Quarterly Review

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Ohio Association of Civil Trial Attorneys

A Quarterly Review of Emerging Trends In Ohio Case Law and Legislative Activity...

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President's Letter

Gary L. Grubler
Grange Insurance House Counsel – Columbus
September 2011

Thanks to Mark McCarthy and Jonathan Cooper, Chair and Vice Chair of the Product Liability Committee, for this edition of OACTA's *Quarterly*. As with all OACTA committees, the Product Liability Committee offers its members the opportunity to interact with the best Ohio attorneys defending product cases. In this publication readers will gain insight into what's going on in the world of product liability litigation in Ohio, beginning with an update on recent cases from Carolyn Cappel and Julius Trombetto of Weston Hurd.

Jonathan Cooper and Arun Kottha of Tucker, Ellis and West tackle the difficulty in complying with warning label requirements for products distributed in the United States and Europe. Benjamin Sassé of Tucker, Ellis and West brings some clarity and guidance for courts and attorneys dealing with cases involving allegations of workplace intentional torts, applying the guidance set forth in recent Ohio Supreme Court decisions.

Every trial attorney has requested a separation of witnesses in trial, but that separation could entail more than having someone step out of the courtroom. Terry Miller, Anthony McClure, Elizabeth Moyo and C. Darcy Copeland, all of the law firm of Porter Wright, elaborate upon what may be accomplished by a separation of witnesses in the Federal and State Courts. Thanks to all of our authors.

It seems like only a short time ago that my colleagues who graduated around the same time as I did and I were trying to find our way around a courtroom, objecting before we knew why, checking the pocket part of research books and challenging expert witnesses on topics about which we knew nothing. Then we suddenly became "senior" lawyers in the community. Twenty-six years of practicing has passed so fast, although with retirement options like they are, it might only be half way. I doubt anyone really enjoys getting older. As Phyllis Diller once said, "Maybe it's true that life begins at fifty, but everything else starts to wear out, fall out or spread out." Somewhere there is a point where our knowledge and experience places us at a high level while we are still physically able to utilize it. Sometimes it seems that by the time we are wise enough to watch our step, we're too old to go anywhere. Before that occurs, each lawyer who has achieved years of experience should recognize and act upon his or her duty to mentor newer lawyers.

It's hard to bill for mentoring; it's hard to see an immediate result. For these reasons, and many others, it doesn't occur to the extent it should. While we may be remembered for certain successes in cases we argue or noteworthy results, it's hard to imagine anything more professionally satisfying than seeing less senior attorneys achieve success using the skills or techniques we attempted to pass on. More importantly, having come from the competitive law school and job search atmosphere, new attorneys would benefit from an introduction to the professionalism needed to maintain a "civil" legal system. Spending time with new lawyers in an effort to instill both competency and professionalism can only create a better system.

Several law schools have finally realized the benefit of offering students credit for internships with lawyers. Thus, there are many programs where the students clerk during the school year in exchange for class credits. For firms and corporations on a budget this poses an excellent opportunity to begin the mentoring process. Consider contacting Ohio law schools to explore these programs that serve as opportunities for the young lawyers and the not so young lawyers.

I hope to see you at OACTA's Annual Meeting at the Crowne Plaza in Columbus on November 10 and 11.

Introduction

Product Liability Committee

Mark F. McCarthy, Chairman
Tucker Ellis & West, L.L.P.

The Product Liability Committee of the Ohio Association of Civil Trial Attorneys is pleased to submit to you the *OACTA Quarterly* dedicated to topics dealing with the defense of product liability cases under Ohio law. Members of OACTA authored each of the articles in this *Quarterly*. The articles not only offer fine scholarship, but practical advice and tactics in defending product liability cases after tort reform in Ohio.

The articles cover subjects ranging from the impact of the European Union Machinery Directive on ANSI and ISO standards to the relationship between the separation of witnesses under Ohio Rule of Evidence 615 and Ohio Rule of Evidence 703 concerning expert witnesses. There is also a summary of Ohio product liability cases from 2010-2011.

Finally, there is an update on the status of Intentional Tort Law after Tort Reform in Ohio. Many industrial workplace accidents comprise a combination of product liability cases involving machinery along with intentional tort cases brought by employees against their employers. The interrelationships between these two causes of action are important to understand for defense practitioners.

Further, there are some significant intentional tort cases moving through Ohio's Appellate Courts presently, including cases defining and clarifying what constitutes a "removal of a guard" that will determine the breadth and span of intentional tort matters in Ohio. We will see if in practice the new Intentional Tort Standard will be applied rigorously by trial courts at the summary judgment level and upheld by Ohio Appellate Courts to limit these types of cases except in the most egregious of circumstances.

We urge you to consider joining an OACTA Substantive Law Committee and hope that if you are practicing the area of product liability in Ohio that you will think of joining the Product Liability Substantive Law Committee.

The Product Liability Committee provides OACTA members with information and advice on experts in specific areas dealing with product liability issues, access to a brief bank, and deposition and trial transcripts for both plaintiff and defense experts.

We urge you to contact us if you are interested in joining and hope that you put this particular issue of the *Quarterly* into your firm's Product Liability Research file. If you have any comments or suggestions about refining the OACTA website on product liability topics, please let us know.

I would like to thank Karen Ross of Tucker Ellis & West LLP who assisted in compiling this *Quarterly*. Her hard work and help was invaluable in getting this publication together, along with the able advice and tutelage of David Peck of Rendigs, Fry in Cincinnati.

Separation of Witnesses Under Ohio Evidence Rule 615: What Is A "Bald" Separation Order And Does It Apply to Expert Witness?

Terrance M. Miller, Anthony R. McClure, Elizabeth L. Moyo, and C. Darcy Copeland[1]
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At the beginning of countless trials across Ohio, litigators commonly make the same request from the court: a separation of witnesses. And almost just as commonly, these requests are met with no resistance from opposing counsel. After all, a witness separation order (pursuant to Ohio Evidence Rule 615) is good for all parties—it prevents fact witnesses from hearing the testimony of other witnesses, which could lead them to change their story (or worse). As a result, the court will issue a simple order granting the party's request for a separation of witnesses—nothing more and nothing less.

But what happens when one party accuses the other of violating a separation order? Does Rule 615 reach beyond the corners of the courtroom—can a court preclude the parties from telling fact witnesses what has happened during the trial? Can a party share daily trial transcripts with its expert witness? How does the court determine what constitutes a violation of the sequestration order, and what can it do about it? This article explores these questions as it examines the scope of Ohio Evidence Rule 615 compared with similar rules from other states and the Federal Rules of Evidence.

I. Ohio's Rule 615 Is Unique

Many states share similar language with Federal Evidence Rule 615, but Ohio is in a league of its own. In Ohio, Rule 615 provides that, unless the court says otherwise, a separation order only excludes witnesses from the courtroom while other witnesses are testifying: "[a]n order directing the 'exclusion' or 'separation' of witnesses or the like, in general terms without specification of other or additional limitations, is effective only to require the exclusion of witnesses from the hearing during the testimony of other witnesses." In other words, a "bald" or general sequestration order excludes a witness from being physically present in the courtroom during the testimony of other witnesses, but it does not necessarily preclude a witness or counsel from discussing the case or sharing witness testimony with other witnesses outside of the courtroom.

In contrast to the Ohio rule, Federal Rule 615 does not distinguish between a general and specific order; it states in pertinent part, "the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses." Circuit courts have disagreed about when and how "bald" sequestration orders, without any specific limitations, prevent witnesses from hearing the testimony of others. The First and Eighth Circuits have interpreted Rule 615 narrowly, holding that a separation order only requires a witness's exclusion from the courtroom during the testimony of other witnesses; outside the courtroom, witnesses may speak freely to one another.[2] The Fourth and Fifth Circuits, however, have found that such narrow interpretations contravene Rule 615's purpose of preventing witness fabrication.[3] These appellate courts interpret Federal Rule 615 to not only proscribe the presence of witnesses in the courtroom during the testimony of other witnesses, but also any discussion or disclosure of a witness's testimony to another outside of the courtroom.[4]

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To address the confusion about the scope of bald separation orders in federal and state courts, the Ohio rule was amended in 2003 to include the default provision described above. According to the Staff Notes, the Ohio Supreme Court was concerned about inconsistencies in interpreting the rule and what was perceived as a potential threat to due process as a result of bald or general separation orders. Specifically, the Staff Notes state, "[s]ome courts, in Ohio and elsewhere, have suggested that at least some additional forms of separation are implicit even in generally stated orders."[5]

The problem with this "implicit-terms" approach is that it provides no notice to the parties or witnesses of what terms are included in the order until after the alleged violation has occurred or until the opposing party is seeking sanctions for the putative violation. Because "[t]he imposition of sanctions without advance warning that the conduct is sanctionable raises obvious due-process concerns," the 2003 amendment to Ohio Rule 615 "rejects an 'implicit-terms' approach."[6] With this amendment, the Ohio Supreme Court preserved the discretion of the trial court "to order forms of separation in addition to exclusion . . . but [now the trial court] can do so only by making the additional restrictions explicit and by giving the parties notice of the specific additional restrictions that have been ordered."[7]

As the Staff Notes to the 2003 amendment suggest, Ohio is not the only state that has addressed the Federal Rule's ambiguity by including more precise language in its evidentiary rule. Louisiana, for example, requires that courts order witnesses to refrain from discussing the facts of the case with anyone other than counsel.[8] The Tennessee rule provides that "the court shall order all persons not to disclose by any means to excluded witnesses any live trial testimony or exhibits created in the courtroom by a witness."[9] Wisconsin gives judges the option of directing excluded witnesses to be kept separate until called or preventing them from communicating with one another until they have been examined or the hearing is ended.[10] But Ohio appears to be the only state that has included a default provision addressing the limited scope of a bald separation order.

II. Do Separation Orders Apply To Expert Witnesses?

To play it safe, a practitioner may choose to interpret a "bald" separation order so that he or she does not share information about the trial with other fact witnesses. But what about expert witnesses? Neither the 2003 amendment nor Ohio case law addresses this particular problem. Many federal courts, however, have found that separation orders only apply to fact witnesses.[11] According to those courts, Rule 615 is designed to preclude fact witnesses—not expert witnesses—from improperly shaping their testimony based on other witnesses' testimony.[12] In contrast, expert witnesses should be permitted to hear the testimony of other witnesses because their expert opinions are properly informed by evidence admitted at trial according to Evidence Rule 703.[13] As the Sixth Circuit observed:

> Theoretically at least, the presence in the courtroom of an expert witness who does not testify to the facts of the case but rather gives his opinion based upon the testimony of others hardly seems suspect and will in most cases be beneficial, for he will be more likely to base his expert opinion on a more accurate understanding of the testimony as it evolves before the jury.[14]

On this point as well, as with Rule 615, Ohio finds itself in unique standing. This is because Ohio's Rule 703 is more narrow than the federal rule. Under the federal rule, expert witnesses may base their opinions on "facts or data . . . made known to the expert at or before the hearing."[15] Plus, an expert may rely on inadmissible facts or data "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."[16] Ohio's rule does not permit experts to rely on the latter type of inadmissible evidence in forming their opinions.[17] Under Ohio's Rule 703, experts can rely only on "facts or data . . . perceived by the expert or admitted in evidence at the hearing."[18] Thus, it may create a logical conundrum to exclude an expert witness from the courtroom under Rule 615 when Rule 703 expressly permits an expert witness to base his opinion on other witnesses' trial testimony. "Certainly an expert who intends to base his opinion on 'facts and data in the particular case' (Rule 703) will be unable to testify if he has been excluded (from the courtroom by an order under Rule 615)."[19]

Not only are expert witnesses permitted to rely on fact witness testimony to form their opinions under Rule 703, expert opinions are subjected to a more rigorous evaluation than lay testimony. For example, Rule

26(a)(2)(B) of the Federal Rules of Civil Procedure requires an expert to provide a written report including all of his opinions and the facts or data underlying his opinions. A party may probe into an expert's opinions through written discovery and deposition. In addition, the admissibility of an expert's opinions may be challenged under Evidence Rule 702 in either state or federal court. Thus, the danger of an expert changing his opinion testimony even after he has heard the testimony of other witnesses is minimal where his expert opinions have been confirmed in his report and throughout discovery.

