

**UPDATE OF SIGNIFICANT FEDERAL AND STATE
APPELLATE DECISIONS**

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UPDATE OF SIGNIFICANT FEDERAL AND STATE APPELLATE DECISIONS

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I. ADMINISTRATION OF THE SUPREME COURT OF OHIO'S DOCKET IN LIGHT OF THE CHIEF JUSTICE'S DEATH

The Honorable Chief Justice Thomas J. Moyer unexpectedly died on April 2, 2010. Chief Justice Moyer was the longest-serving current Chief Justice in the United States. He was first elected to the Supreme Court of Ohio in 1986. He was re-elected three times in 1992, 1998 and 2004.

Although each justice has equal weight in deciding cases, the Chief Justice has more administrative responsibilities in overseeing the state's court system as well as managing the Court's docket. Under Article 4, Section 2 of the Ohio Constitution, as the most senior Justice of the Court, Justice Paul E. Pfeifer served as the acting Chief Justice in the weeks following Chief Justice Moyer's death. Justice Pfeifer has served the Court since 1993.

On April 14, 2010, under the provisions of Article 4, Section 13, Governor Ted Strickland appointed Franklin County Probate Court Judge Eric Brown to be Chief Justice. On May 3, 2010, he was sworn in as the Chief Justice of the Supreme Court of Ohio at a public ceremony at the Ohio Statehouse. Judge Brown will serve the remaining term of Chief Justice Moyer until January 1, 2011, when the new Chief Justice will take office following the November election. Judge Brown had already announced his candidacy to succeed Chief Justice Moyer who was planning on retiring at the end of this year. Judge Brown will run against Justice Maureen O'Connor, who is currently serving on the Court.

Cases in which Chief Justice Moyer voted have been released. It is unclear what will occur with cases where Chief Justice Moyer was writing the opinion or was a deciding vote. According to the Ohio Constitution, if a member of the Court is unable to hear, consider and decide a case, the Acting Chief Justice "may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge." See Article 4, Section 2 of the Ohio Constitution. In cases where the Court is deadlocked 3-3 on a decision, the case may be have to be re-argued to the Court.

II. SIGNIFICANT DECISIONS FROM THE SUPREME COURT OF OHIO

A. Ohio's Employer Intentional Tort Statute is Constitutional

In a trilogy of cases involving the constitutional challenge to Ohio's employer intentional tort statute, R.C. 2745.01, that became effective on April 7, 2005, the Supreme Court determined that the statute does not violate the Ohio Constitution. The trilogy of cases are: *Kaminski v. Metal & Wire Products Co.*, ___ Ohio St.3d ___, 2010-Ohio-102, *Stetter v. R.J. Corman Derailment Services*, ___ Ohio St.3d ___, 2010-Ohio-1027, and *Klaus v. United Equity, Inc.*, ___ Ohio St.3d ___, 2010-Ohio-1014. According to the Court, “[t]he net result of these two decisions [in *Kaminiski* and *Stetter*] is to confirm the constitutional validity of R.C. 2745.01.” *Kaminski* at ¶2. In the third case, *Klaus*, the Court reversed and remanded the lower court judgment so that the appellate court could apply the holding in *Kaminski* and *Stetter*.

1. *Kaminski v. Metal & Wire Products Co.*

In *Kaminski*, the Court held that R.C. 2745.01 does not violate Section 34 or 35 of Article II of the Ohio Constitution. *Kaminski* at ¶1. Those sections authorize the General Assembly to enact statutes that provide for “the comfort, health, safety and general welfare of all employees,” and to adopt laws facilitating the resolution of employment-related injury claims through the Ohio Workers’ Compensation program.

Under the Court’s 1991 decision in *Fyffe v. Jenos Inc.* (1991), 59 Ohio St.3d 115, an injured worker could pursue an “intentional tort” lawsuit against their employer in addition to receiving workers’ compensation benefits. Under the *Fyffe* line of cases, an injured worker may sue for civil damages outside the workers’ compensation system when the worker can show that either: (1) the employer intentionally caused injury to the worker or (2) the employer knew about a workplace condition or practice that was so dangerous that exposing a worker to it created a “substantial certainty” of injury and, despite that knowledge, the employer required the worker to be exposed to the dangerous practice or condition, resulting in injury to the worker. “However, the mere knowledge and appreciation of a risk - something short of substantial certainty - is not intent.” *Fyffe* at paragraphs one and two of the syllabus.

Since 1986, Ohio’s General Assembly has made several unsuccessful attempts to enact laws that codify and limit the scope of workplace intentional tort claims. These prior statutes were struck down as unconstitutional by the Court in *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, and *Johnson v. BP Chemicals Inc.* (1999), 85 Ohio St.3d 298. Then in 2005, the Ohio legislature adopted R.C. 2745.01, which

specifies that to prevail in an intentional tort action asserting a “substantial certainty” claim, the plaintiff must now show that his employer acted “with deliberate intent to cause an employee to suffer an injury ***.” *Kaminski* at ¶27-51.

In the case, the plaintiff, Rose Kaminski, worked as a press operator and was injured in the course of her employment with Metal & Wire Products Inc. Kaminski was injured in June 2005, just months after the new statute became effective. *Kaminski* at ¶¶3-7. She applied for and received workers’ compensation benefits and also filed an intentional tort claim against her employer. *Id.* at ¶8. During the trial court proceedings, Kaminski argued that the newly enacted R.C. 2745.01 was unconstitutional, and that the court should apply the common law “substantially certain to cause injury” standard in *Fyffe*. In response, the employer argued that the new statute was constitutional. *Id.* at ¶9-10.

The trial court granted summary judgment in favor of the employer finding the statute constitutional and therefore, applicable to Kaminski’s complaint. It subsequently granted summary judgment to the employer, dismissing Kaminski’s complaint on the ground that she had not made the showing required by R.C. 2745.01 that Metal & Wire Products had acted with a “deliberate intent” to cause her injuries. *Kaminski* at ¶10.

Kaminski appealed. Relying on the Supreme Court of Ohio’s prior decisions in *Brady* and *Johnson*, the Seventh District Court of Appeals held that the statute was unconstitutional. The appellate court vacated the trial court’s summary judgment decision and remanded the case for consideration of Kaminski’s intentional tort claim under the *Fyffe* common law test. *Kaminski* at ¶11-12.

Metal & Wire Products appealed, and the Supreme Court accepted the case for review. In its opinion, the Court revisited its 1999 decision in *Johnson*, which held that the Ohio legislature’s authority to restrict common law causes of action affecting injured workers is limited by Sections 34 and 35 of Article II. *Kaminski* at ¶78-87. But the Court cited to several of its post-*Johnson* decisions where the Court has held, contrary to *Johnson*, that Sections 34 and 35 of Article II do *not* restrict the legislature’s authority but rather *grant* the legislature wide authority to enact laws regulating wages, hours and workplace conditions affecting employees generally, and to adopt laws and codify common law in order to balance the rights and obligations of employers and employees in the operation of the state workers’ compensation system. *Kaminski* at ¶63-77.

In light of those post-*Johnson* decisions, the Court held that both Sections 34 and 35 do not limit the Ohio legislature’s authority to legislate in the area of employer

intentional torts. As a result, the Court concluded that *Johnson* had no stare decisis value:

Notwithstanding the clear text of Section 34, this court in *Johnson* interpreted Section 34 as placing substantive limits on the General Assembly's authority to enact employer intentional-tort legislation. However, *American Association of University Professors v. Central State Univ. II* (1999) and *Lima v. State* (2009) contradict *Johnson*'s view that Section 34 limits the General Assembly's authority to enact legislation. Because *Lima v. State* and *AAUP II* are the more recent and controlling authorities regarding Section 34, they have effectively superseded the interpretation given to that section by *Johnson*. Consequently, the decision in *Johnson* has no stare decisis value on this issue. Because Section 34 is not a limitation on the General Assembly's authority, it necessarily follows that R.C. 2745.01 does not violate it.

Similarly, notwithstanding the clear text of Section 35, this court in *Johnson* in effect held that any legislative attempt to govern employer intentional torts is per se invalid under that section, asserting that this area of law "is beyond the reach of constitutional empowerment."

Such an interpretation of Section 35 cannot be reconciled with the plain language of the section or with the historical underpinnings of its enactment. Moreover, *Johnson's* interpretation is inconsistent with the later, and more accurate, view of Section 35 expounded in *Holeton [v. Crouse Cartage Co., 2001]* and in *Bickers [v. W&S Life Insurance Co., 2007]*. Therefore *Johnson's* analysis of Section 35 can have no stare decisis value in our inquiry. Section 35 is simply irrelevant to the constitutionality of R.C. 2745.01. Because Section 35 is not a limitation on the General Assembly's authority to legislate in the area of employer intentional torts, it necessarily follows that R.C. 2745.01 does not violate Section 35.

