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I. SPOLIATION OF EVIDENCE

Spoliation, i.e. "spoiling" or destroying evidence, can have significant consequences. A party damaged by spoliation may either file a separate suit or seek sanctions in a pending suit. This article summarizes the case law in both situations and offers guidelines for analyzing spoliation claims.

A. The Tort Of Spoliation

In 1993 the United States District Court, Southern District of Ohio, Eastern Division, certified[1] the following questions to the Supreme Court of Ohio:

> "1. Does Ohio recognize a claim for intentional or negligent spoliation of evidence and/or tortious interference with prospective civil litigation?
>
> 2. If so,
>
> a. What are the elements of such a claim; and
>
> b. Does such a claim exist between the parties to the primary action (i.e., the action in which the spoliated evidence would have been used), or does it only exist against third-party spoliators?
>
> 3. If the answer to 2(b) is that such a claim exists between the parties to the primary action, may such a claim be brought at the same time as the primary claim, or must the victim of spoliation await an adverse judgment?"

In *Smith v. Howard Johnson Co.* (1993), 67 Ohio St.3d 28, 615 N.E.2d 1037, the Supreme Court of Ohio responded as follows:

> "We answer the three questions as follows: (1) A cause of action exists in tort for interference with or destruction of evidence; (2a) the elements of a claim for interference with or destruction of evidence are (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts; (2b) such a claim should be recognized between the parties to the primary action and against third parties; and (3) such a claim may be brought at the same time as the primary action." See *Viviano v. CBS, Inc.* (1991), 251 N.J. Super. 113, 126, 597 A.2d 543, 550.

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[1] Section 18 of the Supreme Court Practice Rules provides that the Supreme Court may answer a question of law certified (i.e. sent to it) by a federal court. The rule may be invoked when the certifying court, in a proceeding before it, determines there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of the Supreme Court.

Without directly stating that the tort[2] must be intentional, the high court explained that the destruction of evidence must be "willful" and "designed to disrupt the plaintiff's case"– hallmarks of intentional, as opposed to negligent, conduct. Lower courts have affirmed that a claim for spoliation necessarily involves intentional conduct. Thus in *Baker v. Wal-Mart Stores, Inc.*, 10th Dist. No. 01AP-658, 2001-Ohio-8854; *Woodell v. Ormet Primary Aluminum Corp.*, 7th Dist. No. 03 MO 7, 2005-Ohio-4372; and *White v. Ford Motor Co.* (2001), 142 Ohio App.3d 384, 755 N.E.2d 954, the courts all explicitly stated that Ohio does not recognize a cause of action for negligent spoliation.

The Supreme Court of Ohio in another case addressed whether a spoliation suit can be pursued after an initial action between the parties is concluded. In *Davis v. Wal-Mart Stores, Inc.* 93 Ohio St.3d 488, 2001-Ohio-1593, Davis won a judgment against Wal-Mart and then came to believe that Wal-Mart withheld evidence. Davis filed another suit seeking additional recompense. Wal-Mart argued that the second suit was barred by principles of *res judicata*.[3] The Supreme Court concluded that the second suit could proceed because the spoliation was not discovered until after the first suit was concluded. The court held in its syllabus: "[c]laims for spoliation of evidence may be brought after the primary action has been concluded only when evidence of spoliation is not discovered until after the conclusion of the primary action."

B. Sanctions For Spoliation

Spoliation need not be the subject of a suit or even a cross-claim or counterclaim. Rather spoliation can serve as the basis for sanctions in a pending suit.

Unlike the tort of spoliation, which requires intentional conduct, sanctions for spoliation can be predicated on negligent acts. See *Simeone v. Girard City Bd. of Educ.*, 171 Ohio App.3d 633, 2007-Ohio-1775. As noted by the court in *Loukinas v. Roto-Rooter Servs. Co.*, 167 Ohio App.3d 559, 2006-Ohio-3172, courts may impose such sanctions as a matter of public policy to discourage plaintiffs from filing false claims or intentionally discarding evidence that they feel may hurt their case.

