SUPREME COURT UPDATE
RECENT DECISIONS, PENDING CASES AND FUTURE CHALLENGES

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I. ABOUT THE SUPREME COURT OF OHIO

A. Ohio Supreme Court Jurisdiction

The Supreme Court of Ohio is the court of last resort in Ohio. Most of the Court's cases are appeals from the 12 Courts of Appeals. The Court may accept any civil case originating from the Court of Appeals that the Court finds to be "of public or great general interest", involves a "substantial constitutional question," cases where conflicting opinions exists on the same question from two or more Courts of Appeals, and cases where the federal court has certified a question of state law. Sp.Ct.Prac.R. 5.02(A)(1) and (3); Sp.Ct.Prac.R. 5.03 and 5.04.

The Supreme Court of Ohio also has original jurisdiction over writ actions including writs of mandamus (compelling a public official to perform a required act), writs of procedendo (compelling a lower court to exercise jurisdiction), writs of prohibition (order preventing a lower court from exercising jurisdiction), and writs of quo warranto (order providing for the ouster of a person or a corporation for misuse or abuse of a public office, corporate office or franchise).

B. The Current Justices of the Supreme Court of Ohio

The Supreme Court of Ohio is comprised of seven members – a Chief Justice and six Associate Justices. Judges in Ohio are selected in nonpartisan general elections, which means that party affiliations are not listed on the ballot. However, judicial candidates are nominated in partisan primary elections and are endorsed by political parties.

Ohio voters elect two Associate Justices to the Court during each even numbered election year. When the Chief Justice seat comes up for election, a total of three Supreme Court seats will be up for election. The Chief Justice and six Associate Justices serve six-year terms. If a vacancy occurs prior to an election, then the Governor appoints a replacement.

Chief Justice Maureen O'Connor - Chief Justice O'Connor, a Republican, is the 10th Chief Justice of the Supreme Court of Ohio and the first woman in Ohio's history

to lead the Supreme Court of Ohio. She was elected to the Supreme Court of Ohio as an Associate Justice in 2002, giving the Court its first ever female majority. She was re-elected in November 2008. She was elected Chief Justice in 2010, and her current term expires in 2016. Currently, there is a female majority on the Court.

Justice Paul E. Pfeifer - Justice Pfeifer, a Republican, was first elected to the Court in 1992. Presently, he is the longest serving Justice on the bench and is currently serving his fourth term. Prior to joining the Court, Justice Pfeifer had a career in state government. He previously served both houses of the Ohio General Assembly, including one term in the House of Representatives and four terms in the Senate. His current term expires on January 1, 2017. Justice Pfeifer, however, cannot run for re-election due to the state's age-restriction law.

Justice Terrence O'Donnell – Justice Terrence O'Donnell, a Republican, was appointed to the Supreme Court of Ohio in 2003 by Governor Bob Taft. Justice O'Donnell has led efforts to increase professionalism among lawyers and judges and implemented the Lawyer to Lawyer Mentoring Program which connects experienced attorneys with newly admitted lawyers. His current term expires on December 31, 2018. Justice O'Donnell cannot run for re-election due to the state's age-restriction law.

Justice Judith Ann Lanzinger – Justice Lanzinger, a Republican, was elected to the Supreme Court of Ohio in 2004. In 2004, Justice Lanzinger became the only person in Ohio ever elected to all four levels of the state courts. She previously served on the Sixth District Court of Appeals, the Lucas County Court of Common Pleas and the Toledo Municipal Court. Justice Lanzinger also has her own blog to educate the public about the courts and the justice system: http://justicejudy.blogspot.com

Justice Lanzinger's current term expires on December 31, 2016. She cannot run for re-election due to the state's age-restriction law.

Justice Sharon L. Kennedy – Justice Kennedy, a Republican, was elected to the Supreme Court of Ohio in 2012 to serve the remainder of the unexpired term previously held by Justice Yvette McGee Brown. Justice Kennedy's current term expires on December 31, 2014. Prior to joining the Court, Justice Kennedy served at the Butler County Court of Common Pleas, Domestic Relations Division. She is also a former police officer.

Justice Kennedy is running for election to a full term in 2014. She will face State Representative Tom Letson of Warren in the general election on November 4, 2014.

Justice Judith L. French – Justice French, a Republican, was appointed to the Supreme Court of Ohio in January 2013 by Governor John Kasich to replace retiring Justice Evelyn Lundberg Stratton. Justice French's term expires in 2014. Prior to

joining the Court, Justice French served as an assistant Ohio attorney general, counsel to the Governor, and as a judge on the Tenth District Court of Appeals.

Justice French is running for election to a full term in 2014. She will face Cuyahoga County Court of Common Pleas Judge John P. O'Donnell in the general election on November 4, 2014

Justice William M. O'Neill – Justice O'Neill, a Democrat, was recently elected to the Court in 2012. Prior to joining the Court, Justice O'Neill served on the Eleventh District Court of Appeals. He was also a registered nurse at Hillcrest Hospital and an assistant Ohio attorney general. He is a Vietnam veteran and retired from the Ohio National Guard as a Judge Advocate General. In 2007, he was inducted into the Ohio Veterans Hall of Fame.

Justice O'Neill's term expires on January 1, 2019. He cannot run for re-election due to the state's age-restriction law.

C. Rule-Making Authority of the Supreme Court of Ohio

The Constitution gives the Supreme Court of Ohio authority to prescribe rules governing practice and procedure in all state courts. Procedural rules promulgated by the Court become effective unless both houses of the Ohio General Assembly adopt a concurrent resolution of disapproval. Before deciding whether to adopt or amend a rule, the Court seeks public comment. The Court first publishes the proposed rules and amendments in both the Ohio State Bar Association Reports and the Ohio Official Advance Sheets and indicates the comment period and the staff member in charge of receiving the public comments.

