



# 2021 Ohio Tort Law Guide

Isaac Wiles Burkholder & Teetor  
Two Miranova Place, Suite 700  
Columbus, Ohio 43215  
614.221.2121

## TABLE OF CONTENTS

<u>SECTION</u>	<u>Page</u>
About Isaac Wiles .....	2
Statutes of Limitation .....	3
Comparative Negligence .....	4
Assumption of the Risk .....	5
Employer Intentional Torts .....	6
Auto Claims .....	6
Ohio UM/UIM .....	8
Subrogation and Liens .....	9
Dram Shop Claims .....	11
Construction Claims.....	12
Premises Liability .....	13
Bad Faith .....	14
Damages.....	14
Ohio Appeals.....	18
Isaac Wiles' Attorneys .....	19
Isaac Wiles' Practice Areas .....	20

## 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 50+ 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 are true to our Midwestern roots. The result is a firm with an entrepreneurial mindset – a collaborative team of sharp thinkers who are 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. R.C. §2305.16. It also may be suspended or tolled against a defendant while the defendant is out-of-state, absconded or hidden, or in prison. R.C. §2305.15. These statutes could be subject to equitable tolling, which often requires legal analysis.

1 YEAR	
Libel, Slander, Defamation	§ 2305.11(A)
Malicious Prosecution	§ 2305.11(A)
False Imprisonment	§ 2305.11(A)
Assault and Battery	§ 2305.111(B)
Legal Malpractice	§ 2305.11(A)
Contribution Claims (after final judgment)	§ 2307.26

2 YEARS	
Wrongful Death	§ 2125.02
Injury to Personal Property or Bodily Injury Due to Negligence	§ 2305.10
Product Liability	§ 2305.10(A)
Employer Intentional Tort	§ 2305.10
Dram Shop	§ 4399.18

3 YEARS*	
UM/UIM Claims	§ 3937.18

\*3 years is permitted by statute, but the Supreme Court of Ohio has held that a 2 year statute of limitation is reasonable and enforceable, if the UM/UIM provision makes it clear and unambiguous to the policy holder that the limitation is reduced. *Miller v. Progressive Cas. Ins. Co.*, 69 Ohio St.3d 619, 624-25, N.E.2d 317 (1994); *Angel v. Reed*, 119 Ohio St.3d 73, 2008-Ohio-3193, 891 N.E.2d 1179, ¶¶ 12-13.

4 YEARS	
Trespassing on Real Property	§ 2305.09(A)
Recovery of Personal Property or for Taking or Detaining It	§ 2305.09(B)
Fraud (except for identity theft)	§ 2305.09(C)
General Negligence where There Is No Specific Statutory Statute of Limitations	§ 2305.09(D)
Physical or Regulatory Taking of Real Property	§ 2305.09(E)
Breach of Contract for Sale of Goods	§ 1302.98(A)

4 YEARS CONT	
Invasion of Privacy	§ 2305.09(D)
Conversion	§ 2305.09(B)
Breach of Fiduciary Duty	§ 2305.09, <i>Cundall v. U.S. Bank</i> , 122 Ohio St.3d 188, 2009-Ohio-2523, 909 N.E.2d 1244.
Damage to Real Property	§ 2305.09
Insurer Bad Faith	§ 2305.09(D)
Loss of Consortium	§ 2305.09(D), <i>Hershberger v. Akron City Hosp.</i> , 34 Ohio St.3d 1, 516 N.E.2d 204 (1987).
Intentional Infliction of Emotional Distress (except for emotional distress parasitic to another tort)	§ 2305.09, <i>Yeager v. Local Union 20</i> , 6 Ohio St.3d 369, 453 N.E.2d 666 (1983).
Professional Negligence Claims, Design Professionals	§ 2305.09
Breach of Warranty	§ 2305.09

6 YEARS	
Breach of Oral Contract	§ 2305.07
Indemnification Based on Primary or Secondary Liability	<i>Poe v. Dixon</i> , 60 Ohio St. 124, 54 N.E. 86 (1983).
Unjust Enrichment	§ 2305.07
Dog Bite Claims	§ 2305.07