Sanctions for spoliation may be awarded upon proof that: (1) the evidence was relevant; (2) a party or its expert has had an opportunity to examine the unaltered evidence; and (3) even though that party was contemplating litigation, the evidence was intentionally or negligently destroyed or altered without providing an opportunity for inspection by the opposing party. See *Watson v. Ford Motor Co.*, 6th Dist. No. E-06-074, 2007-Ohio-6374, ¶51; *Cincinnati Ins. Co. v. GM Corp.*, 6th Dist. No. 94OT017, 1994 Ohio App. LEXIS 4960. If these elements are established, the moving party is entitled to a rebuttable presumption that it was prejudiced by the destruction of evidence, meaning that the burden of persuasion shifts to the other party to show that no prejudice exists. *Bright v. Ford Motor Co.*(1990), 63 Ohio App.3d 256, 578 N.E.2d 547; *Watson*, supra. Prejudice will be

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[2]A "tort" is a private, non-contractual, civil (as opposed to criminal) wrong for which the law provides a remedy.

[3]*Res judicata* ("the thing has been adjudicated") bars relitigation of a matter that has already been decided.

found to exist if there is "a reasonable possibility, based on concrete evidence, that access to the evidence which was destroyed or altered . . . would produce evidence favorable to the objecting party." *Watson*, supra, at ¶14; *Bright*, supra.

The sanction imposed by a court can vary depending on the facts of each case. Sanctions are intended to eliminate the prejudice caused by the spoliation. The severity of the sanctions imposed should reflect the seriousness of the spoliation at issue. *Simeone v. Girard City Bd. of Educ.*, 171 Ohio App.3d 633, 2007-Ohio-1775, ¶74. Thus, in fashioning a remedy, a court considers the intent of the offending party, the reasonableness of the party's actions, the importance of the spoliated evidence, and the resulting prejudice to the opposing party. Id.

A variety of sanctions are possible. For example, in *Watson v. Ford Motor Co.*, the court excluded the testimony of plaintiff's expert regarding the cause of an auto accident when the plaintiff's insurer destroyed the car before the defendant's expert could examine it. Also the court may instruct the jury that it may infer that the spoliated evidence would have been unfavorable to the spoliator. In extreme cases, outright dismissal of the action may be appropriate. See *RFC Capital Corp. v. EarthLink, Inc.*, 10th Dist. No. 03AP-735, 2004-Ohio-7046, ¶87; *Loukinas*, supra, at ¶16. Ohio courts, however, generally adhere to a policy of imposing the least severe sanction available. *Transamerica Ins. Group v. Maytag, Inc.* (1994), 99 Ohio App.3d 203, 206, 650 N.E.2d 169.

C. Guidelines For Evaluating Spoliation Claims

The foregoing cases suggest that spoliation of evidence claims in Ohio may be analyzed in accordance with the following propositions:

1. To determine if a tort cause of action exists for the intentional spoliation of evidence, a plaintiff must establish the following five elements: (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts. *Smith v. Howard Johnson Co.* If any element is missing, a suit should not lie.

2. Such a claim is recognized between the parties to the primary action and against third parties at the same time as the primary action. *Smith v. Howard Johnson Co.* Accordingly, the claim may be pursued in a pending suit against the existing party or a third party (who would be brought in by an amended complaint or third-party complaint).

3. If the spoliation is not discovered in the course of a lawsuit, another suit for spoliation may be brought after the primary action is concluded. *Davis v. Wal-Mart.*

4. Sanctions for spoliation may be imposed for negligent conduct. *Transamerica Ins. Group v. Maytag, Inc.*; *Loukinas v. Roto-Rooter Servs. Co.*

5. Sanctions for spoliation should be commensurate with the prejudice caused. Prejudice will be found if there is a reasonable possibility, based on concrete evidence, that access to the spoliated evidence would produce evidence favorable to the objecting party. *Bright v. Ford Motor Co.*; *Watson v. Ford Motor Co.*

6. A party establishing spoliation of evidence enjoys a rebuttal presumption of prejudice, i.e., the spoliator bears the burden of persuasion that there was no reasonable possibility that the spoliation prejudiced the other party. *Bright v. Ford Motor Co.*; *Watson v. Ford Motor Co.*

II. SUPREME COURT OF OHIO

An Ohio Stop Gap Endorsement Provides Coverage That Is Not Illusory and, There Is No Duty To Defend An Employee Intentional Tort Claim Pursuant To An "Injury Substantially Certain To Occur" Exclusion

Ward v. United Foundries, Inc., 2011-Ohio-3176. The insured/employer purchased a CGL policy with a stop-gap endorsement. That endorsement deleted the exclusions in the CGL policy with respect to "bodily injury" included within the employer's liability hazard, and replaced them with other exclusions listed in the stop-gap endorsement. The exclusion at issue in the stop-gap endorsement barred coverage for: "'Bodily injury' intentionally caused or aggravated by you, or 'bodily injury' resulting from an act which is determined to have been committed by you with the belief that an injury is substantially certain to occur."

