. Specifically, the insurer cited exclusions for damage caused by wear and tear, decay,
deterioration, and defective design, but did not reference at all the policy provision concerning
“collapse.” Thereafter, plaintiff filed a complaint alleging both breach of contract and bad faith,
with the primary issue in dispute being whether the plaintiff’s loss was due to a “collapse” of the
roof.

The Indiana Supreme Court reviewed this case on the issue of whether a punitive damages claim
for bad faith can even proceed where a good faith dispute regarding coverage exists. The
Supreme Court determined apart from the insurance carrier’s denial based on a good faith
dispute regarding whether or not coverage exists, the true question is whether the insurance
carrier’s conduct leading up to and including the denial rose to the level of bad faith. The
Supreme Court determined, based on the facts of this case, the jury’s conclusion that the
insurance carrier’s conduct amounted to an unfounded refusal to pay policy proceeds was
reasonable in the circumstances. Therefore, based on the facts of this case, the Supreme Court
held a good faith dispute concerning insurance coverage does not automatically preclude a
punitive damages claim for bad faith when coverage is denied.
**Gunkel v. Renovations, Inc.** 822 N.E.2d 150 (Ind. 2005)

**Construction Damages**

The plaintiffs contracted with the defendant for construction of a three story family residence. Approximately six months after the contract was entered, plaintiffs hired the co-defendant to install a stone and masonry exterior on the home. Shortly after the stone façade was installed, water began to enter through gaps in the façade and substantial moisture problems arose. Plaintiffs claimed walls, ceilings, floors, drywall, carpeting, and carpet padding were all damaged. The issue presented to the Indiana Supreme Court was whether damages recoverable in tort for a defective product or service are governed by the “economic loss” doctrine.

Generally, under the “economic loss” doctrine, contract is the sole remedy for failure of a product or service to perform as expected. As to a negligence claim, Indiana courts have held economic losses are generally not recoverable where the action is premised on the failure of a product to perform as expected unless the failure causes personal injury or physical harm to property other than the product itself. Therefore, the “economic loss” doctrine permits tort recovery only for personal injury or damage to “other property.” In this case, for reasons that are not entirely clear in the record, the plaintiff’s elected to forego any contract claim against the co-defendant, and based their claim against the co-defendant solely on its alleged negligence. Ultimately the court determined the “economic loss” doctrine precludes tort recovery for damage to the façade, itself, but allowed tort recovery for the damage to the home and its parts as a result of the negligent installation of the façade.

**Keene v. Marion Cty. Superior Court,** 823 NE 2d 1216 (Ind. Ct. App. 2005)

Plaintiff was employed by the defendant and received notice his employment would be terminated one month in the future. One month later plaintiff’s employment was, in fact, terminated by the defendant. Under Indiana law, the statute of limitations for filing suit claiming wrongful termination is two years. Two years to the day after the plaintiff was terminated, he filed suit against the defendant for wrongful termination. Plaintiff’s case was ultimately dismissed by the trial court because the complaint was not filed within the two year statute of limitations. The trial court ruled the statute began to run on the date the employee receives notice he or she will be fired, rather than the date his or her employment is actually terminated.


A declaratory judgment action was filed against Liberty Mutual alleging it breached its duty to defend OSI in an underlying lawsuit. The trial court determined Liberty Mutual breached its duty to defend and granted summary judgment on the declaratory judgment action in favor of the insured. The insured then claimed Liberty Mutual was subsequently estopped from raising any policy defenses in the subsequent litigation. However, the Court of Appeals determined where an insurer violates its duty to defend it is not thereafter collaterally estopped from raising policy defenses in litigation between itself and its insured.
Mayfield filed suit for personal injury as a result of a workplace accident allegedly caused by the defendant’s negligence. Plaintiff’s employer had a contract with The Levy Company to remove “slag,” which is a byproduct of the steel making process. Plaintiff suffered injury when he fell over a large piece of slag which was not removed, causing him to fall into a nearby trench filled with scalding water. Plaintiff filed suit against The Levy Company alleging it breached its duty of care which proximately resulted in plaintiff’s injuries. The Court of Appeals determined the existence of proximate cause depends upon whether the injury was a natural and probable consequence of the act in issue, which in light of the attending circumstances, could have been reasonably foreseen or anticipated. However, the Court ruled where it is reasonably foreseeable that an independent agency would intervene in such a way as to cause the resulting injury, the chain of causation may be broken. If the intervening cause was not reasonably foreseeable, the original negligent actor is relieved of all liability resulting from the original negligent act. Here, the Court of Appeals determined an intervening cause superseded any liability on the part of The Levy Company.