Kaminski at ¶92-94.

While acknowledging that "serious internal flaws" existed in the analysis of Sections 34 and 35 set forth in *Johnson*, the Court noted that the former statute held unconstitutional in *Johnson* included several provisions not included in the new version of R.C. 2745.01. Thus, the Court rejected the invitation to overrule *Johnson*:

We accept that there are serious internal flaws in the analysis of Section 34 and 35 set forth in *Johnson* as we discuss below. However, because a different statute was at issue in *Johnson*, we constrain the interpretation of Section 34 and 35 to the specific context of that case, and we decline to overrule *Johnson*.

Kaminski at ¶91.

2. *Stetter v. R.J. Corman Derailment Services*

In the companion case, *Stetter*, the Court answered questions of state law submitted by the United States District Court for the Northern District of Ohio. Specifically, the Court found that R.C. 2745.01 does not violate the provisions of the Ohio Constitution that guarantee trial by jury (Section 5, Article I), a remedy for damages (Section 16, Article I), open courts (Section 16, Article I), due process (Section 16, Article I), equal protection (Section 2, Article I) or the separation of powers between the legislative and judicial branches of government. The Court also held that while R.C. 2745.01 limits the ability of workers to assert common law employer intentional tort claims previously recognized by the Court, it does not eliminate such claims. Based on those findings, the Court concluded that R.C. 2745.01 is constitutional. *Stetter* at syllabus.

In the case, plaintiff, Carl Stetter, was injured in the course of his employment with R.J. Corman Derailment Services in March 2006. He received workers' compensation benefits as a result of the injuries he sustained. He also filed a lawsuit in state court against his employer, Corman, asserting an intentional tort claim. *Stetter* at ¶3.

Since there was diversity between the parties and the amount in controversy exceeded \$75,000, Corman exercised its option to remove the case to federal district court. In its answer to Stetter's complaint, Corman asserted that since Stetter's injuries occurred after R.C. 2745.01 took effect in April 2005, his intentional tort claim must be dismissed because he was unable to establish that Corman had acted with "deliberate intent" to cause his injuries. Stetter filed a motion asking the district court to reject Corman's statutory defense on the ground that R.C. 2745.01 violates multiple provisions of the Ohio Constitution. Noting that the Supreme Court of Ohio had not yet considered the constitutionality of R.C. 2745.01, the district court requested the Supreme Court answer numerous questions of state law concerning the constitutionality of the newly enacted employer intentional tort statute. *Stetter* at ¶4-15.

At the outset of the opinion, the Court was concerned about the doctrine of stare decisis and the precedential value of its prior decisions in *Johnson* and *Brady*. But according to the Court, since the current version of the intentional tort statute “differs in significant and important ways” from the previous statute, the doctrine of stare decisis did not apply:

While stare decisis applies to the rulings rendered in regard to specific statutes, it is limited to circumstances “where the facts of a subsequent case are substantially the same as a former case.” *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St.3d 1, 5, 539 N.E.2d 103. We will not apply stare decisis to strike down legislation enacted by the General Assembly merely because it is similar to previous enactments that we have deemed unconstitutional. To be covered by the blanket of stare decisis, the legislation must be phrased in language that is substantially the same as that which we have previously invalidated.

“A careful review of the statutes at issue *** reveals that they are more than a rehashing of unconstitutional statutes. In its continued pursuit of reform, the General Assembly has made progress in tailoring its legislation to address the constitutional defects identified by the various majorities of this court. The statutes before us *** are sufficiently different from the previous enactments to avoid the blanket application of stare decisis and to warrant a fresh review of their individual merits.” *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶23-24. See also *Groch*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶104-106.

As with the statutes at issue in *Arbino* and *Groch*, the statute at issue in this case resembles previous invalid legislation in some respects, but it differs in significant and important ways. Consequently, even though this court has struck down employer intentional-tort statutes in previous cases, stare decisis does not necessarily compel the conclusion that R.C. 2745.01 is also unconstitutional. Rather, we conduct a fresh review of the statute in light of its specific terms.

Stetter at ¶37-39.

The Court then went on to highlight the differences between the current and former versions of the statute:

Current R.C. 2745.01, however, jettisons many of the attributes that troubled this court in past versions. For example, the current statute does not require employees to establish an intentional tort by clear and convincing evidence, in contrast to former R.C. 2745.01, which was invalidated in *Johnson*. See 85 Ohio St.3d at 306, 707 N.E.2d 1107; see former R.C. 2745.01(B) (146 Ohio Laws, Part I, 756) (clear-and-convincing-evidence standard applied to all elements of an employer intentional tort) and (C)(1) (Id.) (clear-and-convincing-evidence standard applied to responses to employers' motions for summary judgment). Moreover, the current version does not require that a court impose sanctions for failing to comply with certification requirements, such as the requirement to attest that an action is not brought for an improper purpose such as harassment. See former R.C. 2745.01(C)(2). 146 Ohio Laws, Part I, 757.

Additionally, current R.C. 2745.01, in contrast to former R.C. 4121.80 (141 Ohio Laws, Part I, 733) struck down in *Brady*, does not provide that an employee who recovers for an intentional tort may collect only the amount recovered in excess of the workers' compensation benefits the employee also received, former R.C. 4121.80(A) (Id.), does not provide that the Industrial Commission, rather than a court, must determine the amount of damages and does not cap the amount of damages recovered for an employer intentional tort, 4121.80(D) (Id. at 735), and does not establish an intentional tort fund, 4121.80(E) (Id.).

Stetter at ¶48-49.

After noting the difference between current and former versions of the statute, the Court listed four reasons why R.C. 2745.01 provides for meaningful remedies and did not violate the right to a remedy and the right to an open court:

First, R.C. 2745.01 is not retroactive and, therefore, has no effect on employees whose causes of action arose before the statute's effective date and whose claims have vested.

Second, R.C. 2745.01 allows employees to recover for an intentional tort for injuries that result from a deliberate intent to injure. R.C. 2745.01(A) and (B).

Third, R.C. 2745.01 allows recovery for an intentional tort for situations involving the deliberate removal of an equipment safety

guard or deliberate misrepresentation of a toxic or hazardous substance. R.C. 2745.01(C). The claims listed in R.C. 2745.01(D), such as discrimination, sexual harassment, and retaliation, are unaffected by this enactment.

Fourth, workers' compensation recovery is a meaningful remedy for workers whose injuries result from conduct committed with an intent less than deliberate intent, such as conduct that is reckless (as it is under our current case law). Furthermore, when an injury results from an employer's violation of a specific safety requirement, an additional recovery by the injured worker is constitutionally available. Section 35, Article II of the Ohio Constitution.

Stetter at ¶55-59.

Next, the Court considered whether the employer intentional tort statute violated the right to trial by jury. The Court explained that “[a]n employee who cannot demonstrate deliberate intent under R.C. 2745.01 has the same status as an employee injured by the negligence of his employer. Both employees must seek recovery pursuant to Ohio’s workers’ compensation statutes, and neither has a constitutional right to a jury trial.” *Stetter* at ¶66.

In holding that R.C. 2745.01 does not violate injured workers’ due process rights by barring civil lawsuits against their employers unless they prove that the employer acted with a “deliberate intent to cause injury,” the Court joined the majority of other states which impose similar limitations on workplace injury suits based on the strong public policy favoring “no-fault” workers’ compensation systems. In applying the rational basis test, the Court held that it is not unreasonable or arbitrary for Ohio’s employer intentional tort statute to conform with the majority of jurisdictions:

A statute that does not impinge upon a fundamental right, however, will be reviewed under a rational-basis test. Under this test, a statute will be upheld if it is rationally related to a legitimate government purpose and it is not unreasonable or arbitrary. *Groch* at ¶157; *Mominee v. Scherbarth* (1986), 28 Ohio St.3d 270, 274, 28 OBR 346, 503 N.E.2d 717. “In conducting this review, we must consider whether the General Assembly's purposes in enacting the legislation at issue provide adequate support to justify the statute's effects.” *Groch* at ¶157.

Because the statute does not impinge upon fundamental rights and does not violate the right to an open court, the right to a remedy, or

the right to trial by jury, we reject petitioners' argument that strict scrutiny should apply, and we instead review under the rational-basis standard. See *Groch* at ¶156; *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶49.