8 YEARS	
Breach of Written Contract	§ 2305.06

10 YEARS	
Statute of Repose for Product Liability Claims	§ 2305.10(C)(1)
Construction Claims	§ 2305.131

12 YEARS	
Child Sexual Abuse (runs when child is 18)	§ 2305.111(C)

## COMPARATIVE NEGLIGENCE

- Statute (R.C. § 2315.33)
  - o If plaintiff's negligence is greater than 50% of total negligence, the plaintiff recovers nothing.
  - o Total negligence includes persons from whom plaintiff seeks recovery and persons from whom plaintiff does not seek recovery, but who caused plaintiff's injury.
- Applicability
  - o Only applicable to causes of action accruing on or after April 9, 2003.
  - o 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. R.C. § 2315.32.
- Damages
  - o Any compensatory damages a plaintiff may recover will be reduced proportionately by the plaintiff's percentage of fault.

### Joint and Several Liability (R.C. § 2307.22)

- There is no joint and several liability for a non-economic loss. A defendant is responsible only for his or her proportionate share of a plaintiff's compensatory damages that represent noneconomic loss. Therefore, in regard to damages for pain, suffering, and mental anguish, each defendant is responsible only for that defendant's proportionate share of such damages. R.C. § 2307.22(C).
- A defendant who is determined to be more than 50% responsible for a plaintiff's injury is jointly and severally liable in tort for all compensatory damages that represent economic loss. R.C. § 2307.22(A)(1).
  - o **Intentional Tort:** A defendant found liable for an intentional tort is jointly and severally liable for all compensatory damages that represent economic loss, even if that defendant is determined to be less than 50% responsible for a plaintiff's injury. R.C. § 2307.22(A)(3).
  - o In a situation where one defendant is found to be an intentional tortfeasor, any non-intentional tortfeasor found to be a 50% or less responsible for a plaintiff's injuries is responsible only for that tortfeasor's proportionate share of compensatory damages that represent economic loss. R.C. § 2307.22(A)(4).
  - o A defendant who is determined to be 50% or less responsible for a plaintiff's injury will only be liable for his or her proportionate share of the compensatory damages that represent economic loss. R.C. § 2307.22(A)(2) and (B). If a plaintiff's negligence is greater than 50% of total negligence, the plaintiff recovers nothing.

### Contribution

- A right of contribution will exist only if two or more tortfeasors are subject to joint and several liability. R.C. § 2307.25.
  - o 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. R.C. § 2307.29.
- A contribution action must be commenced separately and within one year after a judgment becomes 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. R.C. § 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.
  - o *Wagner-Meinert, Inc. v. Eda Controls Corp.*, 444 F.Supp.2d 800 (N.D.Ohio 2006).
- Occurs when:
  - o One who is primarily liable is required to reimburse another who has discharged liability for which that other is only secondarily liable, OR
  - o 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 at fault.
  - o 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. R.C. § 2307.25(D).

## **ASSUMPTION OF THE RISK**

Ohio law recognizes three categories of assumption of the risk as defenses to a negligence claim: express, primary, and secondary (aka “implied”).

### **Express**

- Express assumption of the risk applies when a party expressly agrees to release liability, e.g., signs a written acknowledgment of the risks and a waiver of claims.

### **Primary**

- Primary assumption of the risk occurs when a plaintiff, who voluntarily engages in a recreational activity or sporting event, assumes the inherent risks of that activity and cannot recover for injuries sustained in engaging in the activity unless the defendant acted recklessly or intentionally in causing the injuries. *Marchetti v. Kalish*, 53 Ohio St.3d 95, 101, 559 N.E.2d 699 (1990).

### **Secondary or Implied**

- Secondary or implied assumption of the risk requires a showing that the plaintiff has consented to or acquiesced in an appreciated or known risk. Under this approach, the defendant has some duty to plaintiff, but it is plaintiff’s acquiescence in or appreciation of a known risk that acts as a defense to plaintiff’s action. Over time, this has become equivalent to contributory negligence. *Gentry v. Craycraft*, 101 Ohio St.3d 141, 144, 2004-Ohio-37, 802 N.E.2d 1116.

