2017 Ohio Tort Law Guide
ABOUT ISAAC WILES

With an ideal blend of inventive thinking and Midwestern practicality, Isaac Wiles holds a unique position among Ohio law firms.

Built to serve the needs of middle-market businesses as well as closely held companies and high-income individuals, our 55-attorney firm leverages strong ties to Ohio’s legal and business communities. Our insider knowledge of both, along with our breadth of experience, allows us to arrive at effective solutions derived from a business perspective.

Isaac Wiles’ top-notch team of lawyers and staff provides services in 11 distinct legal areas. We find that our flexibility, collaborative approach, and willingness to explore solutions from a variety of vantage points make us a natural fit for the firm’s core middle-market clients.

Always approachable, honest and hard-working, we’re true to our Midwestern roots. The result is a firm with an entrepreneurial mindset – a collaborative team of sharp thinkers that’s always invested in our clients’ success.
**STATUTES OF LIMITATION**

Statutes of limitation may be suspended or tolled for minors or for those of unsound mind. §2305.16. These statutes could be subject to equitable tolling, which often requires legal analysis.

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**Limits on Damages (Damage Caps)**

**Compensatory (§ 2315.18)**
- Damages = economic loss and/or non-economic loss
  - **Economic loss** includes:
    - All wages, salaries, or other compensation lost as a result of an injury or loss to person or property that is a subject of a tort action;
    - All expenditures for medical care or treatment, rehabilitation services, or other care, treatment, services, products, or accommodations as a result of an injury or loss to person or property that is a subject of a tort action;
    - Any other expenditure incurred as a result of an injury or loss to person or property that is a subject of a tort action, other than attorney's fees.
  - **Noneconomic loss** includes:
    - Nonpecuniary harm from an injury or loss to person or property that is a subject of a tort action
    - Pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education, disfigurement, mental anguish, and any other intangible loss.

There are **no caps on economic damages**.

Non-economic damages are capped at the greater of $250,000.00 or three (3) times the amount of economic damages, with an absolute maximum of $350,000.00 per plaintiff or $500,000.00 per occurrence.

- There are **no caps on catastrophic injuries**, including permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system or permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities.
Some Ohio courts have held that severe scarring is a permanent physical deformity. Statute does not apply to wrongful death actions or actions against (1) the state in the Court of Claims or (2) political subdivisions.

**Punitive (§ 2315.21)**
- If the defendant is a private individual or small employer (not more than 100 full-time employees, or not more than 500 employees in the manufacturing sector), punitive damages are limited to the lesser of:
  - Two times the compensatory damages OR
  - 10% of the individual's/employer's net worth when tort was committed
    ▪ Award cannot exceed $350,000
- For all other defendants, punitive damages are capped at one to two times the amount of any compensatory damage award.
  - Attorneys' fees awarded as a result of a claim for punitive damages are not considered for purposes of determining the cap on punitive damages.
  - No limit on an award of punitive damages if (1) the defendant acted purposely or knowingly and (2) has been convicted of or pled guilty to a felony criminal offense that had as an element of the offense the culpable state of mind of purposely or knowingly.
    ▪ The burden of proof is by clear and convincing evidence
- Punitive damages are not recoverable:
  - Unless Plaintiff has been awarded compensatory damages, and the actions/omissions of the defendant demonstrate malice or aggravated or egregious fraud, or that the defendant knowingly authorized, participated in, or ratified actions/omissions of an agent. §§ 2315.21(C)(1) and (2).
  - From a city, political subdivision, or state (§ 2744.05(A)).
  - In a wrongful death action, though they can be recovered as a part of a survivorship claim.

**Real Property Damage**
- Measure of damage when real property has been permanently or irreparably damaged:
  - Difference in the fair market value of the whole property, including improvements thereon, immediately before and after the damage occurred
  - Measure of damage based on temporary injury to noncommercial real estate:
    ▪ Plaintiff need not prove diminution in market value of the property in order to recover reasonable costs of restoration, but either party may offer evidence of diminution of market value of the property as a factor bearing on reasonableness of cost of restoration. *Martin v. Design Const.*, 121 Ohio St.3d 66, 2009-Ohio-1.

