Quarterly Review

Volume 11 Issue No. 4 Fall 2017

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 Note

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NOVEMBER 2017

As parents, we are sometimes reminded that we must "love our children equally." And of course, we have boundless love for ALL of our children. However, in the still of the night, in our heart of hearts, when we search it closely, we may have to quietly admit to ourselves, that we do have a favorite... if only by a slight margin.
And so it is with the Personal Injury Defense Committee. Having spent over three decades practicing personal injury defense and having served a term as chair of this committee several years ago, it is with great pleasure I introduce to you this edition of OACTA's *Quarterly Review*, focused as it is, upon personal injury defense. It is also probably no stretch to say that "Personal Injury Defense" is a broad, common denominator among most of the members of our association. This issue of the *Quarterly Review* is the product of our Personal Injury Defense Committee, brought to us by Committee Chair, Walter Krohngold, and Vice-chair Michelle Burden and the committee members who share their expertise with the rest of us. My heartfelt thanks and congratulations to them.

Within the following pages you will find important procedural insights ("Prosecution of Third-Party Subpoenas"— Christopher Caspary and "Impact of a Conviction Of a Traffic Offense In Subsequent Negligence Action"— Christopher Mars); technical and cutting edge methods of obtaining investigative data ("Get to Know Your Star Witness-Fitbit"— Andrew Smith); useful trial tactics in tort litigation (*"Berry v. Paint Valley Supply, LLC:* Fourth Appellate District's Decision Provides Key Lessons for Personal Injury Defense Litigators"— Ray Frudiger and David Oberly); substantive law relating to premises liability ("Utilizing Ohio's Open and Obvious Doctrine To Defeat Premises Liability Lawsuits"— David Oberly); and substantive law relating to recreational activities and assumption of risk ("It's All Fun and Games Until Someone Gets Hurt"—Thomas Glassman). A nice variety of important and topical information, no matter where you practice in Ohio.

So take a break from the deluge of fall sports (football, basketball and baseball all converging in October to provide a sensory overload of recreational spectatorship) and take advantage of these quick hitting, useful and informative articles.

Also, please do join us in Cleveland next month for our Annual Meeting on November 16 and 17 at the Cleveland Hilton Downtown. Come and enjoy 2 days of great CLE programming, networking and fun with your fellow defense lawyers and claims professionals from around the state in a city that is enjoying a wonderful downtown resurgence in recent years. I hope to see you there.

Introduction

Personal Injury Defense Committee

Walter H. Krohngold, Esq., Chairperson
Ritzler, Coughlin & Paglia, Ltd.

The Fall season is now upon us. Here in Cleveland we are blessed with unseasonably warm weather and saddened by the Cleveland Indians' loss to the (dreaded) New York Yankees. The OACTA Movers and Shakers are busy preparing for another annual meeting, this one to be held only a short distance away from my office in downtown Cleveland. And it is the Personal Injury Defense Committee's turn to contribute to the OACTA *Quarterly Review.*

I hope that you will find this publication both interesting and useful. This issue brings us a variety of unique and informative articles. Tom Glassman discusses injuries which occur from recreational activities and the various defense strategies used to address claims arising from those injuries. One of my associates, Christopher Caspary, discusses third-party subpoenas under Civil Rule 45, and enforcement of those subpoenas for those persons or entities unwilling to comply. David Oberly wrote an interesting article on the open and obvious doctrine for premises liability lawsuits in Ohio. While there are many cases on this issue, Mr. Oberly does a fine job of succinctly summarizing the key defenses to raise, and how courts throughout the state have viewed the open and obvious doctrine.

Mr. Oberly joined with Ray Freudiger on an interesting article discussing a wrongful death case involving an 18-year old woman who was killed by a delivery driver who was backing down an access ramp at a grain-receiving business. Mr. Freudiger and Mr. Oberly were successful in obtaining a defense verdict at trial and the verdict was upheld on appeal. The article discusses an interesting use of a police officer as an expert witness, not for accident reconstruction, but based on the officer's experience as a commercial truck driver.

