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I. WINNING ON APPEAL

We often hear the attorney or spokesperson for a losing party acknowledging disappointment but vowing to appeal. But reversals on appeal are the exception, not the norm.

The chances of winning on appeal can be materially improved by considering appellate issues before the case is even tried. Litigants and counsel must appreciate the standards by which an appeal will be adjudicated, anticipate adverse rulings and preserve reversible error, and frame the issues with an appeal in mind.

This article addresses appellate review standards, preserving reversible error, and framing appellate issues, and concludes with some guidelines to improve the prospects of winning on appeal.

A. Appellate Review Standards And "Harmless" Error vs. Reversible Error.

Errors often occur during a trial, but not all of them will result in a new trial or the reversal of an adverse judgment on appeal. To secure reversal of a judgment, the party appealing must not only show that some error occurred but also that the error was prejudicial. *Hampel v. Food Ingredients Specialties, Inc.*, 89 Ohio St.3d 169, 2000-Ohio-128. So, even if an error does occur during the trial court proceedings, reversal of an adverse judgment will not be warranted unless the error affects the substantial rights of the losing party or the ruling is inconsistent with substantial justice. *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787, ¶35. See also, Civ.R. 61

In reviewing potential error, the court of appeals will apply different standards depending upon the nature of the alleged error. There are, in general, four types of appellate review: (1) review for legal error; (2) review of the legal sufficiency of the evidence; (3) review of the weight of the evidence; and (4) review of the trial court's exercise of its discretionary authority.

When reviewing for legal error, the appellate court applies a de novo ("completely new") standard of review by conducting its own examination and analysis of the trial court record. Greater deference is afforded to the trial court or jury when an appellate court reviews a verdict or judgment to see if it is supported by the weight of the evidence. When deciding if the verdict is supported by the weight of the evidence, the "clearly erroneous" standard applies. Under this standard, judgments and verdicts supported by "some competent, credible evidence going to all the essential elements of the case" will not be reversed as being against the manifest weight of the evidence. Finally, the greatest deference is given to the trial court when reversal is sought based upon the trial court's abuse of its discretion. Abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude is unreasonable, arbitrary, or unconscionable.

The following chart summarizes the various error types subject to appellate scrutiny along with the corresponding standard of review and the deference, if any, given the findings and rulings of the trial court or jury:

Error Type Being Reviewed	Standard of Review	Deference Given
Legal Error: • construction of Constitution, statutes, rules, or contracts • jury instructions • motions to dismiss and for summary judgment	De novo	No deference
Legal Sufficiency of the Evidence: • motions for directed verdict and for JNOV	De novo	No deference
Weight of the Evidence	Clearly erroneous	Great deference
Discretionary Rulings: • pretrial discovery, admission or exclusion of evidence • class action certification • motion for new trial • award of sanctions, prejudgment interest and attorney's fees	Abuse of discretion	Greatest deference

Being aware of which standard of review will apply to a particular ruling, along with an appreciation of the difference between harmless and prejudicial error, will help direct and focus attention on which battles are truly worth fighting. In general, the most important battles will be legal ones concerning jury instructions and rulings on motions which are subject to a de novo standard of review. Appeals based on the weight of the evidence or discretionary rulings are less likely to be successful.

B. Preserving Error: It's All About The Record, The Record, The Record.

An appellate court decides an appeal based upon the record in the trial court. Unless the trial court's record specifically indicates that a particular argument was presented to the trial court, the argument was not made. *Universal Bank v. McCafferty* (1993), 88 Ohio App.3d 556. Thus, arguments at sidebar or in the judge's chambers but not in the presence of the court reporter are not preserved for appellate review. *Lamar v. Marbury* (1982), 69 Ohio St.2d 274, 277 (court of appeals cannot consider an affidavit filed during appeal to establish that an oral motion was made to the trial court where such oral motion was not found in the transcript in the trial court record).

If a particular ruling is important, counsel must ensure that the ruling of the trial judge appears in the record. Some judges may be sensitive to objections made on the record, but given the choice of possibly irritating the judge or certainly losing an appeal, the choice is obvious: make the objection and preserve the error.

Also, astute counsel, anticipating what evidence may draw objections, will be prepared to argue the admissibility of the evidence, ideally with a brief addressing the evidentiary issues.

As noted above, jury instructions can be one of the more fertile grounds for securing reversal of a judgment on appeal. A party, however, may not assign as error in an appeal the trial court's giving or the failure to give any instruction unless the party objects before the jury retires to consider its verdict, *stating specifically* the matter objected to *and the grounds* of the objection. Civ.R. 51(A). Failure to comply with Civ.R. 51(A) results in a waiver of the alleged error on appeal. *Schade v. Carnegie Body Co.* (1982), 70 Ohio St.2d 207, paragraph one of the syllabus.

