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I. SIGNIFICANT OHIO COURT DECISIONS

A. SUPREME COURT DECISIONS

1. Other Significant Decisions

Wilson v. Durrani, 2020-Ohio-6827
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-6827.pdf

Plaintiff May Not Use Saving Statute to Refile a Medical Claim After the Statute of Limitations has Expired if Statute of Repose Has Expired.

The issue before the Ohio Supreme Court was whether a plaintiff may take advantage of Ohio's saving statute to refile a medical claim after the applicable one-year statute of limitations has expired if the four-year statute of repose for medical claims has also expired.

The issue required consideration of the interplay between three distinct types of statutes: (1) statutes of limitations, (2) statutes of repose, and (3) saving statutes. Statutes of limitations and statutes of repose share a common goal of limiting the time during which a putative wrongdoer must be prepared to defend a claim, but they operate differently and have distinct applications.

A statute of limitations establishes a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered). A statute of limitations operates on the remedy, not on the existence of the cause of action itself.

A statute of repose, on the other hand, bars any suit that is brought after a specified time since the defendant acted even if this period ends before the plaintiff has suffered a resulting injury.

In contrast to statutes of limitations and statutes of repose, both of which limit the time in which a plaintiff may file an action, saving statutes extend that time. Saving statutes are remedial and are intended to provide a litigant an adjudication on the merits. Generally, a saving statute will provide that where an action timely begun fails in some manner described in the statute, other than on the merits, another action may be brought within a stated period from such failure. It acts as an exception to the general bar of the statute of limitations.

In the subject case, the Supreme Court found R.C. 2305.113(C) is a true statute of repose that, except as expressly stated in R.C. 2305.113(C) and (D), clearly and unambiguously precludes the commencement of a medical claim more than four years after the occurrence of the alleged act or omission that forms the basis of the claim. Expiration of the statute of repose precludes the commencement, pursuant to the saving statute, of a claim that has previously failed otherwise than on the merits in a prior action. Had the General Assembly intended the saving statute to provide an extension of the medical statute of repose, it would have expressly said so in R.C. 2305.113(C), as it did in the R.C. 2305.10(C), the statute of repose that governs product-liability claims.

Because the injured patients commenced their actions in Hamilton County more than four years after the alleged conduct that formed the basis of their claims, the statute of repose barred appellees' refiled actions.

Nationwide Mut. Fire Ins. Co. v. Pusser, 2020-Ohio-2778
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-2778.pdf

Automobile Insurer's Reliance on Insured's Application Warranty Regarding Household Members/Operators Results in Policy Voidance Ab Initio. Premium returned after judicial voidance.

An insured's sister was driving a car covered under an automobile insurance policy when it struck a pedestrian. During the insurance application process the insured had misstated to the insurer that she was the only member of her household.

The Supreme Court focused its analysis on the seminal case for voidance/recission in Ohio, *Allstate v. Boggs*, 27 Ohio St. 2d 216. *Boggs* essentially creates a two-part test where (1) a statement must be a "warranty," as opposed to a "representation," to void the policy *ab initio*, and (2) the insurer must have included a statement in the policy to the effect that the statements in the application are warranties or the insurer had incorporated by reference the application into the policy.

The Supreme Court then determined the automobile-insurance policy should indeed be voided. One step of the *Boggs* test was satisfied by the following policy provision: "The application for this policy is incorporated herein and made a part of this policy. When we refer to the policy, we mean this document, the application, the Declarations page, and the endorsements." The second step of the *Boggs* test was satisfied with the policy stating answers provided to questions in the application constitute warranties, which if incorrect, could void the policy from the beginning. The Supreme Court further said that information provided regarding "other operators in the household" constituted a warranty.

The Supreme Court explained the Court of Appeals was incorrect to focus on the nonmandatory nature of the word "could." This did not change the fact that the policy plainly stated that a misstatement in the insured's warranty, which plainly occurred, rendered the policy subject to being voided *ab initio*, as if the policy never existed.