When the insured was sued by an employee for an employer intentional tort, the insurer denied any duty to defend based on the foregoing exclusion. The insured filed a declaratory judgment action against the insurer for a declaration of coverage. The insured also sued the insurance agency and broker for failing to obtain the coverage the insured had requested. The insured won in the trial court but lost in the court of appeals. The Supreme Court heard the case after determining that there was a conflict between two courts of appeals on this issue.

The insured advanced two arguments. First, that a defense was owed until a trier of fact determined that an act was committed with the belief that injury was substantially certain to occur. Second, if the exclusion was given effect, any coverage would be illusory. The Supreme Court rejected both arguments.

The court reasoned that there is no language in the exclusion that implies a determination by a fact-finder is required before the exclusion can be enforced. Any purported ambiguity has no legal significance because there is no set of facts under which coverage could exist – all potential claims fall within the exclusion, and the policy provides that there is no duty to defend against any suit to which the insurance does not apply.

As to the claim that any coverage was illusory, the court noted that the endorsement added coverage for "employer's liability hazards" that were expressly excluded in the CGL policy. Thus, coverage was afforded for consequential bodily injury (claims by relatives of an employee for their injuries), dual capacity claims (where the employer is sued both as an employer and in another capacity), and

contribution and indemnification claims of third parties. When there is some benefit to the insured from the face of the endorsement, it is not an illusory contract.

The insured also argued that it did not receive the coverage it intended. The Supreme Court observed that the insured could make that argument against the agency and broker who procured the policy, not the insurer whose policy language is plain, unambiguous, and not misleading.

Limitation Of Action In A Homeowners Policy Is Unambiguous and Enforceable

Dominish v. Nationwide Ins. Co., 2011-Ohio-4102. A storm caused a tree to fall and damaged the insured's house. The insurer twice issued a check to the insured in the same amount, and the insured on both occasions wrote "void" on the checks and returned them to the insurer, deeming the amount insufficient to cover the damage to his home. The insured filed suit against the insurer nearly two years after the loss. The insurer sought summary judgment based upon the following one-year limitation of action provision in the policy: "Any action must be started within one year after the date of loss or damage." The trial court granted the insurer summary judgment. The Lake County Court of Appeals reversed, concluding that the policy language was ambiguous. Alternatively the court reasoned that the insurer, by its actions, had waived its right to enforce the limitation of action provision. In a unanimous decision authored by Justice Pfeiffer, the Supreme Court of Ohio reversed the judgment of the court of appeals and reinstated summary judgment for the insurer. The Supreme Court held that the policy language was not ambiguous and the insurer did not waive its right to enforce the limitation of action clause.

Justice Pfeiffer acknowledged that the word "start" in the clause "is not commonly used to indicate the commencement of a lawsuit" but that "does not mean it refers to something else when it is used in a provision entitled 'Suit Against Us'", and that "though the word 'action' can refer to virtually anything done by a person, there is no reason to think it refers to anything other than a lawsuit when used as part of a two-sentence provision entitled 'Suit Against Us.'"

The Supreme Court distinguished *Hounshell v. Am. States Ins. Co.* (1981), 67 Ohio St.2d 427. In that case the court explained that an insurer may waive a limitation of action provision by recognizing liability or holding out a reasonable hope of adjustment, and by doing so, induce the insured to delay filing a lawsuit until after the contractual period had expired. In the *Dominish* case, though, the insurer asserted the limitation of action clause "at every possible instance" so the insured was not induced to forbear filing suit by anything the insurer did.

III. OHIO COURT OF APPEALS

A. Policy Language, Endorsements, and Exclusions

1. A Named Driver Exclusion Applies To Bar Coverage For Negligent Entrustment Claims Arising From The Excluded Driver's Operation Of A Vehicle.