Christopher Mars authored an article which I believe will be useful to everyone. The article discusses attempts to use the results of a traffic citation issued to a driver in a subsequent civil proceeding by or against that driver. He explores how various pleas to the citation and acquittals or convictions resulting from those pleas may or may not be used in a subsequent civil proceeding, especially if liability is contested.

Finally, another associate in my office showed me an article that attorney Andrew Smith had written for an insurance publication, *CLM Magazine*. I thought the article was extremely informative and instructive to show how defense attorneys can use Fitbits and other wearable devices to track a plaintiff's activities in civil litigation. Mr. Smith and *CLM Magazine* were kind enough to give me permission to reprint this article for your reading pleasure. I think this area of GPS tracking (through Fitbits and even cell phones) can certainly help to defeat claims that someone had a reduced level of activity after an injury. It is an area of law that deserves significant attention and development and I would certainly urge OACTA members who have more information on using GPA tracking devices in civil litigation to share that with your fellow OACTA members.

I hope that you enjoy this publication and find it useful in your practice in defending or otherwise handling personal injury claims.

Prosecution of Third-Party Subpoenas

Christopher D. Caspary, Esq.
Ritzler, Coughlin & Paglia, Ltd.

Often times in personal injury litigation, it will be necessary to issue a subpoena upon a third party pursuant to Civ. R. 45. Such a subpoena could be issued to obtain medical records, employment records, or other pertinent information. While the subpoenaed party may be fully cooperative in responding to said subpoena, especially when the subpoena is appropriately limited in scope, compliance can in other instances prove quite challenging. Accordingly, initiating contempt proceedings may be necessary absent good faith compliance. Be advised that the court may expect counsel to undertake reasonable efforts to ensure that the subpoenaed party is aware of the subpoena and does not have an adequate excuse for noncompliance prior to initiating contempt proceedings.

Broad Reach of Third-Party Subpoenas

Third-party subpoenas are rather broad under the Civil Rules and beyond reaching documents, can even seek information that is not kept in the ordinary course of business and would require computerized searching. Civ. R. 45(A)(1)(b)(iv) and (v) provide that a subpoena *duces tecum* can broadly reach documents, electronically stored information, and other tangible things. The rule likewise does not require that the requested information be currently available in existing documents, and further authorizes inspection, copying, testing, and sampling of the implicated databases. *See* Civ. R. 45(A)(1)(b)(iv) and (v).

Protection of Subpoenaed Parties

Civ. R. 45(C), which addresses "protection of persons subject to subpoenas," permits a deponent to request that the court quash a subpoena under limited circumstances. *See* Civ. R 45(C). Specifically, a subpoena *duces tecum* can be quashed under the following four circumstances:

(a) Fails to allow reasonable time to comply;
(b) Requires disclosure of privileged or otherwise protected matter and no exception or waiver applies;
(c) Requires disclosure of a fact known or opinion held by an expert not retained or specially employed by any party in anticipation of litigation or preparation for trial as described by Civ. R. 26(B)(5), if the fact or opinion does not describe specific events or occurrences in dispute and results from study by that expert that was not made at the request of any party[1];
(d) Subjects a person to undue burden.

Civ. R. 45(C) (Protection of persons subject to subpoenas) permits a subpoenaed party to, "within fourteen days after service of the subpoena or before the time specified for compliance if such time is less than fourteen days after service, serve upon the party or attorney designated in the subpoena written objections to production." Civ. R. 45(C)(1)(b). Civ. R 45(C) further permits a subpoenaed party to move the Court for an order quashing the subpoena.