The Supreme Court also explained that once an insurance policy has been judicially declared void, the insurer can then return any premium that the insured had paid on the policy.

Buddenberg v. Weisdack, 2020-Ohio-3832
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-3832.pdf

No Criminal Conviction Required to Pursue Civil Recovery for Criminal Act Per R.C. 2307.60.

R.C. 2307.60 is a statute that generally provides for civil recovery for those injured by a criminal act. A plaintiff sued in federal court pursuing a claim for civil liability pursuant to R.C. 2307.60 for alleged violations of three criminal statutes: R.C. 2921.05 (retaliation), R.C. 2921.03 (intimidation), and R.C. 2921.45 (interfering with civil rights). The defendants moved to dismiss those claims arguing the civil liability statute did not apply because none of the defendants were convicted of the underlying criminal offenses.

Upon receipt of a certified question from a federal court, the Ohio Supreme Court held that R.C. 2307.60 does not require an underlying criminal conviction because the plain language of the statute does not require such proof. The Ohio Supreme Court noted the word "conviction" is noticeably absent and reading a conviction requirement into R.C. 2307.60(A)(1) would render R.C. 2307.60(A)(2) superfluous. The Ohio Supreme Court was also not persuaded that the term "commission of the offense" as used in the statute necessarily means that a formal declaration of criminal guilt has occurred.

Lubrizol Advanced Materials, Inc. v. Nat'l Union Fire Ins. Co., 2020-Ohio-1579
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-1579.pdf

No Full and Complete Indemnity, Under One Policy for Damage Occurring Over Multiple Policy Periods, When Policy Contains "Those Sums" Language.

Lubrizol manufactured and sold an allegedly defective resin to a second company between 2001 and 2008. The second company used the resin to make pipes that later failed and resulted in numerous claims. The second company settled the claims, but it sued Lubrizol alleging negligence, breach of contract, and breach of warranty on the basis that Lubrizol knew or should have known the resin it sold was not fit or suitable for its intended purpose of being used in pipes. The second company then sought complete indemnification from Lubrizol. The second company and Lubrizol thereafter settled their claims.

Subsequently, Lubrizol sued an insurance company that had insured it during a limited period of portion of the seven total years it had sold the resin. Lubrizol argued that under Ohio law, all of its triggered insurance policies should be treated as establishing joint and several liability, such that Lubrizol could recover under the policy of its choice.

Upon a certified question from a federal court, the Ohio Supreme Court was asked to determine when an insured is permitted to seek full and complete indemnity, under a single policy providing coverage for "those sums" that the insured becomes legally obligated to pay because of property damage that takes place during the policy period, when the property damage occurred over multiple policy periods.

The Ohio Supreme Court answered the question in the negative. It found there was no reason to allocate liability across multiple insurers and policy periods if the injury or damage for which liability coverage is sought occurred at a discernible time. In that circumstance, the insurer who provided coverage for that time period should be liable, to the extent of its coverage, for the claim.

The Ohio Supreme Court cautioned against using its ruling as a blanket rule applicable to all policies with "those sums" language as the terms of the contract and circumstances surrounding the liability still control.

Stiner v. Amazon.com, Inc., 2020-Ohio-4632
http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-4632.pdf

Amazon and Level of Control Over Product Required to Establish Supplier Liability.

Amazon was sued under the Ohio Products Liability Act after a teenager died from his ingestion of caffeine powder purchased through Amazon's website. The Ohio Supreme Court found an

e-commerce company, on whose website the product was purchased from a third-party seller, was not a "supplier" as defined in R.C. 2307.71(A)(15)(a). The Ohio Supreme Court considered the definition of "supplier" in R.C. 2307.71(A)(15)(a)(i) together with the list of entities that were not suppliers found in R.C. 2307.71(A)(15)(b). It found a person who "otherwise participates in the placing of a product in the stream of commerce" must exert some control over the product as a prerequisite to establishing supplier liability. Amazon did not have the requisite level of control over the caffeine powder.