As an initial matter, R.C. 2745.01 is not unreasonable or arbitrary. As we noted in *Kaminski* at ¶99, “R.C. 2745.01 appears to harmonize the law of this state with the law that governs a clear majority of jurisdictions.” See, e.g., 6 Larson's Workers' Compensation Law (2008), Section 103.03 (“the common-law liability of the employer cannot, under the almost unanimous rule, be stretched to include accidental injuries caused by the gross, wanton, wilful, deliberate, intentional, reckless, culpable, or malicious negligence, breach of statute, or other misconduct of the employer short of a conscious and deliberate intent directed to the purpose of inflicting an injury”) (footnote omitted); *Talik*, 117 Ohio St.3d 496, 2008-Ohio-937, 885 N.E.2d 204, ¶32, citing 6 Larson's Workers' Compensation Law (2007) 103-10, Section 103.04[1] (“Ohio is one of only eight states that have judicially adopted a ‘substantial certainty’ standard for employer intentional torts”) (footnote omitted). It is not unreasonable or arbitrary to conform Ohio's law of employer intentional torts to that of a majority of jurisdictions.

Stetter at ¶71-73.

Furthermore, the Court found that R.C. 2745.01 is rationally related to legitimate purposes of having a no-fault system and minimizing litigation:

*** R.C. 2745.01 is rationally related to legitimate purposes. The two most important reasons for the exclusivity of the workers' compensation remedy are “first, to maintain the balance of sacrifices between employer and employee in the substitution of no-fault liability for tort liability and, second, to minimize litigation, even litigation of undoubted merit.” 6 Larson's Workers' Compensation Law, Section 103.03.

As to the first important reason, “it must be remembered once again that this is a no-fault system as to both employer and employee.” *Id.* Conventional standards regarding what a “just” result might be are subordinated to other concerns in this setting, and awards are routinely made to employees injured as the result of their own misconduct. *Id.* See *State ex rel. Gross v. Indus. Comm.*, 115 Ohio

St.3d 249, 2007-Ohio-4916, 874 N.E.2d 1162, ¶¶20, 22 (a claimant who willfully or deliberately violates a workplace rule and is thereby injured is not statutorily disqualified from receiving workers' compensation benefits; “[t]he no-fault nature of our workers' compensation scheme is a statutory mandate,” and in the absence of a statutory provision providing otherwise, workers' compensation benefits may not be denied on the basis of fault to a claimant who was injured in the course and scope of employment”). Given that a claimant's fault is irrelevant in most situations to his or her workers' compensation recovery, it is not incongruous to likewise provide, as the General Assembly has in R.C. 2745.01, that an employer's liability for most injuries is limited to the claimant's recovery of workers' compensation benefits.

As to the second important reason, “every presumption is on the side of avoiding the imposition of the complexities and uncertainties of tort litigation on the compensation process.” 6 Larson's Workers' Compensation Law, Section 103.03. One of the fundamental pillars supporting Section 35, Article II is the exclusivity of the no-fault compensation system. The inclusion of this feature in Section 35, Article II underscores the importance the Constitution places on avoiding litigation over workplace injuries.

No more extensive examination of the relationship between the statute's purposes and its effects is necessary. When conducting a rational-basis review, “we are to grant substantial deference to the predictive judgment of the General Assembly.” *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, at ¶58, quoting *State v. Williams* (2000), 88 Ohio St.3d 513, 531, 2000-Ohio-428, 728 N.E.2d 342. See also *Groch*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, at ¶72. Courts may not “usurp the legislative function” by substituting their judgment for that of a legislative authority. *Cent. Motors Corp. v. Pepper Pike* (1995), 73 Ohio St.3d 581, 584, 1995-Ohio-289, 653 N.E.2d 639.

The state manifestly has a legitimate interest in legislating in the area of employer intentional torts. The fact that a clear majority of jurisdictions apply standards the same as or similar to those contained in R.C. 2745.01, and the well-established rationale behind Section 35,

Article II, which underlies the statute, establish that the statute furthers legitimate purposes that are neither unreasonable nor arbitrary.

Stetter at ¶74-78.

For similar reasons, the Court rejected the argument that the statute violated the equal protection provision of the Ohio Constitution. “The statutory classifications petitioners complain of merely recognize that employees suffering job-related injuries that are not the result of an employer’s deliberate intent are *not* situated similarly to tort victims injured in, say, a car accident or on the operating table.” *Stetter* at ¶82. (Emphasis sic.) The employee victim’s recovery is governed by the Workers’ Compensation Act while the tort victim’s recovery is not. *Id.* The Court pointed out that the workers’ compensation system is authorized by Section 35, Article II of the Ohio Constitution. Thus, “the Ohio Constitution itself draws the classification between persons who, as employees, are injured on the job and those persons who are injured other than in the workplace.” *Stetter* at ¶83. Moreover, the statute furthers the legitimate government interest in minimizing litigation. *Id.* Since the classifications created by R.C. 2745.01 pass the rational basis test, the statute does not violate the right to equal protection of the law. *Id.* at ¶79-85.

In considering whether R.C. 2745.01 violated the separation of powers doctrine, the Court pointed out that the General Assembly has the authority “to define the scope and contours of the tort of workplace intentional injury[.]” *Stetter* at ¶90. The separation of powers doctrine is not violated by requiring employees whose injuries are not the result of the employer’s deliberate intent to recover within the workers’ compensation system. *Id.* Such employees are situated to employees injured as a result of the employer’s negligence.

Quoting from two recent decisions, *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, and *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948, where the Court upheld the constitutionality of tort reform legislation, the Court emphasized that its role is not to second-guess the Ohio legislature’s policy choices. Rather, the Court is to evaluate the constitutionality of the legislature’s policy decisions:

As we noted in *Groch* *** “It is not this court’s role to establish legislative policies or to second-guess the General Assembly’s policy choices. ‘[T]he General Assembly is responsible for weighing [policy] concerns and making policy decisions; we are charged with evaluating the constitutionality of their choices. *** Using a highly deferential standard of review appropriate to a facial challenge to

these statutes, we conclude that the General Assembly has responded to our previous decisions and has created constitutionally permissible limitations.’ (Emphasis sic.) *Arbino*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶113.”

In enacting R.C. 2745.01, the General Assembly has not exceeded its authority to change the common law in the area of employer intentional torts. Accordingly, we must uphold the constitutionality of the statute.

Stetter at ¶93-94.

3. *Klaus v. United Equity, Inc.*

The third case considered by the Supreme Court of Ohio was *Klaus*. In *Klaus*, the Third District Court of Appeals erroneously applied the *Fyffe* test to the employee’s intentional tort action. The Supreme Court reversed and remanded the lower court judgment so that the appellate court could apply *Kaminski* and *Stetter*.

4. *Impact of Kaminski and Stetter*

The impact of the Court’s decisions in *Kaminski* and *Stetter* is significant. Any employer intentional tort cause of action accruing on or after April 7, 2005 will be analyzed under R.C. 2745.01, not the prior case law standard set out in *Fyffe*. Thus, an employee will have to prove that the employer acted with deliberate intent to cause the employee injury. In cases where the employer has deliberately removed a safety guard or deliberately misrepresented a toxic or hazardous substance and caused the employee injury, the employee will have the benefit of a rebuttable presumption that the removal or misrepresentation was committed with intent to injure the employee. As a practical matter, that presumption will likely preclude an employer from winning on summary judgment. But in cases not involving a toxic or hazardous substance, an employer should have a strong basis to seek summary judgment.

B. Medical Bills - *Jaques v. Manton*

Back in 2006, the Supreme Court of Ohio issued its opinion in *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, holding that “[b]oth an original medical bill rendered and the amount accepted as full payment are admissible to prove the reasonableness and necessity of charges rendered for medical and hospital care.” *Id.* at paragraph one of the syllabus. In *Robinson*, the Court recognized that Ohio’s collateral source rule contained in R.C. 2315.20 did not apply because the statute

became effective after the cause of action in *Robinson* accrued. R.C. 2315.20 became effective on April 7, 2005, and states in part:

(A) In any tort action, the defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the damages that result from an injury, death, or loss to person or property that is the subject of the claim upon which the action is based, except if the source of collateral benefits has a *** contractual right of subrogation.

Since the enactment of R.C. 2315.20, litigants have argued that the holding in *Robinson* did not survive. This issue was directly addressed by the Supreme Court of Ohio in *Jaques v. Manton*, ___ Ohio St.3d ___, 2010-Ohio-1838. Specifically, the Court examined whether evidence of a “write-off”, that is, the difference between original medical bills and the amount accepted as full payment by a medical provider, is admissible on the issue of reasonableness of charges for the medical care and treatment under R.C. 2315.20.