## EMPLOYER INTENTIONAL TORTS

- Plaintiff must prove employer committed the tortious act with the intent to injure another or with the belief the injury was substantially certain to occur. R.C. § 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, 927 N.E.2d 1092, ¶ 19.
  - o Deliberate removal of a safety guard or any misrepresentation of a toxic or hazardous substance creates a rebuttable presumption of intent to injure. R.C. § 2745.01(C).
  - o A guard is defined strictly as a device designed to shield the operator from exposure to a dangerous aspect of the equipment. *Hewitt v. L.E. Meyers*, 134 Ohio St.3d 199, 2012-Ohio-5317, 981 N.E.2d 795, ¶ 2.
- 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.
  - *Hoyle v. DTJ Ents., Inc.*, 143 Ohio St.3d 197, 2015-Ohio-843, 36 N.E.3d 122, ¶ 34.

### INTENTIONAL TORT ATTORNEY



**Donald Anspaugh**  
**Partner**  
danspaugh@isaacwiles.com

## AUTO CLAIMS

- **Assured Clear Distance Ahead** (R.C. § 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, skidding, and traffic conditions.
- **Failure to Control** (R.C. § 4511.202)
  - o 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** (R.C. § 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** (R.C. § 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** (R.C. § 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** (R.C. § 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 Crosswalk** (R.C. § 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** (R.C. §§ 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** (R.C. § 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.

**PERSONAL INJURY  
ATTORNEY**



**James Roper**  
**Partner**

[jroper@isaacwiles.com](mailto:jroper@isaacwiles.com)

- **Seatbelts** (R.C. § 4513.263)
  - o 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.
  - o 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 that the injury sustained was enhanced or aggravated by some design defects in the car, or the car was not crash-worthy.
- **Insurance** (R.C. § 4509.51)
  - o 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 UNINSURED & UNDERINSURED MOTORIST COVERAGE (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. R.C. § 3937.21.
- Ohio law prohibits auto and other casualty and liability insurance policies from providing coverage for punitive damages. R.C. § 3937.182(B).
  - o 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.
- **Statute of Limitations:** 3 years is permitted by statute. R.C. § 3937.18. However, the Supreme Court of Ohio has held that a 2-year statute of limitation is reasonable and enforceable, if the UM/UIM provision makes it clear and unambiguous to the policy holder that the limitation is reduced. *Miller v. Progressive Cas. Ins. Co.*, 69 Ohio St.3d 619, 624-25, N.E.2d 317 (1994); *Angel v. Reed*, 119 Ohio St.3d 73, 2008-Ohio-3193, 891 N.E.2d 1179, ¶¶ 12-13.
- Political subdivisions are immune to any subrogation claim brought by an insurer. R.C. § 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.

## SUBROGATION AND LIENS

### 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. R.C. § 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 additional medical expenses had been incurred, but had not yet been paid by the Departments. R.C. § 5160.37(F).
- A payment, settlement, compromise, 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. R.C. § 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, workers' compensation insurance, any liability or no-fault insurance, and any tortfeasor. See 42 U.S.C. § 1395y(b)(2).
  - o If Medicare pays compensation when it is the “secondary payer,” Medicare has a right of subrogation against any “primary payer.”
  - o 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 (6th Cir.1968).

## 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. R.C. § 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 who 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 held 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 person under the age of 21 who then causes injuries in a vehicular accident.

### DRAM SHOP ATTORNEY



**Sam Pipino**  
**Partner**

[spipino@isaacwiles.com](mailto:spipino@isaacwiles.com)

## 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, 979 N.E.2d 269, 2012-Ohio-4712, ¶ 21.
- *Ohio N. Univ. v. Charles Constr. Servs.*, 2018-Ohio-4057, 2018 LEXIS 2375
- 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.”
  - o 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** (R.C. § 2305.131)
  - o 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.
  - o Does not apply if:
    - There is a longer express warranty. R.C. § 2305.131(D);
    - The improvements involved fraudulent conduct. R.C. § 2305.131(C);
    - It prevents claims against one who is in possession or control of the improvement that caused the accident. R.C. § 2305.131(B).

For more information,  
see “[Ohio  
Construction Defect  
Law](#)” by Ike Westfall  
and Scyld Anderson,  
Isaac Wiles  
Burkholder & Teetor,  
LLC.