Lunsford v. Sterilite of Ohio, L.L.C., 2020-Ohio-4193
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-4193.pdf

Drug Tests, "Direct Observation," and No Corresponding Invasion of Privacy Claim.

A private employer had a workplace substance-abuse policy requiring employees to submit urine samples for drug testing under the "direct-observation method." The Ohio Supreme Court determined the employees could not maintain invasion of privacy claims against the employer as they were at will employees and consented to the testing and method. The employees' claim that their consent was involuntary due to their fear of termination lacked merit as the employer had the right to condition employment on consent to drug testing under the "direct-observation method." The employees had the right to refuse to submit to the direct-observation, but the employer likewise had the right to terminate the employees for their failure to submit.

McAdams v. Mercedes-Benz USA, L.L.C., 2020-Ohio-3702
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-3702.pdf

Federal Class Action Opt-Out Procedures Upheld and Informal Opt-Out Through Maintenance of a Pre-Existing Lawsuit Rejected.

The Ohio Supreme Court determined that when a federal court approves a settlement that defines a class action class, and the court excludes only those members of the class who opt out through the specific procedure set forth by the federal court, those who do not properly opt out are subject to the settlement reached in the federal court case and are forever barred from attempting to relitigate claims in state court. The Ohio Supreme Court essentially adopted the majority approach requiring compliance with court-mandated opt-out procedures and rejected the Ohio Tenth District's approach treating maintenance of a preexisting lawsuit as an "informal opt-out."

A.J.R. v. Lute, 2020-Ohio-5168
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-5168.pdf

Response by Teachers/Administrators to Alleged Bully Incidents Not Found to be "Reckless" and Immunity Applied.

A student's parents sued a teacher and various school officials for failing to act following a series of alleged bullying incidents and an injury to the minor student. The Ohio Supreme Court was asked to determine whether a teacher and school officials acted recklessly in response the bullying reports. Had the teacher and school official's conduct been "reckless," immunity would not have applied.

The Ohio Supreme Court found that based on the record, the allegation that another student pushed the student while they were in line, on its own, was insufficient to show that school officials should have been aware that the other student might cause physical harm to the student. The family failed to establish that there was a known risk that the other student might physically attack their child. Because there was no known risk, the school officials could not have been reckless. Summary judgment for the teacher and school officials was therefore appropriate.

Moore v. Mount Carmel Health Sys., 2020-Ohio-4113
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-4113.pdf

Savings Statute Fails to Save Malpractice Complaint Not Served within One Year.

The Ohio Supreme Court determined the Court of Appeals made a mistake in finding that "Savings Statute," R.C. 2305.19, applied to a father's medical malpractice action against an anesthesiologist, his practice, and a hospital. Although the lawsuit was filed one day before expiration of the R.C. 2305.113 (medical malpractice) statute of limitations, it was not commenced under Civ. R. 3(A) because service was not obtained within one year. Also, the lawsuit had not been dismissed or failed otherwise than upon the merits, so the "Savings Statute" did not revive the lawsuit. The father's instructions to the clerk of courts to serve the original complaint that remained on the court's docket after the limitation period had expired could not be treated as a voluntary dismissal and refiling of his complaint.

Crown Servs., Inc. v. Miami Valley Paper Tube Co., 2020-Ohio-4409
http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-4409.pdf

Dismissal Without Prejudice, Based Upon Forum Non Conveniens, Not Final Appealable Order.

In a case won before the Ohio Supreme Court by Rolfes Henry, the Court determined dismissal of a case without prejudice based on *forum non conveniens* is not a final, appealable order because it does not prevent refiling. It therefore does not affect a substantial right, determine the action, or prevent a judgment.

Kisling, Nestico & Redick, L.L.C. v. Progressive Max Ins. Co., 2020-Ohio-82
http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-82.pdf

No Duty for Insurer to Distribute Portion of Settlement Funds to Former Attorney Via Charging Lien.

The Ohio Supreme Court determined an insurer who settles a personal-injury claim with an accident victim does not have a duty to distribute a portion of the settlement proceeds to the victim's former lawyer pursuant to a charging lien.