Although privilege may often be claimed by a subpoenaed party, the case law is clear that the burden is upon the party seeking to withhold information to first make a showing of privilege and/or confidentiality. *See, e.g., Eberhard Architects, L.L.C. v. Schottenstein, Zox & Dunn Co.*, 8th Dist. Cuyahoga No. 99867, 2013-Ohio-5319, ¶ 14. ("Unfortunately, because SZD never requested an in camera inspection of the documents, there is no evidence in the record, beyond SZD's bald assertions, that the documents include confidential or proprietary information."); *see also, Ro-Mai Indus., Inc. v. Manning Properties*, 11th Dist. Portage No. 2009-P-0066, 2010-Ohio-2290, ¶ 25 (noting that "[t]he burden to show that testimony or documents are confidential or privileged is on the party seeking to exclude the material."); *see also, Peyko v. Frederick,* 25 Ohio St. 3d 164, 166, 495 N.E.2d 918 (1986).

"Under Civil Rule 45(C)(3)(d), a trial court shall quash or modify a subpoena if it subjects a person to an undue burden." *McDade v. Morris,* 9th Dist. Summit No. 27454, 2015-Ohio-4670, ¶ 9. The person seeking to quash must establish undue burden. *Id.* The court in *McDade* noted that "...before filing a motion to quash under the foregoing subsection, the subpoenaed person shall attempt to resolve any claim of undue burden through discussions with the issuing attorney. A motion filed pursuant to division

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(C)(3)(d) of [Civil Rule 45] shall be supported by an affidavit of the subpoenaed person or a certificate of that person's attorney of the efforts made to resolve any claim of undue burden." *Id.; see also, Bonewitz v. Red Ferris Chevrolet, Inc.,* 9th Dist. Wayne No. 01CA0006, 2001 WL 1094537, at *2 (Sept. 19, 2001).

Available Remedies

In addition to ordering compliance with the subpoena by a date certain, the court from which the subpoena issued may also hold a hearing and find the subpoenaed party in contempt of court.

As subpoenas issue from the involved court, failure to comply with a subpoena is an act in contempt of court in and of itself. *See* O.R.C. 2705.02(B); *see also,* Civ. R. 45(E). In fairness, a hearing must be held before a finding of contempt of court may be made. *See Id.* at 2705.03 (noting that "[i]n cases under section 2705.02 of the Revised Code, a charge in writing shall be filed with the clerk of the court, an entry thereof made upon the journal, and an opportunity given to the accused to be heard, by himself or counsel."); *see also, Id.* at 2705.05 (noting that "[i]n all contempt proceedings, the court shall conduct the hearing. At the hearing, the court shall investigate the charge and hear any answer or testimony of the accused makes or offers and shall determine whether the accused is guilty of the contempt charge.").[2]

The court's power to issue sanctions as a result of the failure to comply with a proper subpoena is further provided by Civ. R. 45, which provides that the "[f]ailure by any person without adequate excuse to obey subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued." Civ. R. 45(E). Furthermore, Civ. R. 45(E) permits an award of reasonable expenses and attorney's fees in the event that "a subpoenaed person or that person's attorney… frivolously resist discovery under this rule." *Id.*

Conclusion

Third-party subpoenas to be issued pursuant to Civ. R. 45 are incredibly broad. Although causing substantial compliance to occur can prove challenging at times, the case law and procedure provide a clear and well-defined path forward when obtaining the requested discovery is critical to effectively defending your client.

Endnotes

1 Note that subsection (c) is a rather limited exception regarding parties seeking to discover expert knowledge and opinions unrelated to the involved controversy. *See, e.g., Martin, et al. v. The Budd Co., et al.,* 128 Ohio App.3d 115, 713 N.E.2d 1128 (9th Dist. 1998).

2 If the accused is found guilty, the court may impose any of the following penalties: (1) For a first offense, a fine of not more than two hundred fifty dollars, a definite term of imprisonment of not more than thirty days in jail, or both; (2) For a second offense, a fine of not more than five hundred dollars, a definite term of imprisonment of not more than sixty days in jail, or both; (3) For a third or subsequent offense, a fine of not more than one thousand dollars, a definite term of imprisonment of not more than ninety days in jail, or both. *See* O.R.C. 2705.05.