### CONSTRUCTION ATTORNEYS



Ike Westfall  
Partner

Lwestfall@isaacwiles.com



Scyld Anderson  
Partner

sanderson@isaacwiles.com



Sam Pipino  
Partner

spipino@isaacwiles.com

## 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 premises 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 premises of another without permission.
    - If the property owner knows of an ongoing trespassing situation (discovered trespassers), then the property owner owes a duty of ordinary care to warn of known dangers. *Tudor v. Cincinnati*, 130 Ohio App. 3d 805, 721 N.E.2d 444 (1998).
    - 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.
  - o **Recreational users (R.C. § 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**
  - o 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-Ohio-2573, 788 N.E.2d 1088, ¶ 14.
  - o 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).
    - Natural accumulations of ice and snow are ordinarily open and obvious. *Jackson v. J-F Ents., Inc.*, 6th Dist. Lucas No. L-10-1285, 2011-Ohio-1543, ¶ 16.

### LITIGATION ATTORNEY



**Maribeth Meluch**  
**Partner**

[mmeluch@isaacwiles.com](mailto:mmeluch@isaacwiles.com)

## BAD FAITH

### - 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. Insured has the burden of proof. Common situations include:
  - Failure to pay claim
  - Failure to make a good faith offer
  - Failure to fully investigate
  - Failure to pay undisputed amounts until disputed claims are resolved
  - Conditioning payment of covered benefits on settling /releasing other claims
  - Failure to defend, or excess verdict against insured if no good faith offer
- If the contract claim is decided in favor of the insurer, typically the bad faith claim fails as a matter of law. However, even if there is an issue of fact on the contract claim, the issue of bad faith should not be submitted to a jury where there is evidence that an insurer had a reasonable basis for its position. *Helmick v. Republic Franklin Ins. Co.* (1988), 39 Ohio St.3d 71.

### - Third-party bad faith

- Ohio law does not recognize third-party bad faith pertaining to the handling of a claim of a third-party plaintiff.

### - Damages

- A bad faith claim, if proven, allows recovery of what is known as extra contractual damages. Bad faith is a tort. These are actual damages over and above those covered by the insurance contract, as a consequence of the insurer's bad faith.
  - Includes economic, non-economic, and consequential damages.
  - The court can award prejudgment interest (R.C. § 1343.03(C)) in a case in which it finds, after a hearing, that defendant "failed to make a good faith effort to settle the case."
- Punitive damages may be recovered against an insurer who breaches his duty of good faith in refusing to pay a claim of its insured upon proof of actual malice, fraud or insult on the part of the insurer. Proof is different from and in addition to proof necessary to establish a breach of the duty of good faith. The insured must establish by clear and convincing evidence that it is entitled to punitive damages.
  - There cannot be an award of punitive damages without proof of compensatory damages.

### BAD FAITH CLAIMS ATTORNEY



**Steve Teetor**  
**Partner**

[jteetor@isaacwiles.com](mailto:jteetor@isaacwiles.com)



**David Jennings**  
**Partner**

[djennings@isaacwiles.com](mailto:djennings@isaacwiles.com)

- A court shall not enter judgment for punitive damages in excess of two times the amount of compensatory damages. ORC 2315.21.
- Punitive damage claims can be bifurcated from contract claims. ORC 2315.21.
- Attorney fees are recoverable only when an award of punitive damage is proper.

## DAMAGES

### Limits on Damages (Damage Caps)

#### Compensatory (R.C. § 2315.18)

- **Damages** = economic loss and/or non-economic loss
  - **Caps on damages:**
    - There are no caps on economic damages
    - Non-economic damages are capped at the greater of \$250,000 or three (3) times the amount of economic damages, with an absolute maximum of \$500,000 per occurrence.
  - **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; and
    - 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.
  - **Non-economic loss includes:**
    - Nonpecuniary harm from an injury or loss to person or property that is a subject of a tort action; and
    - 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 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.

#### LITIGATION PRACTICE CO-CHAIRS



Ike Westfall  
Partner

[Iwestfall@isaacwiles.com](mailto:Iwestfall@isaacwiles.com)



Don Anspaugh  
Partner

[danspaugh@isaacwiles.com](mailto:danspaugh@isaacwiles.com)

- 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.
  - o These damage caps have been upheld by the Ohio Supreme Court several time, and once again in December 2018, the court upheld the damage caps applying them to a defamation claim. *Wayt v. DHSC, LLC*, 2018-Ohio-4822, 2018 LEXIS 2847.