A great deal of time should be spent on preparing jury instructions and making appropriate objections. In fact, some trial counsel prepare for trial by starting with the jury instructions and working backwards. Indeed, it is hard to over-emphasize the importance of jury instructions: they are the last thing the jury hears, they come from the judge (who many jurors feel is the only person in the courtroom they can trust), they presumably guide the deliberations of the jury, and they may form the basis for an appeal. Winning a case–either to a jury or on appeal-- can depend upon the jury instructions.

C. Framing The Issues: Appeals To The Court Of Appeals And Supreme Court.

Some lawyers believe in having three plans for winning a case. Plan A, which is not feasible in all instances but certainly should be considered, is whether the case can be won on motion, such as on summary judgment. Plan B is to win before the jury. Plan C is to win in the court of appeals or the Supreme Court. This portion of the article focuses on Plan C.

In Ohio, a losing party has an appeal as a matter of right to a court of appeals. In such an appeal, the party presents "assignments of error" pointing out what mistakes were made and why the mistakes justify reversal.

An appeal to the Supreme Court of Ohio, however, has a different focus because the Supreme Court is not concerned with correcting errors that may have occurred in the proceedings below. The high court accepts few cases for discretionary review and will do so only when it finds that the legal issues present are of "public or great general interest." A party must convince at least four justices that the case presents issues of that nature in "propositions of law" (as opposed to "assignments of error"). A proposition of law is a statement of the rule of law that is applicable to the facts in the case and which, if the appeal is accepted, would serve as a general rule of law governing similar cases in the future.

Sometimes a party and counsel recognize that existing Supreme Court case law is adverse and wish to appeal an issue to the Supreme Court in hopes that it will overrule the unfavorable decision. Litigating such a test case presents two particular challenges. First, because only the Supreme Court can reverse its own decisions, the litigant should expect to lose in the trial and appellate courts. Indeed, trial courts and intermediate appellate courts throughout Ohio are bound to follow and apply Supreme Court precedent. *Penn Traffic Co. v. Clark Cty. Bd. of Elections* (1999), 138 Ohio App.3d 1, 5; *In re Wurgler*, 136 Ohio Misc.2d 1, 2005-Ohio-7139, ¶14.

Second, persuading the Supreme Court to abandon a prior decision usually requires a record demonstrating why reversal is appropriate. In Ohio a three-part test for overruling precedent was articulated in *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849. That decision is best known for having reversed *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660, 1999-Ohio-292 (the case which spawned business auto UM/UIM claims by employees not in the course and scope of employment). But the more enduring impact of *Galatis* concerns the circumstances under which the Supreme Court will consider reversing one of its own opinions. The court explained that one of its prior decisions may be overruled when all three of the following circumstances are found to exist:

(1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision,
(2) the decision defies practical workability, and
(3) abandoning the precedent would not create an undue hardship for those who have relied upon it.

Galatis, syllabus paragraph one.

In the almost four years since *Galatis* was decided, the Supreme Court has invoked this tripartite test on several occasions. When the three prongs have been established, the Supreme Court has exhibited a willingness to overrule precedent. But, most often, the Supreme Court has refused to overrule its prior case law, usually because the appealing party failed to establish each prong of the test. In other words, simply arguing that a prior case was wrongly decided is not sufficient to justify overruling a prior decision. *State ex rel. Grimes Aerospace Co., Inc. v. Indus. Comm.*, 112 Ohio St.3d 85, 2006-Ohio-6504, ¶6. The litigant advocating a change in Supreme Court precedent carries the burden of establishing all three prongs of the test, a burden that cannot be met simply with conclusory statements lacking factual or empirical support. *Cleveland Bar Assn. v. CompManagement, Inc.*, 111 Ohio St.3d 444, 2006-Ohio-6108, at ¶¶15-21.

Therefore, if the goal is to reverse existing Supreme Court authority, the litigant should conduct discovery, present the case, and argue the law with the tripartite *Galatis* test in mind.

D. Guidelines.

A party will have a better chance of winning on appeal if the following general guidelines are observed:

(1) Potential appellate issues, and the standards by which they will be decided on appeal, should be identified prior to trial so that proper attention can be focused on the issues which have a reasonable prospect of success on appeal;
(2) The opponent's objections and the trial court's adverse rulings should be anticipated; counsel should be prepared to argue key legal issues, ideally with briefs on those issues, and be ready to state *specifically* the matter objected to and the *grounds* for the objection;

(3) Jury instructions should be carefully crafted prior to trial and appropriate objections made before the jury begins deliberating, to increase the likelihood of prevailing at trial or on appeal;

(4) In presenting evidence and arguing motions, counsel should be cognizant of potential assignments of error and possible propositions of law, in anticipation of an appeal to the court of appeals and, perhaps, eventual review by the Supreme Court of Ohio; and

(5) If the party intends to ask the Supreme Court to reverse an existing case, the party should, at every stage of the case, strive to satisfy the tripartite *Galatis* test for reversing prior authority.