Phoenix Lighting Group, L.L.C. v. Genlyte Thomas Group, L.L.C., 2020-Ohio-1056
http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-1056.pdf

Attorney Fees and Lodestar Calculation.

The Ohio Supreme Court found there was a strong presumption that the reasonable hourly rate multiplied by the number of hours worked, the "lodestar," was the proper amount for the attorney-fee award. The Court found enhancements to the lodestar were to be granted rarely and were appropriate when an attorney produced objective and specific evidence that an enhancement of the lodestar was necessary to account for a factor not already subsumed in the lodestar calculation.

Because the lodestar reflected a reasonable fee based on the prevailing market rate for the services rendered by the attorneys, the Court of Appeals erred by affirming the trial court's enhancement to the lodestar based on the opposing party's conduct.

Pivonka v. Corcoran, 2020-Ohio-3476
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-3476.pdf

R.C. 5160.37 Acts as Sole Remedy for Medicaid Program Participants to Recover Excessive Reimbursement Payments After 2007.

A class action lawsuit sought a declaratory judgment that former R.C. 5101.58, which relates to Medicaid reimbursements, is unconstitutional and sought to recover all sums paid to the Ohio Department of Medicaid under that statute. The Ohio Supreme Court found that because R.C. 5160.37 provided the sole remedy for Medicaid program participants to recover excessive reimbursement payments made to the Ohio Department of Medicaid on or after September 29, 2007, the trial court lacked subject-matter jurisdiction over the class action for the named and prospective class plaintiffs whose claims for recovery fell within the statute's express language.

State ex rel. Omni Manor, Inc. v. Indus. Comm'n of Ohio, 2020-Ohio-4422
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-4422.pdf

Workers Compensation and Procedures for Determining Reasonable and Necessary Treatment.

In April 2016, while working as a housekeeper, the worker injured her right shoulder helping a coworker lift a couch. Her workers' compensation claim was initially allowed for a right-shoulder sprain. She moved to add a right-shoulder rotator-cuff tear as an allowed condition. The employer opposed the request, asserting that the torn rotator-cuff was the result of a degenerative condition and predated the work injury. Throughout the workers compensation claim, the worker's claims for covered injuries/medical needs intensified resulting in a request for medical-service reimbursement for a reverse total-shoulder arthroplasty.

The employer claimed (1) the court of appeals erred when it failed to require the injured worker to prove to the Commission that the reverse total-shoulder arthroplasty was "independently required" before the Commission allowed the condition of a right-shoulder rotator-cuff tear and (2) the court of appeals erred when it found that a doctor's "equivocal" report constituted some evidence in support of the Commission's determination to authorize treatment.

The Ohio Supreme Court found the Industrial Commission properly authorizes medical services if (1) the services are reasonably related to an allowed condition, (2) the services are reasonably necessary for treatment of an allowed condition, and (3) the cost of the services is medically reasonable.

In the subject case the injured worker was required to show the requested medical services were reasonably related to and reasonably necessary for treatment of an allowed condition. Because the doctor believed that a primary repair of the employee's torn rotator cuff would not be successful and that a reverse total-shoulder arthroplasty would be the best option to treat it, the reverse total-shoulder arthroplasty was covered and should have been reimbursed.

State ex rel. Manor Care, Inc. v. Bureau of Workers' Comp., 2020-Ohio-5373
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-5373.pdf

No Compensation to Employer for Overpaid Permanent-Total-Disability Payments.

A self-insured employer made lump-sum payments under protest to two injured workers, in order to correct its long-term underpayment of their permanent-total-disability compensation. The self-insured employer then asked the Bureau of Workers' Compensation for reimbursement from the Disabled Workers' Relief Fund, arguing that its underpayment of permanent-total-disability compensation should be offset by the Bureau's corresponding overpayment of relief-fund benefits to the same employees, for which the company had reimbursed the Bureau as part of its annual assessments. The Bureau denied the request.