**Personal Property Damage**
- Measure of damages to personal property = difference in fair market value of the property immediately before and after the damage
Comparative Negligence

- **Measure of damages to personal property without market value** = the reasonable value to the owner if the property has been totally destroyed
- **Measure of damages if property has not been totally destroyed** = cost of repair to restore it to the condition it was in before it was damaged, provided the cost of repairs does not exceed the reasonable value of the property to the owner
  - If repairs will not restore its value, or if cost of repairs exceeds its reasonable value, measure of damage is the difference in reasonable value of the article to the owner immediately before and after it was damaged.

**Damages and Minors**
- Parental liability limited to $10,000.00 where child willfully damages property or commits a theft offense (§ 3109.09) and where child has assaulted someone (§ 3109.10).

### Comparative Negligence

- **Statute** (§ 2315.33)
  - If plaintiff’s negligence is greater than 50% of total negligence, plaintiff recovers nothing.
  - Total negligence includes persons from whom plaintiff seeks recovery and persons from whom plaintiff does not seek recovery but who caused the plaintiff’s injury.

- **Applicability**
  - Only applicable to causes of action accruing on or after April 9, 2003.
  - Plaintiff’s contributory fault may be asserted as an affirmative defense to a tort claim but not an intentional tort claim or a products liability claim. § 2315.32.

- **Damages**
  - Any compensatory damages the plaintiff may recover will be reduced by an amount proportionately equal to the plaintiff’s percentage of fault.

**Joint and Several Liability** (§ 2315.36)

- Contributory fault is established and plaintiff is entitled to recover damages from 2+ parties.
  - Tortfeasor is jointly and severally liable for economic damages if their fault percentage is ≥ 50%.
    - Otherwise, each tortfeasor is only severally liable for economic damages
  - Joint tortfeasors are only severally liable for non-economic damages
  - For intentional tort defendants, any defendant found to be liable for an intentional tort is jointly and severally liable in tort for all compensatory damages that represent economic loss even if that defendant is <50% at fault. § 2307.22(A)(3).
Contribution

- A right of contribution will exist only if two or more tortfeasors are subject to joint and several liability. § 2307.25.
  - If Plaintiff recovers entire amount of judgment from one party, that party must seek contribution from the other tortfeasors to recover the portions of judgment for which those tortfeasors are liable

- Statutes governing contribution do not apply to a tort claim to the extent the statutes on joint and several liability and comparative negligence make a party liable only for his proportionate share of the liability. § 2307.29.

- A contribution action must be commenced separately and within one year after a judgment has become final.

- Statute only applies to claims where the injury occurred on or after April 8, 2003.

- There is no right of contribution in favor of any tortfeasor against whom an intentional tort claim has been established. § 2307.25(A).

Indemnity

- Arises from a written, oral, or implied contract and is the right of a person who has been compelled to pay what another should have paid to require complete reimbursement.
- Occurs when:
  - One who is primarily liable is required to reimburse another who has discharged liability for which that other is only secondarily liable, OR
  - When a person secondarily liable due to his relationship with the other party is compelled to pay damages to an injured party, he may recoup his loss for the entire amount of damages paid from the one who is actually at fault
  - Recognized situations:
    - Wholesaler/retailer
    - Abutting property owner/municipality
    - Independent contractor/employer
    - Master/servant

- Indemnity is not allowed when two parties are joint or concurrent tortfeasors and both are chargeable with actual negligence.

- If one tortfeasor is entitled to indemnity, the right of the indemnity obligee is not for contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of the indemnity obligation. § 2307.25(D).
EMPLOYER INTENTIONAL TORTS

- Plaintiff must prove employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur. § 2745.01.
  o Substantial certainty = deliberate intent to cause injury, disease, or death. Deliberate intent is now the standard under the statute.
    ▪ Stetter v. R.J. Corman Derailment Servs., L.L.C., 125 Ohio St.3d 280, 2010-Ohio-1029.
  o Deliberate removal of a safety guard or any misrepresentation of a toxic or hazardous substance creates a rebuttable presumption of intent to injure. § 2745.01(C).
  o A guard is defined strictly as a device to shield the operator from exposure to a dangerous aspect of the equipment. Hewitt v. L.E. Meyers, 2012-Ohio-5317 (2002).

- Depending on the language of the particular policy involved, an insurer may not have a duty to defend an employer intentional tort case where there is deliberate intent under the new standard.