II. SUPREME COURT OF OHIO

A. Insurer May Exclude UM/UIM Coverage Where Tortfeasor Statutorily Immune From Liability.

In *Snyder v. Am. Family Ins. Co.*, 113 Ohio St.3d 239, 2007-Ohio-4004, the Supreme Court held that Ohio's uninsured/underinsured motorist law, R.C. 3937.18, effective October 31, 2001 (S.B. 97), permits an insurance policy requiring the insured be "legally entitled to recover" from the tortfeasor to preclude UM/UIM benefits for injuries caused by a tortfeasor immune from liability under R.C. 2744 (political/subdivision tort/immunity), or R.C. 4123.741 (fellow-servant immunity).

B. Actual Controversy Required For Declaratory Judgment Action.

In *Mid-American Fire & Cas. Co. v. Heasley*, 2007-Ohio-1248, the Supreme Court held that an insurer cannot file a declaratory judgment action to determine the rights and obligations of the parties if there is no viable claim under existing law. The court also held that a court of appeals should apply an "abuse of discretion" standard in reviewing the denial of a declaratory judgment action by a trial court.

Shortly after Heasley filed his lawsuit, the Ohio Supreme Court decided *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, which limited *Scott-Pontzer* and held that only those acting within the scope of their employment were eligible for UM/UIM benefits under an employer's insurance policy. Once *Galatis* was decided, Heasley voluntarily dismissed his UM/UIM complaint, but he did so without prejudice. Perhaps concerned that *Scott-Pontzer* could be resurrected, Mid-American filed a declaratory judgment action seeking a declaration that Mid-American owed Heasley no UM/UIM coverage. The Supreme Court said: "While Heasley remains free to refile his claim, such a claim would be frivolous. Heasley voluntarily dismissed his claim, but any rights he might have had to UM/UIM payments as a result of *Scott-Pontzer* were extinguished by *Galatis*. … Heasley's claim would not survive unless the rule announced in *Galatis* were overruled. Although technically possible, the likelihood is remote. Mid-American's theory, then, is nothing more than a remote possibility, and 'the controversy is based upon a contingency which may never occur.'" Essentially, the high court concluded that a declaratory judgment action is appropriate only where there is an actual, rather than a hypothetical, controversy.

C. Insurer May Not Amend Policy Within Two-Year Guarantee Period.

In *Shay v. Shay*, 2007-Ohio-1384, the Supreme Court reversed a court of appeals decision that allowed a policyholder to recover uninsured motorist coverage. At issue was the household exclusion, which excludes from the definition of an uninsured vehicle a vehicle owned by a named insured or family member in the household of the named insured. The court of appeals had found that the policy's household exclusion was unenforceable by reason of S.B. 267. That measure deleted from the Ohio UM/UIM statute language permitting the household exclusion. The appellate court concluded that the provisions of S.B. 267 had been incorporated into the policy upon the first six-month renewal of the policy.

In reversing the court of appeals, the Supreme Court held, however, that S.B. 267 had not been incorporated into the policy at the six-month renewal. The high court reasoned that unless there is an express agreement between the insurer and policyholder to amend a policy at a six-month renewal point within the two-year guaranteed period of R.C. 3937.31, an insurer may not amend the policy, even to increase the coverage.

D. Off Road Vehicle Not Motor Vehicle Under UM/UIM Statute.

In *State Automobile Ins. Co. v. Pasquale*, 2007-Ohio-970, the Supreme Court held that no uninsured motorists coverage was owed the defendant-insured for injuries the minor sustained when he was struck on a dirt track by an off-road motorbike. The Supreme Court held the policy language that excluded vehicles "[d]esigned for use mainly off public roads while not on public roads" was enforceable under R.C. 3937.18 as amended by Am.Sub.H.B. 261 because the off-road motorbike did not qualify as a "motor vehicle" as defined by R.C. 4501.01(B) and was instead an "off-road motorcycle" as defined in R.C. 4519.91(I).

III. SIXTH CIRCUIT COURT OF APPEALS

A. District Court Abused Its Discretion In Retaining Discretionary "Diversity Of Citizenship" Jurisdiction Over A Complaint For Declaratory Judgment.

Travelers Indem. Co. v. Bowling Green Prof'l Assocs., PLC, 2007 U.S. App. LEXIS 17246, 9-15 (6th Cir. 2007). A federal court has "discretionary" diversity of citizenship jurisdiction over a complaint for declaratory judgment. The recent Sixth Circuit decision in *Travelers* set forth the elements to be considered in accepting or declining discretionary declaratory jurisdiction:

(1) whether the declaratory action would settle the controversy;
(2) whether the declaratory action would serve a useful purpose in clarifying the legal relations in issue;
(3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for res judicata;"
(4) whether the use of a declaratory action would increase friction between our federal and state courts and improperly encroach on state jurisdiction;
(5) whether there is an alternative remedy which is better or more effective;

(6) whether the underlying factual issues are important to an informed resolution of the case;

(7) whether the state trial court is in a better position to evaluate those factual issues than is the federal court; and

(8) whether there is a close nexus between the underlying factual and legal issues and state law and/or public policy, or whether federal common law or statutory law dictates a resolution of the declaratory judgment action.