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Berry v. Paint Valley Supply, LLC: Fourth Appellate District's Decision Provides Key Lessons for Personal Injury Defense Litigators

Ray C. Freudiger, Esq. and David J. Oberly, Esq.
Marshall Dennehey Warner Colemen & Goggin

Ray Freudiger

David Oberly

I. Why It Matters

Earlier this year, Ray Freudiger and David Oberly secured a long-fought victory in a fiercely litigated wrongful death lawsuit involving the death of an 18-year old woman who was struck and killed while traversing up an access ramp at a grain receiving business at the same time a delivery driver was backing up his commercial truck up the ramp to deliver a load of goods at the facility. Following a defense verdict at trial, Ray and David then successfully defeated the plaintiff estate's post-trial motion, as well as an appeal to the Fourth District Court of Appeals. The Fourth District's decision is noteworthy because it touches on several different critical legal issues that that frequently arise in the context of personal injury litigation. When addressed properly, these thorny issues can be effectively navigated by personal injury defense practitioners in a wide variety of contexts.

II. Discussion & Analysis

In *Berry v. Paint Valley Supply, LLC, et al.,* 4th Dist. Highland No. 16CA0019, 2017- Ohio-4254, the plaintiff was the husband and administrator of the estate of an 18-year old woman who, distracted and talking on her cell phone, stepped up onto the truck access ramp at the private property of a feed and farm supply facility and into the rearward path of a commercial delivery truck that was backing up the ramp to deliver a load of corn. The woman was struck as the driver neared the top of the ramp, and died instantly from her accident-related injuries. Ray and David represented the driver of the commercial vehicle, as well as the vehicle's owner. Midway through the four-day jury trial, the trial court entered a direct verdict in favor or the owner of the commercial vehicle. At the conclusion of the lengthy trial, the jury returned a defense verdict in favor of the vehicle's driver. In doing so, the jury found that the driver was not in any way negligent in the operation of his commercial truck on the premises on the day of the accident. Rather, the jury found that the decedent was 100% negligent and responsible for her injuries and resulting death. Following trial, Ray and David successfully defeated the estate's post-trial motion for judgment notwithstanding the verdict and motion for new trial, which the estate appealed. The Fourth Appellate District affirmed the proceedings at the trial court level in their entirety, upholding the jury's verdict that the decedent—and not Ray and David's client—was wholly responsible for the decedent's injuries and resulting death.

Importantly, there were several critical disputes at issue on appeal that are of significant relevance to personal injury defense litigators. The first major issue decided by the Fourth District pertained to defense counsel's utilization of an investigating police officer as a defense witness at trial. In *Berry,* the investigating police officer was called at trial to provide testimony in support of the defendant driver. While on the witness stand, the officer offered testimony regarding his prior experience operating commercial vehicles. In doing so, the officer testified that he would have not done anything different than the defendant driver in operating the commercial truck on the day of the accident. On appeal, the estate argued that it was entitled to a new trial because counsel had elicited improper and prejudicial testimony from a lay police officer. The Fourth District rejected this argument, finding that the trial court did not err in permitting the officer's testimony. In doing so, the appellate court concluded that while the officer was not qualified as an accident reconstruction expert, the officer did not improperly testify about the cause of the accident. Rather, the officer's testimony was limited to his opinion had he been driving the truck, he would not have

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done anything differently, which was permissible based on the officer's prior training on the operation of commercial vehicles.

The second major issue decided by the Fourth District pertained to defense counsel's characterization of the investigating officer as an "expert" during closing arguments. On appeal, the estate argued that the characterization of the officer who had no real accident reconstruction training as an "expert" during closing argument warranted a new trial. The Fourth District also rejected this argument, finding instead that even though the officer was not offered as an expert at trial, he was qualified as an expert on operating commercial vehicles, as he possessed a commercial driver's license and had received training on the subject.