D. Statistics for 2013 Caseload

The Supreme Court of Ohio 2013 Annual Report provides statistical information about the number of cases filed and accepted for review in 2013. In 2013, 2,055 new cases were filed, marking a .9% decrease from 2012 which saw 2,187 new cases filed. This is the fifth consecutive year in which the Court saw a decline in the number of new cases filed.

In reviewing the final disposition numbers from the 2013 Annual Report, the Supreme Court of Ohio reviewed 1,390 discretionary appeals (both felony and non-felony cases). A discretionary appeal is an appeal involving a question of public or great general interest or a substantial constitutional question. Out of 1,390 cases, only 67 cases (or less than 5%) were accepted by the Court for merit review. In comparison to 2012, the Court reviewed 1,396 discretionary appeals. Out of 1,396 cases, only 99 cases (or 7%) were accepted by the Court for merit review.

In 2013, criminal cases made up 46% of the Court's caseload, which is consistent with the Court's caseload in prior years. Civil cases filed with the Court increased from 19% in 2012 to 23% in 2013.

Finally, in 2013, the Court disposed of 2,040 cases. In all cases, from the date of filing to the date of final disposition, the average number of days a case was pending before the Court was 124 days in 2013 (or approximately 4 months). When a jurisdictional appeal was accepted for merit review, it took the Court an average of 408 days (or less than 1 year and 2 months) from the filing of the notice of appeal to reach a final disposition in the case. It took the Court an average of 96 days (slightly more than 3 months) to consider and dispose of a jurisdictional appeal not accepted for merit review. Once a case has been submitted for determination (such as after oral argument), it took the Court 115 days (or less than 4 months) to issue an opinion.

II. SIGNIFICANT DECISIONS FROM THE SUPREME COURT OF OHIO

A. *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552

In *Havel*, the Supreme Court of Ohio was asked to decide whether R.C. 2314.21(B), which provides for mandatory bifurcation of trials in which a punitive damages claim is made, supersedes Civ.R. 42(B), which vests a court with discretion to bifurcate a trial.

The Court held that R.C. 2315.21(B) creates, defines, and regulates a substantive, enforceable right to separate stages of trial relating to the presentation of evidence for compensatory and punitive damages in tort actions and therefore, takes precedence over Civ.R. 42(B), and does not violate the Ohio Constitution.

The underlying complaint involved medical malpractice, wrongful death and statutory claims and sought both compensatory and punitive damages. Defendants moved to bifurcate the trial into two stages per R.C. 2315.21(B), but the trial court denied the motion. On appeal, the Eighth Appellate District held R.C. 2315.21(B) unconstitutional because it conflicted with Civ.R. 42(B) by "purporting to legislate a strictly procedural matter already addressed by the Civil Rules." *Havel* at ¶ 8. Because a conflict existed between the Eighth and Tenth Appellate Districts, the Supreme Court of Ohio agreed to resolve the conflict.

In resolving the issue, the Supreme Court of Ohio stated "'if a rule created pursuant to Section 5(B), Article IV conflicts with a statute, the rule will control for procedural matters, and the statute will control for matters of substantive law.'" *Id.* at ¶ 12. The Court found the statute and the rule to be in conflict; therefore, the determinative issue was whether the statute was a substantive or procedural law.

The Court found that R.C. 2315.21(B) created a substantive right, and therefore controls over Civ.R. 42(B).

> By eliminating judicial discretion, R.C. 2315.21(B) creates a concomitant right to bifurcation: because the court cannot deny a request for bifurcation under the specified circumstances, the statute turns a request into a demand for or an entitlement to bifurcation by controlling the outcome.
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> [A]lthough R.C. 2315.21(B) may be 'packaged in procedural wrapping,' it is a substantive law because it creates a right to 'address potential injustice.'

Id. at ¶26, 29.

B. *Flynn v. Fairview Village Retirement Community, Ltd.*, 132 Ohio St.3d 199, 2012-Ohio-2582.

Flynn addressed whether the denial of a motion to bifurcate is a final, appealable order. Defendants moved to bifurcate the trial to separate the damages claims pursuant to R.C. 2315.21(B) which requires the trial to bifurcate a tort action upon motion of any party. The trial court denied the motion, and defendants appealed. The appellate court dismissed the appeal for lack of a final, appealable order.

In reversing the Court of Appeals, the Supreme Court of Ohio stated that, by denying the motion to bifurcate under R.C. 2315.21(B), the trial court "implicitly" determined that the statute's mandatory bifurcation was unconstitutional on the grounds that the statute conflicts with the bifurcation rule in Civ.R. 42(B). While Civ.R. 42(B) gives trial courts discretion to bifurcate trials generally, the statute makes bifurcation of a jury trial involving a punitive damage claim in a tort action mandatory upon the filing of a motion. The appellate court's rationale for dismissing the appeal was rejected earlier in *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552, where the Supreme Court held that the bifurcation mandated by R.C. 2315.21(B) is constitutional and does not conflict with Civ.R. 42(B).

C. *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017

In *Schwartzwald*, the Supreme Court of Ohio held that a mortgage company did not have standing to file a foreclosure action before it received an assignment of the mortgage. Standing is determined at the time of the filing of the complaint.

At issue in this mortgage foreclosure action was whether a party's lack of standing could be cured by the assignment of the mortgage prior to judgment. Federal Home

Loan Mortgage Corporation ("Federal Home Loan") commenced a foreclosure action prior to the assignment of the promissory note and mortgage securing the homeowners' loan. The homeowners argued that Federal Home Loan lacked standing, but the trial court entered judgment in favor of Federal Home Loan. The Second District Court of Appeals affirmed the judgment and held that although Federal Home Loan lacked standing at the time it commenced the foreclosure action, it cured that defect by the assignment of the mortgage and transfer of the note prior to entry of judgment.