In *Jaques*, the plaintiff, Richard Jaques, was injured in a car accident in December 2005 by the defendant, Patricia Manton. During trial, Manton was prohibited from introducing evidence that while Jaques had been billed a total of \$21,874 for medical treatments stemming from the car accident, his health care providers had accepted \$7,484 as payment in full for those medical services, thereby having \$14,390 “written off” from the medical bills. Pursuant to *Robinson*, Manton argued that she was permitted to introduce the amounts actually accepted by the medical providers.

The jury awarded Jaques \$25,000, with \$15,500 for medical expenses. *Jaques* at ¶2-4.

On appeal, the Sixth District Court of Appeals held that since the case arose after the enactment of R.C. 2315.20, the holding in *Robinson* did not apply. See *Jaques v. Manton*, 6th Dist. No. L-08-1096, 2009-Ohio-1468 at ¶2-11. Rather, the collateral source rule contained in R.C. 2315.20 controlled. Since there was no dispute between the parties that the medical providers were subject to a contractual right of subrogation, the defendant was not allowed to present evidence of the reduced amount accepted as full payment for plaintiff’s medical bills.

In reversing the judgment of the trial and appellate courts, the Supreme Court of Ohio explained that its holding in *Robinson* still applies even after the enactment of R.C. 2315.20. *Robinson* “addressed the admissibility of write-offs under the common-law collateral-source rule.” *Jaques* at ¶7. As a general rule, the common law collateral source rule prevents the admission of evidence showing payments made to benefit the plaintiff from other sources. But “[p]ermitting a tortfeasor to

introduce evidence of write-offs does not violate the purpose of the common-law rule, because the tortfeasor is not benefitting from actual payments by third parties.” Id. at ¶8. As the Court explained, since no one pays the write-off, it cannot constitute a payment for purposes of the collateral source rule:

We observed in *Robinson* that “[b]ecause no one pays the write-off, it cannot possibly constitute *payment* of any benefit from a collateral source.” *** The common-law rule does not, therefore, preclude introducing evidence of write-offs.

Jaques at ¶8.

Since R.C. 2315.20 “does not address evidence of such ‘write-offs’ by medical providers,” the Court determined that its holding in *Robinson* controls. *Jaques* at ¶1, 16. As such, “evidence of write-offs is admissible to show the reasonable value of medical expenses.” *Jaques* at ¶16. According to the Court, this result supports the goal of making the plaintiff whole:

Write-offs are amounts not paid by third parties, or anyone else, so permitting introduction of evidence of them allows the fact-finder to determine the actual amount of medical expenses incurred as a result of the defendant’s conduct. This result supports the traditional goal of compensatory damages - making the plaintiff whole.

Jaques at ¶12.

In light of the Court’s decision in *Jaques*, the argument that the holding in *Robinson* did not survive the enactment of R.C. 2315.20 is no longer viable. The Supreme Court of Ohio has made clear that *Robinson* remains good law and allows evidence of write-offs so juries can determine the reasonable value of medical expenses.

But there appears to be an effort by Ohio’s General Assembly to overrule *Robinson* and preclude the admission of write-offs to show the reasonable value of medical expenses. The Supreme Court of Ohio acknowledge in both *Robinson* and *Jaques* that it was for the General Assembly to determine “whether plaintiffs should be allowed to seek recovery for medical expenses as they are or only for the amount negotiated and paid by insurance ***.” *Jaques* at ¶14, quoting *Robinson* at ¶19. Currently, the General Assembly is considering House Bill 361 which would expressly prohibit the admission of evidence of the difference between the original medical bills and the amount accepted as full payment by a medical provider if the evidence is offered to show that the original amount billed is unreasonable. The link to that legislation is: http://www.legislature.state.oh.us/bills.cfm?ID=128_HB_361.

C. Political Subdivision Liability - *Oliver v. Cleveland Indians Baseball Co. Ltd. Partnership*

In *Oliver v. Cleveland Indians Baseball Co. Ltd. Partnership*, 123 Ohio St.3d 278, 2009-Ohio-5030, the Supreme Court of Ohio upheld the \$250,000 cap on noneconomic compensatory damages awarded in lawsuits against political subdivisions. Specifically, the Court held that “[t]he limit on noneconomic compensatory damages in R.C. 2744.05(C)(1) does not violate the right to a jury trial or the right to equal protection under the law. *Oliver* at syllabus.

The *Oliver* case arose out of an incident that occurred during a Cleveland Indians baseball game in June 2002 when an explosive device was detonated injuring four persons. Donald Krieger and Clifton Oliver were arrested and taken into police custody. While in custody, Krieger and Oliver suffered from poor conditions in the jail and harsh treatment by the jailers. Although a grand jury indicted both men on aggravated arson and felonious assault, the charges were later dismissed by the Cuyahoga County prosecutor’s office. A third person was ultimately convicted for detonating the device. *Oliver* at ¶1-2.

Oliver and Krieger sued the city of Cleveland for malicious prosecution, false arrest, imprisonment and intentional infliction of emotional distress. The jury awarded each plaintiff \$400,000 in compensatory damages. The city sought to reduce the award to \$250,000 for each plaintiff based on the damage caps in R.C. 2744.05(C)(1). The trial court overruled the city’s motion. On appeal, the Eighth Appellate District affirmed the jury’s award of compensatory damages, holding that R.C. 2744.05(C)(1) is unconstitutional because it violates a plaintiff’s right to a jury trial and the Equal Protection Clause of the United States Constitution. *Oliver* at ¶3.

In reversing the court of appeals, the Supreme Court of Ohio noted that the appellate court had not considered the Court’s decision in *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948. In *Arbino*, the Court reviewed R.C. 2315.18, a statute similar to R.C. 2744.05(C)(1), and upheld the constitutionality of the damage cap placed on noneconomic damages in lawsuits against private litigants. *Oliver* at ¶5. While the statute reviewed in *Arbino* contains an exception to the limits on noneconomic damages for persons who suffer “catastrophic injuries,” an exception not found in R.C. 2744.05(C), the Court found that “this difference between the statutes to be no obstacle” in upholding the constitutionality of the damage cap found in R.C. 2744.05(C)(1):

The difference has no bearing on our analysis of the effect of R.C. 2744.05 on the constitutional right to a jury trial. Nor does this

difference affect our rational-basis review of the statute for equal protection purposes, for the reasons explained below. Therefore, we will apply the reasoning of *Arbino* in this case.

Oliver at ¶6.

In determining that the limit on noneconomic damages in R.C. 2744.05(C)(1) does not intrude on the fact-finding function of a jury, the Court explained that while a jury determines the amount of damages based on the facts of the case, the award can still be reduced as a matter of law, “akin to altering awards through remittiturs or statutory treble damages.” *Oliver* at ¶7.

The Court also rejected the argument that R.C. 2744.05(C)(1) violated the Equal Protection Clause of the United States Constitution, noting that “[a] limit on the damages for which a political subdivision may be liable is rationally related to the purpose of preserving the financial integrity of political subdivisions. Therefore, R.C. 2744.05(C)(1) is rationally related to a legitimate government interest.” *Oliver* at ¶10.

D. Insurance Coverage

1. *Neal-Pettit v. Lahman*

In *Neal Pettit v. Lahman*, ___ Ohio St.3d ___, 2010-Ohio-1829, the Supreme Court of Ohio determined that an insurance carrier must pay an award of attorney fees on behalf of its insured even though the award of attorney fees is based on a jury’s award of punitive damages. In *Neal Pettit*, the plaintiff was injured when her vehicle was hit by the defendant who was driving while intoxicated and fleeing the scene of an earlier accident. A jury awarded the plaintiff \$113,800 in compensatory damages and \$75,000 in punitive damages. Based on a finding that the defendant acted “with malice” in causing the plaintiff’s injuries, the jury also awarded attorney fees which the trial court set at \$46,825. The defendant’s insurance carrier, Allstate Insurance Company, paid the award of compensatory damages but denied coverage under its policy for the award of attorney fees and punitive damages. *Neal Pettit* at ¶1-3.

The plaintiff sued Allstate seeking payment for the attorney fees. The trial court granted summary judgment in favor of the plaintiff. Allstate appealed on two grounds. First, Allstate argued that it had no contractual obligation to pay attorney fees. Second, since the award of attorney fees was based on the jury’s award of punitive damages, Allstate claimed that public policy prevents an insurer from covering punitive damages. *Neal Pettit* at ¶4. The Eighth District Court of Appeals rejected Allstate’s arguments on the basis that “attorney fees are ‘conceptually

distinct’ from punitive damages and that attorney fees are not expressly excluded from coverage by the language of the policy.” Id.