### **Punitive** (R.C. § 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:
  - o Two times the compensatory damages; OR
  - o 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.**
  - o Attorneys' fees awarded as a result of a claim for punitive damages are not considered for purposes of determining the cap on punitive damages.
  - o No limit on an award of punitive damages if (1) 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:
  - o Unless plaintiff has been awarded compensatory damages, and the actions/omissions of defendant demonstrate malice or aggravated or egregious fraud, or defendant knowingly authorized, participated in, or ratified actions/omissions of an agent. R.C. §§ 2315.21(C)(1) and (2).
  - o From a city, political subdivision, or state. R.C. § 2744.05(A).
  - o In a wrongful death action, though they can be recovered as part of a survivorship claim.

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.

### **Real Property Damage**

- Measure of damage when real property has been permanently or irreparably damaged.
  - o Difference in the fair market value of the whole property, including improvements thereon, immediately before and after the damage occurred.
  - o 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, 902 N.E.2d 10, ¶ 24.

### **Personal Property Damage**

- Measure of damages to personal property = difference in fair market value of the property immediately before and after the damage.
- 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.
  - o 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 (R.C. § 3109.09); and where child has assaulted someone (R.C. § 3109.10).

### **Non-party at Fault** (R.C. § 2307.23)

- Requires a jury to consider the percentage of tortious conduct attributable to each person who proximately caused the injury or loss, regardless of whether plaintiff is seeking recovery, or is able to seek recovery from that person.
- Any party to a tort action from whom plaintiff seeks recovery in an action may raise an affirmative defense under R.C. § 2307.23(C) at any time before trial of the action.
  - o R.C. § 2307.23(C) does not exclude any party who may be entitled to immunity or otherwise could not be made a party. Rather, pursuant to R.C. § 2307.011(J), persons from whom plaintiff does not seek recovery in an action includes persons who are not a party to the tort action whether or not that person was or could have been a party.

### **Admissibility of amount of medical bills actually paid**

- A jury is permitted to examine both the original medical bills and the amount accepted as full payment to determine the reasonableness and necessity of charges rendered for a plaintiff's medical and hospital care. *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195, ¶ 26.
  - o Before this case, only the original medical bills were admissible.
  - o The Supreme Court of Ohio found that the collateral-source rule did not apply to bar evidence of amount accepted by a medical care provider from an insurer as full payment for medical or hospital treatment.
- The Supreme Court of Ohio affirmed the *Robinson* rule in *Jacques v. Manton*, ruling that evidence of write-offs is admissible to show the reasonable value of medical expenses. *Jacques v. Manton*, 125 Ohio St.3d 342, 2010-Ohio-1838, 928 N.E.2d 434, ¶ 15.
  - o *Jacques* argued that R.C. § 2315.20 does apply to write-offs, because write-offs are evidence of a payment to the plaintiff, even though they are not payments themselves. *Id.* at ¶ 13. As a result, *Jacque* argued the jury obtains the evidence that R.C. § 2315.20 expressly prohibits, when the insurer has a right of subrogation. *Id.*
  - o R.C. § 2315.20 provides: "In any tort action, the defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the damages that result from an injury, death, or loss to person or property that is the subject of the claim upon which the action is based, except if the source of collateral benefits has ... a contractual right of subrogation ...."

- The Supreme Court of Ohio concluded that R.C. § 2315.20 does not apply to write offs, and thus, *Robinson* controls (evidence of write-offs is admissible to show the reasonable value of medical expenses). *Jacques* at ¶ 16.