Roberts v. Reyes, 2011-Ohio-2608 (Ninth App. Dist.). Chrystal Roberts was injured when she was struck by a pick-up truck negligently operated by David Reyes. The pick-up truck was owned by his wife, Iris Reyes. Iris Reyes insured the pick-up truck under an insurance policy issued by State Farm. The policy contained a Driver Exclusion Endorsement that explicitly excluded coverage for David Reyes' operation of any vehicle. Roberts filed suit against David Reyes alleging negligence, and against Iris Reyes alleging negligent entrustment. State Farm filed a declaratory judgment action seeking a declaration that it had no duty to defend or indemnify David or Iris Reyes based on the Driver Exclusion Endorsement. The negligence action was consolidated with the coverage action. The trial court found no coverage for David or Iris Reyes. The Court of Appeals affirmed, holding that "[c]ourts in other states have consistently held that similar driver exclusions in automobile insurance policies preclude any coverage for the excluded driver's negligent operation of the insured vehicle as well as coverage for the vehicle owner's negligent entrustment of the vehicle to the excluded driver."

2. An Insurer Who Adds A Policy Exclusion At Policy Renewal Must Inform The Insured Of The New Exclusion In Order For The Exclusion To Be Enforceable.

Allstate Ins. Co. v. Croom, 2011-Ohio-1697 (Eighth App. Dist.). Scott lived with her minor son Dwayne in a home she leased from Croom. Scott sued Croom for injuries Dwayne allegedly sustained as a result of exposure to lead in the leased home. Croom was insured by Allstate for liability coverage. Allstate filed a declaratory judgment action against both Scott and Croom seeking a declaration that it had no duty to defend or indemnify Croom relative to Scott's suit. Croom never appeared or defended, and default judgment was rendered in favor of Allstate. Scott appealed, claiming that a genuine issue of material fact existed as to whether Croom was properly notified of the lead exposure exclusion. The court of appeals noted that "[i]nsureds are entitled to assume that the terms of a renewal insurance policy are the same as the terms of their original policy unless they have notice to the contrary. An insurer's changes in coverage are invalid and unenforceable unless the insurer provides notice of the changes to its insured." But the court of appeals went on to affirm the trial court's entry of judgment in favor of Allstate because it had

provided Croom with an "Important Notice" indicating the addition of the lead exposure exclusion when his policy was renewed. Thus, the court found the notice requirement satisfied.

3. Delivery Drivers Using Their Own Autos Are Excluded From Coverage Under Their Personal Auto Policies Regardless Of Whether They Are Paid A Specific Sum For Each Delivery Or Paid Hourly.

Discover Prop. & Cas. Co. v. Progressive Cas., 2011-Ohio-3841 (Eighth App. Dist.). Discover Property & Casualty Co. insured Papa Johns Pizza. Papa Johns' pizza delivery drivers operate their own vehicles while making deliveries. While making pizza deliveries, two of Papa Johns' employees struck pedestrians. The drivers' personal auto insurers were Progressive Casualty and Geico Casualty Company. Discover defended Papa Johns in the suits filed by the injured pedestrians and then filed suit against the delivery drivers' personal auto insurers (Progressive and Geico) seeking reimbursement for the cost of defense. Progressive and Geico filed motions for summary judgment arguing that coverage was excluded while the drivers were delivering pizzas "for hire" and "for compensation or a fee." Discover asserted that the drivers were not hired for a "specific sum" to deliver each pizza and, therefore, the policy exclusions did not apply. The trial court and Court of Appeals disagreed and entered judgment in favor of Progressive and Geico, reasoning that "the terms 'compensation' and 'for hire' indicate the exclusions apply to payment to drivers in any form for the deliveries, not just a specific sum."

4. A Passenger Who "Jerks" The Steering Wheel Causing An Accident Is Not "Operating" The Vehicle So As To Fall Within The Unlicensed Driver Exclusion.