The Ohio Supreme Court found the employer cited no authority imposing on the Bureau of Workers' Compensation a clear legal duty to deem overpaid relief-fund benefits permanent-total-disability compensation. The employer also cited no authority permitting the Bureau to treat relief-fund-benefit payments as permanent-total-disability compensation, let alone imposing a clear legal duty to do so. The Bureau, therefore, did not abuse its discretion by rejecting the employer's proposed accounting adjustment and instead requiring the employer to correct its permanent-total-disability-compensation underpayment by making lump-sum payments to the employees.

2. Appellate Court Decisions

a) Insurance Coverage Decisions

Acuity v. Masters Pharm., Inc., 2020-Ohio-3440
https://www.supremecourt.ohio.gov/rod/docs/pdf/1/2020/2020-Ohio-3440.pdf

Duty to Defend Opioid Litigation.

This case addressed an insurance company's duty to defend and indemnify an insured pharmaceutical distributor in lawsuits brought by governmental entities for costs incurred in combating the opioid epidemic.

The insurance policies at issue contained the following provision:

> [Insurer] will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies. [Insurer] will have the right and duty to defend the insured against any suit seeking those damages. However, [Insurer] will have no duty to defend [Insured] against any suit seeking damages for bodily injury or property damage to which this insurance does not apply.

The insurer argued it had no duty to defend or indemnify. The Court of Appeals determined the trial court erred by granting summary judgment for the insurer because, since the policies potentially covered some of the claims and damages in the underlying suits, the insurer had a duty to defend against the underlying suits. There was arguably a causal connection between the alleged conduct of the insured, a pharmaceutical wholesale distributor, and the bodily injury suffered by individuals who became addicted to opioids, overdosed, or died, and the damages suffered by the governmental entities. Furthermore, although the insured may have been aware there was a risk that, if it filled suspicious orders, diversion of its products could contribute to the opioid epidemic, thus causing damages to the governmental entities, that mere knowledge of the risk was not enough to bar coverage under the loss-in-progress policy provision.

Al Neyer, L.L.C. v. Westfield Ins. Co., 2020-Ohio-5417
https://www.supremecourt.ohio.gov/rod/docs/pdf/1/2020/2020-Ohio-5417.pdf

Demolition Without a Formal Contract Not Accidental and Not an Occurrence Under CGL Policy.

The Court of Appeals determined the trial court erred in declaring that the insured, a construction company, was entitled to coverage for defense and indemnification of the underlying lawsuit. This was because the CGL policy at issue included coverage for property damage caused by an "occurrence." However, the insured's unauthorized demolition of a restaurant did not constitute an "occurrence." The insured proceeding with a demolition without a formal contract in place was not accidental and was entirely within the project manager's control.

Stamper v. Polley, 2020-Ohio-3709
https://www.supremecourt.ohio.gov/rod/docs/pdf/4/2020/2020-Ohio-3709.pdf

Land Contracts and Division of Fire Insurance Proceeds.

A property being sold via a land contract was involved in a fire. The Court of Appeals had to address (1) whether a vendor who maintains insurance on property subject to a land contract has any obligation to the vendee when an insurable loss occurs; and (2) the meaning of the contract language "as their interests appear."

The Court of Appeals explained that when A has insurance on property which he contracts to sell to B, but before the title is transferred a loss occurs, A may collect from his insurance company. However, A holds the insurance proceeds in trust for B subject to A's claim for unpaid compensation. A vendor who maintains insurance on property subject to a land installment contract has an obligation to the vendee when an insurable loss occurs, and the vendor may be entitled to the insurance proceeds to the extent of the unpaid purchase price, while the vendee may be entitled to the excess amount.

Here, the land contract stated that sellers would provide insurance on the property. Although the loss that resulted from the fire fell on sellers, the insurance proceeds that sellers received were for the benefit of the legal and equitable estates.

The Court of Appeals also found that per the doctrine of equitable conversion, the meaning of the phrase "as their interests appear" refers to the amount of the unpaid purchase price as it relates to a vendor. The vendee's interest, then, is the equitable interest in all of the benefits that pertain to

the property and may include the amount of insurance proceeds in excess of the unpaid purchase price.