## OHIO APPEALS

- In Ohio, a party in a case in Municipal, Small Claims Court, Common Pleas Court, or the Court of Claims has a right to appeal a final judgment to the Court of Appeals. R.C. §§ 2505.02 to 2505.03. The Court of Appeals in Ohio is divided into 12 districts that are grouped geographically and may include one large county or a group of smaller counties. Only final judgments can be appealed, and the determination of when a judgment is a final appealable judgment is a complex one based on statutes and case law. R.C. § 2505.02(B). We recommend consultation with counsel as to whether an order or judgment constitutes a final appealable order.
- In order to commence an appeal and invoke jurisdiction of the appellate court, a notice of appeal must be filed within 30 days of a final judgment. App.P. 4(A). The 30-day deadline is absolute and cannot be extended. Once the notices are timely filed, a record of the proceedings in the trial court will be transmitted to the Court of Appeals. If any of the parties order a transcript of a trial or hearing, the transcript will be included with the record. App.P. 9(B)(3).
- Once the record is complete, the parties will file briefs on their positions. App.P. 18(A).
- The briefing process is complex and subject to many rules, some of which differ between appellate districts. Generally, a brief oral argument of 15 minutes per side is then scheduled in front of a panel of three judges. The three judges then issue an opinion.
- While an appeal is pending, a money judgment is not automatically stayed, and the winning party can collect on the judgment. Civ.R. 62(B); App.P. 7(A). The only way to prevent collection efforts is the filing of a motion to stay with an appropriate bond or security in the trial court. App.P. 7(A) & (B). Appellate bonds are complex and can be expensive.
- If a party wishes to appeal a decision of the Court of Appeals, they can file an appeal with the Ohio Supreme Court in 45 days. S.Ct.Prac.R. 7.01(A)(1)(a)(i). However, the Ohio Supreme Court does not have to hear most cases and only accepts jurisdiction in a limited number of appeals.

### APPELLATE ATTORNEY



**Dale Cook**  
**Partner**

*OSBA Certified Specialist in  
Appellate Law*  
dcook@isaacwiles.com

## ISAAC WILES ATTORNEYS

Scyld Anderson	sanderson@isaacwiles.com
Donald Anspaugh	danspaugh@isaacwiles.com
Kevin Bacon	kbacon@isaacwiles.com
Joanne Beasy	jbeasy@isaacwiles.com
Jordan Benson	jbenson@isaacwiles.com
William Browning	wbrowning@isaacwiles.com
Bruce Burkholder	bburkholder@isaacwiles.com
Michael Close	mclose@isaacwiles.com
Dale Cook	dcook@isaacwiles.com
Jay Eggspuehler	jeggspuehler@isaacwiles.com
Christopher Geer	cgeer@isaacwiles.com
Aaron Glasgow	aglasgow@isaacwiles.com
Molly Gwin	mgwin@isaacwiles.com
Thomas Hart	thart@isaacwiles.com
James Hughes	jhughes@isaacwiles.com
Frederick Isaac	fisaac@isaacwiles.com
David Jennings	djennings@isaacwiles.com
John Jolley	jjolley@isaacwiles.com
Shawn Judge	sjudge@isaacwiles.com
Mark Landes	mlandes@isaacwiles.com
John Lucas	jlucaas@isaacwiles.com
Maribeth Meluch	mmeluch@isaacwiles.com
Timothy Miller	tmiller@isaacwiles.com
David Moser	dmoser@isaacwiles.com

Dennis Newman	dnewman@isaacwiles.com
Catherine Perkins	cperkins@isaacwiles.com
John Perkins, Jr.	jperkins@isaacwiles.com
Patrick Pickett	ppickett@isaacwiles.com
Samuel Pipino	spipino@isaacwiles.com
James Roper	jroper@isaacwiles.com
Danielle Skestos	dskestos@isaacwiles.com
Steve Soltis	ssoltis@isaacwiles.com
Jeffrey Stankunas	jstankunas@isaacwiles.com
Keith Stevens	kstevens@isaacwiles.com
Phil Stovall	pstovall@isaacwiles.com
Matthew Teetor	mteetor@isaacwiles.com
Steve Teetor	jteetor@isaacwiles.com
Gregory Travalio	gtravalio@isaacwiles.com
Mark Troutman	mtroutman@isaacwiles.com
Mark Weaver	mweaver@isaacwiles.com
Maurice Wells	mwells@isaacwiles.com
Ike Westfall	lwestfall@isaacwiles.com
David Whitaker	dwhitaker@isaacwiles.com
James Wiles	jwiles@isaacwiles.com
Andrew Yosowitz	ayosowitz@isaacwiles.com
Alicia Zambelli	azambelli@isaacwiles.com
Brian Zets	bzets@isaacwiles.com

## PRACTICE AREAS

Business  
Litigation  
Creditors' Rights  
Environmental Law  
Estate Planning, Trust &  
Probate Family Law

Labor & Employment  
Public Law  
Real Estate  
Intellectual Property  
Tax

**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.

4836-3027-5940.6

Isaac Wiles Burkholder & Teetor, LLC

Two Miranova Place, Suite 700, Columbus, Ohio 43215 | 614.221.2121 | isaacwiles.com