In affirming the lower courts’ decision, the Supreme Court of Ohio rejected Allstate’s argument that the attorney fee award is an element of the jury’s punitive damages award because both types of relief are based on a finding that the defendant acted “with malice.” *Neal Pettit* at ¶14. “The fact that the awards have similar bases is irrelevant” because according to the Court there is a distinction between attorney fees and punitive damages awards:

We have recognized that attorney-fee awards and punitive-damages awards are distinct: ‘In an action to recover damages for a tort which involves the ingredients of fraud, malice, or insult, a jury may go beyond the rule of mere compensation to the party aggrieved, and award exemplary or punitive damages ***. In such a case, the jury may, in their estimate of *compensatory* damages, take into consideration and include reasonable fees of counsel employed by the plaintiff in the prosecution of his action.’ (Emphasis sic.) *Roberts v. Mason* (1859), 10 Ohio St. 277, 1859 WL 78, paragraphs one and two of the syllabus. See also *Smith v. Pittsburgh, Ft. Wayne & Chicago Ry. Co.* (1872), 23 Ohio St. 10, 18 1872 WL 50 (“The doctrine *** announced [in *Roberts*] is that in a case where punitive as well as compensatory damages may be awarded, the jury *** should regard counsel fees as compensation and not as punishment”); *Zappitelli v. Miller*, 114 Ohio St.3d 102, 2007-Ohio-3251, 868 N.E.2d 968, ¶6 (when an award of attorney fees is made in addition to a punitive -damages award, it is awarded as an element of compensatory damages).

Neal Pettit at ¶14. (Emphasis sic.)

As for the punitive damages exclusion contained in the insurance policy, the Court explained that the exclusion did not make reference to attorney fees. As a result, coverage for attorney fees is not excluded from the policy:

[T]he exclusion does not refer in any way to attorney fees or litigation expenses. It specifically mentions only punitive or exemplary damages, which, as we have discussed, are conceptually distinct from attorney fees. Therefore, the term “punitive or exemplary damages” does not clearly and unambiguously encompass an award of attorney fees. We decline to read such language into the contract. We instead construe the policy strictly against the insurer.

King v. Nationwide Ins. Co. (1988), 35 Ohio St. 3d 208, 519 N.E.2d 1380. Allstate, as the drafter, is responsible for ensuring that the policy states clearly what it does and does not cover.

Neal Pettit at ¶20.

The Court also rejected Allstate’s argument that payment of attorney fees resulting from a punitive damages award would violate public policy and R.C. 3937.182(B). While R.C. 3937.182(B) prohibits insurance coverage for punitive damages, the statute makes no mention of attorney fees. As a result, the Court refused to include attorney fees as part of the statute:

It is true that public policy prevents insurance contracts from insuring against claims for punitive damages based upon an insured’s malicious conduct. *** In addition, R.C. 3937.182(B) prohibits insurance coverage of punitive damages: “No policy of automobile or motor vehicle insurance *** shall provide coverage for judgments or claims against insured for punitive or exemplary damages.”

But R.C. 3937.182(B) mentions only punitive and exemplary damages, not attorney fees. The General Assembly chose not to mention attorney fees when it drafted the statute, and we decline to add them. ***

Our holding will not encourage wrongful behavior merely because it permits insurers to cover attorney fees for which tortfeasors become liable. The tortfeasors remain liable for punitive damages awarded for their malicious actions, and these punitive damages remain uninsurable. Payment by the insurer of an attorney-fee award violates neither public policy nor R.C. 3937.182(B).

Neal Pettit at ¶21-23. (Citations omitted.)

The impact of the Court’s decision in *Neal Pettit* is significant. Unless the insurance carrier’s policy expressly excludes coverage for attorney fees, the insurance carrier will be required to pay attorney fees predicated on an award of punitive damages.

2. *Safeco Ins. Co. of Am. v. White*

In *Safeco Ins. Co. of Am. v. White*, 122 Ohio St.3d 562, 2009-Ohio-3718, the Supreme Court of Ohio held that a negligent act committed by an insured (i.e., negligent supervision or negligent hiring) which later results in an intentional act by

another insured qualifies as an occurrence where the policy defines an “occurrence” as an “accident.” *White* at ¶27. In *White*, 17 year old Benjamin White attacked Casey Hilmer, a 13 year old girl. He pled guilty to attempted murder and felonious assault and was sentenced to an aggregate term of ten years in prison. The Hilmers sued Benjamin and his parents on multiple claims, including battery against Benjamin and negligent supervision, negligent entrustment and negligent infliction of emotional distress against the Whites. The Hilmers prevailed at trial. The jury awarded \$6.5 million in compensatory damages for these combined torts and \$3.5 million in punitive damages. *White* at ¶5-7.

At the time of the attack, the Whites had several insurance policies, including a homeowner’s policy and a separate umbrella policy issued by Safeco. When the Hilmers filed suit, the Whites sought a defense and indemnification from the insurance carrier. Safeco filed an action seeking a declaratory judgment that it had no obligation to defend or indemnify the Whites because the injury resulted from their son’s intentional act; therefore, the act was not an “occurrence,” which is defined as an “accident.” The trial court determined that Safeco was required to defend and indemnify the Whites. On appeal, the First Appellate District affirmed the trial court’s decision, holding that the Whites’ negligence constituted an “occurrence” under the policy. *White* at ¶8-13.

In affirming the court of appeals, the Supreme Court explained that while the son intentionally injured another child, the jury found the parents negligent with respect to their son’s act. “In other words, from Benjamin's perspective the act was intentional, but from the perspective of his parents, it was accidental. Thus, for purposes of coverage, the question is whether the accidental or intentional nature of the act that caused Casey's injury should be determined from the perspective of Benjamin or from the perspective of his parents.” *White* at ¶22.

Relying on prior precedent, the Court determined that the critical issue is the intention of the party seeking coverage. “[L]iability coverage hinges on whether the act is intentional from the perspective of the person seeking coverage.” *White* at ¶24. The Court joined the majority of other jurisdictions which have held that an “‘occurrence’ exists if the person seeking coverage was negligent with regard to the intentional act.” *Id.* Thus, “when a liability insurance policy defines an ‘occurrence’ as an ‘accident,’ a negligent act committed by an insured that is predicated on the commission of an intentional tort by another person, e.g., negligent hiring or negligent supervision, qualifies as an ‘occurrence.’” *Id.* In this case, since the parents did not intentionally injure the 13 year old girl, from their perspective, the injury was an accident. Thus, the act that caused the girl’s injury constituted an “occurrence.” *Id.* at ¶27.

The Court also held that policy exclusions precluding coverage for intentional or criminal acts do not apply to bar coverage for negligent supervision, negligent hiring or negligent retention and entrustment because they are separate torts with separate elements. “[T]orts like negligent supervision, hiring, retention, and entrustment are separate and distinct from related intentional torts (committed by other actors) that make the negligent torts actionable.” *White* at ¶33. As such, the Court concluded that the intentional and criminal acts exclusions are inapplicable to determining whether coverage is afforded for these separate torts. *Id.* at ¶28-43.

The impact of the decision in *White* is that insurance carriers will be required to provide a defense to the insured even in instances where the injury resulted from an intentional act. Arguably, this decision broadens coverage beyond instances that were contemplated by the insurance carrier.

3. *State Farm Mut. Auto. Ins. Co. v. Grace*

In *State Farm Mut. Auto. Ins. Co. v. Grace*, 123 Ohio St.3d 471, 2009-Ohio-5934, the Court decided that pursuant to R.C. 3937.18(I), an insurance carrier may decline to pay medical expenses pursuant to UM/UIM coverage when those same medical expenses have already been paid or will be paid pursuant to the medical payments coverage in the same policy. This issue was certified by the United States District Court for the Northern District of Ohio.

In *Grace*, the State Farm insurance policies contained a non-duplication clause that precluded payment under the UM/UIM coverage for medical expenses that are paid or payable under the med pay coverage in the same policies. State Farm argued that the non-duplication clause is enforceable under R.C. 3937.18(I), as amended by S.B. 97 (effective October 31, 2001), which permits exclusionary or limiting provisions in UM/UIM policies. In response, the policyholders maintained that under prior case law they should be allowed to collect benefits under both coverages because they paid separate premiums for UM/UIM and med pay benefits. *Grace* at ¶4-18.

The Supreme Court noted that S.B. 97 eliminates the statutory obligation of an insurance carrier to offer UM/UIM coverage. *Grace* at ¶23. The Court pointed out that S.B. 97 explicitly provides that insurance carriers may include terms and conditions in their policies “to limit or exclude UM/UIM coverage in their policies and make no distinction on the basis of premiums paid.” *Id.* at ¶35. Based on these conclusions, the Court found the non-duplication clause to be effective. *Id.* at ¶36. Accordingly, *Grace*, re-enforces the validity of the non-duplication clause in insurance policies to preclude an insured from obtaining double recovery from the insurance carrier.