The Sixth Circuit found that the District Court had abused its discretion in exercising jurisdiction over a declaratory judgment action brought by an insurance company to determine its duties to defend and indemnify for the following reasons: (1) the declaration would not settle or clarify the underlying dispute between the insured and the tortfeasor (the court ignored the dispute between the insurers); (2) "because [state] law is controlling, we conclude that [state] courts are in the better position to apply and interpret its law on these issues"; (3) "issues of 'insurance contract interpretation are questions of state law with which the . . . state courts are more familiar and, therefore, better able to resolve'"; and (4) "'[s]tates regulate insurance companies for the protection of their residents, and state courts are best situated to identify and enforce the public policies that form the foundation of such regulation.'" Thus, the Sixth Circuit found that factors 1, 2, and 4-8 favored declining jurisdiction. The Sixth Circuit Court of Appeals vacated the district court's judgment granting summary judgment in favor of the insurers and remanded the case with instructions to dismiss for lack of jurisdiction.

IV. OHIO COURT OF APPEALS

A. Bad Faith.

1. Insured Owed Claimant Duty Of Good Faith Because Claimant's Rights As An Insured Vested When Claimant Negotiated A Settlement With UM/UIM Insurance Carrier.

Coe v. Grange Mut. Cas. Co., 2007-Ohio-2823 (Sixth Appellate District). Prior to *Galatis* decision, an insurance carrier settled a claim with plaintiff who was considered an "insured" for UM/UIM coverage under the holding in *Scott-Pontzer*. The "insured" did not, however, release her claims of bad faith against the insurance carrier. After *Galatis* limited the holding in *Scott-Pontzer*, the insurance carrier moved for summary judgment on the bad faith claim arguing only an insured may sue an insurance carrier for bad faith. The court determined the claimant's rights as an "insured" vested at the time of the settlement which dismissed the contractual claim with prejudice. The court reasoned that the retroactive effect of the *Galatis* holding did not apply to the claimant's claim for bad faith, because the settlement vested the claimant's rights as an "insured."

B. Cancellation of Policy.

1. Cancellation Notice Valid Where The Insurer Provides Proof Of Mailing, Even If The Insured Attests To Having Never Received The Notice.

Palte v. United Ohio Ins. Co., 2007-Ohio-2990 (Third Appellate District). Palte purchased automobile liability coverage from United Ohio Insurance Company through Grant Insurance Agency, Inc. The policy was to be effective from May 26, 2005 through November 26, 2005 and had periodic premium payments due during that period. Palte quickly fell behind and United mailed a notice that, if the premium payments were not brought up to date, then the policy would be canceled effective 12:01 a.m. on August 13, 2005. Palte made no payments and on August 15, 2005, United sent Palte a correspondence indicating that the Policy had been canceled as of August 13, 2005, for non-payment of premium. Palte claims never have to received either correspondence. On October 11, 2005, Palte negligently caused an automobile accident; United denied coverage. The Ohio Bureau of Motor Vehicles notified Palte that it intended to suspend his driver's license under Ohio's financial responsibility law (R.C. 4509.17 and 4509.101(C)). However, after an administrative hearing, the Bureau found that Palte had insurance coverage at the time of the accident and did not suspend his driver's license. Palte then filed suit against United seeking a declaration that he had coverage. United produced affidavits indicating that the notices were mailed and attaching a bulk mail certificate to that effect. The court held that because the insurer presented evidence that the notices were mailed, they were presumed received despite Palte's affidavit stating to the contrary (and the finding of the Ohio Bureau of Motor Vehicles). Accordingly, the court found proper cancellation and that no coverage was available.

C. Duty to Defend.

1. Where Policy Excludes Coverage Only Where Certain Facts Are "Determined," The Insurer Has The Duty To Defend And Indemnify Until Facts Excluding Coverage Are Established By The Finder Of Fact.