The Supreme Court of Ohio disagreed and held that because Federal Home Loan failed to establish an interest in the note or mortgage at the time it commenced foreclosure proceedings, it failed to establish it suffered any injury and it had no standing. Furthermore, it rejected Federal Home Loan's argument that it could substitute the real party in interest pursuant to Civ. R. 17. Specifically, the Court held that "a common pleas court cannot substitute a real party in interest for another party if no party with standing has invoked its jurisdiction in the first instance." *Schwartzwald* at ¶38. Thus, "a litigant cannot pursuant to Civ.R. 17(A) cure the lack of standing after commencement of the action by obtaining an interest in the subject of the litigation and substituting itself as the real party in interest." *Id.* at ¶39.

In light of this decision, it is anticipated that homeowners may attempt to vacate prior judgments against them in foreclosure matters. It may also increase the filing of lawsuits against lenders, servicers and the law firms that file foreclosure actions on behalf of their clients, claiming that the filing of a foreclosure action on behalf of a party without standing violates the Fair Debt Collection Practices Act ("FDCPA") and the Ohio Consumer Sales Practices Act ("CSPA").

D. *Acordia of Ohio, L.L.C. v. Fishel*, 133 Ohio St.3d 356, 2012-Ohio-4648

The Supreme Court of Ohio partially overruled its prior decision in *Acordia of Ohio L.L.C. v. Fishel*, ("*Acordia I*") and held that the surviving company in a merger has the right to enforce non-compete agreements as if it stepped into the shoes of the acquired company.

In *Acordia I*, the Court held that the surviving company in a merger could not enforce non-compete agreements that employees signed with the absorbed company unless the agreements contained language stating that the "successors and assigns" of the original company were empowered to enforce the agreement. Based on that holding, the Court held that the surviving company lacked standing to enforce the acquired company's non-compete agreements. Upon reconsideration of its prior decision, the Court held that *Acordia I* was erroneously decided based on a misreading of prior case law.

In *Acordia II*, the Court stated that the fact that the absorbed company no longer exists as a separate entity does not mean it has been completely erased from existence. Instead, the absorbed company becomes a part of the surviving company after the merger. The surviving company, therefore, has the ability to enforce non-compete

covenants as if it had "stepped into the shoes" of the absorbed company. *Acordia II* at ¶7. As a result, the omission of "successors and assigns" language is immaterial.

The Court narrowly confined its holding to issues involving non-compete agreements. *Acordia II* does not apply to other contracts transferred as a result of a merger. Additionally, employees can still challenge the validity of restrictive covenants based on whether the agreements are reasonable and whether the merger created additional obligations or duties such that the agreements should not be enforced.

E. *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317

In *Hewitt*, the Supreme Court of Ohio addressed the meanings of the terms "equipment safety guard" and "deliberate removal" in R.C. 2745.01(C), Ohio's Employer Intentional Tort Statute. The Court held that "equipment safety guard" means only a device on a machine that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment. It does not include "personal items" such as protective rubber gloves and sleeves that an employee controls. The Court also held that the "deliberate removal" of an equipment safety guard occurs when an employer makes a deliberate decision to lift, push aside, take off, or otherwise eliminate that guard.

Plaintiff-employee was working as an apprentice lineman for the defendant-employer replacing old electrical power lines. Plaintiff's job was to tie in the new de-energized power line. Company policy required workers to use protective rubber gloves and sleeves in case the lines became energized. Plaintiff admitted that gloves were available but claimed that his supervisor told him that he should not need the gloves and sleeves because the lines were de-energized. While plaintiff was working without protective gloves or sleeves, the wire became energized and he was severely burned. Plaintiff filed a lawsuit claiming that the defendant-employer "removed" the protective gloves and sleeves that were the safety guards creating a barrier between him and the electrical current, thereby entitling him to a rebuttal presumption of his employer's intent to injure him. The case proceeded to trial and the jury found for the plaintiff. The Eighth District Court of Appeals affirmed finding that protective rubber gloves and sleeves were "equipment safety guards" under R.C. 2745.01(C) and the decision by plaintiff's supervisor to have plaintiff work without the gloves and sleeves amounted to the "deliberate removal" of a safety guard.

The Supreme Court of Ohio disagreed holding that for purposes of R.C. 2745.01(C), freestanding items that serve as physical barriers between the employee and potential exposure to injury, such as rubber gloves and sleeves, are not equipment safety guards as they are personal protective items that the employee controls. *Id.* at ¶26. An employee's failure to use them, or an employer's failure to require an employee to use them, does not constitute the deliberate removal by an employer of equipment safety guard. An "equipment safety guard" means "a device that is designed to shield the operator from exposure to injury by a dangerous aspect of the equipment." *Id.* The

"deliberate removal" of an equipment safety guard occurs when an employer makes a deliberate decision to lift, push aside, take off, or otherwise eliminate that guard from the machine. *Id.* at ¶30. However, "an employer's failure to train or instruct an employee on a safety procedure does not constitute the deliberate removal of an equipment safety guard." *Id.* at ¶29. Likewise, the employer's failure to place guardrail and/or scaffolding does not amount to a deliberate removal when the guardrail and/or scaffolding were never in place. *Id.*

Hewitt put an end to the confusion created by various appellate districts which enabled plaintiffs' attorneys to prevent employers from obtaining summary judgment when it was asserted that a safety feature had been removed, even if the feature was free-standing and the removal was unintentional. It is anticipated that this decision will result in fewer intentional tort cases being filed in Ohio.

F. *Houdek v. ThyssenKrupp Materials N.A., Inc.*, 134 Ohio St.3d 491, 2012-Ohio-5685

In *Houdek*, the Supreme Court of Ohio addressed the definition of the term "substantially certain" in R.C. 2745.01(B), Ohio's Employer Intentional Tort Statute. The statute defines "substantially certain" as acting "with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death." In upholding R.C. 2745.01, the Court reaffirmed that "absent a deliberate intent to injure another, an employer is not liable for a claim alleging an employer intentional tort, and the injured employee's exclusive remedy is within the workers' compensation system." *Houdek* at ¶25.