Despite the good reasons for exempting expert witnesses from sequestration orders, neither Rules 615 nor 703 expressly or automatically exempts them. While an expert witness may base his expert opinion on evidence admitted at trial, "Rule 703 does not furnish an automatic basis for exempting an expert from sequestration under Rule 615."[20] Further, Rule 615 contains several exceptions for persons exempt from sequestration orders, but an expert witness does not automatically fall within any one of those exceptions.[21] Perhaps there is no express exemption for expert witnesses because "the very breadth of the permissible scope of testimony by an expert witness suggests that in some circumstances at least, the trial judge could be justified in holding that [the expert's] presence in the courtroom was not essential and that his exclusion from the courtroom might in a given case make a more objective and, perhaps, more honest witness out of him."[22] In other words, under certain circumstances, it may be beneficial to sequester an expert witness for similar reasons that a fact witness is sequestered.[23] Sequestering an expert witness, however, is the exceptional rather than the usual practice.[24]

III. Practice Pointers

Regardless of what the case law may tell us about whether Rule 615 applies to expert witnesses, the best practice may be the simplest solution: a specific separation order. Consider asking the court for a separation order that makes an exception for expert witnesses. If your practice is to share trial transcripts with your expert witnesses, ask the court to bless this practice in its separation order. If you think the presence of a certain expert is necessary to manage your case, request a specific exemption for that particular expert under Federal Evidence Rule 615(3) or Ohio Evidence Rule 615(B)(3). Also consider whether you want the separation order to apply to fact witnesses beyond the confines of the courtroom. Although there is certainly a risk that the court will deny your request for a specific separation order, the greater risk may be sanctions from the trial court for violating what the court determined to be an implicit term of its sequestration order.

Endnotes

1 The authors of this article are members of Porter Wright's Product Liability Practice Group, which has defended thousands of product liability cases in state and federal courts throughout the country.
2 *U.S. v. Sepulveda* (C.A.1, 1993), 15 F.3d 1161, 1175-1177; *U.S. v. Smith* (C.A.8, 1978), 578 F.2d 1227, 1235.
3 *United States v. McMahon* (C.A.4, 1997), 104 F.3d 638, 641-42; *Miller v. Universal City Studios* (C.A.5, 1981), 650 F.2d 1365.
4 See id.
5 OhioEvid.R. 615, 2003 Staff Notes.
6 Id.
7 Id.
8 La.CodeEvid. Article 615 (2000).
9 Tenn.R.Evid. 615.
10 Wis. Stat. § 906.15(3) (2001).
11 *United States v. Seschillie* (C.A.9, 2002), 310 F.3d 1208, 1214; *Opus 3 Ltd. v. Heritage Park, Inc.* (C.A.4, 1996), 91 F.3d 625, 629; *Polythane Sys., Inc. v. Marina Ventures Int'l Ltd.* (C.A.5, 1993), 993 F.2d 1201, 1209-10; *United States v. Crabtree* (C.A.7, 1993), 979 F.2d 1261, 1270; *United States v. Connors* (C.A.8, 1990), 894 F.2d 987, 991; *Mayo v. Tri-Bell Industries* (C.A.5, 1986), 787 F.2d 1007; *Transworld Metals, Inc. v. South Wire Co.* (C.A.2, 1985), 769 F.2d 902, 911.
12 See *Opus 3 Ltd.*, 91 F.3d at 629.
13 *Morvant v. Construction Aggregates Corp.* (C.A.6, 1978), 570 F.2d 626, 629-30.
14 Id.
15 Fed.R.Evid. 703.
16 Id.
17 OhioEvid.R. 703.
18 Id.
19 *Morvant*, 570 F.2d at 630.
20 *Miller*, 650 F.2d at 1373-74 (citing *Morvant*, 570 F.2d at 630).
21 See Fed.R.Evid. 615; OhioEvid.R. 615; see also *Morvant*, 570 F.2d at 630 (noting, "had the framers intended [experts to be excluded from Rule 615 orders], they would have said so, or added a fourth exception").
22 *Morvant*, 570 F.2d at 630.
23 See, e.g., *Miller*, 650 F.2d at 1373-74 (affirming district court's decision to exclude defendant's literary expert who received daily transcripts in a copyright infringement case and who would be testifying about the similarity of the same two works plaintiff analyzed in his trial testimony); *In re Omeprazole Patent Litigation* (S.D.N.Y. 2002), 190 F.Supp.2d 582 (sequestering each of the two co-defendants' patent invalidity experts from each co-defendant's case-in-chief on the invalidity of plaintiff's patent, so neither expert witness could tailor his testimony to be more consistent with that of the other co-defendant's expert).
24 See *In re Omeprazole*, 190 F.Supp.2d at 584 ("Usually an expert is either responding to the theories of an adversary's expert or is basing his opinion entirely on facts adduced by fact witnesses at trial. Such experts are infrequently sequestered.").

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Terry Miller is a partner at Porter Wright and serves as Chair of the Product Liability Practice Group. He has more than 35 years of experience at both the trial and appellate levels in both state and federal courts, and his current practice spans a range of cases from complex commercial disputes to intentional tort allegations to product liability lawsuits involving a wide spectrum of products.

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All That Is Old Is New Again: Workplace Intentional Tort Claims Under R.C. 2745.01

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Workplace intentional torts lie at the intersection of product liability law, employment law and Ohio's workers' compensation system. The incidents giving rise to such claims frequently involve the use of industrial equipment,[1] arise in the course of employment,[2] and result in the receipt of workers' compensation benefits.[3] Yet the history of the workplace intentional tort claim is, and always has been, unique.

The General Assembly modified Ohio's workplace intentional tort in 2005 with the passage of Amended House Bill 498, which enacted current R.C. 2745.01. That Bill was adopted to "clarify the definition of an intentional tort."[4] But clarity has proven to be an elusive goal. A debate over the constitutionality of R.C. 2745.01 followed its enactment; the debate was not resolved until the Supreme Court of Ohio's recent opinions in *Kaminski v. Metal & Wire Products Company*[5] and *Stetter v. R.J. Corman Derailment Servs., LLC*,[6] upheld the constitutionality of the statute.

The resolution of that debate, however, merely sparked others. Does Ohio's intentional tort statute articulate two standards for proving intent, or only one?[7] Can the statute's definition of "substantially certain" be "harmonized" with its definition of intent?[8] What is an "equipment safety guard"? What does it mean to "deliberately remove" such a guard? A jurisprudence that answers these questions is just now beginning to develop in Ohio's trial and appellate courts. This Article suggests a framework through which these questions should be analyzed to develop a workable intentional tort jurisprudence that avoids the pitfalls of the past and, perhaps, the need for further legislative modification in the future.

R.C. 2745.01 must be viewed through the lens of history.

Kaminski and *Stetter* provide a roadmap for addressing questions of statutory interpretation concerning R.C. 2745.01. While the primary issue before the Supreme Court of Ohio in each case was the constitutionality of R.C. 2745.01, both also addressed the meaning of that statute.[9] In so doing, *Kaminski* and *Stetter* employed a historical approach that traced the development, abolition, and resurrection of Ohio's workplace intentional tort.[10] The Court rightly emphasized that an analysis of the General Assembly's intent in passing R.C. 2745.01 must reflect "the dynamic between the General Assembly's attempts to legislate in this area and [the Court's] decisions reacting to those attempts."[11] In other words, the meaning of the General Assembly's legislative efforts is best understood when viewed in light of the judicial decisions that provoked them.

Following the Supreme Court of Ohio's lead, a brief recap of the history of Ohio's workers' compensation and workplace intentional tort will aid in the analysis of the questions of interpretation identified above.

The Initial Bargain: Employers and employees give up common law rights to establish a workers' compensation system.

"The origins of the [current workers' compensation system] date from 1911, when the General Assembly enacted Ohio's first comprehensive law pertaining to compensation for industrial injuries."[12] It was "a specific pragmatic response to the social dissatisfaction with the lack of compensation available to injured workers at common law."[13] That response embodied a public policy trade off "between the interests of the employer and the employee whereby employees relinquish[ed] their common law remedy and accept[ed] lower benefits coupled with the greater assurance of recovery and employers [gave] up their common law defenses and [were] protected from unlimited liability."[14]

A couple features of this system are noteworthy. For one thing, the original system was voluntary and insulated participating employers from tort liability, unless an employer engaged in a "willful act" that injured an employee.[15] For another, an employee who believed he had been injured by a "willful act" had to choose between pursuing a claim for workers' compensation benefits and filing a lawsuit; he could not do both.[16] While the Supreme Court of Ohio upheld the constitutionality of the original workers' compensation system in 1912, the Court's

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opinion rested on the voluntary nature of that system and its inapplicability to existing contracts.[17]

Labor amendments adopted during the Ohio Constitutional Convention of 1912 paved the way for a compulsory workers' compensation system.[18] Section 35, Article II supplied the General Assembly with broad authority to enact a compulsory system, specifying that "laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers * * *." In addition to insulating a compulsory workers' compensation system from further constitutional challenge, Section 35 also provided that "no right of action shall be taken away from any employe[e] when the injury, disease or death arises from failure of the employer to comply with any lawful requirement for the protection of the lives, health and safety of employe[e]s."[19] That exemption was understood to preserve existing employer liability for "willful acts,"[20] and the compulsory workers' compensation system enacted in 1913 continued to require an injured employee to choose between pursing a claim for workers' compensation benefits and filing a lawsuit.[21]

The Compromise: Expansive judicial interpretations of employer liability lead to the abolition of that liability and creation of VSSR proceedings.

Expansive judicial interpretations of employer liability led to the abolition of that liability in the early 1920s. In response to a broad judicial construction of the phrase "willful acts," the General Assembly defined that term in 1914 to mean "an act done knowingly and purposely with the direct object of injuring another."[22] But, in the years following this legislative action to *narrow* the definition of "willful acts," the Supreme Court of Ohio issued several controversial and deeply divided decisions that ultimately expanded an employer's liability to actions approximating mere negligence.[23]

The General Assembly responded to these judicial decisions by adopting a Joint Resolution that proposed an amendment to Section 35, Article II of the Ohio Constitution. The proposed amendment embodied yet another compromise between the rights of employers and employees. On the one hand, the proposed amendment abolished the employer's remaining "open liability," specifying that a workers' compensation award "*shall be in lieu of all other rights to compensation,* or damages, for such death, injury, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries, or occupational disease."[24] On the other, it created the constitutional foundation for the development of proceedings before the Industrial Commission to determine whether the employer's conduct violated a specific safety requirement — now known as "VSSR" proceedings.[25]

Following the adoption of this constitutional amendment in 1924, the Supreme Court of Ohio confirmed that its effect was to abolish court jurisdiction over claims for damages against complying employers.[26] Thus, from the mid-1920s until the 1980s, employers were immune from civil lawsuits for damages, but a) paid premiums to the state insurance fund under the Workers' Compensation Act, and b) could be required to pay as a penalty for violation of a specific safety requirement an additional amount of 15% to 50% of the total compensation awarded to an injured employee.[27]

Liability unbound: *Blankenship* "devises" an exception to the compromises embodied in Ohio's Constitution.

Despite the seeming clarity of the amendment to Section 35, Article II, the Supreme Court of Ohio "devised" an exception to workers' compensation exclusivity in the early 1980s with its opinion in *Blankenship v. Cincinnati Milicron Chem., Inc*.[28] This new exception rested on the thin reed that intentional torts did not fall within workers' compensation exclusivity because "[a]n intentional tort * * * is clearly not an 'injury' arising out of the course of employment."[29] A leading workers' compensation treatise criticized that rationale as "[t]he most fictitious theory of all," since "if it is a work-connected assault, it is no less so because the assailant happens to be the employer."[30] Nevertheless, *Blankenship* ushered in a new era of intentional tort liability for employers.[31]

Shortly after *Blankenship* created a common-law workplace intentional tort claim, the Supreme Court of Ohio expanded the scope of that claim to cover not only so-called "direct intent" torts, but also acts committed by the employer with the belief that injury is "substantially certain to occur."[32] To prevail under a "substantial certainty" theory, an employee was required to demonstrate: 1) that the employer knew of a dangerous condition within its workplace; 2) that the employer knew that, if the employee was subjected to this dangerous condition, harm to the employee was substantially certain to result; and 3) that the employer, with this knowledge, required the employee to continue to perform the dangerous task.[33] Most workplace intentional tort claims were based on the broader "substantial certainty" theory.[34]

In addition to creating a new intentional tort claim, the Supreme Court of Ohio also held that: a) an employer was not entitled to a reduction of an employee's judgment by any amounts received from third parties; b) an employee's receipt of workers' compensation benefits did not preclude a common-law workplace intentional tort claim; and c) the employer was not entitled to a setoff for the amount of compensation received by the employee.[35] Even setting aside any potential VSSR proceedings, the upshot of these holdings was that "a plaintiff could recover three times for the same injury by suing an employer under the intentional tort theory, by suing a third party under a negligence, intentional tort, or products liability theory, and by collecting workers' compensation."[36] As a result, the Supreme Court of Ohio's *Blankenship* jurisprudence dramatically altered the balance of rights between employers and employees struck by the General Assembly.