Schmucker v. Kurzenberger, 2011-Ohio-3741 (Ninth App. Dist.). Mr. Kurzenberger was driving his vehicle. His daughter was seated next to him. Jessica Schmucker, a friend, was seated in the back passenger seat. When Mr. Kurzenberger's daughter perceived him veering left of center, she jerked the steering wheel to compensate, resulting in Mr. Kurzenberger losing control of the vehicle. The vehicle rolled several times, ejecting Jessica Schmucker, who died as a result of her injuries. Jessica Schmucker's estate sued the Kurzenbergers (father and daughter) seeking recovery for her wrongful death. The Kurzenbergers were insured by Wayne Mutual Insurance Company. The Wayne Mutual policy excluded coverage "for any covered person *** who operates any motor vehicle and is 14 years of age or older and does not possess a valid operator license or learner permit." Mr. Kurzenberger's daughter was 14 years old and did not have a license or learners permit at the time of the accident. Wayne Mutual asserted that by jerking the steering wheel she was "operating" the vehicle. The trial court agreed and held coverage excluded. The Court of Appeals reversed, finding that she was not "operating" the vehicle because "[c]ausing a vehicle to function

requires more than simply directing its steering and would necessarily include control over the vehicle's ability to start, stop, and adjust its speed, as only the vehicle's driver could do."

B. Coverage For Intentional Acts

1. An Intentional Act Exclusion May Not Bar Coverage Where Damage Is Caused By An Incompetent Minor, Who Intended The Act But Not The Resulting Damage.

Sanders v. Nationwide Mut. Ins. Co., 2011-Ohio-1933 (Eighth App. Dist.). Sanders' home, insured by Nationwide Mutual Insurance Company, was destroyed by a fire. She submitted a claim to Nationwide, which conducted an investigation and concluded that Sanders' 17-year-old son intentionally set the fire. Nationwide denied the claim because the insurance policy excluded coverage for any: "loss resulting from an act committed by or at the direction of an insured that may reasonably be expected to result from such acts, or is the intended result from such acts." The Nationwide insurance policy further expressly stated that "[s]uch [intentional] acts exclude coverage for all insureds." Sanders filed suit against Nationwide seeking coverage and alleging bad faith. The trial court entered summary judgment in favor of Nationwide, finding that Sanders' son's actions had been established as intentional by his delinquency adjudication for arson. The Court of Appeals reversed because "the standard used to determine whether a criminal defendant was capable of forming the requisite intent to commit a crime is different than the standard used to determine whether an insured lacked the mental capacity to commit an intentional act." The Court of Appeals reasoned that the question of whether Sanders' son had "the intent to damage plaintiff's house by starting the fire" had never been determined because there was evidence that Sanders' son was mentally ill and therefore may have intended to start the fire without intending damage to the house. The Court of Appeals reversed the judgment in favor of Nationwide and remanded the matter for trial.

C. Workmanship/Construction Claims

1. Commercial General Liability Policy Does Not Provide Coverage For Negligent Workmanship.

The Cincinnati Ins. Co. v. Dorsey Reconditioning, Inc., 2011-Ohio-1499 (Fifth App. Dist.). The insured provided surface preparation and primer for construction piping. The finish coats of the piping later flaked off, and the insured settled a claim against it for $800,000. The trial court granted summary judgment for the insurer in a subsequent declaratory judgment action, finding there was no coverage for negligent workmanship. The Court of Appeals affirmed, citing a report that specifically found it was misapplication of the primer that resulted in the flaking. The Court cited Ohio precedent finding that commercial policies generally do not insure an insured's work itself; rather, the policies generally insure consequential risks that stem from the insured's work. The Court also cited a policy provision excluding coverage for property that must be "restored, repaired or replaced because your work was incorrectly performed on it."

D. Representations Or Warranties On A Policy Application

1. A Clause In A Life Insurance Policy Representing That There Has Been No Material Change In Health Between The Application and Issuance Of The Policy Is A Warranty and Not A Condition Precedent To Coverage. As Such, The Incontestability Clause Bars Enforcement Of The Warranty After Two Years.

Ohio Nat'l Life Assur. Corp. v. Satterfield, 2011-Ohio-2116 (Ninth App. Dist.). Mr. Satterfield purchased a life insurance policy from Ohio National Life Assurance Corporation. At the time of his application, Mr. Satterfield had not been diagnosed with cancer. While his application was pending, he was diagnosed with cancer but he did not update his application. Ohio National issued him a policy based on the information originally provided, and Mr. Satterfield died of cancer 3 ½ years later. Ohio National filed a declaratory judgment action seeking to void the policy based on the material change in Mr. Satterfield's medical history which was not disclosed in the application. Mrs. Satterfield counterclaimed for coverage and alleged bad faith. The Court of Appeals held that under both the relevant insurance policy language and R.C. 3915.05, Ohio National could not contest coverage after two years so long as the contract had been formed. Ohio National argued that the contract of life insurance had not been formed because the clause representing that there had been no "material change" between the application and issuance of the policy was a condition precedent to contract formation. The Court of Appeals disagreed, holding the clause to be a warranty. Because the clause was a warranty, the contract was formed and became incontestable

after two years. The Court of Appeals accordingly found both coverage to have been provided and Ohio National to have acted in bad faith (without reasonable justification) in denying the claim.