Cooper Tire & Rubber Co. v. Travelers Cas. & Sur. Co., 2007-Ohio-1905 (Third Appellate District). Cooper Tire & Rubber Company was sued by its employee Kim Caudill. Ms. Caudill alleged that Cooper failed to provide a safe place of employment and required Caudill to work in a location with hazards which were substantially certain to cause serious physical harm. Cooper was insured by Travelers Casualty and Surety Company under a Workers Compensation and Employers Liability Policy. Travelers initially agreed to pay defense costs under a reservation of rights but subsequently determined that it was not under any obligation to defend the suit and denied coverage. Cooper sued Travelers seeking coverage and alleging bad faith. In the meantime, Cooper settled the suit with Caudill. The Traveler's Policy excluded coverage for liability for bodily injury from an act "determined to have been committed by [the insured] with the belief that an injury is substantially certain to occur." The court found the term "determined" to be undefined and ambiguous. The court found one reasonable reading of "determined" to be resolved by the finder of fact. As such, and because there had been no trial, the court found a duty to defend. Further, because there was no clear "determination" as to the duty to indemnify, the court found that the settlement amount was also covered.

D. Insurance Agents.

1. Insurer Liable For Improper Termination Of Insurance Agent.

Orebaugh v. Am. Family Ins., 2007-Ohio-3891 (Fourth Appellate District). Orebaugh had been an insurance agent for American Family Insurance since 1999. In order to operate his business, he purchased an office in Greenfield, Ohio, and purchased furniture and supplies. Orebaugh was involved in an motor vehicle accident which prevented him from attending a conference hosted by American Family Insurance. American Family Insurance terminated his contract, effective immediately. When Orebaugh returned to his office, he found an insurance agent hired by American Family Insurance, working out of his office. Orebaugh sued American Family Insurance for trespass and conversion and sought punitive damages. The case was tried to a jury, and Orebaugh prevailed in all respects. The court of appeals affirmed, noting that American Family Insurance was aware of its wrongdoing and, therefore, properly subject to punitive damages.

E. Late Notice.

1. Failure To Notify Excess Umbrella Carrier Excludes Coverage.

Nicholas v. McColloch-Baker Ins. Serv., 2007-Ohio-1748 (Second Appellate District). The Nicholases had a primary homeowners policy with Buckeye State Mutual Insurance Company with a liability coverage limit of $500,000 and a excess umbrella policy issued by Mt. Vernon Fire Insurance Company with liability coverage limits of $4,000,000. The Nicholases were sued by Kohlhorst for an injury he sustained in their home. The Nicholases contacted their independent insurance agent, McColloch-Baker Insurance Services Agency, and advised the agency of the claim and suit. The McColloch Agency put only Buckeye on notice. Buckeye provided a defense but the trial verdict ($584,560.71) came in above Buckeye's coverage limits.

Mt. Vernon is not authorized to do business in Ohio. Rather, because the Nicholases were high risk, the McColloch Agency had to contacted a third party surplus lines broker, International Excess Agency, Inc., to procure the Mt. Vernon policy for the Nicholases. Only a licensed surplus lines broker can procure insurance from an unauthorized insurer. The Nicholases relied on R.C. 3929.27 which provides that "A person who solicits and procures the application [of insurance] shall be considered as the agent of the party, company, or association thereafter issuing a policy upon such application * * * despite any contrary provisions in the application or policy." The court found that because the McColloch Agency obtained the application for the umbrella policy from the International Agency and not Mt. Vernon, the statute was inapplicable to make the McColloch Agency Mt. Vernon's agent. Accordingly, the court concluded that Nicholases' notice to the McColloch Agency did not put Mt. Vernon on notice and that, accordingly, coverage under the Mt. Vernon Policy was excluded by late notice.

2. When An Insured Fails To Comply With A Policy's Prompt-Notice Provision, The Insurer Is Not Liable For Default Judgment Against The Insured.

First American Title Ins. Co. v. Chicago Ins. Co., 2007-Ohio-1593 (Eighth Appellate District). The Title Insurance Company ("TIC") notified its title agency that it was seeking damages for the title agency's negligence. The title agency notified its insurance carrier of the claim. The Title Agency subsequently informed its insurer that the TIC was no longer pursuing its claim. The insurer closed its file. Later, the TIC filed suit against the title agency and obtained a default judgment of approximately $240,000. Subsequently, the TIC filed suit against the insurer seeking the amount of the default judgment. The trial court granted summary judgment to the insurer, finding no coverage due to the failure of notice and cooperation. On appeal, the court affirmed the lower court's finding of no coverage, noting it was undisputed that the insurer was not notified of the lawsuit.

F. Policy Language, Endorsements, And Exclusions.

1. An Exclusion Referencing Definitions Found In The Ohio Revised Code Is Not Ambiguous.

Eric C. Choby v. James Aylsworth, 2007-Ohio-3375 (Tenth Appellate District). The plaintiff was at appellant Aylsworth's neighbor's home when he was bitten by appellant's dalmatian. Unbeknownst to plaintiff, the dog had previously bitten a woman and attacked a small dog. The appellant submitted a homeowner's claim to the Motorist Insurance, which denied the claim under an exclusion for injuries caused by a "dangerous or vicious dog as defined by Ohio Revised Code 955.11...." The appellate court rejected the appellant's argument that the failure to provide him with a copy of the entire Code section referenced in the exclusion created an ambiguity. The court determined that, as revised, a matter of policy using definitions found in the Ohio Revised Code promoted uniformity and clarity.