The General Assembly rebuffed: Initial attempts to codify and modify *Blankenship* liability are struck down.

The General Assembly attempted on multiple occasions to restore a measure of this balance by codifying and modifying the Court's *Blankenship* jurisprudence. One such attempt came in 1986 with considerable bipartisan support, when the General Assembly enacted former R.C. 4121.80.[37] In yet another legislative compromise, R.C. 4121.80(G)(1), on the one hand, dramatically narrowed the scope of workplace intentional tort liability by supplying a narrow definition for "substantial certainty" torts: "'[s]ubstantially certain' means that an employer acts with the deliberate intent to cause an employee to suffer injury, disease, condition or death."[38] On the other, R.C. 4121.80(G)(1) simultaneously created a rebuttable presumption of intent to injure for the "[d]eliberate removal by the employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance" where "injury or an occupational disease or condition occurs as a direct result."[39]

The Supreme Court of Ohio, however, rebuffed this attempt to modify Ohio's workplace intentional tort on constitutional grounds.[40] While the plurality and concurring opinion in *Brady v. Safety-Kleen Corp.*[41] did not find fault with the definition of "substantial certainty" contained in former R.C. 4121.80(G), the Court struck down the statute on the grounds that other provisions in the law establishing a hybrid system permitting a court (but not a jury) to determine liability for intentional torts — while vesting the Industrial Commission with jurisdiction over the amount of the award — violated the constitutional right to trial by jury.[42]

Yet prior to issuing its decision in *Brady*, the Court issued an opinion in *Fyffe v. Geno's, Inc.*[43] that addressed and incorporated the "public policy" embodied in the provision of former R.C. 4121.80(G)(1) specifying that "[d]eliberate removal by the employer of an equipment safety guard * * * is evidence, the presumption of which may be rebutted, of an act committed with the intent to injure another * * *."[44] Specifically, *Fyffe* analyzed the "public policy" embodied in this statutory language and held that courts may consider as evidence of an intent to injure "that the employer has deliberately removed a safety guard from equipment which employees are required to operate."[45]

Following *Brady*, the General Assembly responded by passing former R.C. 2745.01,[46] which modified the standard for workplace intentional tort claims within the court system without attempting to transfer jurisdiction over any aspect of those claims. Nevertheless, a 4-3 majority of the Supreme Court of Ohio declared former R.C. 2745.01 unconstitutional in its entirety, asserting that "the constitutional impediments at issue in *Brady* * * * also apply with equal force to R.C. 2745.01."[47]

The Latest Attempt to Limit Workplace Intentional Torts: Current R.C. 2745.01.

The General Assembly enacted current R.C. 2745.01 against this backdrop. Sponsor testimony supporting the enactment of R.C. 2745.01 correctly observed that "the workers' compensation system was designed to eliminate lawsuits against employers and allow for the payment of benefits to injured employees regardless of fault."[48] Reacting to their concern that *Blankenship* liability had "opened the door for employees to continue to sue employers for workplace injuries in addition to availing themselves of the no-fault workers' compensation system," the sponsors sought to "clarify the definition of an intentional tort," which in their view had "been essentially reduced to a negligence-based standard that is far below any reasonable definition of an intentional tort."[49]

The text of R.C. 2745.01 accomplished this clarification by re-enacting the legislative compromise concerning the scope of workplace intentional tort liability contained in the 1986 statute, which *Brady* did not criticize. Like former R.C. 4121.80(G)(1), R.C. 2745.01(B) dramatically narrowed the "substantial certainty" theory to acts involving a "deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death."[50] R.C. 2745.01(B). At the same time, however, R.C. 2745.01(C) created a rebuttable presumption of intent to injure for the "[d]eliberate removal by an employer of an equipment

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safety guard or deliberate misrepresentation of a toxic or hazardous substance" where "injury or an occupational disease or condition occurs as a direct result."[51]

The lessons of history and their implications

Three lessons

Several lessons emerge from the history recounted above that are helpful in resolving existing disputes concerning the interpretation of R.C. 2745.01. First and foremost among these is the judicial tendency to create and broaden exceptions to workers' compensation exclusivity in a manner that is inconsistent with the policies supporting that exclusivity, as exemplified by the numerous legislative responses to judicial opinions invoking a broad theory of employer liability. As a leading treatise has observed, "[t]here are two central purposes to exclusiveness: first, to maintain the balance of sacrifices between the employer and employee in the substitution of no-fault liability for tort liability and, second, to minimize litigation, even litigation of undoubted merit."[52] Yet history teaches that it is difficult for the court system to keep these central purposes in mind when evaluating a claim asserted by an injured worker.

Even though, in the run of cases, a no-fault workers' compensation system means that "'unjust' results, by conventional standards, are commonplace,"[53] and even though these "unjust" results may burden employers as well as employees, it is difficult for the court system to remain cognizant of the aggregate effects of the workers' compensation system on employers when faced with a claim asserted by a particular injured employee. Defense practitioners should remain cognizant of this difficulty and frame their arguments concerning R.C. 2745.01 in a manner that incorporates the policy goals of workers' compensation exclusivity, particularly the goal that "every presumption is on the side of avoiding the imposition of the complexities and uncertainties of tort litigation on the compensation process."[54] Closer scrutiny by the court system of the policy goals of workers' compensation exclusivity may eliminate the need for further legislative action in the future.

The second lesson is that Ohio's workplace intentional tort does not stand alone in providing an avenue of recovery to an injured worker. In addition to asserting a claim for workers' compensation benefits, Ohio's injured workers may assert a VSSR claim where an employer violates a specific safety requirement. R.C. 2745.01 thus represents a third potential recovery, and defense practitioners should emphasize this unique feature of workplace intentional tort liability when opposing overly broad constructions of that statute: unlike the typical tort plaintiff, virtually all injured workers who bring workplace intentional tort claims will have already received at least one recovery.

The third lesson is that R.C. 2745.01 is, in many ways, a direct response to prior Supreme Court of Ohio opinions. It is noteworthy that the General Assembly adopted, virtually verbatim, the text of those portions of the 1986 legislation that were not criticized by the Supreme Court of Ohio in *Brady*. This reaction signals the General Assembly's awareness of the Court's prior opinions, and defense practitioners should be mindful of this when framing arguments concerning the meaning of phrases in R.C. 2745.01.

Each of these lessons underscores one broader and crucial point: context is critical in the interpretation of R.C. 2745.01, and debates over the meaning of its terms should not be resolved by grabbing a dictionary off the shelf.[55]

And Their Implications for the Current Debates on Interpreting R.C. 2745.01.

To make these lessons more concrete, let's return to the questions posed at the beginning of this Article.

Ohio's intentional tort statute articulates a single standard for proving intent and the legislative definition of "substantially certain" is the key to applying this standard. The first and second questions have an easy response — one already articulated by the Supreme Court of Ohio in *Kaminski*: the General Assembly did not intend to create two separate standards for proving intent under R.C. 2745.01; rather, the General Assembly's intent, "as expressed particularly in 2745.01(B), [was] to permit recovery for employer intentional torts only when an employer acts with specific intent to cause an injury, subject to subsections (C) and (D)."[56]

Such an interpretation "harmonizes" R.C. 2745.01(A) and R.C. 2745.01(B). When viewed within the correct historical context, R.C. 2745.01 leaves intact the "direct intent" (as described by *Harasyn*)[57] prong of intentional tort liability while narrowing the "substantial certainty" theory to only those acts involving a "deliberate intent" to injure. It accomplishes this task in two steps: 1) subsection (A) restates the common law test for intent; and 2) subsection (B) re-defines "substantially certain" as acts involving a "deliberate intent to cause an employee to suffer an injury[.]"[58] Therefore, as some Ohio appellate opinions have already held, the proper focus in every intentional tort case is on whether the employer acted with

a specific intent — whether characterized as "direct" or "deliberate" — to injure the employee.[59]

This interpretation also best fits the public policy goals embodied in Ohio's workers' compensation system. First, it is consistent with the General Assembly's goal to restore a measure of the balance between employer and employee inherent in the workers' compensation system — employers are already subject to VSSR proceedings for violating certain safety requirements, and this additional penalty was created by constitutional amendment as part of a trade-off that was designed to preclude *any* civil liability on the part of the employer. While a narrow standard for workplace intentional tort liability does not re-establish this constitutionally mandated balance, it at least minimizes the damage to this balance created by Ohio's workplace intentional tort. Second, recognizing a single, specific-intent standard is consistent with the presumption of avoiding the imposition of the complexities and uncertainties of tort litigation on the compensation process.

Thus, even if the Eighth District's "cautionary note" in *Houdek v. ThyssenKrupp Materials NA, Inc*.[60] that enforcement of this standard would "spread the risk of * * * employer conduct [falling short of a deliberate intent to injure] to all of Ohio's employers" through the operation of the workers' compensation system is correct,[61] such "risk spreading" is the inevitable consequence of the system established by Section 35, Article II of the Ohio Constitution — which was designed to extinguish all civil liability in exchange for funneling claims for accidental injuries and those resulting from an alleged failure to follow specific safety requirements through the Industrial Commission.

Deliberate removal of an equipment safety guard. The lessons of history also provide guidance for interpreting the rebuttable presumption of intent contained in R.C. 2745.01(C). As explained above, under the guise of incorporating "public policy" expressed in identical statutory language, *Fyffe* analyzed the statutory phrase "deliberate removal * * * of an equipment safety guard" and construed that language as meaning "that the employer has deliberately removed a safety guard from equipment which employees are required to operate."[62] Because R.C. 2745.01 is properly viewed as a response by the General Assembly to prior Supreme Court of Ohio opinions, it is reasonable to assume that the General Assembly was aware of and intended to adopt this interpretation of that statutory language.[63] One implication of this awareness is that a device may be considered an "equipment safety guard" only if it is a part of a piece of equipment — broad arguments that any device which shields an employee from injury is a "safety guard" are inconsistent with *Fyffe*'s construction of "equipment safety guard" and should be rejected.[64]

Another is that the phrase "deliberate removal" requires an actual removal of a safety guard. Therefore, arguments seeking application of a rebuttable presumption of intent based on the perceived logic of equating deliberate removal with a lack of adequate training in the use of a safety guard should be rejected.[65] So should arguments based on an alleged bypass of an equipment safety guard that rely on analogies to authorities from other states, which may evaluate the public policies surrounding workplace tort claims differently.[66] In all events, the most reasonable interpretation of the phrase "deliberate removal * * * of an equipment safety guard" is that the General Assembly intended to enact *Fyffe*'s teaching that this phrase means "that the employer has deliberately removed a safety guard from equipment which employees are required to operate."[67]

Finally, a construction of R.C. 2745.01(C) that requires actual removal of a safety guard from a piece of equipment before the rebuttable presumption of intent may be invoked best fits the policy goals behind workers' compensation exclusivity. It is consistent with the General Assembly's goal to restore a measure of the balance between employer and employee inherent in the workers' compensation system, as well as the presumption of avoiding the imposition of the complexities and uncertainties of tort litigation on the compensation process. And, as history teaches, if these policy goals are not adhered to when examining the scope of R.C. 2745.01(C), further legislative action may be inevitable — including possible consideration of eliminating the cause of action created by R.C. 2745.01 and restoring the balance of interests embodied in Section 35, Article II of the Ohio Constitution.

Conclusion

Cases addressing the many questions that have arisen concerning the proper interpretation of R.C. 2745.01 are currently winding their way through the appellate system. Hopefully, within the next couple of years some of these questions will be addressed and resolved by the Supreme Court of Ohio. In the meantime, however, if you are trying to get a case into the Supreme Court of Ohio, or defending against a workplace intentional tort claim in a trial court or on appeal, I recommend applying the lessons of history when framing arguments under R.C. 2745.01. It will give context to your dispute, alert the court to the many policy issues that underlie your case, and explain the fairness of the statutory construction you seek.