The Supreme Court of Ohio reversed the controversial decision of the Eighth District Court of Appeals which rejected the statutory definition of "substantially certain" and concluded that the definition in R.C. 2745.01(B) resulted from a "scrivener's error." *Id.* at ¶5. Plaintiff brought his employer intentional tort claim against ThyssenKrupp for injuries he sustained when he was struck by a sideloading forklift. Mr. Houdek asserted that his employer had knowledge that injury would be substantially certain to occur when his supervisor directed him to work in a warehouse aisle where a co-worker was operating the sideloader. Mr. Houdek also claimed that the failure to use proper lighting, safety cones and other protective gear created a presumption of intent to injure him under R.C. 2745.01(C). The Court of Appeals deviated from the intent-to-injure standard by applying an objective test (what a reasonably prudent employer would believe) rather than a subjective test (what the employer actually believed). The appellate court reversed summary judgment that had been granted by the trial court in favor of the employer.

In reversing the appellate court, the Supreme Court of Ohio found that R.C. 2745.01(C) was inapplicable. *Id.* at ¶27. With respect to the "substantially certain" issue, the Court explained "Houdek's injuries are the result of a tragic accident, and at most, the evidence shows that this accident may have been avoided had certain

precautions been taken. However, because this evidence does not show that ThyssenKrupp deliberately intended to injure Houdek, pursuant to R.C. 2745.01, ThyssenKrupp is not liable for damages resulting from an intentional tort." *Id.* at ¶28. In its strongly worded conclusion, the Court admonished the appellate court: "The Ohio Constitution vests the General Assembly, not the courts, with the legislative powers of government. Our role, in exercise of the judicial power granted to us by the Constitution, is to interpret and apply the law enacted by the General Assembly, not to rewrite it." *Id.* at ¶29.

G. *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711

In examining whether an exception exists for the statutory immunity generally provided to political subdivisions and their employees, the Supreme Court of Ohio clarified that the standards of "willful," "wanton," and "reckless" are "different and distinct degrees of care and are not interchangeable." *Anderson* at ¶31. Also, the Court held that the violation of a statute, ordinance, or departmental policy enacted for the safety of the public is not per se willful, wanton, or reckless conduct but may be relevant to determining the culpability of an employee's conduct.

In *Anderson*, the plaintiff's husband was killed when his car collided with a fire truck that was responding to an emergency. The trial court granted the city's motion for summary judgment based on the finding that the city was entitled to immunity under R.C. 2744.02(B)(1)(b), because the fire truck was responding to an emergency call and the operation of the fire truck did not constitute willful or wanton misconduct. The trial court further concluded that the two firefighters in the fire truck were entitled to immunity under R.C. 2744.03(A)(6)(b), because the plaintiff failed to present any evidence that the firefighters had acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

The Fifth District Court of Appeals reversed the trial court's summary judgment holding that "[t]he 'wanton or reckless misconduct' standard set forth in R.C. 2744.03(A)(6) and [the] 'willful or wanton misconduct' standard set forth in R.C. 2744.02(B)(1)[b] are functionally equivalent." *Anderson* at ¶15. The appellate court found that genuine issues of material fact existed as to whether the operation of the fire truck was reckless.

In affirming the reversal of summary judgment, the Supreme Court of Ohio held that the legal standards for willful, wanton, and reckless conduct describe different and distinct degrees of care and are not interchangeable. "Willful misconduct" implies "an intentional deviation from a clear duty or from a definite rule of conduct, a deliberate purpose not to discharge some duty necessary to safety, or purposefully doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury." *Anderson* at ¶32. "Wanton misconduct" is "the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is great probability that harm will result." *Id.* "Reckless conduct" is "characterized by the

conscious disregard of or indifference to a known or obvious risk of harm to another which is unreasonable under the circumstances and substantially greater than negligent conduct." *Id.* The Court also made clear that "the violation of a statute, ordinance, or departmental policy enacted for the safety of the public is not per se willful, wanton, or reckless conduct, but may be relevant to determining the culpability of a course of conduct." *Id.* at ¶37. But without evidence of knowledge that the violations "will in all probability result in injury," evidence that policies have been violated "'demonstrates negligence at best.'" *Id.* at ¶38.

H. *Moretz v. Muakkassa*, 137 Ohio St.3d 171, 2013-Ohio-4656

The Supreme Court of Ohio held that expert testimony is not required to establish the reasonableness of "write-offs" reflected in medical bills. The Court concluded that medical bills showing "write-offs" and amounts accepted by medical providers as full payment can be admitted under R.C. 2317.421 as prima facie evidence of the reasonable value of medical services.

In a medical malpractice action, the trial court prohibited the defendant-physician from presenting evidence of "write-offs" to contest the plaintiff-patient's medical bills because the defendant-physician had no medical expert to support their reasonableness. The trial court concluded that medical bills were made presumptively reasonable by R.C. 2317.421, but medical write-offs were not. The jury returned a verdict for the plaintiff-patient, and the Court of Appeals affirmed.

The Supreme Court of Ohio disagreed. R.C. 2317.421 provides that "a written bill or statement, or any relevant portion thereof" establishes a presumption of the reasonableness of medical charges and fees. According to the Court, the phrase "any relevant portion thereof" broadens the meaning of the words "bill or statement" and reflects the General Assembly's intent to include "more than just charges." *Moretz* at ¶92. Additionally, "there is no language in R.C. 2317.421 that excludes write-offs from the statutory presumption." *Id.* The Court further explained:

> There is no basis for requiring expert-witness testimony that the actual amounts charged for medical services are reasonable, when the initial charges for the services are admissible into evidence without such testimony. Eliminating the need for expert testimony allows both parties to avoid the expense and 'the usually empty ceremonial' of expert testimony on reasonableness. Thus, we conclude that R.C. 2317.421 obviates the necessity of expert testimony for the admission of evidence of write-offs, reflected on medical bills and statements, as prima facie evidence of the reasonable value of medical services.