AUTO CLAIMS

- Assured Distance Ahead § 4511.21(A)
  o A person may not drive any motor vehicle at a greater speed than will permit the person to bring it to a stop within the assured clear distance ahead. To be at fault:
    1. Defendant must have struck an object/vehicle ahead of him
    2. Vehicle must have been stationary or moving in same direction as defendant
    3. Vehicle must have not suddenly appeared in the driver’s path, AND
    4. Vehicle must have been reasonably visible.
  o Defense: Defendant must establish that, through no fault of his own and because of circumstances over which he had no control, compliance with the law was impossible.
    ▪ Ineffective defenses include sun glare, sleet, rain, road width, mental illness, equipment failure, blinding lights, and skidding, and traffic conditions.
- **Failure to Control § 4511.202**
  - No person may operate a motor vehicle on any street, highway, or property open to the public for vehicular traffic without being in reasonable control of the vehicle

- **Right of Way**
  - **Intersections § 4511.41**
    - When two vehicles approach or enter an intersection from different streets/highways at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right.
  - **Turning Left § 4511.42**
    - Operator of a vehicle intending to turn left shall yield the right of way to any vehicle approaching from the opposite direction.
  - **Entering Roadway From Non-Roadway § 4511.44**
    - Operator of a vehicle about to enter or cross a highway from any place other than another roadway shall yield the right of way to all traffic approaching on the roadway to be entered or crossed.
  - **Pedestrians**
    - **In crosswalk § 4511.46**
      - When traffic control signals not in place, not in operation, or not clearly assigning the right of way, driver of vehicle must yield the right of way to the pedestrian.
    - **Outside of crosswalk § 4511.48**
      - Every pedestrian shall yield the right of way to vehicles on the roadway
        - Statute does not relieve vehicle operator from exercising due care.

- **Passing §§ 4511.27, .28, .29**
  - **Passing Vehicles Going the Same Direction**
    - Must signal to the other vehicle, pass to the left at safe distance, and not drive in front of the other driver until there is a safe distance.
- **Passing Vehicle to the Right**
  - Only when other vehicle is making or about to make a turn; only when on a roadway with pavement sufficient for two or more lines of vehicles going in the same direction; only allowed for safety – vehicle cannot drive off the roadway.

- **Driving Left of Center when Passing**
  - Only when left side is clearly visible and clear from oncoming traffic; must return to proper lane of travel as soon as practicable.

- **Backing § 4511.38**
  - Before backing, operators shall give ample warning and exercise vigilance not to injure persons or property on the roadway
  - No person shall back a vehicle on a highway except in a rest area, for public works, official duties, as a result of accident or breakdown

- **Seatbelts § 4513.263**
  - Automobile operator on street/highway required to wear all elements of a properly adjusted occupant restraining device; also required to ensure all passengers in the front seat and children subject to the use of child restraint devices do the same.
  - Evidence of the failure to use a seat belt does not establish negligence or contributory negligence
    - Such evidence is allowed where defendant is manufacturer, designer, distributor or seller of the car and the claim against the defendant is the injury sustained was enhanced or aggravated by some design defects in the car or the car was not crash-worthy.

- **Insurance § 4509.51**
  - Requirement for minimum automobile liability coverage limits (per accident) of: (1) $25,000.00 for bodily injury or death of any one person in any accident; (2) $50,000.00 for bodily injury to or death of two or more persons in any one accident; and (3) $25,000.00 for injury to property of others in any one accident.

### Ohio UM/UIM

Effective October 31, 2001, an insurer no longer has a duty to offer UM/UIM coverage to its insured with the sale of a policy.

- Any policy that insures against loss resulting from liability imposed by law for bodily injury or death may, but is not required to, include uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages.
- No requirement that a rejection or reduction in coverage be in writing.
- In the event of payment to an insured for an UM/UIM claim, the insurer making such payment is entitled to the proceeds of any settlement or judgment resulting from the exercise of the insured’s rights against a legally liable party. This right is limited by relevant insolvency proceedings (§ 3937.21).
- Ohio law prohibits auto and other casualty and liability insurance policies from providing coverage for punitive damages. §3937.182(B).
However, depending on the policy language, a policy might cover the attorney fee component of a punitive damage award. *Neal-Pettit v. Lahman*, 125 Ohio St.3d 327, 2010-Ohio-1829.