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Endnotes

[1] E.g., *Fyffe v. Geno's, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108 (addressing intentional tort claim arising out of injuries allegedly experienced by plaintiff when his arm was pulled into an industrial conveyor).

[2] E.g., *Fickle v. Conversion Technologies Intl., Inc.*, 6th Dist. No. WM-10-016, 2011-Ohio-2960, at ¶2 (workplace intentional tort action involving alleged injuries experienced "in the course of [plaintiff's] employment * * * when her left hand and arm became caught in the pinch point of a roller at the rewind end of a Grauvure Line adhesive coating machine").

[3] E.g., *Kaminski v. Metal & Wire Prods. Co.,* 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066, at ¶8 (noting that "Kaminski applied for and received workers' compensation benefits for her injuries").

[4] Ohio Capitol Connection, Minutes of House Labor and Commerce Committee (Aug. 25, 2004), p. 1.

[5] 125 Ohio St.3d 250, 2010-Ohio-1027, 927 N.E.2d 1066.

[6] 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092.

[7] Compare *Estate of Jose M. Diaz v. Superior Environmental Solutions* (Feb. 16, 2011), Lorain C.P. Case No. 09CV160223, unreported (suggesting that R.C. 2745.01(A) creates two separate standards for proving intent, and that a failure to install a safety device and failure to follow OSHA standards are probative of an "intent to injure") with *Klaus v. United Equity, Inc*., 3d Dist. No. 1-07-63, 2010-Ohio-3549, at ¶¶33-34 (alleged violations of lock-out/tag-out procedures not sufficient to show a specific intent to injure plaintiff).

[8] See *Houdek v. ThyssenKrupp Materials NA, Inc*., 8th Dist. No. 95399, 2011-Ohio-1694, at ¶42 (suggesting that R.C. 2745.01(A) and (B) "are in a state of harmonic dissonance").

[9] See *Kaminski*, 2010-Ohio-1027, at ¶¶52-57; *Stetter*, 2010-Ohio-1029, at ¶¶17-28.

[10] See *Kaminski*, 2010-Ohio-1027, at ¶¶14-46, 57; *Stetter*, 2010-Ohio-1029, at ¶27.

[11] *Stetter*, 2010-Ohio-1029, at ¶27.

[12] *Arrington v. DaimlerChrysler Corp.*, 109 Ohio St.3d 539, 2006-Ohio-3257, 849 N.E.2d 1004, at ¶14.

[13] Id. at ¶15.

[14] Id. at ¶19, quoting *Blankenship v. Cincinnati Milicron Chem., Inc.* (1982), 69 Ohio St.2d 608, 433 N.E.2d 572.

[15] See G.C. 1465-61 (S.B. No. 127, 102 Ohio Laws 524, 529). This limited liability also extended to "the failure of such employer * * * to comply with any municipal ordinance or lawful order of any duly authorized officer, or an statute for the protection of the life or safety of employees." Id.

[16] Id. ("Every employé, or legal representative in case death results, who makes application for an award from the state liability board of awards, waives his right to exercise his option to institute proceedings, in any court. Every employé or his legal representative in case death results, who exercises his option to institute proceedings in court * * * waives his right to any award[.]").

[17] *State ex rel. Yaple v. Creamer* (1912), 85 Ohio St. 349, 97 N.E. 602. The Supreme Court of Ohio decided *Creamer* during the " *Lochner* era, "see *Lochner v. New York* (1905), 198 U.S. 45 — an era characterized by "its hostility toward labor regulation," in which courts were "quite willing – certainly more willing than [they have] ever otherwise been – to scrutinize and invalidate the substance of economic regulations pursuant to the Due Process Clause." 1 Tribe, American Constitutional Law (3d Ed.2000) 1345, Section 8-2.

[18] See Terzian, Ohio's Constitution: An Historical Perspective (2004), 51 Clev.St.L.Rev. 357, 382 (explaining that the "labor amendments" to the Ohio Constitution, including Section 35 of Article II, were adopted "to establish clear constitutional authority for labor legislation and to restrict the courts' power to inhibit it.").

[19] Former Section 35, Article II, Ohio Constitution, reprinted in 2 Proceedings and Debates of the Constitutional Convention of the State of Ohio (1913) 2104.

[20] See *Vayto v. River T. & Ry.* (C.P. 1915), 18 Ohio N.P. (N.S.) 305, 314; 2 Proceedings and Debates of the Constitutional Convention of the State of Ohio (1913) 1346.

[21] G.C. 1465-76 (Am. S.B. No. 48, 1913 Ohio Laws 72, 84-85) ("Every employé, or his legal representative in case death results, who makes application for an award * * * waives his right to exercise his option to institute proceedings in any court * * *. Every employé or his legal representative in case death results who exercises his option to institute proceedings in court as provided in this section, waives his right to any award or direct compensation from his employer under section twenty-two hereof, as provided on this act.").

[22] G.C. 1465-76 (S.B. No. 28, 1914 Ohio Laws 193, 194); see, also, *Vayto*, 18 Ohio N.P. (N.S.) at 315.

[23] See *American Woodenware Mfg. Co. v. Schorling* (1917), 96 Ohio St. 305, 117 N.E. 366, syllabus (holding that constitutional term "lawful requirement" "does not include a general course of conduct, or those general duties and obligations of care and caution which rest upon employers and employés, and all other members of the community, for the protection of life, health, and safety"); *Patten v. Aluminum Castings Co.* (1922), 105 Ohio St. 1, 136 N.E. 426, syllabus (holding that "term 'lawful requirement,' as used in section 35, article II, of the Constitution * * * comprehends such lawful, specific, and definite requirements or standard of conduct as would advise an employer of his legal obligations"); *Ohio Automatic Sprinkler Co. v. Fender* (1923), 108 Ohio St. 149, 141 N.E. 269, syllabus (overruling *Schorling* and *Patten* and holding that "[a] lawful requirement within the meaning of section 35, art. 2, of the Ohio Constitution * * * includes statutes and ordinances, lawful orders of duly authorized officers, specific and definite requirements constituted by law, and laws embodying in general terms duties and obligations of care and caution, and further includes requirements relating to safety of the place of employment and to the furnishing and use of devices, safeguards, methods, and processes designed for the reasonable protection of the life, health, safety, and welfare of employés.").

[24] Joint Resolution No. 40, 1923 Ohio Laws 681 (emphasis added).

[25] Id.; see, also, *State ex rel. Rudd v. Indus. Comm*. (1927), 116 Ohio St. 67, 69, 156 N.E. 107 ("By the adoption in November, 1923 of the amendment to section 35, art. 2 of our Constitution, pertaining to workmen's compensation, provisions were made giving to the Industrial Commission full power to determine whether the death of an employee resulted from the failure of the employer to comply with a specific requirement enacted by the General Assembly or promulgated in the form of an order adopted by the commission or board.").

[26] *State ex rel. Engle v. Indus. Comm.* (1944), 142 Ohio St. 425, 430-31, 52 N.E.2d 743.

[27] Section 35, Article II, Constitution; see, also, *State ex rel. AK Steel Corp. v. Davis*, 123 Ohio St.3d 458, 2009-Ohio-5865, 917 N.E.2d 797, at ¶19 (explaining that "[a]n award to an employee for a violation of a specific safety requirement (VSSR) is a penalty to the employer")

[28] See *Blankenship*, supra; *Kaminski*, 2010-Ohio-1027, at ¶21 (observing that, "[d]espite the emergence and development of the concept that recovery within the workers' compensation system was to be the exclusive remedy for employee injury in the workplace, this court in *Blankenship* * * * devised an exception").

[29] 69 Ohio St.2d at 613 n. 8.

[30] 6 Larson, Workers' Compensation Law (2011) 103-4, Section 103.01.

[31] See *Blankenship*, supra; *Jones v. VIP Development Co.* (1984), 15 Ohio St.3d 90, 472 N.E.2d 1046; *Fyffe v. Geno's, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108.

[32] *Jones*, 15 Ohio St.3d at 95; *Harasyn v. Normandy Metals, Inc.* (1990), 49 Ohio St.3d 173, 175, 551 N.E.2d 962.

[33] *Fyffe*, 59 Ohio St.3d at 118.

[34] *Harasyn*, 49 Ohio St.3d at 175 ("[M]ost employer intentional torts * * * [fell] into the latter category.").

[35] *Jones*, 15 Ohio St.3d at 97-100.

[36] 6 Larson, Workers' Compensation Law (2011) 103-10 n.10, Section 103.04[2][b].

[37] See *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 646, 576 N.E.2d 722 (Holmes, J., dissenting).

[38] 61 Ohio St.3d at 627 n. 1.

[39] Id.

[40] *Brady*, supra (holding former R.C. 4121.80 unconstitutional).

[41] (1991), 61 Ohio St.3d 624, 576 N.E.2d 722.

[42] A plurality of the Court determined that former R.C. 4121.80 could not withstand constitutional scrutiny under Section 35, Article II because: 1) its hybrid system purported to transfer jurisdiction over intentional tort awards to the Industrial Commission; 2) intentional tort awards were not subject to Section 35, Article II; and 3) the "General Assembly has no power to confer jurisdiction on the commission except as authorized by that constitutional provision." 61 Ohio St.3d at 634 (internal quotation omitted). Justice Brown's decisive concurring opinion concluded that the hybrid system created by former R.C. 4121.80 was unconstitutional on the grounds that it violated the employee's right to a jury trial by requiring the court to determine liability and the Industrial Commission to determine damages. Id. at 640-41 (Brown, J., concurring).

[43] (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108.

[44] 59 Ohio St.3d at 119.

[45] Id. (emphasis added).

[46] See Am. H.B. No. 103 (enacting former R.C. 2745.01).

[47] *Johnson v. BP Chemicals, Inc.* (1999), 85 Ohio St.3d 298, 305, 707 N.E.2d 1107.

[48] Ohio Capitol Connection, Minutes of House Labor and Commerce Committee (Aug. 25, 2004), p. 1.

[49] Id.

[50] R.C. 2745.01(B).

[51] R.C. 2745.01(C).

[52] 6 Larson, Workers' Compensation Law (2011) 103-8, Section 103.03.

[53] Id.

[54] Id. at 103-9, Section 103.3.

[55] But see *Fickle v. Conversion Technologies, Internatl., Inc.*, 6th Dist. No. WM-10-016, 2011-Ohio-2960, at ¶29 (stating in the context of construing R.C. 2745.01(C) that, "[i]n the absence of clear legislative intent to the contrary, words and phrases shall be read in context and construed according to their plain, ordinary meaning," and observing that "[t]he plain, ordinary, or generally accepted meaning of an undefined statutory term is invariably ascertained by resort to common dictionary definitions").

[56] *Kaminski*, 2010-Ohio-1027, at ¶56.

[57] 49 Ohio St.3d at 175.

[58] R.C. 2745.01(A)-(B).

[59] See *Klaus v. United Equity, Inc.*, 3d Dist. No. 1-07-63, 2010-Ohio-3549, at ¶33 (affirming summary judgment in favor of the employer where "there is nothing in the record demonstrating that United committed a tortious act with the specific intent to injure Klaus or that United acted with deliberate intent to cause Klaus to suffer an injury for purposes of R.C. 2745.01(A) and (B)"); *McCarthy v. Sterling Chemicals, Inc.*, 1st Dist. Nos. C-090077, C-090082, C-090691, C-090700, 2011-Ohio-887, at ¶14 (alleged failures to provide fall protection and adequately train and supervise the employee are insufficient to establish intent where appellants admit that there is no evidence that employer deliberately intended to injure the employee).

[60] 8th Dist. No. 95399, 2011-Ohio-1694.

[61] Id. at ¶39. Since, as explained in the text above, VSSR payments are a form of penalty paid by the employer that commits the violation, it is not clear that a single "deliberate" or "direct" intent standard will spread the entire risk of employer conduct falling short of a deliberate intent to injure to all Ohio employers.

[62] Id. (emphasis added).