(Citation omitted.) *Id.* at ¶92.

The decision in *Moretz* should be interpreted by trial courts in Ohio as establishing a clear rule of law: Medical bills and statements that comply with the requirements of R.C. 2317.421 should be admissible in evidence without the need of expert testimony. The medical bills and statements can be used to prove not only the amount billed, but also the amount accepted as full payment. This evidence, both the amount billed and the amount eventually accepted as payment, may be considered by the trier of fact in determining damages.

I. *Anderson v. Barclay's Capital Real Estate, Inc.*, 136 Ohio St.3d 31, 2013-Ohio-1933

In *Anderson,* the Supreme Court of Ohio was asked to determine whether the Ohio Consumer Sales Practices Act ("CSPA"), codified in R.C. Chapter 1345, applies to the servicing of residential mortgage loans.

Barclay's Capital Real Estate, Inc. was a mortgage servicer that accepted, applied, and distributed loan payments and other fees regarding residential mortgage accounts. It maintained a call center, handled customer disputes regarding their mortgage loans, negotiated modification or forbearance agreements with customers, and purchased insurance for its customers. The United States District Court for the Northern District of Ohio certified the question of whether the CSPA applies to mortgage servicers such as Barclay's.

The CSPA prohibits unfair or deceptive acts and unconscionable acts or practices by suppliers in consumer transactions. Therefore, the Court was required to determine whether mortgage servicing was a "consumer transaction" and whether Barclay's was a "supplier." A "consumer transaction" is defined as only "[a] sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible[.]" R.C. 1345.01(A).

The Supreme Court of Ohio determined that the CSPA specifically excludes real estate transactions from its definition of "consumer transaction" and that "mortgage servicing *** is a 'collateral service' associated with a pure real estate transaction." *Anderson* at ¶10, 14. Furthermore, the Court held that mortgage servicing is not a "consumer transaction" because there is no transfer of an item of goods, a service, a franchise, an intangible, to an individual. The Court explained:

> Here, the mortgage servicer neither sells nor gives the borrower the services it provides to the owner of the mortgage and note. A mortgage servicer provides a service to a financial institution, but providing such a service to a financial institution is neither analogous to transferring a service to a borrower nor sufficient to impose liability under the CSPA. *** Thus, under a plain reading of the statute, the servicing of a borrower's residential mortgage loan is not a 'consumer transaction' as defined in R.C. 1345.01(A). The statute simply cannot be read to cover

> instances in which a financial institution contracts with an entity to service its loans or mortgages.

Id. at ¶17.

As respects the second question, the Court determined that entities that service residential mortgage loans are not "suppliers" within the meaning of the CSPA. "Mortgage servicers are not part of [the transaction between the financial institution and the borrower]. And simply servicing the mortgage is not causing a consumer transaction to happen." *Id.* at ¶31. Therefore, the Court held that the CSPA does not apply to the servicing of residential mortgage loans.

Since mortgage servicing and real estate transactions fall outside the scope of a consumer transaction, this decision is expected to limit the number of CSPA cases involving such transactions.

III. PENDING CASES BEFORE THE SUPREME COURT OF OHIO

A. *Wallace v. Golden Comb, Inc.*, Supreme Court Case No. 2014-0064, accepted for review on March 26, 2014

This case from the Eighth District Court of Appeals involves landlord liability. The issue accepted for review involves whether a landlord who retains an independent contractor to perform improvements to the rental property can rely upon the approval of the construction plans and government inspections as being in compliance with the Ohio Basic Building Code ("OBBC"). This case also raises the question of whether the landlord can be held liable for a latent defect in the work when the landlord neither knew nor should have known of circumstances causing the building code violation. *See Wallace v. Golden Comb, Inc.*, 8th Dist. No. 99910, 2013-Ohio-5320.

Sivit v. Village Green of Beachwood, L.P., Supreme Court Case No. 2013-0586, involves similar issues and was argued to the Court on March 11, 2014.

B. *Smith v. Chen*, Supreme Court Case No. 2013-2008, accepted for review on March 26, 2014

This medical malpractice case involves the production of surveillance videotapes which defense counsel intended to use solely as impeachment evidence. Defendants (a doctor and his employer), claimed that the video was prepared for trial and thus, privileged attorney work-product, and that the local court rules did not require parties to disclose impeachment evidence before trial. The trial court ordered the surveillance videotapes to be produced because the plaintiff-patient established good cause under Civ.R. 26(B)(3) for its production. The plaintiff argued that the substance of the video might reveal the extent of the patient's injuries which were directly at issue in the case. The trial court determined that the plaintiff had a compelling interest in viewing the

video to ascertain its quality and accuracy, whether defendants had manipulated the video images and whether the person in the video was actually the plaintiff. Additionally, the plaintiff was unable to obtain the video elsewhere since it was in the sole control of the doctor and his employer. The lower court concluded that the surprise and unfairness to plaintiff outweighed the attorney work-product privileged. The Tenth District Court of Appeals affirmed, *Smith v. Chen,* 10th Dist. No. 12AP-1027, 2013-Ohio-4931, and defendants appealed to the Supreme Court of Ohio.

C. *Infinite Security Solutions, LLC v. Karam Properties, I, LTD,* Supreme Court Case No. 2013-1795, accepted for review on January 22, 2014

This case from the Sixth District Court of Appeals involves the review of a dismissal entry. In this case, the parties reached a settlement agreement. Although the settlement agreement was discussed in open court, no record was made of those proceedings. And the settlement agreement was not reduced to writing and signed by the parties. The trial court, sua sponte, entered a judgment dismissing the action. Afterwards, one of the parties filed a Civ.R. 60(B) motion and a motion to determine who had priority over the settlement funds. Another party filed a motion to enforce the settlement agreement. The trial court determined that its original judgment was a conditional dismissal and therefore retained jurisdiction to enforce the settlement agreement and decide the priority issue.