The final major issue addressed by the Fourth District pertained to the application of Ohio Revised Code § 4511.38(A). That statute provides that:

> (A)No person shall start a vehicle, streetcar, or trackless trolley which is stopped, standing, or parked until such movement can be made with reasonable safety.
>
> Before backing, operators of vehicle, streetcars, or trackless trolleys shall give ample warning, and while backing they shall exercise vigilance not to injure person or property on the *street or highway.*

R.C. § 4511.01(BB) defines "street" or "highway" as the entire width between the boundary lines of every way open to the use of the public as a thoroughfare for purposes of vehicular travel. On appeal, the estate contended that the trial court erred in overruling its motion for a directed verdict on the issue of R.C. § 4511.38 because the uncontroverted evidence at trial established that the driver was negligent *per se* as a result of his violation of R.C. § 4511.38. The Fourth District also rejected this argument in its entirety as well, finding that the statute did not apply to the subject accident because the accident occurred solely on private property. In doing so, the Fourth District noted that courts have consistently construed R.C. § 4511.38 to apply only to public property, and not to private property. As such, the appellate court concluded that although the defendant driver started his backing maneuver while in a public alley, the death that occurred at the feed and farm supply facility took place completely on the private access ramp on the private company's property. Consequently, based on the plain language of the statute, the Fourth District found that R.C. § 4511.38 was inapplicable to the estate's negligence claim, and therefore the trial court did not err in denying the motion for a directed verdict.

III. Takeaways for Defense Practitioners

The legal issues that arose in the *Berry* appeal are far from unique, and occur frequently in the context of personal injury litigation. With respect to investigating police officers who are called to testify at trial in motor vehicle accident suits, disputes commonly arise as to the allowable scope of the officer's trial testimony. As a general rule, courts hold that a witness who testifies about the cause of an accident must have some knowledge concerning, or experience in determining the cause of, accidents. In Ohio, a significant distinction exists between accident *investigation* and accident *reconstruction.* Accident investigation involves the collection and recording of information, while accident reconstruction involves the use of scientific methodology to draw inferences from investigative data. As a result, police officers who have not been qualified as accident reconstruction experts may not give opinions on the cause of an accident, but rather may only testify about their collection of data and observations at the accident scene. Critically, however, as the *Berry* decision shows, even where they are not qualified as accident reconstruction experts, police officers can still nonetheless testify in an expert capacity on other matters relating to the operation of vehicles where they have "specialized knowledge, skill, experience, training or education regarding" such matters sufficient to qualify them as experts under Ohio Evidence Rule 702. Accordingly, so long as counsel does not elicit testimony from an officer as to the cause of an accident, counsel can leverage the testimony of law enforcement personnel in a variety of other ways which, if utilized properly, can have a significant impact on the outcome of trial.

In addition, the *Berry* decision also highlights the fact that even where a trial court does not make a ruling that a witness is qualified to testify as an expert, expert testimony is still nonetheless allowable where the record shows that the trial court could have properly concluded that the witness qualified as an expert. Accordingly, even where a party fails to formally tender a witness as an expert, no reversible error occurs where the record establishes that counsel elicited sufficient information from the witness to qualify the witness as an expert in his or her field of expertise. As the *Berry* decision illustrates, counsel should

not shy away from referring to a witness as an "expert" at trial even if the witness was not tendered as an expert, so long as the witness provided sufficient testimony to qualify him or her as an expert under Evidence Rule 702.

With respect to the issue of closing arguments, the *Berry* decision highlights the wide latitude that parties have in their closing statements, particularly latitude as to what the evidence has shown and what inferences can be drawn from the evidence. As the Ohio Supreme Court has noted, attorneys are permitted to "present their most convincing positions" during closing statements. *State v. Phillips,* 74 Ohio St.3d 72, 90 (1995). In addition, during closing arguments reasonable inferences and deductions may be drawn from evidence adduced during trial.

Finally, the *Berry* decision also highlights the importance of meticulously analyzing the applicability of Ohio's statutory traffic provisions in motor vehicle lawsuits. As *Berry* demonstrates, Ohio traffic laws are inapplicable to accidents occurring on private property, including parking lots and private ways. Importantly, this rule of inapplicability applies even where the chain of events leading to the accident begins on public property, so long as the accident itself occurred on private property. Under such circumstances, the standard of care that must be utilized in determining the issue of negligence is the common law negligence standard of ordinary care.