[63] Cf. *Spitzer v. Stillings* (1924), 109 Ohio St. 297, 142 N.E. 365, syllabus ("Where a statute is construed by a court of last resort having jurisdiction, and such statute is thereafter amended in certain particulars but remains unchanged so far as the same has been construed and defined by the court, it will be presumed that the legislature was familiar with such interpretation at the time of such amendment, and that such interpretation was intended to be adopted by such amendment as a part of the law, unless express provision is made for a different construction.").

[64] Cf. *Fickle v. Conversion Technologies, Internatl., Inc.*, 6th Dist. No. WM-10-016, 2011-Ohio-2960, at ¶43 (stating that "an 'equipment safety guard' would be commonly understood to be mean a device that is designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment").

[65] Id. at ¶50 (Singer, J., concurring) (stating that it is not "necessary for us [to] also rule out the possibility that, in an appropriate case, the lack of training, or incorrect training, could constitute removal of a safety guard").

[66] See *Fickle*, 2011-Ohio-2960, at ¶31 (stating that "[r]emoval of a safety guard does not require proof of physical separation from the machine, but may include the act of bypassing, disabling, or rendering inoperable"), citing *Harris v. Gill* (Ala. 1991), 585 So.2d 831, 836-37. Cf. *Forwerck v. Principle Business Ents., Inc.*, 6th Dist. No. WD-10-040, 2011-Ohio-489, at ¶15 (stating in dicta that a "deliberate process of requiring employees to use a ladder to climb over a six foot eight inch guard wall to clean moving machinery may constitute a deliberate removal of a guard pursuant to R.C. 2845.01(C)").

[67] Id. (emphasis added).

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WARNING: Conflicting Issues Regarding Warning Labels May Be Hazardous To Your Company's Health

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Until recently, a properly crafted safety warning seldom interfered with the salability of a product. The 2006 European Union Machinery Directive ("the EUMD"), ratified by the European Union's member countries at the end of 2009, will likely create a great deal of interference.

Many U.S. manufacturers sell products in the United States and the European Union. In almost every case, such products are festooned with warning labels to prevent accidents and to avoid liability.

Warning labels are expensive. They must be designed, manufactured and applied. They are made from special plastic that will withstand harsh environments. Care must be taken to ensure they are properly affixed and properly placed on the product.

Manufacturers have been able to design harmonized product warnings on products bound for the United States and the European Union. The EUMD threatens that ability. If the EUMD is followed to the letter, every warning on every product destined for a European Union state must consist of a pictogram, and any written warnings must be translated into the official language of the country of the product's destination. Manufacturers have four choices: ignore United States warning standards and risk liability for insufficient warnings; ignore the EUMD and risk product rejection in the European Union; draft multiple translations of all words and message panels and apply them on a case by case basis or; maintain one set of American National Standards Institute ("ANSI") style warnings for the United States market and another set of pictograms for the European market.

None of these solutions is attractive; all are potentially costly. But this is not merely a financial decision. ANSI and the International Organization for Standardization ("ISO") designed the different warning schemes to promote and enhance the safety of the products produced. The warnings are based on an expectation that uniformity in format will enhance readability and compliance.[1] Instituting a new set of requirements may interfere with that overarching goal.

A Brief History of the Standardized, Pictorial Warning Label

The story of modern, standardized, pictorial warning labels begins with the National Electrical Manufacturers Association ("NEMA"). Confronted with rising levels of "failure to warn" allegations involving electrical equipment in the early 1980's, NEMA's members set out to develop a warning label.[2] Although their electrical equipment was generally locked, tampering by vandals gave rise to a number of serious injuries when children explored the interior of such equipment and were electrocuted.[3] In order to combat the failure to warn claims, the manufacturers needed to develop a warning label effective for young children who either could not read, or who could not grasp the severity of danger in the language.[4] NEMA members developed the now-famous pictorial of "Mr. Ouch" and engaged in extensive testing of children of several ethnicities aged 2.5-6.5 years. The Mr. Ouch pictorial ranked the highest in "every major category relative to depicting a threat and inducing a safe response."[5]

The beauty of Mr. Ouch was that it worked. The testing demonstrated that people, including children, recognized the symbol and were given the information necessary to avoid the risk of harm. From a products liability standpoint, manufacturers could prove that they had used an effective warning. This not only improved safety, it also improved a manufacturer's ability to defend its products. Mr. Ouch was the first standardized warning adopted by an industry.

ANSI

Manufacturers typically rely on compliance with consensus standards promulgated by bodies such as ANSI that oversee the creation, promulgation and use of thousands of norms and guidelines that directly impact businesses in nearly every sector of the U.S. economy.[6]

In the case of warnings, the relevant standards have been promulgated under the ANSI Z535 committee since 1991. The Z535 standards were designed to create something that was as effective as Mr. Ouch. The mantra of the ANSI warning system is threefold: alert a user to the danger; inform the user of the severity of the danger; and instruct the user how to avoid the danger. A combination of symbols, colors, and mandatory warning language accomplish all three.

The stated purposes of ANSI Z535 are: to establish a uniform and consistent visual layout for safety signs and labels applied to a wide variety of products; to minimize the proliferation of designs for product safety signs and labels; and to establish a national uniform system for the recognition of potential personal injury hazards for those persons using products.[7]

There are four levels of severity denoted by the following four "signal words" (with corresponding colors): "DANGER" (white letters, red background); "WARNING" (black letters, orange background); "CAUTION" (black letters, yellow background); or "NOTICE" (white letters, blue background). A safety symbol displayed as an equilateral triangle surrounding an exclamation point, accompanies all signal words.

A product safety sign or label consists of a signal word panel and a mandatory message panel that communicates the type of hazard, the consequence of not avoiding the hazard, and how to avoid the hazard.[8] There are a number of specific instructions regarding the font, alignment, and other physical characteristics of the language used on the message panel. Grammatical instructions such as the avoidance of passive voice and prepositional phrases are also included.[9]

The idea is that any person could, with a quick look, know what sort of trouble was ahead, what might happen, and how to avoid the trouble. Manufacturers in the United States have now spent more than a generation teaching users and consumers to recognize and interpret ANSI-style warnings.

Compliance with ANSI Z535 also gives a manufacturer a litigation advantage. Compliance with ANSI Z535 allows the manufacturer to argue that it fulfilled its duty to warn by following the relevant consensus standard.

ISO

While the ANSI committees were honing the Z535 standards, ISO, was developing its own standard, using a different concept. While the ANSI standard was based on a combination of safety symbols, signal words, and message panels, ISO created a symbol-based system.

ISO is the world's largest developer and publisher of International Standards. ISO, a non-governmental organization, is a network of the national standards institutes of 161 countries, with its Central Secretariat in Geneva coordinating the system.[10] ANSI is the official United States representative to ISO.[11]

ISO 3864-2 establishes principles for the design of product safety labels. According to ISO 3864-2, the purpose of a product safety label is to alert persons to a specific hazard and to identify how the hazard can be avoided.[12] In short, ISO and ANSI have similar goals – uniform systems to give users and others information about hazards, the severity of the hazards and how to avoid them. The major difference is the method each system uses to achieve its goals.

To comply with the ISO regulations, businesses must use at least one of three types of safety signs: an equilateral yellow triangle (warning)[13], a red circle with slash (prohibition), or a blue circle (mandatory action).[14] A pictogram describing a hazard, an action, or an instruction will be included on each type of sign. The most familiar example is the no smoking "prohibition" sign. The ISO 3864-2 system utilizes three basic colors as signals for the severity of harm to be encountered (red for high, orange for medium, and yellow for low).[15] Signal words can be associated with each level of severity: danger, warning, and caution, respectively.[16] Each of these three levels of severity has an equilateral triangle surrounding an exclamation point in the appropriate color. Together they form a hazard severity panel. Note, however, that the use of signal words or a hazard severity panel is not mandatory.[17] Stated differently: each label "shall be comprised of one or more safety signs", and may be "accompanied by a hazard severity panel."[18] Finally, there

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is the option of adding supplementary safety information text which can include warnings such as: "ELECTRICAL HAZARD - Contact with Water Can Cause Electrical Shock."[19] These language-based warnings, like the signal words, are permissive.[20]

ISO V. ANSI

ISO places a heavier reliance on pictorial warnings than ANSI. In fact, the ISO warning can be exclusively pictorial, with no words at all. By contrast, the ANSI standard mandates a signal word and a message panel provide necessary information to the product user.
Neither the ANSI nor the ISO warning schemes has the force of law. Their lack of uniformity can cause potential litigation problems and possible safety issues. If a manufacturer, adhering to the ISO standard, exports its products to the United States, it is at risk for liability based upon failure to warn. The liability stems from not producing warnings adhering to the relevant U.S. standards.

In addition, the goals of the two systems, while similar, are not exactly the same. ISO's goal is "to alert persons to a specific hazard and to identify how the hazard can be avoided,"[21] whereas ANSI's goals are to: "establish a uniform and consistent visual layout for safety signs and labels applied to a wide variety of products; to minimize the proliferation of designs for product safety signs and labels; and to establish a national uniform system for the recognition of potential personal injury hazards for those persons using products."[22] The ISO system is less concerned with variation and more concerned with adapting safety labels to specific situations. By contrast, ANSI is more concerned with a standardized system. ANSI's theory is essentially that although the warnings may not adapt to each unique situation, workers will be safer when conditioned to the same signal words and warning style year after year.

Using ISO warnings in the United States. or ANSI warnings in Europe may have safety consequences. If the goal of each warning system is to provide a uniform system to provide readily understandable access to safety information, using a different system is problematic.[23]

It is possible to harmonize ISO and ANSI standards into a single hybrid warning label. For example, an ISO/ANSI hybrid warning label would be one with an ISO pictorial, accompanied by an ANSI-compliant message panel and signal word. This would ostensibly satisfy the ISO requirements and supply the required verbiage of the ANSI requirements. This solution is not perfect. The ISO system doesn't require any language at all in either a hazard severity panel or supplementary safety information text. If one does exercise such an option, there is no guidance as to the language that must be used. The colors and color schemes are slightly different. For example, including an ANSI-compliant message panel for a given severity of risk would not be exactly congruent in color with ISO. However, the hybrid label is very close to full compliance with both standards.

Enter the New European Requirements

Much of the work harmonizing ISO and ANSI warnings may be for naught due to the EUMD. Unless the EUMD is modified, any manufacturer selling a product in Europe will now need to comply with this new law, which introduces a third set of requirements for approved warnings.

These new requirements are the law. The European Union Parliament has power to legislate directives and regulations. Both have the force and effect of law. Regulations are self-executing, and effective and binding on the member states automatically and immediately. There is no country-by-country ratification process for the individual member states, although they are sovereign nations. Directives, once approved by the Parliament, must still be enacted by each member state. Each member state may tailor a directive to its particular needs as long as its version remains aligned with the spirit of the directive. Directives generally set forth a series of goals and give a date by which each member state is to enact legislation to its effect.[24]

Each of the European Union member states has now ratified the EUMD. The EUMD is applicable to machinery: interchangeable equipment; safety components; lifting accessories; chains, ropes and webbing; removable mechanical transmission devices; and partly completed machinery.[25] A number of items are excepted from the EUMD.[26]

At issue is section 1.7 to Annex I, entitled "information" which deals with warnings and accompanying instructions. The Machinery Directive explicitly states a preference for pictorial-based warnings, presumably due to the diversity of languages spoken in the European Community."

In fact, any "…written or verbal information and warnings must be expressed in an official Community language or

languages, which may be determined in accordance with the Treaty by the Member State in which the machinery is placed on the market and/or put into service and may be accompanied, on request, by versions in any other official Community language or languages understood by the operators."[27]

In short, any verbiage on a warning label must be translated in the official language(s) of the destination member state. If a product is sold to an entity near a border, the language problem may multiply. So now, to comply with the EUMD, ANSI and ISO, multiple translations of the signal words and the message panels are required.