2. No Duty To Defend Or Indemnity For Claims Of Improper Billing, As It Was Not "Professional Services" As Defined In A Professional Liability Policy.

Davis & Meyer Law Ltd. v. ProNational Insurance Co., 2007-Ohio-3552 (Tenth Appellate District). In an Illinois class action suit, Lakeshore Title was sued for a violation of the Illinois Consumer Fraud Act for excess fees for courier service and county recording fees. ProNational agreed to pay Piper Rudick $180/hour for defending appellants in the class action lawsuit with the appellants paying for the remainder of the attorney's fees. Four (4) months later, ProNatonal wrote Piper Rudick refusing to pay any additional fees as of that date. After the class action settled, appellants sued ProNational for breach of contract, negligence and bad faith. The trial court agreed with ProNational and found that the claims were not for "professional services" as defined in the policy. The appellate court determined that "the act of billing or charging clients for ministerial, or non-ministerial activities, is not a service 'performed by an insured for others for a fee,'and thus does not fit the definition of 'professional services' under the policy."

The appellate court also rejected appellants' argument that ProNational should be estopped from withdrawing its defense because ProNational was not required to accept the defense of the claim in the first place. The court also found that there was no evidence that appellants' rights were prejudiced by ProNational's actions or statements. The court noted that appellants even received the benefit of ProNational paying over $40,000 in legal fees to the attorney, whom they requested. The fact that appellants felt that they would have pursued settlement earlier does not mean that it would have been more favorable or that it would have settled earlier. Therefore, the appellate court held that the timing of the coverage denial did not disadvantage the appellants in preparing for its defense or settling the class action lawsuit.

3. Court Applies Resident Relative Exclusion And Late Notice In Homeowner Policy To Bar Claim Of Minor Child.

Keith v. State Farm Ins. Co., 2007-Ohio-1878 (Fifth Appellate District). The legal custodian mother of an eight-year-old girl sued the girl's father and his wife for injuries the daughter received when the step-mother left the daughter unattended. The mother had custody of the child but, by agreement between the daughter's parents, the girl was staying with her father until the girl's mother "got back on her feet." The court granted the father and step-mother's insurer, State Farm, summary judgment because the policy excludes liability coverage for a lawsuit by a relative who is a resident of the named insured's household. The court determined the daughter lived with her father for "some duration and with some regularity" because the daughter lived with her father for at least the prior six months and the mother had not given any time frame for the daughter to return to the mother's home. Because the State Farm policy excluded liability coverage for injuries to a resident relative, the court held the insurance policy did not afford coverage. Furthermore, the father and step-mother failed to notify State Farm of the lawsuit for about ten months allowing the mother to obtain a default judgment of $12,000,000. Therefore, the court also determined that the insured failed to comply with the terms of the policy requiring prompt notification of the claim precluding coverage under the State Farm policy.

G. Subrogation.

1. When A Tortfeasor Settles A Claim With Notice Of A Subrogation Lien, The Lienholder May Maintain An Action Against The Tortfeasor Notwithstanding The Settlement And Release.

Qualchoice v. Paige-Thompson, 2007-Ohio-1712 (Eighth Appellate District). The victim, whose insurer paid approximately $9,300 of victim's medical bills, settled with the tortfeasor for the tortfeasor's insurance policy limits. Pursuant to the settlement, the victim was to pay the $9,300 subrogation lien. The victim's attorney did not pay off the subrogation lien. The victim's insurer filed suit against the tortfeasor. The appellate court held that the victim's insurer could maintain the action because the tortfeasor had notice of the subrogation lien, and held that the recovery was limited to amount it set forth in its complaint.

2. Qualchoice Has Right To Pursue Subrogation Against A Homeowner Policy's Medical Payment Coverage.

Qualchoice v. State Farm Ins. Co., 2007-Ohio-584 (Eleventh Appellate District). Health insurer Qualchoice's insured, Sadie Scaminace, was injured on a property insured under a homeowners insurance policy issued by State Farm. Pursuant to Qualchoice's subrogation clause, Qualchoice sued State Farm under State Farm's medical payment coverage. The trial court granted State Farm's motion for summary judgment because Qualchoice's policy only allowed subrogation for "damages," which required Qualchoice to prove that a tort had been committed. The Eleventh District Court of Appeals disagreed and determined that "damages" could arise from a tort or breach of contract and that Qualchoice's policy language allowed it to pursue its subrogation rights when another party may be financially responsible.

H. Volunteer.

1. An Insurer Who Pays A Claim Knowing That There Is Another Policy Under Which Coverage Has Been Denied Is Not Acting As A Volunteer.