III. OHIO'S NEW PRO HAC VICE REQUIREMENT – 3 CASE LIMIT ANNUALLY

The Supreme Court of Ohio has adopted amendments to Gov. Bar R. XII regarding temporary admission to practice law in Ohio which significantly alters requirements for pro hac vice admissions in Ohio. These requirements are effective January 1, 2011, and apply to newly filed cases after that date. Notably, there is a limitation of three pro hac vice appearances per calendar year. In the event the case continues to the next or subsequent year, the case will not count towards the annual limitation. An appeal or transfer of a case or consolidation of cases where the attorney participated in the initial proceeding will not be counted toward the annual limitation.

Admission now requires the payment of \$100 each calendar year the pro hac attorney appears in any cases in Ohio. If a case continues over into a second calendar year, the attorney must pay the \$100 fee each January. If the attorney fails to make the renewal payment within the first 30 days of the calendar year, that attorney is automatically excluded from continuing to practice law in Ohio. The attorney may file a Petition for Reinstatement to be reinstated. If the case has concluded or if the attorney has withdrawn from the proceeding, then the attorney must notify the Office of Attorney Services by the deadline for renewal of registration.

IV. SIGNIFICANT DECISIONS FROM THE SUPREME COURT OF THE UNITED STATES

A. Fair Debt Collection Practices Act - *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*

In *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA* (Apr. 21, 2010), U.S. Sp. Ct. Case No. 08-1200, ___ U.S. ___, 2010 U.S. LEXIS 3480, at 59, the Supreme Court of the United States held the “bona fide error” defense found in 15 U.S.C. §1692k(c) of the Fair Debt Collection Practices Act (“FDCPA”) “does not apply to a violation of the FDCPA resulting from a debt collector’s incorrect interpretation of the requirements of that statute.”

The FDCPA imposes “civil liability on ‘debt collector[s]’ for certain prohibited debt collection practices.” *Jerman* at 7. However, Section 813(c) of the Act, 15 U.S.C. §1692k(c) establishes a “bona fide error” defense:

A debt collector may not be held liable in any action brought under [the FDCPA] if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error

notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

15 U.S.C. §1692k(c).

The case arose out of a lawsuit filed by a law firm in Ohio state court on behalf of a mortgage company to foreclose a mortgage on real property owned by Jerman. The complaint included a “Notice” stating that the mortgage debt would be assumed valid unless Jerman disputed it in writing. Jerman's lawyer sent a letter disputing the debt. When the mortgage company acknowledged that the debt had, in fact, been paid, the law firm withdrew the suit. Although Jerman claimed no harm arising out of the letter, she filed a class action lawsuit in federal court under the FDCPA contending that by sending the notice requiring her to dispute the debt in writing, which the Act does not require, the law firm violated the FDCPA. In response, the law firm claimed that 15 U.S.C. §1692k(c) shielded it from liability because the statutory violation was not intentional and resulted from a bona fide error. Jerman claimed that the law firm was not entitled to the bona fide error defense because that defense did not extend to the attorney's misinterpretation of the legal requirements under the FDCPA. The law firm, however, argued that the bona fide error defense was not limited to clerical or factual errors but also applied to errors of law. *Jerman* at 6-13.

Upon consideration, the Supreme Court of the United States held that the bona fide error defense in 15 U.S.C. §1692k(c) did not apply to the violation under the FDCPA resulting from the attorney's incorrect interpretation of the requirements of the FDCPA. The attorney, the same as every debt collector, was precluded from claiming ignorance of the law to excuse the violation, and the violation resulting from the attorney's legal misinterpretation could not be “not intentional” under § 1692k(c). *Jerman* at 15-17. The Supreme Court recognized “‘the common maxim’ *** that ignorance of the law will not excuse any person, either civilly or criminally. *Id.* at 15. Further, § 1692k(c) did not explicitly provide for the mistake-of-law defense to civil liability. *Id.* at 20-21-27.

As a result of the holding in *Jerman*, the “bona fide error” defense can only be used to shield a lawyer from liability for FDCPA violations arising from clerical or factual errors, not good faith errors in legal interpretation of the FDCPA's requirements or mistakes of law. From a practical standpoint, the decision “leaves attorneys and their clients vulnerable to civil liability for adopting good-faith legal positions later determined to be mistaken, even if reasonable efforts were made to avoid mistakes. *** [A]ttorneys will face liability even when they have done nothing wrong – indeed, even when they have acted in accordance with their professional responsibilities.” *Jerman* at 80-90. (Kennedy, J., dissenting.)

B. Employment Practices Liability

1. *“Principle Place of Business” Defined - Hertz Corp. v. Friend*

In *Hertz Corp. v. Friend* (2010), ___ U.S. ___, 130 S.Ct. 1181, the Supreme Court of the United States clarified what is meant by a company’s “principle place of business” for purposes of federal diversity jurisdiction. The Supreme Court held that a company’s principle place of business is its “nerve center,” which typically will be the location of its headquarters.

In *Hertz Corp.*, two California citizens sued Hertz in California state court claiming that it violated state wage and hour laws. Hertz sought to remove the case to federal court based upon diversity of citizenship. Hertz, a Delaware corporation which conducts a large amount of business in California, maintained that its principal place of business is in New Jersey, not California, as New Jersey is where its corporate headquarters is located.

The federal diversity jurisdiction statute, 28 U.S.C. §1332(a) allows a defendant to remove a case from state court to federal court if the plaintiffs and defendants are from different states and the amount in controversy exceeds \$75,000. In determining the citizenship of a corporation, 28 U.S.C. §1332(c)(1) states that “a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business[.]”

The Supreme Court concluded that Hertz properly removed the case. In doing so, the Supreme Court defined the phrase “principal place of business” as the company’s “nerve center,” which normally would be its headquarters:

“[P]rinciple place of business” is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities. It is the place that Courts of Appeals have called the corporation’s “nerve center.” And in practice it should normally be the place where the corporation maintains its headquarters - provided that the headquarters is the actual center of direction, control, and coordination, i.e., the “nerve center,” and not simply an office where the corporation holds its board meetings (for example, attended by directors and officers who have traveled there for the occasion).

Hertz Corp. at 1041-1042.

As a result of the decision in *Hertz*, employers will likely have greater access to federal courts, which are often more desirable and appropriate than state courts.

2. *Age Discrimination - Gross v. FBL Financial Services, Inc.*

In *Gross v. FBL Financial Services, Inc.* (2009), ___ U.S. ___, 129 S.Ct. 2343, 2352, the Supreme Court of the United States held that to prevail on an age discrimination case, the employee must establish that age discrimination was the “but for” cause of the adverse employment action. The Court clarified that the burden did not shift to the employer to show that it would have taken the employment action regardless of age, even when a plaintiff produced some evidence that age was a motivating factor.

In *Gross*, the plaintiff-employee filed a lawsuit against the defendant-employer alleging that his reassignment violated the Age Discrimination Employment Act (“ADEA”). At trial, the court instructed the jury on the burden of proof as to the plaintiff-employee and defendant-employer. Specifically, the court instructed that the jury must find in favor of the plaintiff if the plaintiff proved beyond a preponderance of the evidence that his age was a “motivating factor” in the employer’s decision to demote him. In turn, the jury was instructed to find in favor of the defendant if the employer proved by a preponderance of the evidence that it would have demoted the employee regardless of his age. This is known as the “mixed motive” instruction. The jury returned a verdict in favor of the plaintiff, awarding him \$46,945 in lost compensation. *Gross* at 2346-2347.

The Supreme Court rejected the plaintiff’s argument that the interpretation of the ADEA is controlled by case law governing Title VII claims due to the difference in the language of the statutes. The Court explained that “the ADEA’s text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor.” *Gross* at 2349. In contrast, Title VII does expressly allow members of a protected class to simply show that membership in the protected class was a “motivating factor” in the adverse employment action. *Id.*

From a practical standpoint, the decision eliminates the opportunity for plaintiffs to prevail in an age discrimination case by establishing a “mixed motive,” thereby making it more difficult for employees to establish age discrimination under the ADEA. Prior to the decision in *Gross*, courts were using a “burden-shifting” approach in analyzing ADEA claims and requiring the plaintiff to show that age was only one of the reasons (mixed motive) for the adverse employment action and the employer was then required to prove that they would have taken such employment action regardless of age.

The Ohio Civil Rights statute lacks the “motivating factor” language of Title VII, thereby making it similar to the ADEA. Thus, the decision in *Gross* may also make it more difficult to establish all forms of discrimination under Ohio’s statute.