## Subrogation and Liens

- Political subdivisions are immune to any subrogation claim brought by an insurer. § 3937.18(E)
- If an insurance company pays to, or on behalf of, its insured any amount later determined to be due from another insurer, it shall be subrogated to all rights of the insured against such insurer.

### Ohio Medicaid Subrogation

- The acceptance of Medicaid benefits gives an automatic right of subrogation to the Ohio Department of Job and Family Services and the County Department of Job and Family Services against the third party for the cost of the medical assistance paid on behalf of the public assistance recipient or participant.
  - § 5101.58(A).

- The Departments shall be permitted to enforce their subrogation rights against a third party even though they accepted prior payments in discharge of their rights if, at the time the Departments received such payments, they were not aware that additional medical expenses had been incurred but had not yet been paid by the Departments. § 5160.37(F).
- A payment, settlement, compromise, or judgment or award that purports to exclude the cost of medical assistance paid for by the Departments shall not preclude the Departments from enforcing subrogation rights. § 5101.58(A).

### Ohio Medicare Subrogation

- The Medicare Secondary Payer Act provides that Medicare is the “secondary payer” for eligible Medicare beneficiaries' medical expenses when a “primary payer” is available. Primary payers include health insurance, worker’s compensation insurance, any liability or no-fault insurance and any tortfeasor. See 42 USCS § 1395(b)(2).
  - If Medicare pays compensation when it is the “secondary payer,” Medicare has a right of subrogation against any “primary payer.”
  - Even though the Medicare statute uses the word “subrogation,” Medicare's right to recovery from “primary payers” does not depend on the recipient’s rights of recovery. *United States v. York*, 398 F.2d 582, 584 (C.A.6 1968).
Workers’ Compensation (§ 4123.93)
- The Bureau of Worker’s Compensation has an automatic statutory right of subrogation.
- Applies only to injuries occurring on or after April 9, 2003.
  - For injuries occurring prior to April 9, 2003, there is no right of subrogation.
  - Employees must notify lienholder if there is a third-party who is responsible for their injuries so that there is a reasonable opportunity to assert their subrogation rights.
    - Responsible parties include UM/UIM insurers.
    - No settlement, compromise, judgment, award, or other recovery in any action or claim will be final unless the claimant provides the statutory subrogee and, when require, the Attorney General, with prior notice and a reasonable opportunity to assert its subrogation rights.
  - If an employee is not made whole, the statute prescribes a formula for pro-rata distribution of any recovery between the employee and lienholder. If there is the potential for future payments by the lienholder, a portion of the recovery is to be put in an interest-bearing trust account to protect any future lien.
DRAM SHOP CLAIMS

- Exclusive remedy to an innocent third person suffering damages as a result of intoxication of a patron
  o Common law recovery is precluded. § 4399.18

- Personal injury, death, or property damage occurred on permit holder’s premises or in the permit holder’s parking lot:
  o A person has a cause of action if injury, death, or damage was proximately caused by the negligence of the permit holder or employee.

- Personal injury, death, or property damage occurring off permit holder’s premises or parking lot:
  o A person has a cause of action if the permit holder knowingly sold an intoxicating beverage in violation of the law (sale to a “noticeably” intoxicated person or to a minor) and the person’s intoxication proximately caused the injuries or damage.
    • “Knowingly” requires actual knowledge of violation in order to impose liability.

- An adult that becomes voluntarily intoxicated normally cannot recover damages for his/her own injuries or property damage.

- Applies only to vendors who are licensed to serve alcohol.
  o Social hosts who provide alcohol to guests at parties are generally not help responsible if a guest then injures someone else.
  o However, a claim may be brought against a social host if he/she provides alcohol to a minor under the age of 21 who then causes injuries in a vehicular accident.
CONSTRUCTION CLAIMS

A construction defect claim is one for damages based on allegations of defective design, construction, or oversight.

- Owners bring claims against sellers, developers, design professionals, and general contractors.
- Developers may bring third party claims against designers and general contractors.
- Designers may bring third party claims against subcontractors and material suppliers.

Claims of defective construction or workmanship brought by a property owner are not claims for “property damage” caused by an “occurrence” under a commercial general liability policy. Westfield Ins. Co. v. Custom Agri Sys., Inc., 133 Ohio St.3d 476, 2012-Ohio-4712.