LTF 55 Prob. Ltd. v. Charter Oak Fire Ins. Co., 2020-Ohio-4294
https://www.supremecourt.ohio.gov/rod/docs/pdf/8/2020/2020-Ohio-4294.pdf

Five-Month Delay in Reporting Fire was Factual Issue Inappropriate for Summary Judgment as to Prompt Notice Requirement.

In a coverage dispute stemming from a fire loss, the Court of Appeals determined there was a factual issue as to whether the insured breached the policy's prompt notice condition. The reasonableness of the additional insureds' five-month delay in providing notice required a factual determination not appropriate for summary judgment. There were also factual issues as to whether the insurer had represented it would handle the claim, when the insurance agent was notified, and whether the ability to access some of the claimed damages truly prejudiced the insurance company and should have resulted in a complete denial of the claim.

Turner v. Univ. of Cincinnati, 2020-Ohio-248
https://www.supremecourt.ohio.gov/rod/docs/pdf/10/2020/2020-Ohio-248.pdf

Student Injured During Club Sports Travel for University Not Covered Under University Auto Policy.

A student sued the university for damages he sustained in a car crash. The student played on the university's club ultimate frisbee team. He and his teammates had driven from Cincinnati to Columbus and for a frisbee tournament. On their return travel, the car crashed, seriously injuring all occupants. The involved car was driven by another student and owned by that student's family. The injured student testified he was not aware at the time of the collision, but learned afterwards, that university policy required clubs to procure rental vehicles through the university for trips in excess of 50 miles. He was aware that anyone driving such a rental vehicle was, by policy, required to be over 21 years of age. The student testified that student officers of the club were the persons who made rental arrangements for the teams, that such officers went to university meetings about club sports rules from time to time, but that such persons had not informed him of any requirements regarding the use of rental vehicles as opposed to personal vehicles for out-of-town club-related travel.

The university had a Joint Self-Insurance Pool Automobile Liability Coverage Agreement. Covered persons under the policy included: "Any permitted user. Any person or organization to whom you've given permission to use a covered auto you own, rent, lease, hire or borrow is a protected person."

The university argued the injured student had not made a claim against its institutional automobile liability coverage and, even if he had, it would not succeed as he was not a covered person in a covered automobile.

The Court of Appeals found no agency relationship could be implied to create derivative liability through respondeat superior between the student and the university, in connection with the car accident involving the student and classmates. This was because the 18-year-old student drove his family's vehicle to transport members of the university's ultimate frisbee club with no evidence of any actions taken to even notify the university that its team members were traveling.

Par v. Geico Gen. Ins. Co., 2020-Ohio-5247
https://www.supremecourt.ohio.gov/rod/docs/pdf/1/2020/2020-Ohio-5247.pdf

Shooting Did Not Arise Out of Use of Vehicle, Interpretation of Kentucky Law.

In a case where the plaintiff attempted to recover for decedent's injuries and death incurred while driving, but caused by a shooting from an unknown assailant, the trial court correctly granted summary judgment in the defendant-insurer's favor because, under Kentucky law, the shooting did not arise out of the use of a vehicle.

Villaos v. Nationwide Mut. Fire Ins. Co., 2020-Ohio-5123
https://www.supremecourt.ohio.gov/rod/docs/pdf/12/2020/2020-Ohio-5123.pdf

Dog Liability Exclusion Upheld.

Following a dog attack, the homeowners confessed judgment and assigned to the injured party any claims that might exist against their homeowner's insurance policy. However, the Court of Appeals ruled in favor of the insurer and pursuant to a dog liability exclusion that had been added to the homeowners' policy. The Court of Appeals noted an affidavit was providing showing the insurer mailed the homeowner separate and clearly worded notices alerting them to the new exclusion.

Buehrer v. Meyers, 2020-Ohio-3207
https://www.supremecourt.ohio.gov/rod/docs/pdf/6/2020/2020-Ohio-3207.pdf

Childcare Business Exclusion Upheld.