3. *Reverse Discrimination - Ricci v. DeStefano*

In *Ricci v. DeStefano* (2009), ___ U.S. ___, 129 S.Ct. 2658, the Supreme Court of the United States held that white firefighters in New Haven, Connecticut were unfairly denied promotions because of their race. In *Ricci*, the Supreme Court reversed the lower courts’ decisions to allow the city of New Haven to disregard results of a racially neutral promotion exam for city firefighters because the white firefighters performed better on the exam than minority firefighters. According to the exam results, the only minorities eligible for a promotion to lieutenant or captain were two Hispanic firefighters. To avoid a lawsuit by minorities based on the disparate impact on minorities for promotions, the city refused to certify the exam result. Additionally, the city sought to achieve a more desirable racial distribution of promoting eligible candidates. But the white firefighters who would have been promoted based on their good test performance sued the City claiming that they were deprived of promotions on the basis of race in violation of Title VII. This type of discrimination lawsuit is known as “reverse discrimination.” *Ricci* at 2664-2672.

The Supreme Court found that the city “lacked a strong basis” to believe it would face disparate-impact liability if it certified the exam results. “Fear of litigation” did not justify the city’s refusal to certify the test results based solely on the racial disparity in the results:

On the record before us, there is no genuine dispute that the City lacked a strong basis in evidence to believe it would face disparate-impact liability if it certified the examination results. In other words, there is no evidence -- let alone the required strong basis in evidence -- that the tests were flawed because they were not job-related or because other, equally valid and less discriminatory tests were available to the City. Fear of litigation alone cannot justify an employer's reliance on race to the detriment of individuals who passed the examinations and qualified for promotions. The City's discarding the test results was impermissible under Title VII, and summary judgment is appropriate for petitioners on their disparate-treatment claim.

Ricci at 2681.

The city's procedure to base promotions on an objective, racially neutral test "was true to the promise of Title VII." *Ricci* at 2681. "The problem, of course, is that after the tests were completed, the raw racial results became the predominate rationale for the city's refusal to certify the results." *Id.* According to the Supreme Court, had the city certified the promotion exam results and minority firefighters filed suit, the city would have won. But the city's refusal to use the exam results was solely based on the racial disparity in the results. Thus, the decision to discard the exam results violated the rights of the firefighters who were eligible for promotions based on their high scores on the exam. *Ricci* at 2681.

The *Ricci* decision may impact future discrimination lawsuits by making it more difficult for minority plaintiffs to prove that a policy violated Title VII because of the disparate impact the policy may have on minorities if there is strong evidence that the policy was based on neutral criteria.

C. *Mohawk Industries, Inc. v. Carpenter* - Order Disclosing Privileged Information is Not Appealable in Federal Court

In *Mohawk Industries, Inc. v. Carpenter* (2010), ___ U.S. ___, 130 S.Ct. 599, the Supreme Court of the United States held that a district court's order compelling the disclosure of attorney-client privileged information is not a final appealable order. In this case, the plaintiff-employee, Carpenter, filed a lawsuit in district court alleging that his employer had terminated him in violation of 42 U.S.C.S. § 1985(2) and various Georgia laws. According to the complaint, his termination came after he informed the employer's human resources department that the company was employing undocumented immigrants. Unbeknownst to Carpenter, the employer had been accused in a pending class action lawsuit of conspiring to drive down the wages of its legal employees by knowingly hiring undocumented workers. The employer ordered Carpenter to meet with the company's attorney in the class action lawsuit. Carpenter was allegedly pressured to recant his statements. But when he refused to recant his statement, Carpenter was fired. *Carpenter* at 603.

Carpenter filed a motion to compel the employer to produce information concerning his meeting with the company's attorney. The employer maintained that the requested information was protected by the attorney-client privilege. Although the district court agreed that the privilege applied, it granted Carpenter's motion to compel disclosure because the employer had waived the privilege by disclosing the information in the class action lawsuit. The district court declined to certify its order for interlocutory appeal under 28 U.S.C. § 1292(b). As a result, the employer filed a notice of appeal under the collateral order doctrine. *Carpenter* at 603-604.

As a matter of background, 28 U.S.C. § 1291 confers on federal courts of appeals jurisdiction to review "final decisions of the district courts." "Although 'final decisions'

typically are ones that trigger the entry of judgment, they also include a small set of pre-judgment orders that are ‘collateral to’ the merits of an action and ‘too important’ to be denied immediate review.” *Carpenter* at 603. In this case, the employer attempted to bring a collateral order appeal after the district court ordered it to disclose certain confidential materials on the ground that the employer had waived the attorney-client privilege. The United States Court of Appeals for the Eleventh District dismissed the appeal for lack of jurisdiction. *Carpenter* at 604-605.

Upon review, the Supreme Court held that the order compelling disclosure of attorney-client privileged information did not qualify for an immediate appeal under the collateral order doctrine. The Supreme Court pointed out that pretrial discovery orders and evidentiary rulings are not subject to collateral order appeals. Rather, such decisions can be challenged only after a final judgment has been entered in the case. Relying on this comparison, the Supreme Court concluded that postjudgment appeals are adequate to protect the rights of litigants and preserve the vitality of the attorney-client privilege:

In our estimation, postjudgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege. Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence.

Dismissing such relief as inadequate, Mohawk [the employer] emphasizes that the attorney-client privilege does not merely “prohibi[t] use of protected information at trial”; it provides a “right not to disclose the privileged information in the first place.” Brief for Petitioner 25. Mohawk is undoubtedly correct that an order to disclose privileged information intrudes on the confidentiality of attorney-client communications. But deferring review until final judgment does not meaningfully reduce the ex ante incentives for full and frank consultations between clients and counsel.

Carpenter at 606-607.

The Supreme Court also noted that there were other “established mechanisms for appellate review” beside a collateral order appeal. For instance, the party could ask the district court to certify and the court of appeals to accept an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The party could also petition the court of appeals for a writ of mandamus. *Carpenter* at 607-608. Another option would be for the party to “defy a disclosure order and incur court-imposed sanctions. *** Such sanctions allow a party to obtain postjudgment review without having to reveal its privileged information.” *Id.* at 608. In reaching its holding, the Supreme Court explained the importance of avoiding “piecemeal appeals”

which would “unduly delay the resolution of district court litigation and needlessly burden the Court of Appeals.” *Id.*

The impact of the decision in *Carpenter* is that litigants in federal court will likely have to wait until a final judgment is entered in a case to challenge the disclosure of privileged information. But by then, irreparable harm may have already been done by disclosing sensitive information. Ohio state courts have taken the opposite approach. Generally, under Ohio law, discovery orders do not constitute final, appealable orders. However, where an order compels the production of material allegedly protected by attorney-client privilege, an interlocutory appeal can be taken. *Miles-McClellan Construction Co. Inc. v. Bd. of Ed. Westerville City School Bd.*, 10th Dist. Nos. 05AP-1112-1115, 2006-Ohio-3439 at ¶8; *Shaffer v. Ohio Health Corp.*, 10th Dist No. 03 AP-102, 2004-Ohio-63, at ¶6.

D. CSX Transp., Inc. v. Hensley - Fear of Cancer Claim Under the FELA

Back in 2003, the Supreme Court of the United States determined an asbestosis claimant can recover under the Federal Employers’ Liability Act (“FELA) for the fear of developing cancer as part of his pain and suffering damages. *Norfolk & Western R. Co. v. Ayers* (2003), 538 U.S.135, 158. While this holding was limited by requiring the plaintiff to prove his/her alleged fear of cancer is both “genuine and serious,” the Supreme Court did not define these terms or specify how this standard of proof is to be shown or refuted.

Recently, the Supreme Court of the United States provided some guidance on the definition of “genuine and serious” fear of cancer. In *CSX Transp., Inc. v. Hensley* (2009), 556 U.S.____, 129 S.Ct. 2139, 2142, the Court held that trial courts must instruct juries that an asbestosis-plaintiff who seeks damages for fear of cancer must prove that any alleged fear is genuine and serious when a party asks for such an instruction.

In *Hensley*, the railroad requested two jury instructions. The first instruction stated the basic holding in *Ayers* – “Plaintiff is also alleging that he suffers from a compensable fear of cancer. In order to recover, Plaintiff must demonstrate *** that the *** fear is genuine and serious.” *Hensley* at 2140. The second instruction advised the jury that when considering if the fear was “genuine and serious” to determine whether the plaintiff voiced more than a general concern about his future health, suffered from insomnia or other stress-related conditions, sought psychiatric or medical attention, consulted counselors or ministers concerning his fear, demonstrated physical symptoms, or produced witnesses who could corroborate his fear of cancer. *Hensley* at 2140, 2142, fn. 1.