IV. The Final Word

When thorny legal issues such as those seen in *Berry* arise in the course of personal injury disputes, defense litigators are well-advised to devote a considerable amount of time and effort towards mapping out an effective strategy to effectively litigate these crucial matters through the time of trial. When approached from the right angle, these vital issues that repeatedly arise in the course of personal injury litigation can be successfully navigated by defense counsel, putting defense practitioners and their clients in the best position to prevail in a wide variety of personal injury lawsuits.

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Get to Know Your Star Witness – Fitbit

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So-called "wearable devices" come in all shapes and sizes with varying features. Ranging from $60 to nearly $200, Fitbit currently offers eight different fitness trackers. Valued at $11 billion, Fitbit is the leader of the wearable device revolution. Similar options include Nike Fuelband and Apple Watch. Companies such as Jawbone, Garmin, Misfit, and Moov Now also offer wearables on the internet and nearly every department store across the country.

Largely known for counting the steps you take, wearables now have all kinds of abilities. According to the Fitbit website, *"Fitbit motivates you to reach your health and fitness goals by tracking your activity, exercise, sleep, weight and more."* "And more" is an understatement. They can track heart rate, workout regimens, skin temperature, sleep habits, and diet. Some can take photographs and video footage, provide call and text notifications, and even search the Internet. Importantly, many wearable devices use GPS to map running routes and track the coordinates of the owner's whereabouts at all times. This information can be accessed in an app and stored on your phone, tablet, or computer.

A wearable device is essentially a pedometer on steroids with GPS. Clearly, wearables are very useful to step up your workout routine. But the information retained on these "mini computers" can also aid in many forms of claims investigations and criminal and civil cases, which we will explore in detail below.

Fitbit Leads to Arrests for Lying to Police and Murder

Police are already using fitness trackers in courtrooms as evidence throughout the country. Law enforcement and legal experts are deeming wearable devices as the human body's very own *"black box."* They can track your every movement 24 hours a day, seven days a week. Wearables provide a "receipt" of human activity, which detectives and police officers now use to evaluate alibis and determine what really happens at crime scenes. Meet your new star eye witness, folks.

The goldmine of evidence kicked off as a result of *Commonwealth v. Risley*, Case No. CP-36-CR-0002937 (C.P. Pa., Lancaster Cnty. Apr. 17, 2015). In Risley, Fitbit established a woman was lying about being sexually assaulted. Ms. Risley traveled to Lancaster, Pennsylvania, where she stayed at her boss' home. The police were called to the home where they found a knife, a bottle of vodka, and furniture in disarray. Ms. Risley notified police she was woken up at midnight and sexually assaulted by a man.

Although she thought she lost her Fitbit during the chaos, the police located Ms. Risley's Fitbit in a hallway. With her consent, the police downloaded data from the device and the Fitbit became the star witness in the alleged rape case. The data showed Ms. Risley was awake, alert, and walking around at the time she claimed she was sleeping. This data, coupled with the boss notifying police Ms. Risley was soon going to lose her position at work, led authorities to discredit the rape allegations. Ms. Risley was then charged with three misdemeanors, including false reports to law enforcement, false alarms to public safety, and tampering with evidence. She pled guilty and had to complete two years of probation for her acts of deceit.

More recently, Fitbit led to a murder arrest in Connecticut. On December 23, 2015, Richard Dabate told the police he took his two children to the bus stop, waved goodbye to his wife, Connie, and went to work. Mrs. Dabate attended an exercise class at the nearby YMCA, with her Fitbit.

Mr. Dabate claimed he then went back home around 9 a.m. because he forgot his laptop. He heard a noise and allegedly went upstairs to investigate. Mr. Dabate allegedly witnessed an intruder at that point. He said he heard Mrs. Dabate return home and yelled for her to run away. Mr. Dabate claims after a short altercation the intruder shot and killed his wife.