E. Misrepresentation

1. An Insurer Is Not Responsible For An Agent's Negligent Misrepresentations As To Coverage.

Wencel v. Am. Family Ins. Co., 2011-Ohio-2290 (Eighth App. Dist.). Wencel's home was insured by American Family Insurance Company. The Wencel's in-ground swimming pool was forced out of the ground by underground water pressure. The American Family policy excluded coverage for damage to a swimming pool caused by the "Pressure or Weight of Water." The Wencels sued for coverage. The Court of Appeals found no coverage available due to the exclusion for property damage caused by water pressure. The Wencel's further asserted "that they believed their policy covered the swimming pool because their agent told them so and because they 'purchased the most expensive policy.'" The Court of Appeals disagreed and held that the Wencels "were required to examine the policy to ensure that the extent of coverage it provided met their needs," and that American Family is "not accountable if the Wencels' insurance agent made negligent oral misrepresentations about the policy terms."

F. Appraisal

1. Policy's Appraisal Provision Stating Appraisers Will "Separately Set The Amount Of Loss" Is Unambiguous And Enforceable.

Stuckman v. Westfield Insurance, 2011-Ohio-2338 (Third App. Dist.). An insurer and its insureds were unable to agree on the amount of loss resulting from a fire at the insureds' residence. The insurer demanded an appraisal pursuant to policy terms, which stated each party would choose an appraiser, and the appraisers or a court will choose an umpire. The appraisers would then "separately set the amount of loss," and if the appraisers disagreed on the loss amount, the umpire would decide. The insureds filed a declaratory action, seeking to either have the appraisal provisions held ambiguous and unenforceable or have the court appoint an umpire. The trial court appointed an umpire, and held that appraisal would be conducted pursuant to the policy terms. The court entered judgment based on the umpire's findings, and the insureds appealed. The insureds claimed that appraisal provision was ambiguous and unenforceable because it did not specify how losses should be determined, only that they be "set." The Court of Appeals disagreed, finding that each party picked its own appraiser. The Court assumed that each party instructed its appraiser as to what needed to be considered, and the umpire appointed by the trial court would address any conflicts.

2. A Court's Authority Under The Appraisal Provisions Of An Insurance Policy Is Limited To Appointing An Umpire And Does Not Extend To Delineating The Appraiser's Authority.

Douglas H. Hull v. Motorists Ins. Group, 2011-Ohio-2502 (Ninth App. Dist.). Douglas Hull insured his building with Motorists Mutual Insurance Company. Hull made a claim for alleged wind and hail damage to that building. Motorist and Hull could not reach an agreed value as to the damage because Motorists believed the damage to be from non-covered wear and tear. Hull invoked the appraisal provision of the Motorist policy. When the appraisers chosen by the parties were unable to select an umpire, Hull petitioned the trial court to appoint an umpire. The trial court appointed an umpire and also ordered the appraisal panel not to "make any determination as to whether or not the building repairs/losses submitted by [Mr. Hull] were or were not caused by the subject wind and hail storm or make any other coverage or causation determination." Motorists appealed, arguing that the order directing the appraisal panel not to consider causation in determining the amount of covered damages was erroneous. The Court of Appeals reversed, holding that "under the insurance policy, the parties only agreed to allow the court to select an umpire, not to restrict the means by which the appraisers and umpire would determine the value of Mr. Hull's property or the amount of loss." Because the only request to the trial court was to appoint an umpire and no declaration as to the policy was sought, the trial court was not permitted to do anything more than appoint an umpire.

G. Additional Insurance Coverage

1. The Duty To Defend Or Indemnify An Additional Insured Exists Only Where The Additional Insured Is Alleged To Be Vicariously Liable For The Negligence Of The Named Insured.