The Supreme Court found that the requested instructions should have been given to the jury because such instructions “struck a delicate balance between plaintiffs and defendants” in FELA actions in which an asbestosis-plaintiff can recover damages for fear of cancer under the FELA when his alleged fear of cancer is “genuine and serious.” *Hensley* at 2142. Since

the *Ayers* decision, there has been a battle over the undefined “genuine and serious” fear requirement, and a split among courts as to whether the railroad is entitled to jury instructions relating to this requirement. The *Hensley* decision ends the debate. Thus, when a “genuine and serious” instruction is requested, the trial court is required to provide the instruction to the jury.

V. ADDITIONAL CASES AWAITING MERIT OPINION FROM THE SUPREME COURT OF OHIO

A. Insurance Coverage

1. *Fed. Ins. Co. v. Executive Coach Luxury Travel, Inc.*, Case No. 2009-2307, accepted 3/10/10.

This case arises out of the March 2, 2007 motor coach accident in Atlanta, Georgia involving the players and coaches of the Bluffton University baseball team. At the time of the accident, the baseball team was being transported to a Florida tournament in a motor coach owned by Partnership Financial Services but leased to Executive Coach Luxury Travel, Inc. Executive Coach contracted to provide Bluffton University’s baseball team charter service to and from the Florida tournament and likewise employed the driver of the motor coach. *Fed. Ins. Co. v. Executive Coach Luxury Travel, Inc.*, 3d App. Nos. 1-09-17 & 1-09-18, 2009-Ohio-5910, at ¶1-3.

At the time of the accident, Bluffton University had three insurance policies: (1) a commercial auto policy issued by the Hartford Fire Insurance Company with liability limits of \$1 million; (2) a commercial umbrella policy issued by American Alternative Insurance Corporation with liability limits of \$5 million and (3) an excess follow-form policy issued by Federal Insurance Company with liability limits of \$15 million. Under the terms and conditions of these policies, if the underlying insurance policy issued by the Hartford applies, then the American and Federal policy apply as well. *Executive Coach* at ¶4-5.

Federal and American filed separate complaints for declaratory judgment against Executive Coach and Niemeyer’s estate requesting that the court declare that neither Federal nor American owe Executive Coach and Niemeyer’s estate coverage as Executive Coach and Niemeyer did not qualify as “insureds” under the Hartford policy. *Executive Coach* at ¶6.

The dispute centers around the interpretation of who is an insured person as used in the “omnibus clause” of the Hartford policy. For the third-party driver, Jerome Niemeyer, to be considered an “insured” under the policy, two requirements had to

be met: (1) the third-party must use the covered auto with the named insured's permission and (2) the covered auto must be one the named insured owns, hires or borrows. *Executive Coach* at ¶17.

As to the first requirement -- whether Niemeyer was using the motor coach with Bluffton's permission -- Bluffton University's authority over the motor coach drive was always subject to the permission of Executive Coach. In other words, Bluffton University could not make any use of the motor coach that Executive Coach did not permit. Additionally, Niemeyer was employed by Executive Coach, not Bluffton University, and the university could not terminate Niemeyer's use if the coach. Thus, Bluffton University could not give permission to Niemeyer to drive the bus. Rather, Niemeyer was using the motor coach with permission from Executive Coach. *Executive Coach* at ¶24-30. While Bluffton's baseball coach had some authority to direct the specific activities of the bus and the driver with regard to rest stops, routes, detours and meals, Executive Coach and not Bluffton University "had predominate authority and control over the bus and driver under the charter contract." *Id.* at ¶38.

Since Executive Coach and not Bluffton University "had predominate authority and control over the bus and driver under the charter contract," the second requirement under the policy could not be met -- Bluffton University could not have owned, hired or borrowed the motor coach at the time of the accident. "[T]he bus and driver were 'hired' by Executive Coach and not Bluffton, and were operating with the 'permission' of Executive Coach and not Bluffton within the meaning of those terms as used in the insurance contract." *Executive Coach* at ¶39.

In light of these conclusions, the trial court held that Niemeyer was not an insured motorist under the Hartford insurance policy at the time of the accident. Since he was not insured by Hartford, he was also not insured by American or Federal. As a result, summary judgment was granted in favor of American and Federal and affirmed by the Third District Court of Appeals. Later this year, the Supreme Court of Ohio will determine whether the trial and appellate courts reached the correct decision.

2. *Pennsylvania Gen. Ins. Co. v. Park-Ohio Industries, Inc.*, Case No. 2009-0104, argued 12/2/09.

In *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St. 3d 512, 2002-Ohio-2842, the Supreme Court of Ohio held that Ohio is an "all sums" jurisdiction in that an insured may designate a policy of its choice to respond in full to a claim triggering multiple policies. In other words, the insured is permitted to seek full coverage for its claim from any single triggered policy up to the policy's coverage

limits. If the claim is not satisfied by a single policy, then the insured may select additional triggered policies to respond to the claim. *Goodyear* at ¶10-15.

The issue raised in *Pennsylvania Gen. Ins. Co. v. Park-Ohio Industries, Inc.*, Case No. 2009-0104, relates to whether *Goodyear Tire v. Aetna* is still the law in Ohio, and if so, what must a targeted insurer do in order to obtain contribution from a non-targeted insurer's policy. The case arises from an asbestos lawsuit filed against Park-Ohio. Park-Ohio had three separate insurers: Penn General, Continental Casualty Company and Nationwide Insurance Company. Park-Ohio only notified one of its insurers, Penn General, about the asbestos lawsuit. Without formal consent of Penn General, Park-Ohio negotiated a \$1,000,000 settlement. Park-Ohio then filed suit against Penn General for coverage and bad faith. Penn General ultimately paid the full settlement amount.

Penn General then filed suit against Continental and Nationwide, which were Park-Ohio's other insurers. In this action, Penn General sought contribution from Continental and Nationwide on the basis that it was compelled to pay a disproportionate share when the other applicable insurance policies were available. Continental and Nationwide contend that the insured, Park-Ohio, breached the notification provisions of their policies. According to Continental and Nationwide, there is no coverage and thus, Penn General could not seek contribution.

The trial court entered judgment against Penn General denying its contribution claim. Park-Ohio correctly exercised its right to select coverage from a single insurer of its choice (which was Penn General) from multiple triggered insurers to seek coverage for the asbestos claim. But Park-Ohio waived coverage from Continental and Nationwide by failing to timely notify them of the asbestos lawsuit and breached the applicable policy provisions concerning notice and settlement without consent. The trial court concluded that if there is no applicable coverage, then there can be no right of contribution for Penn General.

Penn General appealed, and the Eighth District Court of Appeals reversed the judgment of the trial court. According to the appellate court, *Goodyear* was not controlling authority as it did not address the specific fact pattern in this case. Since Continental and Nationwide shared liability on the asbestos claim but were not selected by the insured to indemnify its loss, the court of appeals determined that equity required that they pay Penn General their pro rata share of defense costs and indemnity paid by Penn General on behalf of Park-Ohio in the asbestos lawsuit. *Pennsylvania Gen. Ins. Co. v. Park-Ohio Industries, Inc.*, 179 Ohio App.3d 385, 2008-Ohio-5991.

Continental and Nationwide filed a notice of appeal to the Supreme Court of Ohio. The Court accepted the case for review and will now consider whether Penn General is entitled to contribution in this case.

B. Ohio's Asbestos Legislation

1. *Adams v. Goodyear Tire & Rubber Co.*, Case No. 2009-0542, argued 12/15/09.

With respect to premises defendants, Ohio's asbestos reform legislation, R.C. 2307.941 was enacted to address claims against a premises owner for exposure to asbestos on the premises owner's property. R.C. 2307.941(A)(1) bars recovery for injury where the individual was not exposed to asbestos on the defendant's property. The *Adams* case involved a "take home" asbestos exposure claim where the decedent was allegedly exposed to asbestos contained on her husband's work clothes that she shook out and washed. The wife's estate filed a lawsuit against her husband's employer, Goodyear Tire & Rubber Company, which resulted in the trial court granting summary judgment to the employer upon finding that the claims were barred by Ohio's asbestos reform legislation, R.C. 2307.941(A)(1).

The trial court also found that the negligence claim failed because the employer did not owe the wife a duty of care. On appeal, the Eighth District Court Appeals agreed with the trial court's summary judgment ruling. It found that since the wife's asbestos exposure did not occur on the employer's premises, R.C. 2307.941(A)(1) applied and barred recovery. Likewise, the appellate court found that the negligence claim failed as a matter of law because the employer did not owe the wife a duty of care when the exposure did not occur on the employer's premises.

The case turns on statutory construction, and the Supreme Court of Ohio will now consider whether Ohio's asbestos reform legislation, R.C. Section 2307.941(A), bars "take home" asbestos exposure claims against premise owners.