Following the collapse of its roof and consequent property damage and business interruption, Office Environments filed a claim with its insurer, Lake States. A dispute arose regarding payment of the claim and Office Environment ultimately filed a complaint alleging breach of contract and bad faith. The trial court set the case for trial, but also issued a Pre-Trial Order directing the parties to complete mediation at least sixty days prior to the date of trial. For various reasons, mediation was cancelled and rescheduled numerous times over a three year period along with the trial being continued several times. At some point, counsel for the plaintiff withdrew his representation based on a fee dispute with Office Environments, causing the plaintiff to retain new counsel. Plaintiff’s new counsel notified the mediator he would not be responsible for any mediation costs or expenses and that his client would remain fully responsible for any such charges. This prompted the mediator to request a retainer from Office Environments, which it refused to pay. Thereafter, the final mediation date was cancelled, and the defendant filed a motion to dismiss the case based on Office Environments’ failure to participate in the mediation as directed by the trial court.

In reviewing the case, the Court of Appeals recognized not all of the delays in commencing mediation are attributable to the plaintiff, but the Court found plaintiff did cause the mediation to be rescheduled at least three times and its refusal to pay the requested retainer resulted in the final cancellation. In addition, the Court found the circumstances were not merely attributable to an attorney’s lack of diligence, but rather the client, itself, was responsible for at least some of the delays and for the ultimate cancellation of the mediation. Ultimately, the Court of Appeals held a party’s failure to comply with a Court ordered mediation warranted dismissal of the case with prejudice under Trial Rule 41(E).

Plaintiff was injured while working at Benchwarmers Sports Lounge when he attempted to break up a fight in the bar. Over the years plaintiff worked in several different capacities at Benchwarmers Lounge, including as an employee for the owner, as an “independent contractor” working security for the owner, and as an “independent contractor” working security for a separate individual who routinely hosted events at the bar. Believing he was working in his
capacity as an employee at the time of the incident, plaintiff filed a claim with the Indiana Workers’ Compensation Board. During the Workers’ Compensation litigation, and as the statute of limitations on any potential tort claim quickly approached, an issue arose regarding whether the plaintiff was an employee, or independent contractor, at the time of the incident. Based on the discovery response of the defendant in the Workers’ Compensation action, plaintiff did not file a tort claim within the applicable limitations period. Subsequently in a deposition after the expiration of the limitations period it became clear the plaintiff was in fact working as an independent contractor on the date of the incident. Shortly after discovering this information, plaintiff filed a tort claim, which the defendant immediately moved to dismiss based on the statute of limitations.

In this case, the Court of Appeals determined equitable estoppel may be used to bar a defendant from asserting a statute of limitations defense where a material misrepresentation is made, causing the plaintiff to miss the statute of limitations deadline for filing suit. However, the Court of Appeals further restricted this determination finding the doctrine of equitable estoppel will not be applied where the party to which the misrepresentation was made had the means to discover the information on its own. In this case, the Court allowed plaintiff’s claim to proceed determining the defendant’s misrepresentation directly resulted in the plaintiff’s failure to file suit in a timely fashion.
XI. **SIGNIFICANT CASES PENDING BEFORE THE OHIO SUPREME COURT**

*Robinson v. Bates*
**Collateral Sources**
This appeal asks the Supreme Court to consider whether the damages a plaintiff may claim for medical expenses are limited to what were actually paid by health insurance and what the plaintiff is responsible for out of pocket, or if a plaintiff may also claim as damages medical expenses charged by physicians and not paid by insurers but which were ultimately written off by the providers.

*Hedges v. Nationwide Mutual Insurance Company*
**Moore Claims**
This appeal asks the Supreme Court to determine whether Moore claims can still be asserted under UM/UIM coverage following the effective date of House Bill 261 of September 3, 1997.