CNH Capital v. Janson Excavating, Inc., 2007-Ohio-2127 (First Appellate District). Ohio Casualty Insurance Company and Owners Insurance Company both insured a piece of machinery called a "tub grinder" which was destroyed by fire. Glen Janson had purchased the Ohio Casualty policy a few weeks before the fire while he was in the process of dissolving one business, Janson Excavating Inc., and incorporating a new business, Janson Inc. The tub grinder was used in connection with both businesses. Ohio Casualty's policy insured Janson Inc., and the Owners policy insured Janson Excavating Inc. Ohio Casualty disclaimed all liability for the loss, asserted that its policy was void ab initio, and refunded the full premium. Owners then paid the claim in full and sued Ohio Casualty for pro rata recovery under the "other insurance" clause. The court found that Janson Inc. had an insurable interest in the tub grinder because it used it, although it did not own it. The court rejected Ohio Casualty's argument that Owners had acted as a volunteer because "Ohio Casualty had disclaimed all liability for the tub-grinder loss." Therefore, the court concluded that there was no other "collectible insurance" at the time that Owners paid the claim. The court found that Owners had a valid claim against Ohio Casualty in its own right and not as subrogee.

I. UM/UIM.

1. The Other Owned Auto Exclusion Applies To Exclude Wrongful Death Claims.

Tuohy v. Taylor, 2007-Ohio-3597 (Third Appellate District). Tuohy was killed in an automobile accident when his vehicle was struck by a vehicle driven by Taylor. At the time of the accident, Tuohy was driving a Chevrolet Blazer titled in his own name. Tuohy was living with his parents who were insured under a Westfield policy providing $300,000 in UM/UIM coverage. The Westfield policy did not list the Chevrolet Blazer as a covered automobile. Tuohy's estate sued Westfield for UM/UIM coverage. Then Tuohy's parents intervened to assert their separate UM/UIM claim under the Westfield policy for the wrongful death of their son.

The Westfield policy contained an "other owned auto exclusion" "for *bodily injury* sustained by an *insured* while operating, *occupying*, or when struck by, any motor vehicle owned by or furnished or available for the regular use of you or any *family member* which is not insured for this coverage under this policy." There was no dispute that the exclusion is permissible under Ohio's current UM/UIM statute.

Tuohy's parents asserted that a wrongful death action is an independent cause of action from that of their son and that the other owned auto exclusion applies to claims "for bodily injury" not wrongful death claims which are "because of bodily injury." The court followed the dissent in *Kotlarczyk v. State Farm Mutual Aut. Ins. Co.*, 2004-Ohio-3447 (Sixth Appellate District) and held that the meaning of the other owned auto exclusion is plain and that "the stated intent is to limit coverage to vehicles specifically identified to the policy." The court noted a conflict between the appellate districts, but rejected the argument that the exclusion was ambiguous as to wrongful death claims because it only excludes claims "for bodily injury." The court, accordingly, found the other owned auto exclusion applicable to both Tuohy and his parents.

2. "Other Owned Auto" Exclusion Ambiguous In Parents' Claim For UIM For Daughter's Death.

Lager v. Miller-Gonzalez, 2007-Ohio-4094 (Sixth Appellate District). Sara Lager, a passenger in her own vehicle that was insured through Nationwide with limits of $50,000, died in an auto accident. Sara's parents had a separate UIM policy through Nationwide with limits of $300,000. They made a claim under their policy for damages arguing they were legally entitled to recover under Ohio's wrongful death statute. Nationwide argued the "other owned auto" exclusion applied because Sara, a relative as defined by the policy, was occupying a vehicle that Sara owned but not listed on the parents' policy. The parents' policy exclusion reads, "This coverage is not applied to anyone *for* bodily injury or derivative claims: *** 3. While any insured operates or occupies a motor vehicle: a) owned by; b) furnished to; or c) available for the regular use of; you or a relative, but not insured for auto liability coverage under this policy." (Emphasis added). The court, following a Tenth Appellate District decision, determined the exclusion did not apply to the parents' claim because the wrongful death claim was *because of* bodily injury and not *for* bodily injury.

3. An Insurance Policy Which Provides No UM/UIM Coverage In Ohio Does Not Provide Coverage For Employees Of The Named Insured Injured In Ohio Within The Course And Scope Of Their Employment.

Janicki v. Zurich Am. Ins. Co., 2007-Ohio-2971 (Second Appellate District). The plaintiff Janicki's employer, Kforce, was insured by Zurich American Insurance Company. The policy provided UM/UIM coverage in certain states by endorsement. Janicki was injured when an underinsured tortfeasor drove through a red light and hit her as she walked across a street. She was acting in the scope of her employment at the time of her injury. She accordingly claimed UM/UIM coverage under her employer's insurance policy with Zurich. The court found, however, that the Zurich policy provided no UM/UIM coverage in Ohio because: 1) it is a multi-state policy, and the only discussion of UM/UIM coverage is found in specific endorsements for Arizona and Florida,

where Kforce is based; 2) no premium was indicated or paid for UM/UIM coverage in Ohio, as opposed to Arizona and Florida; and 3) there was no Ohio UM/UIM endorsement in the policy.