City of Cleveland v. Vandra Bros. Constr., Inc., 2011-Ohio-821 (Eighth App. Dist.). Dawson lost control of his vehicle and hit a telephone pole as the result of driving though a series of potholes in the street. Dawson was injured in the accident. The City of Cleveland had contracted with Vandra to repair the street. As part of that contract, Vandra agreed to indemnify the City. Vandra was insured for liability by Cincinnati Insurance Company. Dawson sued both Vandra and the City. The City cross-claimed against Vandra (for indemnity under the construction contact) and Cincinnati (as an additional insured under Vandra's liability policy) seeking a declaration that they were obligated to indemnify the City as to Dawson's suit. The trial court found no indemnity obligations running to the City. The Court of Appeals agreed, holding that: 1) R.C. 2305.31 "prohibits the City from seeking indemnification from Vandra for damages caused by or resulting from the City's negligence" "regardless of whether such negligence is sole or concurrent"; and 2) Cincinnati owes the City no defense or indemnity coverage because "as an additional insured on the Cincinnati policy, the City

is protected in situations where it is secondarily liable for Vandra's acts" not where, as here, the City is alleged to be "independently negligent from Vandra for allowing dangerous [pothole] conditions to exist" in the roadway.

H. UM/UIM

1. Insured Was Entitled To UM Coverage For An Accident With An Immune Driver.

Ken R. Payton v. Steven Peskins, et al., 2011-Ohio-3905 (Twelfth App. Dist.). Plaintiff was riding a motorcycle when he was struck by a police cruiser in an intersection. He saw the cruiser's emergency lights just before the accident but could not stop in time. Plaintiff sought uninsured motorist coverage under his policy with Progressive. The Progressive policy provided that Progressive "will pay for damages that an insured person is legally entitled to recover from an uninsured motorist or underinsured motorist because of bodily injury." The Progressive policy further provided that "an 'uninsured motorist' does not include an owner or operator of a motor vehicle: (c) that is owned by any governmental unit or agency unless the operator of the motor vehicle has immunity under Chapter 2744 of the Ohio Revised Code..." The Court of Appeals affirmed the decision of the trial court finding coverage, and held that the Progressive policy "carved out an exception to the 'legally entitled to recover' language by stating that the policy holder could not recover for uninsured motorist protection when bodily injury was caused by a government-owned vehicle unless that vehicle was driven by an operator who has immunity under R.C. Chapter 2744."

I. Bad Faith

1. An Insurer Has No Duty To Third Parties And Cannot Be Held Liable In Bad Faith For Its Conduct As To Injured Third-Parties.

Intercity Auto Sales, Inc. v. Evans, 2011-Ohio-1378 (Eighth App. Dist.). Evans was insured for liability coverage by Allstate. Evans caused an auto accident which resulted in damage to a vehicle owned by Intercity. Intercity filed suit against both Evans and Evans' insurer, Allstate. Evans admitted liability. Intercity then brought a bad faith claim against Allstate, claiming that its failure to pay Intercity earlier and provide reimbursement for a substitute rental vehicle, among other things, constituted bad faith. The court disagreed, holding that because Intercity was not insured under the Allstate policy issued to Evans, Allstate had no duty to Intercity, and Intercity "therefore, has no cause of action for bad faith against the tortfeasor's insurance company."

J. Miscellaneous

1. Actual Ownership Of Real Property Not Necessary To Create Insurable Interest Under Homeowner's Policy.

Auto-Owners Mutual Ins. Co. v. Mohammed, 2011-Ohio-4009 (Second App. Dist.). A tenant began renting real property from a landlord, and began negotiations to execute a land installment contract to purchase the property. In anticipation thereof, the landlord added the tenant as an additional insured under her Auto-Owners homeowner's insurance policy, and the tenant obtained a separate homeowner's policy through Nationwide. Shortly thereafter, a fire completely destroyed the property. Litigation ensued, and it was determined that the parties had never properly executed the land installment contract. Both Auto-Owners and Nationwide filed declaratory judgment actions seeking a finding that they owed no coverage to the tenant. The trial court granted the insurers' motions, finding that because the land installment contract was invalid, the tenant did not have insurable interest in the property. In reversing, the Court of Appeals noted that actual ownership is not essential to create an insurable interest; all that is required is an interest in the preservation of the subject matter. While the tenant had no ownership rights to the real property, both policies of insurance specifically covered "personal property owned or used by an insured at the residence premises." Accordingly, the lack of a valid land contract did not preclude coverage for the personal property.