A wrongful death action was instituted after the plaintiffs' son died in the paid care of the defendant-insureds. The defendant's homeowner's insurer sought a declaration that it did not owe coverage given the exclusions for a childcare "business" under the policy. The Court of Appeals agreed and determined the loss was not covered. The homeowners' activity in the home did not meet the four exceptions to avoid being a "business" under the insurance policy. The incident occurred in the homeowner's home, and the differing opinions between the homeowner and the mother as to whether or not the homeowner operated a childcare business out of her home did not create material issues of fact where the underlying facts about the homeowner's childcare activities were undisputed.

Watkins v. Allstate Vehicle & Property Ins. Co., 2020-Ohio-3397
https://www.supremecourt.ohio.gov/rod/docs/pdf/6/2020/2020-Ohio-3397.pdf

Following Fire Loss, Court Considers Denials as to Dwelling and Personal Property Separately.

Following a fire, the insurer denied coverage as to both the dwelling and personal property claims based on fraud. The Court of Appeals determined the dismissal of the bad faith claim was improper as the insurer disputed the value of personal property claim, but purportedly never claimed that insured acted fraudulently in connection with fire. The Court of Appeals found the policy for the dwelling was separate. The Court of Appeals also considered testimony that corroborated the personal property ownership. Finally, the insurer's adjuster stated that she had no reason to believe that insured submitted a false claim.

Krothe v. Westfield Ins., 2020-Ohio-172
https://www.supremecourt.ohio.gov/rod/docs/pdf/5/2020/2020-Ohio-172.pdf

UIM Denial Upheld Where Insureds Failed to Provide Notice of Settlement.

The Court of Appeals found summary judgment was properly granted for an insurer on an underinsured motorist (UIM) claim because the insureds failed to place the insurer on notice of their tentative settlement with the motorist and failed to afford the insurer 30 days to advance payment of the tentative settlement amount in order to preserve the insurer's right of subrogation. Furthermore, even though the insurer did not respond to the insureds' letter or otherwise contact them, that was not an unforeseen circumstance that rendered it impossible for them to send written a notice to the insurer of the tentative settlement as required by the policy. There was also a presumption the insurer was prejudiced by the failure to provide notice that the insured failed to rebut.

b) Employment Decisions

Oliphant v. AWP, Inc., 2020-Ohio-229
https://www.supremecourt.ohio.gov/rod/docs/pdf/12/2020/2020-Ohio-229.pdf

No Liability for Independent Contractor Providing Traffic Control to Work Zone.

The case stems from an accident that occurred within a utility work zone. Duke Energy had contracted with AWP to provide temporary traffic control services for a project. Workers at the site were seriously injured and/or died when they were struck by an intoxicated driver who had entered the project area and struck the area in which they were huddling.

The Court of Appeals determined AWP, the independent contractor providing traffic control, was entitled to judgment as a matter of law on negligence and loss of consortium claims the injured workers and family had asserted against it because the contractor did not owe a duty of care to the employee. As the contractor's employees did not direct the employee to meet at the side of a utility truck or otherwise give or deny permission for a huddle, it could not be said to have actively participated in the critical acts that led to the employee's injuries. The company's foreman determined when and where the meeting would take place. The Court of Appeals found a duty of care does not arise out of the "Guidance" section of § 6E.07 of the Ohio Manual on Uniform Traffic Control Devices (OMUTCD) because "guidance" statements set forth in the OMUTCD were not mandatory but rather recommended practice.

Cruz v. Western, 2020-Ohio-5086
https://www.supremecourt.ohio.gov/rod/docs/pdf/8/2020/2020-Ohio-5086.pdf

No Removal of Safety Guard Under Facts of Employer Intentional Tort Case.