Ohio appellate courts vary as to whether construction defect claims are subject to a “continuous trigger,” a “manifestation trigger,” or an “injury in fact trigger.”

- The Ohio Supreme Court has not taken the issue.

Clauses in construction contracts that require a party to be indemnified for its negligence for damages arising from injury to persons or damage to property are prohibited.

Statute of Repose § 2305.131

- No claim for bodily injury, wrongful death or injury to property, which arises out of an improvement to real property, shall accrue against a person who furnished the design, planning, supervision of construction, or construction of the improvement later than ten years from the date of completion.

- Does not apply if:
  - There is a longer express warranty [§ 2305.131(D)]
  - The improvements involved fraudulent conduct [§ 2305.131(C)]
  - It prevent claims against one who is in possession or control of the improvement that caused the accident [§ 2305.131(B)].
PREMISES LIABILITY

- Ohio courts have broken down liability analysis pertaining to any property owner/insured into levels of duty of care owed to people who may be entering one’s property.
  
  o Invitee
    - One who comes upon the premises of another, by express or implied invitation, for some purpose that is beneficial to the owner. *Light v. Ohio Univ.*, 28 Ohio St.3d 66, 68, 502 N.E.2d 611 (1986).
    - Property owner/homeowner must exercise ordinary care and protect the invitee by maintaining the premises in a safe condition.
  
  o Licensee
    - One who enters the premise of another by permission but for his own benefit, not by invitation. *Light v. Ohio Univ.*, 28 Ohio St.3d 66, 68, 502 N.E.2d 611 (1986).
    - Property owner is obligated not to have the premises in a fully safe condition, but only to not hurt that person by willful or wanton misconduct or expose them to any hidden dangers, pitfalls or obstructions. *Scheurer v. Trustees of Open Bible Church*, 175 Ohio St. 163, 192 N.E.2d 38 (1963).
  
  o Trespasser
    - One who enters the premise of another without permission.
    - If the property owner is not directly aware of any trespassing conditions (undiscovered trespassers), the property owner owes only a duty to refrain from willful and wanton misconduct.
Recreational users (§ 1533.181)

- One who has permission to enter upon premises without payment to operate an “all purpose vehicle” or engage in other recreational pursuits.
- An owner of premises does not (1) owe any duty to a recreational user to keep the premises safe for entry or use; (2) by giving permission, extend any assurance to a recreational user that the premises are safe for use; or (3) assume liability for injury to person or property caused by an act of a recreational user.

- Slip and Fall

  - A premises-owner owes no duty to persons entering those premises regarding dangers that are open and obvious. *Armstrong v. Best Buy Co. Inc.*, 99 Ohio St.3d 80 (2003).
  - It is unduly burdensome to require a landowner to keep his premises free from ice and snow. *City of Norwalk v. Tuttle*, 73 Ohio St. 242, 76 N.E.617 (1906).


BAD FAITH

- Third party bad faith

  - Occurs when an insurer intentionally refuses to satisfy an insured’s claim where there is no lawful basis for refusal, coupled with actual knowledge of that fact or an intentional failure to determine whether there was any lawful basis for such refusal.
  - Ohio law does not recognize third party bad faith pertaining to the handling of a claim of a third party plaintiff.

- First party bad faith

  - Occurs when an insurer fails to exercise good faith in the processing of a claim where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefore. Common situations include:
    - Failure to Pay Claim
    - Failure to Make a Good Faith Offer
    - Failure to Fully Investigate or Defend
    - Failure to pay undisputed amounts until disputed claims are resolved
    - Conditioning payment of covered benefits on settling /releasing other claims.

- Damages

  - A bad faith claim, if proven, allows recovery of what is known as extra contractual damages. These are actual damages over and above those covered by the insurance contract, as a consequence of the insurer’s bad faith.
    - Can include economic, non-economic, consequential, and punitive damages.

- Pre-Judgment Interest (§ 1343.03(C))

  - The court is authorized to award prejudgment interest in a case in which it finds, after a hearing, that the defendant “failed to make a good faith effort to settle the case.”
  - If plaintiff prevails under statute, the judge has discretion as to when interest starts.
Disclaimer: This guide is not intended to provide legal advice. It is for informational purposes only. Please contact an attorney at Isaac Wiles for any legal questions or consultation.