Upon consideration, the Sixth District Court of Appeals dismissed the appeal because the trial court lacked jurisdiction to enforce the settlement agreement. Therefore, its rulings on the motion to enforce settlement and priority issues were void. Since the dismissal entry did not include the terms of the settlement agreement or expressly reserve jurisdiction to enforce the agreement, it constituted an unconditional dismissal. Since the Sixth Appellate District's holding was in conflict with two other appellate court districts, the court certified the record to the Supreme Court of Ohio for consideration of whether a dismissal entry that did not either embody the terms of a settlement agreement or expressly reserve jurisdiction to enforce the terms of the settlement agreement was an unconditional dismissal. *See Infinite Security Solutions, LLC v. Karam Properties, I, LTD*, 6th Dist. No. L-12-1313, 2013-Ohio-4415.

D. *Wilkins v. Sha'ste Inc.,* Supreme Court Case No. 2013-1794, accepted for review on March 12, 2014

This case from the Eighth District Court of Appeals raises the issue of whether a trial court may award reasonable attorney fees to a prevailing party under Civ.R. 37 regardless of the party's fee arrangement with counsel. The defendant was ordered to pay attorney fees in the amount of $1,000 as a discovery sanction under Civ.R. 37. The plaintiff was represented by a law clinic operated by Case Western Reserve University Law School in a dispute involving a home repair contract. Students in the law clinic are certified legal interns representing low-income clients under the supervision of licensed attorneys. Although the law clinic agreed not to charge

plaintiff any fees for her representation, her retainer agreement specifically contemplated the award of attorney fees from adverse parties, and plaintiff agreed to be responsible for paying other costs and expenses related to the case.

After the defendant failed to timely respond to plaintiff's discovery request, plaintiff filed a motion to compel discovery and for sanctions under Civ.R. 37(A). Defendant did not oppose the motion and the trial court awarded attorney fees in the amount of $1,000. In a 2-1 decision, the Court of Appeals "albeit reluctantly" reversed and held that the plaintiff was not entitled to an award of attorney fees as a sanction under Civ.R. 37(A)(4) because the plaintiff retained a clinic operated by a law school to represent her in a contract dispute and was unable to produce evidence that she actually incurred attorney fees as a result of the legal interns obtaining an order compelling discovery. *See Wilkins v. Sha'ste Inc.*, 8th Dist. No. 99167, 2013-Ohio-3527. The case is now before the Supreme Court of Ohio.

E. *Hoyle v. DTJ Enterprises, Inc.*, Supreme Court Case No. 2013-1405, accepted for review on December 4, 2013

At issue in *Hoyle* is Ohio's employer intentional tort statute, R.C. 2745.01(C), which creates a rebuttable presumption that an employer intended to injure a worker if the employer deliberately removes a safety guard.

The plaintiff-employee was injured when he fell approximately 13 feet from a scaffold while employed by DTJ Enterprises, Inc. and Cavanaugh Building Corporation. The employee filed a complaint against DTJ and Cavanaugh alleging a workplace intentional tort. DTJ and Cavanaugh were insured by Cincinnati Insurance Companies. The insurance company intervened seeking a declaratory judgment that it was not required to provide coverage to DTJ and Cavanaugh based upon certain exclusions contained in the insurance contract. In particular, the policy excluded from coverage acts committed by the insured with the "deliberate intent" to injure.

DTJ, Cavanaugh and Cincinnati Insurance all filed for summary judgment. The trial court granted partial summary judgment to DTJ and Cavanaugh concluding that a material question of fact remained only as to the employee's claim that his injuries were caused by DTJ and Cavanaugh deliberately removing a safety guard. Cincinnati Insurance was granted summary judgment on the basis that the employee would have to demonstrate "deliberate intent" of DTJ or Cavanaugh to cause injury to prevail on his intentional tort claim. The trial court determined that the insurance policy excluded from coverage damages caused by "deliberate intent" of the insured to injure and thus, Cincinnati Insurance was not required to indemnify DTJ or Cavanaugh for any potential judgment against them.

In a 2-1 decision, the Ninth District Court of Appeals reversed. The trial court concluded that a question of fact existed as to whether the employee could prevail on his intentional tort claim through the presumption of intent to injure by operation of

R.C. 2745.01(C). According to the appellate court, to do so, the employee would need to only prove the deliberate removal of a safety guard. The burden of proof would then shift to DTJ and Cavanaugh to rebut the presumption. If DTJ and Cavanaugh failed to rebut the presumption, then the employee could prevail on his claim without actual proof of deliberate intent to injure. This reasoning appears to be in conflict with *Houdek v. ThyssenKrupp Materials N.A., Inc.,* 134 Ohio St. 3d 491, 2012-Ohio-5685, ¶25, which holds that "absent a deliberate intent to injure another, an employer is not liable for a claim alleging an employer intentional tort, and the injured employee's exclusive remedy is within the workers' compensation system." *See also Hoyle v. DTJ Enterprises, Inc.,* 9th Dist. Nos. 26579 & 26587, 2013-Ohio-3223, ¶23 (J. Hensal, dissenting). Nevertheless, the Ninth District held that "[a]lthough the deliberate intent to injure may be presumed for purposes of the statute where there is a deliberate removal of a safety guard, we conclude that this does not in itself amount to 'deliberate intent' for the purposes of the insurance exclusion." *Hoyle v. DTJ Enterprises, Inc.,* 9th Dist. Nos. 26579 & 26587, 2013-Ohio-3223, ¶19. In other words, the appellate court found that the term "deliberate intent" did not have the same meaning under the insurance contract as under Ohio's employer intentional tort statute.