The police could not locate any helpful physical evidence at the home. However, the Fitbit provided the following details:

- Movement occurred at 9:23 a.m., the same time the garage door opened into the kitchen.

- While Mrs. Dabate was at home, her Fitbit recorded 1,217 feet of movement between 9:18 a.m. and 10:05 a.m. when all activity stopped.

If Mr. Dabate's statements were true, the police claim the total distance for Mrs. Dabate to walk from her vehicle to the basement, where she was shot, would be a maximum of 125 feet. Mr. Dabate later admitted to having an affair and impregnating the other woman. Just five days after her death, Mr. Dabate also made a claim for her life insurance policy for $475,000.

The combination of the Fitbit data and circumstantial evidence led to Mr. Dabate's arrest on April 14, 2017, for murder, tampering with evidence, and providing a false statement. A trial date has not been set, but you can follow the murder case on the Tolland County Superior Court online docket. *See State v. Dabate,* Case No. TTD -CR17-0110576-T. Mr. Dabate is currently being held at the Hartford Correctional Center on a million-dollar bond.

Wearables in the Civil Context

In 2014, a plaintiff introduced Fitbit evidence in a personal injury case in Canada. The woman used the data to show her physical activity was affected following a car accident.

Likewise, in *Flint v. Strava,* Case No. CGC-12-521659 (Super. Ct., San Francisco Cnty. June 18, 2012), attorneys obtained data from the wearable device company Strava to prove a bicyclist was speeding and at fault for causing his own death after hitting a car. Known as "The Social Network for Athletes," Strava is unique in that the app is designed to connect nearby athletes through the app, and rank them. The plaintiff in *Flint* was attempting to achieve the fastest race pace to regain his first place rank when this accident occurred.

Consider a routine personal injury case where the plaintiff claims his injuries prevent him from engaging in numerous physical activities he engaged in before the accident. He claims to be very active, running 70 miles per week and participating in races and marathons on a regular basis. During the plaintiff's deposition, you learn he wore his Fitbit at all times in the year before the accident. You then request the plaintiff's Fitbit records for the preceding year and discover — contrary to the deposition testimony — the plaintiff would work out two times a week and run a total of eight miles a month.

In employment cases the data can assist in evaluating disability claims, workplace injuries, and even harassment claims. Consider an example where a Nike Fuelband demonstrates the employee's stress level and heart hate increase whenever she is around the alleged harasser at work.

In the insurance defense realm, data obtained from wearable devices can be used in all sorts of ways. Imagine you are investigating a fire loss of a multi-million home located in a rural area. Your origin and cause investigator cannot locate an area of origin due to the size of the home, and he provides a classification of undetermined. The insured, who is self-employed, claims he was driving between job sites at the time of the fire. The insured was waiting for his cell phone to be replaced and he did not have a cell phone that day. However, the insured was wearing a Nike Fuelband his daughter gave him for Christmas.

The GPS tracking data shows the insured had an elevated heart rate the entire hour before the fire. And, most importantly, the GPS data places the insured inside the home just 15 minutes before the home was fully engulfed in flames. I think it is safe to say, the Fuelband just provided a key piece of evidence incapable of being obtained elsewhere.

The following is a list of areas wearable device data can assist us, and this is just the tip of the iceberg:

- Arson Claims
- Theft Claims
- Fraud or Misrepresentation Defense
- General SIU Investigations
- Alibi Verification
- Emotional Distress Allegations
- Personal Injury Cases
- Evaluation of Physical Activities Before and After Accident

How Do We Get It?

So now we know the many types of information wearable devices offer, but how exactly do we obtain this treasure-trove of data? Depending on whether you are at the claims stage or involved in litigation, different options may be available.

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1. You can begin by mining publicly available data and data linked to social media accounts, including Facebook and Twitter. Many individuals will post the results and accomplishments from their workouts on Facebook much the say way as people update their status or check-in to a favorite restaurant. Depending on privacy settings, this may be all you need to do to obtain the data you are seeking.