European Union Enforcement

With the EUMD in full force and effect in member states for 1.5 years,[28] EU member states have taken multiple actions to comply with the myriad of EUMD requirements. A brief overview of the approval process for machinery may be helpful: There are several ways a manufacturer can establish conformity with the EUMD. For machinery listed in Annex IV of the EUMD (e.g. circular saws, band-saws, vehicle servicing lifts, etc.), the manufacturer can construct a so-called technical file and ensure compliance with the file through self-certification;[29] contact a "notified body" (an organization authorized by a member state to assess whether the design and manufacture of a machine meets the requirements of the EUMD) to certify that the machine satisfies the EUMD's requirements, or confirm that the machine was manufactured using a full quality assurance system by having a "notified body" assess and approve the quality system and monitor its application.[30] If the machine is not listed in Annex IV, the only option for the manufacturer is to self-certify compliance with the Directive.[31]

Once the manufacturer of a machine has established conformity with the EUMD, it can prepare a Declaration of Conformity. The Declaration of Conformity appears in the machine's operation manual, and declares that the manufacturer guarantees each piece of equipment sold is in conformity with the Directive.[32]

An accompanying regulation – automatically binding on all member states – notes that a machine presenting a "serious risk", must be recalled or withdrawn from the market.[33] If a member state takes action in accordance with this provision, it must notify the European Commission immediately.[34]

The EUMD was implemented by the United Kingdom through the Supply of Machinery (Safety) Regulations 2008 ("the Regulations").[35] The Regulations are enforced by the Health and Safety Executive (comparable OSHA) for machinery used in the workplace, and by the Trading Standards Service for machinery used at home.[36] When a machine is suspected of being deficient, the authority must serve the manufacturer in writing, stating that the machine has failed to comply with the requirements of the EUMD.[37] The notice must include the reason the authority finds the machine deficient and the actions the manufacturer must take to bring the machine into EUMD compliance (whether through a product recall, withdrawal from the market, or the repair of a faulty product).[38]

There are signs that the EUMD has some teeth. Although there have been no apparent actions relating to the warning language requirements specifically, there has been activity in the moths since the EUMD's effective date. For example, in the UK, a Chinese-made angle grinder was voluntarily recalled because it failed to comply with the EUMD for a safety concern (sticky power switch).[39]

Harmonizing the United States' and Europe's Requirements: What Do We Do?

Subsequent to the ratification of the EUMD, designing one warning label that will pass muster in both the United States and Europe may be impossible. The main problem in this regulatory nightmare is the language requirement in the EUMD. By itself, it provides for an almost unworkable requirement of translating any text on warning labels into over 20 languages. It appears the only clear way to comply with the machinery directive's language requirements is to have no language at all. However, that warning would then fail to comply with ANSI Z535.4. Failure to comply with ANSI Z535 in the United States may make the product less safe. It will almost certainly make it harder to defend in the event of a failure to warn claim.

There are limited options to solve this issue and none is ideal. The first option is to simply issue different warnings for European products: use ANSI for the United States bound products and a wordless ISO-based warning label for products sold in Europe. This possibility precludes the use of a universal warning label and increases costs, due to the need to design and implement two warnings regimes, engage workers to install these warnings, and engage inspectors that insure that the proper warnings are

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used. Another possibility is to utilize an ANSI compliant warning for the product for distribution across continents, and offer a method for obtaining a language translation to a subsequent European purchaser, such as an automated website which will send translated warnings to anyone who provides a serial number. This methodology, does not solve the problem of retaining one universal warning label, and in fact, requires maintaining warning labels in myriad languages, at increased cost. In addition, it underscores the main problem with the Machinery Directive: in order to comply with the strict letter of the EUMD, a manufacturer must keep on hand or affix to the product, a warning label in all of the community languages, which is extremely difficult. Moreover, the EUMD requires that the warning accompany the product.[40] It is not clear that directing a buyer or user to a website will satisfy that requirement.

A third possibility is to utilize an entirely ISO pictorial warning in the United States and Europe. However, such a plan creates a risk when a party is injured by a product is sold in the United States. The argument will be that the manufacturer failed to effectively warn, because it failed to comply with the ANSI standard.

All of these options present a potential for eventually mastering the regulatory structure anomalies, but all have their drawbacks.

The overarching concern in all of this is worker safety. As counselors, we can advise our clients as to the best way to prevail in a lawsuit, but it is far better to avoid lawsuits in the first place and promote safety as a company policy. The premise of the ANSI warning systems and the one permitted by ISO is to give the user quick information: a worker sees the word "Danger," in a certain recognizable format he has seen hundreds of times. That worker knows injury or death is a result of not following the instructions, and that same scheme is on every product. While the research on the effectiveness of ISO and ANSI warnings shows neither is significantly better at changing user behavior than a non-standardized label[41], adding a third varying scheme with no scientific basis will certainly not advance that cause of safety. If the EUMD precipitates a sudden deviation after 30 years of training workers what to look for, shouldn't there be some effort to advance safety?

Endnotes

1 See ISO 3864-2:2004 and ANSI Z535.4-2007, § 2.2.
2 Kenneth Ross, "The Story of 'MR OUCH', Creation of a warning label", Product Liability Int'l, October 1983, pp. 152-154.
3 Id.
4 See id.
5 Id.
6 http://www.ansi.org/about_ansi/overview/overview.aspx?menuid=1, accessed 1/18/2011.
7 ANSI Z535.4-2007, § 2.2.
8 Id. at Annex B.
9 Id.
10 http://www.iso.org/iso/about/discover-iso_how-the-iso-system-is-managed.htm, accessed 1/18/2011. A host of information about ISO can be found on their website, www.ISO.org, and copies of all referenced ISO standards can be purchased there as well.
11 http://www.ansi.org/about_ansi/introduction introduction.aspx?menuid=1, accessed 1/18/2011.
12 http://www.iso.org/iso/iso_catalogue/catalogue_tc/catalogue_detail.htm?csnumber=31020, accessed 1/18/2011.
13 Note that the colors inside the ISO and ANSI triangles differ; with ISO, the color is always yellow and with ANSI, the color varies according to the level of hazard.
14 ISO 3864-2:2004, § 6.2.
15 Id. at § 4.3.
16 Id. at § 5.3.
17 Id. at § 5.1 ("If the level of hazard severity is to be indicated…").
18 Id. at § 6.1.
19 Id. at §§ 3.15, 6.1.
20 Id. at § 6.1.
21 ISO 3864-2:2004; http://www.iso.org/iso/iso_catalogue/catalogue_tc/catalogue_detail.htm?csnumber=31020.
22 ANSI Z535.4-2007, § 2.2.
23 There is a great deal of debate in the scientific community about whether warnings are effective in changing behavior. That debate extends to whether the formats set forth by ANSI and ISO result in any increased compliance. A recent study found that the ANSI and ISO formats did not result in significantly greater compliance than messages that followed no particular format. Eric F. Shaver, *et al*., "Comparison of ISO and ANSI Standard Formats on People's Response to Product Warnings", Proceedings of the Human Factors and Ergonomics Society, 50th Annual Meeting, 2006, pp. 2197-2201. A copy of the proceedings, including the article, can be purchased at the HFES website at http://www.hfes.org/publications/ProductDetail.aspx?ProductId=79, accessed 1/19/2011. Reading the study does show that the US residents were more likely to comply with the ANSI formatted warning than an ISO formatted warning, even though the ISO warning contained a signal word and a message panel. Id. at 2199.
24 For example the EUMD was enacted in 2006, and gave a deadline to enact legislation by June 29, 2008, with an effective date of such legislation of December 29, 2009 at the latest. 2006/42/EC, Art. 26, ¶ 1. A copy of the English version of the directive can be found at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_157/l_15720060609en00240086.pdf, accessed 1/18/2011.
25 2006/42/EC, Art. 1, ¶ 1.
26 Id. at Annex I, § 1.7. There are a number of exceptions to the EUMD: site hoists, weapons, devices for lifting personnel, consumer products, certain farm tractors, electrical equipment (including a variety of items from consumer electronics to high voltage switchgear), certain safety devices, vehicles for transport of persons and cargo (land, sea and air), machinery for "nuclear purposes," military equipment and a variety of highly specialized machines.
27 2006/42/EC, Annex I, § 1.7.
28 See n. 24, supra.
29 A machine's technical file contains details of a hazard and risk assessment in which categories of risk are identified. 2006/42/EC, Annex VII. The file then details how the machine complies with the EUMD, using detailed drawings of the equipment and any calculations or test results. 2006/42/EC, Annex VII (A)(1)(a). For example, the file will detail each essential health and safety

requirement (and how the machine complies or actions that must be taken in order for it to comply), and then address numerous other requirements. 2006/42/EC, Annex VII (A)(1)(a). Because most machines that are CE marked are self-certified by the manufacturer, technical files are not typically examined until an incident occurs. In the case of an incident, the member state's agency responsible for consumer safety will request the machine's technical file. The EUMD requires manufacturers based outside of the EU appoint a person based in the EU to be responsible for providing the technical file to the national authorities if so requested. 2006/42/EC, Annex VII(2). Non-EU manufacturers who previously self-certified their machines, are now burdened with having to establish a link with a European company/individual before they are able to sell their machine in the EU.

[30] 2006/42/EC, Art. 12, ¶1; 2006/42/EC, Art. 14.

[31] 2006/42/EC, Art. 12, ¶2.

[32] 2006/42/EC, Annex II, (1)(A)(4).

[33] EU Regulation No. 765/2008, Art. 20. A copy of the english version of the regulation can be found at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:218:0030:0047:en:PDF, accessed 7/22/2011

[34] *Id*. at Art 22.

[35] Statutory Instrument 2008:1597.

[36] Id. at part 6(21)(2)

[37] Id. at part 6(21)(3).

[38] Id.
The maximum penalty under the Regulations is two years imprisonment and/or a fine. Part 6(22)(a), (b). The Regulations also note that any incident that involves injury or damage to a consumer will also fall within the scope of other UK safety legislation, so further sanctions may be applied.

[39] See http://webforms.sgs.com/v4/corp/safeguards/pdf/PRODUCT-RECALLS-Consumer-Products-February-01-15.pdf, accessed 7/22/2010.

[40] 2006/42/EC, Annex I, § 1.74.

[41] See n. 23, supra.

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Product Liability Update – 2010-2011

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Jurisdiction

***Goodyear Dunlop Tires Operation S.A. v. Brown* (2011), —U.S.—, 131 S.Ct. 2846, 180 L. Ed. 3d 796.**

Respondents, North Carolina residents whose sons died in a bus accident outside Paris, France filed a suit for wrongful death damages in North Carolina State Court. Alleging that the accident was caused by tire failure, they named as defendants Goodyear USA, an Ohio corporation and petitioners, three Goodyear USA subsidiaries, organized and operating, respectively, in Luxemburg, Turkey and France. Petitioners' tires are manufactured primarily for European and Asian markets and differ in size and construction from tires ordinarily sold in the United States. Petitioners are not registered to do business in North Carolina; have no place of business, employees or bank accounts in the state; do not design, manufacture or advertise their products in the state; and do not solicit business in the state or sell or ship tires to North Carolina customers. A small percentage of their tires were distributed in North Carolina by other Goodyear USA affiliates. The trial court denied petitioners' motion to dismiss the claims against them for want of personal jurisdiction. The North Carolina Court of Appeals affirmed, concluding that the North Carolina courts had general jurisdiction over petitioners, whose tires had reached the state through "the stream of commerce."

The Court distinguished between general jurisdiction over foreign corporations and specific jurisdiction and held that the petitioners were not amenable to suit in North Carolina on claims unrelated to any activity of petitioners in the forum state.

***J. McIntyre Machinery Ltd. v. Nicastro* (2011), —U.S.—, 131 S.Ct. 2780, 180 L.Ed. 2d 765.**

Nicastro injured his hand while using a metal shearing machine that J. McIntyre Machinery Ltd. manufactured in England where the company was incorporated and operated. Nicastro filed a products liability suit in a state court in New Jersey where the accident occurred. McIntyre sought to dismiss the suit for want of personal jurisdiction. Nicastro's jurisdictional claim was based on three primary facts: a U.S. distributor agreed to sell J. McIntyre's machines in this country; J. McIntyre officials attended trade shows in several states, albeit not in New Jersey; and no more than four J. McIntyre machines, including the one at issue, ended up in New Jersey. The New Jersey State Supreme Court held that New Jersey's courts cannot exercise jurisdiction over a foreign manufacturer without contravening the 14th Amendment's due process clause so long as the manufacturer knew or reasonably should have known that its products are distributed through a nationwide distribution system that might lead to sales in any of the states. The U.S. Supreme Court reversed and concluded that because J. McIntyre never engaged in any activities in New Jersey that revealed an intent to invoke or benefit from the protection of the state's laws, New Jersey was without power to adjudge the company's rights and liabilities, and its exercise of jurisdiction would violate due process.