An employee filed an employer intentional tort action alleging that her workplace injuries, sustained when she reached around machine's profile gate to lubricate machine, were the result of the employer's deliberate removal of an equipment safety guard. The Court of Appeals found summary judgment for the employer was not an error since the profile gate to keep errant chips

from flying into the operator did not qualify as a safety guard for purposes of R.C. 2745.01 and the manual lubrication process did not constitute deliberate removal of a safety guard.

c) Premises Liability Decisions

Jirousek v. Sladek, 2020-Ohio-5382
https://www.supremecourt.ohio.gov/rod/docs/pdf/11/2020/2020-Ohio-5382.pdf

Dram Shop Act Sole Remedy Against Liquor Permit Holders and No Liability Because Injuries Sustained Off Premises and Caused By Own Intoxication.

In a plaintiff's negligence action against a bar for serious injuries he sustained when he struck by a vehicle after heavily drinking alcohol he purchased elsewhere while sitting at the bar's patio, trial court did not err in granting bar's motion to dismiss. The Dram Shop Act provides the exclusive remedy against liquor permit holders for negligent acts of intoxicated patrons, and plaintiff has no claim under the Act because his injuries were sustained off the premises and caused by his own intoxication per R.C. 4301.22(B).

d) Other Significant Decisions

Perrin v. Cincinnati Ins. Co., 2020-Ohio-1405
https://www.supremecourt.ohio.gov/rod/docs/pdf/2/2020/2020-Ohio-1405.pdf

Information Sharing Between Medpay and Liability Adjuster Not Improper.

Following a car accident, an insured sought both Medpay benefits and third-party liability against another driver. During a subsequent bad faith lawsuit, the insured claimed the insurer's medical payments adjuster acted improperly by sharing information, which the adjuster had received for purposes the Medpay claim, with the company's liability adjuster to help the insurer defend the concurrent liability claim. The insured alleged the insurer violated R.C. Chapter 3904 and OAC Chapter 3901 and breached its fiduciary duty to her.

The Court of Appeals ruled for the insurer and found neither R.C. Chapter 3904, which concerned insurance information practices, nor Ohio Admin. Code Chapter 3901, which comprises a variety of insurance-related regulations, prohibited sharing of medical payment records between the insurance company and its liability adjuster.

Koscielak v. United Ohio Ins. Co., 2020-Ohio-3224
https://www.supremecourt.ohio.gov/rod/docs/pdf/3/2020/2020-Ohio-3224.pdf

Failure to Appear for Examination Under Oath and Produce Documents Precludes Insured's Claim.

The Court of Appeals found the trial court correctly determined that an insurer was entitled to summary judgment in a coverage dispute because the insured repeatedly failed to comply with the insurer's demands for her to appear for an examination under oath and for her to provide documentation regarding personal property losses. Furthermore, the insured admitted to willfully ignoring the insurer's ongoing investigation despite the numerous and stern letters she received from the insurer's attorneys.

e) Significant Cases Pending Before Supreme Court

Motorists Mut. Ins. Co. v. Ironics, Inc., 2020-Ohio-137
https://www.supremecourt.ohio.gov/rod/docs/pdf/6/2020/2020-Ohio-137.pdf

On May 12, 2020, the Ohio Supreme Court agreed to hear an insurance coverage case to decide whether the incorporation of a defective ingredient into a product, allegedly making the end product defective, constitutes damage to other property resulting from an occurrence, so as to implicate insurance coverage.

The Court of Appeals case, cited above, determined the insured was not entitled to coverage under a CGL policy for claims asserted by the underlying plaintiff, arising out of the damage caused by the insured's nonconforming ingredient because the ultimate products into which the ingredient was incorporated were not "other property" for purposes of the application of the economic-loss rule. However, the Court of Appeals determined the insured was entitled to coverage under the umbrella policy because the physical injury to the underlying plaintiff's ultimate product, by the insured's transfer of a nonconforming ingredient, constituted unintended and unexpected "property damage" as that term was defined in the umbrella policy, and, thus, the transfer met the definition of an "occurrence" under the umbrella policy.

These cases were pending at the time this summary was printed. To confirm whether the Supreme Court has issued a decision in any of these cases, we invite you to visit our website at http://www.rolfeshenry.com.