The case is now before the Supreme Court of Ohio to determine the coverage issue and whether the ultimate burden remains with the employee to prove that the employer acted with deliberate intent to establish liability against the employer for a workplace intentional tort.

F. *Pixley v. Pro-Pak Industries, Inc.,* Supreme Court Case No. 2013-0797, accepted for review on September 4, 2013

This is another employer intentional tort case. The employee was injured while working at the corporation's facility when his leg became trapped between a transfer car and a conveyer line. The transfer car was equipped with a safety bumper, but it failed to shut off power to the car. The Sixth District Court of Appeals concluded that the safety bumper was an "equipment safety guard" under R.C. 2745.01(C) by relying on *Hewitt v. L.E. Myers Co.,* 134 Ohio St. 3d 199, 2012-Ohio-5317, to define "equipment safety guard" as a device designed to shield the employee, not just the operator, from injury by a dangerous aspect of the equipment. The appellate court also examined the service manual which stated that the safety bumper on the transfer car was designed to protect employees from a dangerous aspect of the equipment. Having determined that the bumper was an equipment safety guard, the Court of Appeals found that a genuine issue of material fact existed as to whether the corporation deliberately bypassed the safety bumper. "Based on expert testimony, reasonable minds could conclude that the bumper compressed enough to shut off power to the transfer car, the power was not shut off, and the only way the bumper could have compressed as far as it did without shutting off the power was if the proximity switch had been deliberately bypassed." *Pixley v. Pro-Pak Industries, Inc.,* 6th Dist. No. L-12-1177, 2013-Ohio-1358.

The case is now before the Supreme Court of Ohio to determine whether the Sixth District Court of Appeals should have expanded the definition of "equipment safety guard" and whether the deliberate removal of an equipment safety guard occurs only when there is evidence that the employer made a deliberate decision to take off or eliminate the guard from the machine.

G. *Cleo J. Renfrow v. Norfolk S. Ry. Co.*, Supreme Court Case No. 2013-0761, accepted for review on September 4, 2013 and *Burkhart v. H.J. Heinz Co.*, Supreme Court Case No. 2013-0580, accepted for review on June 26, 2013

Both of these cases involve asbestos claims. In *Renfrow*, the Supreme Court of Ohio will determine whether a Veterans Administration ("VA") exception exists under Ohio's asbestos tort reform legislation known as H.B. 292, codified as R.C. 2307.92 and R.C. 2307.93. Under these statutes, a plaintiff is required to file prima facie evidence, including written medical reports from his treating physician, to show that exposure to asbestos was a substantial contributing factor to the development of lung cancer; otherwise, the asbestos claim will be administratively dismissed without prejudice. The Eighth District Court of Appeals determined that since the plaintiff was treated at a VA hospital, he was not required to submit a written medical report from a treating physician because he did not have a traditional doctor-patient relationship. Instead, the appellate court permitted the plaintiff to rely on a paid expert which is prohibited under the statute. *See Cleo J. Renfrow v. Norfolk S. Ry. Co.*, 8th Dist. No. 98715, 2013-Ohio-1189. The Supreme Court of Ohio will determine whether this analysis was appropriate.

In *Burkhart v. H.J. Heinz Co.*, the Supreme Court of Ohio will determine whether under Evid.R. 804(B)(1), a deposition taken in an unrelated product liability lawsuit against sellers of asbestos-containing materials is admissible against a defendant-employer in a subsequent workers' compensation action. *See Burkhart v. H.J. Heinz Co.*, 6th Dist. No. WD-12-008, 2013-Ohio-723.

H. Proposed Amendments to Civ. R. 41

Article IV of the Ohio Constitution grants the Supreme Court of Ohio rule-making authority over the Rules of Civil Procedure, Rules of Criminal Procedure, Rules of Appellate Procedure, Rules of Juvenile Procedure, and Rules of Evidence.

Under the current version of Civ.R. 41(A)(1), a plaintiff does not need to seek permission from the trial court to voluntarily dismiss the entire case after the trial court has issued an order granting a defendant's motion for summary judgment while other claims remain pending.

The proposed amendment to Civ.R. 41 would require a plaintiff to file an application to the trial court for an order of dismissal without prejudice pursuant to Civ.R.

41(A)(2) once the trial court has announced its ruling on the record or has filed an order granting summary judgment. The proposed amendment would also require an application to the trial court for an order of dismissal without prejudice pursuant to Civ.R. 41(A)(2) when dismissal is sought less than ten days before trial. If the proposed amendment is accepted, then it will take effect on July 1, 2014.

The reason why this amendment is important is that under the current version of Civ.R. 41, a plaintiff can voluntarily dismiss the entire case after receiving an unfavorable interlocutory decision, such as a summary judgment decision. This procedural maneuver will cause that favorable summary judgment decision to be dissolved and nullified. A plaintiff can then re-file the lawsuit and in essence, get a second bite at the apple.

The proposed amendment to Civ.R. 41 was likely intended to address the situation that occurred in *Fairchilds v. Miami Valley Hosp., Inc.*, 160 Ohio App.3d 363, 2005-Ohio-1712, (2d Dist.). In *Fairchild*, the trial court granted summary judgment for defendant-hospital on all claims and for defendant-driver on all claims except the negligence claim in a lawsuit filed by plaintiffs. The trial court's ruling was interlocutory because other claims remained pending, and the court did not enter a Civ.R. 54(B) certification that there was no just reason for delay. After the trial court issued these rulings, plaintiffs dismissed the entire case without prejudice. One month later, plaintiffs re-filed their complaint, and the defendant-hospital was granted summary judgment based on the doctrine of res judicata. According to the trial court, plaintiffs could not re-file those claims based on the summary judgment decision issued in the first case.