The U.S. Supreme Court did not accept the "stream of commerce" reasoning set forth in *Asahi Metal Industry v. Superior Court of California* (1987), 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed. 2d 92. The Court held that the exercise of judicial power is not lawful unless the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.

***Scott v. Sona USA* (Jan. 25, 2011), S.D.Ohio No. 1:08-CV-00625, 2011 U.S. District LEXIS 6837.**

This was a products liability action in which plaintiffs alleged a dangerous toy, a "zoom zopter," blinded a three-year-old child in her right eye. The original complaint pleaded both diversity and federal subject matter jurisdiction. Diversity was destroyed when in discovery it was determined that a number of defendants were Ohio residents, as were the plaintiffs.

The second amended complaint premised jurisdiction solely on the basis of federal subject matter, claiming that the federal Consumer Product Safety Act applied. Defendants filed a motion to dismiss challenging plaintiffs' contention that the CPSA created a private right of action claiming that the Court should not exercise supplemental jurisdiction over plaintiffs' remaining personal injury claims. The CPSA does not create a private cause of action for the violation of any regulation. It more narrowly creates a cause of action when a party violates a consumer product safety rule, or rule or order, of the CPSC promulgated under the CPSA.

Procedure

***In re Whirlpool Corporation v. Front Loading Washer Products Liability* (July 12, 2010), N.D.Ohio No. 1:08-WP-65000, 2010 U.S. District LEXIS 69254**

Two plaintiffs in a multidistrict products liability litigation based on Whirlpool's allegedly defective front-loading washing machine moved to certify their Ohio tort, warranty, and fraud claims as a class action under FRCP 23(b)(3). The Court held the plaintiffs met the Rule 23(a) prerequisites because common questions predominate and because a class action is the superior method for adjudicating a controversy.

The Court found that the plaintiffs satisfied the four Rule 23(a) prerequisites of numerosity, commonality, typicality, and adequacy of representation, as well as the Rule 23(b)(3) predominance and superiority requirements to justify certification on their three Ohio claims of negligent design, negligent failure to warn, and tortious breach of warranty.

The Court declined to certify the plaintiffs' Ohio Consumer Sales Practices Act claim finding that applying Rule 23 would abridge, enlarge, or modify Ohio's rights or remedies rendering it ultravires under the Rules Enabling Act, 28 U.S.C. § 2072(b) requiring it to give way to O.R.C. § 1345.09(B).

***Friedman v. Castle Aviation, et al.* (May 17, 2011), S.D.Ohio, No. 2:09-CV-749, 2011 U.S. District LEXIS 53117.**

The pilot and the passenger were both killed in an airplane crash that occurred shortly after takeoff from Rickenbacker International Airport in Columbus, Ohio. The aircraft that crashed was a Cessna 208B manufactured by Cessna Aircraft Company in 1999.

Plaintiff asserted five claims against Cessna in the first amended complaint; negligence, negligence per se, breach of warranty, punitive conduct, and punitive damages. Cessna filed a motion to dismiss the claims against it for failure to state a claim upon which relief could be granted. Cessna contended that plaintiff's amended complaint failed to provide sufficient factual matters to state a claim for relief that is plausible on its face and, second, that plaintiff failed to reference the relevant provisions of the Ohio Product Liability Act.

In response, plaintiff argued that the first amended complaint satisfied the pleading standards necessary to survive a motion to dismiss and requested leave to file a second amended complaint so as to formalize the clarification plaintiff presented in his response brief to Cessna's motion to dismiss.

In its reply brief, Cessna essentially asserted a futility argument contending that the proposed second amended complaint failed to articulate how the alleged defects in the Cessna that crashed proximately caused the injuries and damages claimed by the plaintiff. Cessna claimed the second amended complaint would be subject to a Rule 12(b)(6) motion as well.

The Court permitted plaintiff to file the second amended complaint and held that defendant's "futility argument" would be more appropriately addressed after full briefing by both parties on a proper Rule 12(b)(6) motion if and when such motion was filed.

Relation Back

***Erie Indemnity Co. v. Keurig, Inc.* (July 15, 2011), N.D.Ohio, No. 1:10-CV-02899, 2011 U.S. District LEXIS 76998.**

On December 22, 2010, the plaintiffs initially sued Keurig, Inc. The plaintiffs brought claims for strict products liability under the O.R.C. § 2307.71 and common law negligence, alleging that a February 19, 2009 fire in the Burns' home was caused by a Keurig B50 coffeemaker. At first, the plaintiffs believed that Keurig was solely responsible for the design, manufacture, assembly and supply of the coffeemaker. Further investigation by the plaintiffs

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suggested that Defendant Simatelex – a Hong Kong manufacturer – was likely involved in manufacturing the coffeemaker. On March 1, 2011 the Plaintiffs filed an Amended Complaint adding Simatelex as a defendant and making claims of strict products liability under the OPLA and common law negligence against both defendants Keurig and Simatelex.

Simatelex filed a Motion to Dismiss under Rule 12(b)(6) claiming that the plaintiffs' common law negligent design claim was abrogated by OPLA and that both claims asserted against Simatelex were barred by Ohio's two-year personal injury and property damage statute of limitations.

The District Court found that decisions of several District Courts in the Sixth Circuit had considered the interaction of *Krupski v. Costa Crociere S.p.A.* (2010), 130 S.Ct. 2485, 177 L. Ed. 2nd 48 and concluded that a lack of knowledge regarding additional parties is not the type of mistake that would allow the relation back under Rule 15(c)(1)(C). However, this District Court held that these decisions read *Krupski* in an unduly narrow fashion. The Court determined that a better reading of *Krupski* views it as abrogating the prior Sixth Circuit rule that categorically barred addition of new parties under Rule 15(c).

The Court also found that the OPLA is the sole cause of action under Ohio state law for "products liability" claims and dismissed the common law negligence claims.

***Ohio Power Company v. General Hydrogen* (March 28, 2011), S.D.Ohio No. 2:09-CV-16, 2011 U.S. Dist. LEXIS 32639.**

The Court held that Rule 15(c) may not be used over defendant's limitations objection to authorize its addition to the defendants in plaintiff's amended complaint. Both the Sixth Circuit and the State of Ohio are clear on the limited extent of Procedural Rule 30 to allow amendment of pleadings after applicable limitations have expired.

Federal Rule 15(c) allows corrections of misnomers, but not the addition or substitution of new parties after the statute of limitations has expired.

When a new party is added, a new cause of action is created and will not relate back to the date of filing the original action for statute of limitations purposes.

Statute of Limitations

***Reddick v. Lazar Brothers, Inc.,* Cuyahoga App. No. 94424, 2010-Ohio 5136.**

On May 20, 2006, plaintiff contracted with Stanley Steemer to clean the tile floors in her kitchen and bathrooms and some upholstered furniture. A Stanley Steemer employee cleaned the tile and grout using an alkaline-based cleaner which plaintiff claimed caused staining on some but not all of the tiles. On May 27, 2006, Stanley Steemer returned to plaintiff's house to clean the tiles again. When the stains could not be removed, Stanley Steemer sent a certified tile technician to plaintiff's house who told her that the tile was either defective or had been stained prior to Stanley Steemer's cleaning on May 20.

Plaintiff filed a small claims complaint against Stanley Steemer. Judgment was entered in favor of the plaintiff in the amount of $2,867.07, which represented the amount it would cost the plaintiff to replace the damaged tile, minus what she owed Stanley Steemer for cleaning her upholstery.

Stanley Steemer appealed, arguing that the trial court abused its discretion. Stanley Steemer argued that the plaintiff's complaint was not filed within the applicable statute of limitations, which it contends is two years under R.C. 2305.10(A). Plaintiff argued that it was a breach of contract case and, therefore, subject to a 15-year statute of limitations under R.C. 2305.06.

R.C. 2305.10(A) sets forth the statute of limitations for actions based on a product liability claim, an action for bodily injury, or an action for injury to personal property. This statute of limitations does not apply to plaintiff's claim for relief for damage to her real property, the damaged floor tiles in her house.

The Court of Appeals found that the action was premised on a breach of contract, which allowed plaintiff 15 years to bring the action. However, even if it was not a breach of contract action, the appellate court found the only other applicable statute of limitations would be R.C. 2305.09(D), which provides a four-year statute of limitations for an injury to the rights of a plaintiff not arising on contract nor enumerated in R.C. 2305.10, which would include tortious damage to real property.

Abrogation of Common Law Claims

***Clonch v. I-Flow Corporation* (Nov. 16, 2010), S.D.Ohio No. 1:10-CV-00348, 2010 U.S. District LEXIS 121607.**

Plaintiff sought damages for injuries allegedly caused by the use of a pump manufactured by defendant, I-Flow, that was used to dispense pain medication on her joint after knee surgery in 2001. She alleged that she developed chondrolysis as a result of the continuous infusion of pain medication on her knee joint via the I-Flow pump and will eventually need a total knee replacement. Her complaint included claims for strict liability, negligence, breach of warranty, and punitive damages.

Defendant filed a motion to dismiss the breach of warranty claim contending that it is precluded by Ohio's Product Liability Act. Defendant read the breach of warranty claim as being a claim for the implied breach of warranty of merchantability and fitness for a particular use. Ohio's Product Liability Act preempts any UCC-based claims for breach of implied warranty or merchantability or intended use.

The Court denied the defendant's motion to dismiss. The Court indicated that although the complaint did not contain the exact language of a representation alleged to have been made by defendant, it did set forth facts from which the Court could plausibly infer that a representation was made and that the pump did not conform to that representation, which is all that is required by R.C. 2307.77 at the pleading stage. While the complaint may have been inartfully drafted in that it did not reference the particular sections of the Ohio Product Liability Act under which plaintiff sought relief, it did provide sufficient notice to the defendant of the nature of plaintiff's claims.

***Coffey v. Smith & Wesson Corporation*, (Jan. 11, 2011), N.D.Ohio No. 5:10-CV-01286, 2011 U.S. Dist. LEXIS 2615.**

Plaintiff purchased a used handgun which defendant manufactured. On May 9, 2009, plaintiff stated that he was unloading the handgun when it discharged, without plaintiff touching or pulling the trigger, and a bullet entered his left palm, exited the back and entered plaintiff's left thigh. On February 20, 2009, plaintiff received a recall notice from Smith & Wesson indicating that a condition may exist that permits the gun to discharge a bullet without pulling the trigger.

Defendants moved to dismiss plaintiff's common law claims of negligence, negligent design, and failure to warn on the basis that they were abrogated by the Ohio Product Liability Act. The Court found that if the common law negligence and breach of warranty claims asserted by the plaintiffs are covered by the statutory language abrogating common law product liability causes of action, those claims are extinguished.

The Court dismissed the complaint as written without prejudice and permitted the plaintiff to replead the complaint under the Ohio Product Liability Act, with reference to the applicable provision of the OPLA.

The Court also found plaintiff need not prove malice to recover punitive damages since the proof requirement under R.C. 2307.80 is "misconduct of the manufacturer or supplier in question that manifested a flagrant disregard of the safety of persons who might be harmed by the product in question."

Exposure to Product

***Cantrell v. Adience, Inc.*, Cuyahoga App. No. 93944, 2010-Ohio 3614.**

The trial court granted defendant's motion for summary judgment. The appellants, a worker and her husband, alleged that during the worker's employment, she was exposed to asbestos and asbestos-containing materials made by the manufacturer, causing her to develop malignant pleural mesothelioma. The worker was employed for 16 or 17 months in the transmission assembly room at a car manufacturing plant within 20-40 feet of asbestos-containing clutch plates allegedly supplied by the manufacturer. The Court held that the trial court properly granted summary judgment to the manufacturer as the worker failed to present sufficient evidence to establish that she was actually exposed to the manufacturer's asbestos-containing product during the course of her employment at the plant. Accordingly, she could not establish causation.

The Court rejected the worker's contention that Evidence Rule 406 could be applied to show that the manufacturer's past pattern of supplying the clutch plates to the plant continued during the time of her employment. The Court held that this was not a case where a routine practice of an organization was used to prove conduct in conformity

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on a particular occasion. Rather, the worker sought to use Evidence Rule 406 to establish that a business relationship continued to exist between the parties. The district found that this was not an appropriate use of the rule as products were not supplied as a course of routine practice but were supplied as part of a contractual business relationship.