*Young v. Cincinnati Insurance Company*
**Changes to Policy**
This appeal asks the Supreme Court to consider whether an insurer has the right to change provisions within an insurance policy during the policy’s two year guaranteed renewal period.

*Lorince v. Universal Underwriters*
**Coverage for Loaner Cars**
This appeal asks the Supreme Court to consider whether a customer driving a car dealer’s loaner vehicle is insured under the dealer’s liability coverage.

*Groob v. Key Bank*
**Vicarious Liability**
This appeal asks the Supreme Court to consider whether an employer can be held vicariously liable for the intentional (and self-serving) misconduct of an employee.

*Garcia v. O’Rourke*
**Loss of Consortium**
The plaintiffs filed a medical malpractice suit and ultimately settled their claims against the doctor. The plaintiffs’ children were not named as parties in the malpractice claim, for the purposes of asserting a loss of consortium claim. Subsequently a second suit was filed on behalf of the children asserting a claim for loss of their parents’ services and the defendants sought the dismissal of the case. The Supreme Court is asked to consider the failure of the plaintiffs to
assert the children’s claims in the original action and whether their failure to include these derivative claims in the first suit bars them from being later asserted.

*Doe v. Archdiocese of Cincinnati*
*Discovery Rule in Sexual Abuse Cases*

This appeal asks the Supreme Court whether the discovery rule can be adopted for the purpose of extending the statute of limitations in sexual abuse cases.
XII. SIGNIFICANT CASES PENDING BEFORE THE KENTUCKY SUPREME COURT

Gainsco Companies v. Gentry
Vehicle Ownership
This appeal asks the Supreme Court to consider what liability a car dealer faces for delivering possession of a vehicle to a customer without securing proof of insurance.

Cincinnati Insurance Company v. Samples
Work Related Accidents
This appeal asks the Supreme Court to consider whether an employee, injured in the course and scope of their employment, can recover under the employer’s UM/UIM coverage for the same damages that they have already recovered through their Workers Compensation claim.

Bayless v. Boyer
Zero Verdict
This appeal asks whether a jury may decline to award a plaintiff any damages when the evidence shows the plaintiff had to undergo surgery.

Stratton v. Cabinet for Families and Children
Sovereign Immunity
This appeal asks whether Cabinet employees are immune from liability for negligence in investigating alleged child abuse.

Brown v. Indiana Insurance Company
Insurance for Employees
This appeal stems from a collision between an employer’s truck and a train, resulting in the death of several seasonal employees. The appeal focuses on whether the employees were “temporary workers” as defined under the employer’s policy.

Baker v. Kammerer
Admissibility of Insurance
This appeal asks the Supreme Court to further scrutinize K.R.E. 411 as far as when the existence liability insurance may be admissible for impeachment purposes.
**Kubajak v. Lexington-Fayette Urban County Government**  
Workers Compensation

Plaintiff suffered a work-related psychological injury without any physical trauma. This appeal seeks clarification as to whether the employee’s remedy is a civil suit or a Workers’ Compensation claim.

**Knotts v. Zurich Insurance Company**  
Unfair Claims Settlement Practices Act

This appeal asks the Supreme Court to determine whether the act is limited to pre-litigation conduct on the part of an insurer, or also applies after suit is filed.

**Abney v. Nationwide Mutual Insurance Company**  
Releases

This appeal involves a release which specifically names one person and their insurer as released parties, but the release also contained languages releasing “all other persons, firms or corporations.” The question is whether this language does indeed serve as a release for all other persons not specifically identified by name.
XIII. **SIGNIFICANT CASES PENDING BEFORE THE INDIANA SUPREME COURT**

*Cain v. Griffin*
The Indiana Supreme Court is being asked to consider whether the duty of good faith and fair dealing on the part of the insurer extends to third-party claimants.

*Penn Harris Madison School Corp. v. Howard*
The Indiana Supreme Court is being asked to clarify the standard of care required of a minor in a negligence action. The Court is also being asked to reconsider the “last clear chance doctrine” under Indiana law.

*Glotzbach v. Froman*
The key issue in this case involves a party’s ability to maintain a cause of action for and recover punitive damages on a claim of spoliation of evidence in a product liability action.