On appeal, plaintiffs argued that the summary judgment ruling in the first case was not a final order because no Civ.R. 54(B) certification was made before the suit was dismissed. The Second District Court of Appeals held that the trial court erred in ruling that the voluntary dismissal of the entire case somehow converted the interlocutory summary judgment decision in the first case into a final appealable order. The voluntary dismissal of the entire case prevented the prior interlocutory summary judgment ruling from becoming a final adjudication of the claims. The appellate court commented that permitting a plaintiff to dismiss the suit after receiving an adverse ruling on the merits violated "'a sense of fair play'" and may be "'subject to abuse[.]'"*Id.* at ¶40, 42. However, as Civ.R. 41 stands right now, it gives plaintiffs "'an absolute right, regardless of motives'" to voluntarily dismiss all claims against a defendant without prejudice before the start of a trial. *Id.* at ¶42.

In light of this analysis, the trial court also erred in granting summary judgment for the hospital in the re-filed case based on the doctrine of res judicata. For res judicata to apply, a final judgment on the merits must be rendered in the prior case. Since the summary judgment decision in the first case was not a final judgment, the decision did not have res judicata effect on the subsequent litigation and therefore could not be used to bar plaintiff from re-filing the lawsuit.

The case was appealed to the Supreme Court of Ohio, accepted for review but then dismissed as being improvidently allowed. *See Fairchilds v. Miami Valley Hosp.,* 106 Ohio St. 3d 1504, 2005-Ohio-4605, appeal dismissed by, review improvidently allowed by *Fairchilds v. Miami Valley Hosp*., 109 Ohio St. 3d 1229, 2006-Ohio-3055. Justice Lundberg Stratton authored a dissenting opinion which was joined by Justice O'Donnell. The dissent voiced concerns that "we should prevent the unfair and abusive use of Civ.R. 41 now" and that "a rule amendment may be necessary." *Fairchilds v. Miami Valley Hosp*., 109 Ohio St. 3d 1229, 2006-Ohio-3055, ¶2, 9. "[T]he plaintiffs cannot nullify or dissolve a summary judgment decision, albeit interlocutory, by filing a Civ.R. 41(A) voluntary dismissal." *Id.*

Interestingly, the Second Appellate District urged the Rules Advisory Committee of the Supreme Court of Ohio to reconsider allowing voluntary dismissals without prejudice at the late stage of the litigation when summary judgment rulings have been issued. *Fairchilds*, 2005-Ohio-1712, ¶43. That amendment will hopefully take effect in July 2014.

As the rule stands now, when a trial court has granted summary judgment with respect to less than all of the claims pending in the case and has not certified that there is no just cause for delay per Civ.R. 54(B), a plaintiff can dismiss without prejudice all of the claims, including the claims that were subject to the summary judgment ruling, under Civ.R. 41(A). In other words, a plaintiff can dissolve or nullify the trial court's interlocutory summary judgment ruling by voluntarily dismissing the entire case without prejudice.

To avoid any potential pitfalls of Civ.R. 41(A) (even if the amendment takes effect in July 2014), it is recommended that you immediately seek Civ.R. 54(B) certification of the trial court's interlocutory summary judgment ruling to prevent a plaintiff from dissolving that order and getting a second bite at the apple by re-filing the lawsuit after receiving an unfavorable interlocutory decision. Obtaining Civ.R. 54(B) certification of an interlocutory summary judgment ruling will also have binding effect for purposes of res judicata and will cause the 30-day appeal time to commence.

IV. FUTURE CHALLENGES

A. Plans for Improving How Judges are Selected in Ohio

In May 2013, Chief Justice O'Connor contributed an op-ed piece to the *Columbus Dispatch* introducing a proposal titled "Ohio Courts 2013: A Proposal for Strengthening Judicial Elections." The purpose of this proposal was to encourage the public to get involved in judicial reform. In her op-ed piece, Chief Justice O'Connor expressed serious concerns over voter participation in judicial elections:

> "Voter participation in judicial races is much less than in other contests. In fact, on average, one quarter of all voters who came to the polls over the past decade in statewide elections did not cast a ballot in Ohio Supreme Court contests."

Chief Justice O'Connor also observed that while "[j]udical elections have been a matter of controversy in Ohio since they were first established in the Constitution of 1851[,]" most recently, there has been widespread agreement that judges should be elected:

> "Voters time and again have reaffirmed by large margins that they want judges to be accountable. Most recently, a poll in December found more than 80 percent of Ohioans oppose doing away with competitive elections."

Thus, the purpose of the proposal is "not to do away with judicial elections, but to strengthen them."

In 2014, Chief Justice O'Connor plans to propose a final plan based on public feedback and to begin the process of working with legislative leaders on measures. Issues that Chief Justice O'Connor presented for improving judicial selection are:

- Should Ohio change the law so judicial races are no longer listed at the end of the ballot?

- Should all judicial elections be held in odd-numbered years?

- Should Ohio centralize and expand its civic-education programming and institute a judicial voter guide?

- Should Ohio eliminate party affiliation on the ballot in judicial primaries?

- Should Ohio join other states that have a formal, nonpartisan system for recommending nominees to the governor to fill judicial vacancies?

- Should appointments to the Ohio Supreme Court require the advice and consent of the Ohio Senate?

- Should Ohio increase the basic qualifications for serving as a judge?

- Should Ohio increase the length of judges' terms?

Chief Justice O'Connor's op-ed piece to the *Columbus Dispatch* can be found at:

http://www.dispatch.com/content/stories/editorials/2013/05/26/lets-improve-how-judges-are-selected.html

More information about Chief Justice O'Connor's plan can also be found at:
www.OhioCourts2013.org

B. November 2014 Election

Two Supreme Court seats are up for re-election in November 2014. The incumbents seeking re-election are Justices Judith L. French and Sharon L. Kennedy, both Republicans. With the impending elections in November 2014 to elect the Governor of Ohio, the two Supreme Court seats up for re-election, and four Justices unable to seek re-election due to the state's age-restriction law, we will be looking at a lot of new faces on the Supreme Court in the future.