Duty to Warn

***Stringer v. National Football League* (Sept. 22, 2010), S.D.Ohio No. 2:03-CV-665, 2010 U.S. District LEXIS 98874.**

In July, 2009, the District Court granted summary judgment in favor of Riddell on plaintiff's claims of design defect and breach of warranty, leaving only plaintiff's failure to warn claim for trial. Riddell moved for partial reconsideration.

Riddell maintained that the Court committed clear error in holding that Riddell, as a matter of law, had a duty to warn of the risk of heat exhaustion and heat stroke, and in extending the duty to warn to non-injured non-users of the products.

In denying Riddell's motion for summary judgment on the failure to warn claim, the Court had earlier found that in determining whether Riddell had a duty to warn of the risks associated with using its equipment, the relevant risk was not the general risk of simply becoming hotter while wearing its equipment, but the more specific risk of developing heat exhaustion and heat stroke when wearing this equipment during extremely hot and humid conditions and while engaged in strenuous exercise. The Court had concluded that because the danger of developing heat exhaustion and heat stroke under these circumstances was not obvious, and because it was reasonably foreseeable that a football player could suffer heat exhaustion and heat stroke while wearing the helmet and shoulder pads during extremely hot and humid conditions and while engaged in strenuous exercise, Riddell had a duty to warn as a matter of law.

The Court found no clear error in its previous ruling and denied Riddell's motion for reconsideration with respect to the issue of duty.

Riddell also argued that the duty to warn extends only to reasonably foreseeable users of the product. Riddell maintained that since Corey Stringer was the end user of the equipment, and since the Court had already found that a warning would not have changed Stringer's behavior, plaintiff was unable to establish the requisite causation as a matter of law. Riddell argued that the Court, in finding genuine issues of material fact concerning whether a warning would have prompted the Vikings' trainers and coaches to change their behavior and would have prevented Stringer's death, the Court implicitly and erroneously extended the duty to warn to non-injured non-users of the product.

The Court rejected the argument and denied the motion for reconsideration. The Court found that if a manufacturer's failure to warn influenced the conduct of a third party, and that third party's acts or omissions were the proximate cause of the plaintiff's injury, then the manufacturer may be held liable.

Open and Obvious Risk

***American Winds Flight Academy v. Garmin International* (Sept. 17, 2010), N.D.Ohio Nos. 5:07-CV-3401 and 5:07-CV-3402, 2010 U.S. District LEXIS 97642.**

Four people were killed when a Lancair 235 collided with a Cessna 172L in the air above Rootstown, Ohio, on October 14, 2005. The Lancair, which instigated the collision, was equipped with a Garmin GNS 430 navigation unit capable of displaying a moving map that charted the progress of the plane in flight (represented by a white airplane icon) relative to a desired course (represented by a magenta line). Plaintiffs in the two related cases sued Garmin International, the GPS unit manufacturer and marketer, asserting claims under the Ohio Products Liability Act, based upon Garmin's purported failure to warn of the risks associated with the use of the GNS 430 by non-instrument rated pilots in visual flight conditions.

The plaintiffs alleged that in the moments leading up to the crash, the Lancair pilots focused their attention on the GNS 430's display, flying the plane exclusively by manipulating the controls to keep the white airplane icon on the magenta line, in dereliction of their duty to visually scan for other traffic by looking out the plane's windscreen.

Defendant Garmin filed a motion for summary judgment on grounds that the risk at issue qualifies as "open and obvious," absolving Garmin of any potential liability under the statute.

The Court granted Garmin's motion finding that the risk associated with using the GNS 430 to navigate without maintaining a vigilant scan for other aircraft is common knowledge among reasonable pilots.

The Court also found that the Lancair pilots' inattention to their duty to maintain a visual scan severed any causal connection between Garmin's alleged failure to warn and plaintiffs' injury as a matter of law, finding Garmin's motion for summary judgment was warranted due to the lack of proximate causation.

Expert Testimony

***Estate of Scott Thompson v. Club Car, Inc.,* Richland App. No. 2009-CA-0120, 2010-Ohio 2593.**

The Fifth District found that the trial court erred in granting the motion in limine excluding the testimony of the expert. The Court analyzed Ohio Rule of Evidence 702. There was no dispute that the expert was a qualified expert who testified about a subject beyond the knowledge of laypersons. At issue was whether the expert's testimony complied with the requirements of Evidence Rule 702(C) as to reliability. The Court's inquiry focused on whether the principles and methods the expert employed to reach his opinion were reliable, not on whether his conclusions were correct. The Court's focus was also on whether the expert's testimony would assist the trier of fact.

***Newell Rubbermaid, Inc. v. Raymond Corporation* (July 1, 2010), N.D.Ohio No. 5:08 CV 2632, 2010 U.S. District LEXIS 65564.**

On December 23, 2004, while working at a Newell Rubbermaid facility in Ohio, Ms. Hashman was driving a Dockstocker forklift manufactured by Raymond which plaintiff had purchased secondhand. The forklift was a stand-up, counterbalance, rear entry model designed for use "dock to stock," including loading and unloading docked tractor trailers and storing heavy loads in narrow aisle warehouse environments. The operator compartment of this forklift was open. It had no door or operator guard.

Plaintiff proffered the testimony and expert report of Ben T. Railsback. Railsback opined that the forklift involved was defectively designed and unreasonably dangerous because the operator compartment did not have a latching rear door or, at the very least, a spring-loaded rear door to prevent the operator's foot from leaving the operator compartment. He opined that Raymond had long been aware of this hazard but failed to provide an effective operator guard, a remedy which, in his view, would have been technically and economically feasible. He further opined that the warning label on the forklift was defective, although he admitted that a better warning would not have prevented the accident.

Raymond moved to exclude the expert testimony on the basis that Railsback was "the quintessential expert for hire, and his opinions in this case are pure litigation constructs." Rubbermaid opposed the motion claiming that Railsback was a highly qualified mechanical engineer and an expert in the field of stand-up lift truck design, operation, and safety.

The Court addressed the requirements of Federal Rule of Evidence 702. With respect to the expert's qualifications, the Court concluded that while Railsback was trained in engineering, he did not have specific qualifications to be identified as an expert in the field of forklifts. With respect to the requirement of reliability under 702, the Court found that Railsback's methods were not scientifically sound. The Court determined that Railsback merely counted accidents from accident reports relating to non-Raymond forklifts. Without questioning or verifying the data and without conducting any tests of his own, he reached conclusions about the forklift involved in the case.

As to relevance, the Court concluded that the plaintiff's expert report did not meet the requirement of relevance because there was no scientific methodology to speak of and what little "methodology" there might have been had to do with forklifts that were not manufactured by Raymond and were not shown scientifically to be reasonably similar to the Raymond forklift involved.

Defendant's motion to exclude the testimony of plaintiff's expert was granted.

The Court then went on to address the defendant's motion for summary judgment. The defendant argued that the plaintiff failed to prove that there was a practical and technically feasible alternative design and absent said proof, plaintiff could not prevail. The fundamental issue in the case was whether the open-back design of the Dockstocker forklift is a defective design which should have been corrected by either a latching or a spring-loaded rear operator door. Defendant argued that expert

testimony was required to prove the underlying products liability claim and absent such expert testimony, the defendant would be entitled to summary judgment. Because a forklift was determined by the Sixth Circuit to be a complex mechanism, the consumer expectation test was inapplicable and, when applying the risk-benefit test, expert testimony was required. Since the Court had already excluded plaintiff's expert testimony, the plaintiff was unable to meet the burden of proof on the products liability claims and defendant's motion for summary judgment on the products liability claims was granted.

Supplier Liability

***Brentar v. Ford Motor Company* (August 10, 2010), N.D.Ohio No. 09-CV-2685, 2010 U.S. District LEXIS 80470.**

Decedent, a city police officer, was involved in a fatal single-vehicle accident. The vehicle was manufactured by defendant manufacturer and the city purchased the vehicle from defendant business. Plaintiff, executrix of decedent's estate, sued in state court. Defendants filed a notice of removal on diversity grounds. Plaintiff moved to remand.

Defendant was a Delaware corporation. Although plaintiff and defendant business were both Ohio residents, defendants asserted that complete diversity of citizenship existed because plaintiff fraudulently joined defendant business to defeat federal jurisdiction. Plaintiff disputed the assertion of fraudulent joinder and moved to remand on the basis that she had a colorable cause of action against defendant business, as a supplier, under the Ohio Products Liability Act because she had alleged that defendant business was negligent and that the subject vehicle failed to conform to representations made by defendant business.

To prove fraudulent joinder, the removing party must show that there is no "reasonable basis" upon which liability might be imposed upon the non-diverse party. The burden is on the removing party to show that the plaintiff cannot establish a cause of action against the non-diverse defendant under state law.

The Court concluded that there was at least some possibility that plaintiff could state a cause of action against the supplier for negligence. The question for the Court was not whether the plaintiff would ultimately prevail against the supplier but, rather, whether the plaintiff had a colorable claim against the supplier.

The Court concluded that the supplier was not fraudulently joined and granted the plaintiff's motion to remand the case to the Cuyahoga County Court of Common Pleas.

***Studniarz v. Sears Roebuck & Company*, Lake App. No. 2009-L-159, 2010-Ohio 3049.**

A patron was shopping for men's pants at Sears and was injured when a bar on a hanger accidently sprung open and struck him in the eye. The trial court granted defendant's motion for summary judgment as the store had no actual knowledge of any potential danger of the hanger and the store could not be charged with the knowledge. Accordingly, the store had no duty to warn its customers of the hanger's potential danger. The patron presented no evidence to show that the store received previous complaints regarding the hanger or was otherwise aware of any potential danger of the hangers. The Court also found that the store could not have foreseen that, when the clip of the hanger became accidentally unclasped, the hanger's top bar would swing upwards to strike the patron in the eye. With respect to the claim that the store was liable as a seller of a defective product, the evidence showed that the hanger was not for sale but was only a device for merchandise display.

The Eleventh District affirmed the judgment of the trial court.

Economic Loss Doctrine

***Apostolos Group, Inc. v. BASF Construction Chemicals, LLC*, Summit App. No. 2009-L-159, 2011-Ohio 2238.**

The consumer used the manufacturer's concrete deck coating product to coat a deck the consumer was working on for a commercial project. When the coating did not work as represented, the consumer sustained economic damages due to being forced to remedy the situation by applying new coating. The Court held that the trial court properly dismissed the consumer's breach of implied warranty claim against the manufacturer as the Court's precedent held that a common law action in tort for purely economic loss from defective products, based upon an implied warranty theory, was not available to commercial buyers. The Court declined to adopt a standard that would allow a consumer who is not in privity with the

manufacturer and who enjoyed only limited bargaining power to assert an implied warranty claim. While the consumer did not have an opportunity to negotiate the warranty and product formulation of the product, this did not mean that it was similarly situated as a member of the general public making a purchase for commercial use.

The Court of Appeals affirmed the trial court's decision. The Court of Appeals found that the case did not involve a situation where an average customer was placed in physical danger due to the purchase of a defective product. Rather, a commercial consumer purchased a product for use in a commercial context and suffered purely economic losses. The product was not purchased by a member of the general public. The product was purchased by a commercial consumer who is engaged in a profit-seeking endeavor.

***Hale v. Enerco Group, Inc.* (Jan. 5, 2011), N.D.Ohio No. 1:10-CV-00867-DAP, 2011 U.S. District LEXIS 781.**

The application of the economic loss doctrine by Ohio courts depends not only upon the identity of the parties, but upon the foundational doctrinal distinction of privity of contract. In cases of contractual privity, the courts apply a strong version of the economic loss rule. However, in cases where the parties are not in privity of contract, the courts apply a more relaxed rule, allowing individual consumers to bring negligence claims for solely economic injuries. This exception is not limited to claims for tortious breach of warranty, but includes claims for negligent design and failure to warn.

The Court held that insofar as plaintiffs' second amended complaint sought damages in addition to economic losses, the claims for negligent design and failure to warn were preempted by Ohio products liability law. The Court held that plaintiffs' common law negligent design and failure to warn claims, not sounding in products liability law, survive dismissal, but only to the extent that the plaintiffs seek economic damages.

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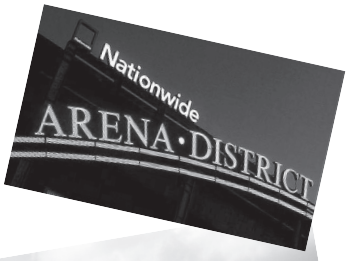

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