4. R.C. 3937.18 Does Not Prevent An Insurance Carrier From Excluding Coverage For A Passenger In A Vehicle Hit By An Underinsured Motorist.

Engler v. Stafford, 2007-Ohio-2256 (Sixth Appellate District). Grange insured a vehicle hit by an uninsured motorist. The Grange policy defined an insured for purposes of UM/UIM coverage using the following language:

(1) You or any other family member;
(2) Any family member who does not own a motor vehicle;
(3) Any other person while occupying your covered auto with a reasonable belief that that person is entitled to do so, *if that person is not insured for Uninsured Motorist Coverage under another policy*.

The passenger in the vehicle insured by Grange was an insured under a UM/UIM policy issued by Citizens Insurance. Grange, therefore, argued the passenger was not an insured under its UM/UIM coverage because the passenger was an insured under the Citizens policy. The court agreed reasoning the UM/UIM statute (R.C. 3937.18) allows an insurer to define an "insured" for purposes of UM/UIM coverage and deny UM/UIM benefits to a person that was not an insured.

5. An Employer's Code Of Conduct For Outside Business Hours Does Not Bring The Employee Within The Scope And Course Of Employment For Purposes Of UM/UIM Coverage Under The Employer's Policy.

Dalferro v. Knight, 2007-Ohio-2255 (Sixth Appellate District). Gallagher Sharp successfully defended an insurance company at trial and on appeal against a plaintiff who claimed UIM coverage. The plaintiff argued that she was in the scope and course of her employment when the accident occurred because the plaintiff's employer's code of conduct stated, "When participating in public affairs and other off the job activities, all employees are cautioned to refrain from conduct that could reflect negatively on the participant or the company." The trial court directed a verdict for the defense, and the court of appeals affirmed. Finding no nexus between the plaintiff's employment and her activities when the accident occurred, the appellate court held that an employer's code of conduct cautioning a person to act in a prudent manner was not sufficient to bring the employee within the scope and course of her employment.

6. A UIM Carrier Is Entitled To Setoff The Amount Its Insured Received Under A Separate UIM Policy.

Merz v. Motorists Mut. Ins. Co., 2007-Ohio-2293 (Twelfth Appellate District). The plaintiff's decedent, James Merz, was a passenger in a vehicle operated by William Parker when it was involved in an accident caused by the negligence of Robert Centers. Mr. Centers was insured by State Farm and settled with the decedent's estate for his policy limits of $25,000. Mr. Parker was also insured by State Farm with UIM limits of $100,000 per person/$300,000 per accident. With the set-off of the tortfeasor's limits, State Farm settled the UIM claim for $75,000. The decedent

was insured by Motorists Mutual at the time of the accident and maintained a policy with UIM limits of $100,000 per person/$300,000 per accident. Motorists argued that, after the set off, it did not owe any UIM coverage to the estate.

In affirming summary judgment to Motorists, the appellate court determined that the language of R.C. 3937.18 (C) does not mandate a setoff of the amounts available from other UIM providers. Nevertheless, the statute also does not prohibit policy language requiring such a set off. In this case, the setoff provision in the Motorists policy provides that "[w]ith respect to [UIM] coverage...the limits of liability shall be reduced by all sums paid because of bodily injury by or on behalf of persons or organizations who may be legally responsible." Therefore, the trial court properly found that Motorists was entitled to set off from its UIM limits the amount the estate received under the State Farm UIM claim. The appellate court also determined that the estate was attempting to improperly stack UIM coverages in violation of the Motorists policy language.

J. Miscellaneous.

1. Plaintiff May Recover Cost Of Repair Of Vehicle And Residual Diminution In Value.

Cheryl Rakich, et al. v. Anthem Blue-Cross and Blue Shield, et al., 2007-Ohio-3739 (Tenth Appellate District). The plaintiff claimed she was entitled to recover for diminution in value after her car was repaired. The appellate court agreed with the defendant that "plaintiff may not recover both the cost of repairs to her vehicle and the difference in the market value of the vehicle immediately before and immediately after the accident." The trial court recognized that "[s]uch diminution in value subsumes the cost of repair. To permit recovery of both measures of damages would overcompensate the plaintiff for his or her loss." The appellate court, however, found that "residual diminution in value" differs from gross diminution in value and does not overlap with the cost of repairs. The court held that Ohio precedent does not foreclose "a plaintiff's recovery of residual diminution in value in addition to the cost of repairs, provided the plaintiff proves that the damages for the cost of repairs did not fully compensate for the loss occasioned by the defendant's negligence."