2. You can request the user's wearable fitness device password and log-in credentials. Next, you can seek the consent of the user, which is exactly what occurred in the criminal investigations discussed above. Whether you obtain the login information or a copy of the stored data from the user's computer, this is a quick and easy option.

3. If you are in litigation, you can use traditional discovery techniques and issue written interrogatories and requests for production of documents to obtain the data.

4. You can also use subpoena power to directly subpoena the data from the wearable device company such as Fitbit or Nike. However, be weary of the procedural "hoops to jump through" using this method. The third-party providers often rely upon the Stored Communications Act and require in-person service of the subpoena before they even consider complying. If you have ever attempted to subpoena other technological companies like Facebook you should expect to confront the same difficulties. If you are not in litigation, you can also consider filing a pre-suit petition for discovery depending upon the state's rules of civil procedure.

Conclusion

Whether you are investigating a minor theft loss or defending a multi-million-dollar personal injury suit, are you using wearable device data to your advantage? As claims professionals and attorneys, devices such as Fitbit offer us a wide array of valuable, easy-to-use, relevant information. Here are a few parting tips regarding the wearable device revolution.

1. Do your research on the different devices on the market and their features. For instance, not every wearable device stores GPS data. Learn how each device works just as if you were researching to purchase a wearable for your own personal use.

2. Consider issuing a discovery preservation letter from the start. The hold letter not only applies to "traditional" ESI, but also to social media postings and wearable device logs and data.

3. When evaluating your discovery options in any claim or case where this data could be relevant, include requests for wearable device data. Also consider the quickest and most efficient mechanism for securing the data.

4. Be prepared to address and respond to evidentiary objections based on the right to privacy, HIPAA, the Federal Food, Drug, and Cosmetic Act, unreliability or inaccuracy of the data, as well as evidentiary rules on hearsay, authentication, relevance, and unfair prejudice.

5. Consider retaining a qualified expert witness to explain and interpret the data you obtain and may rely upon. Likewise, consider addressing discovery of wearable device data with your local electronic discovery management vendor.

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Utilizing Ohio's Open and Obvious Doctrine to Defeat Premises Liability Lawsuits

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I. Why It Matters

Premises liability claims come in all shapes and sizes — from potholes in gas station parking lots to puddles of slipped water inside big box retail stores—and the list is endless when it comes to the litany of conditions that exist on any given premises that pose the risk of causing injury to others. Fortunately, Ohio law is extremely favorable to property owners and occupiers on the issue of liability arising from injuries resulting from allegedly defective premises conditions. In particular, the open and obvious doctrine serves as a robust, overpowering defense to a broad array of premises liability lawsuits, oftentimes serving as an insurmountable obstacle for injured plaintiffs who seek to recover damages as a result of a slip or fall incident. When utilized property, this game-changing defense can be used to completely dispose of premises liability actions in a variety of contexts.

II. Ohio's Open and Obvious Doctrine

To establish actionable negligence, a plaintiff must show that the defendant owed her a duty, that the defendant breached that duty, and that the plaintiff sustained injury as a direct and proximate result of the breach. However, a business owner is not the insurer of his or her customers' safety. Under the open and obvious doctrine, the owner or occupier of the premises is under no duty to protect business invitees from dangers which are known to such invitee or are so obvious and apparent to such invitee that he may reasonably be expected to discover them and protect himself against them. Where a danger is open and obvious, a business owner owes no duty of care to individuals lawfully on the premises, as the owner may reasonably expect that persons entering the premises will discover the danger and take proper measures to protect themselves. Thus, when a plaintiff is injured by an open and obvious danger, summary judgment is generally appropriate because the duty of care necessary to establish negligence does not exist as a matter of law.

Open and obvious dangers are those that are not hidden, concealed from view, or undiscoverable upon ordinary inspection. Stated differently, a hazard is open and obvious when it is in plain view and discoverable upon ordinary inspection. The open-and-obvious test considers the objective nature of the dangerous condition itself, as opposed to the subjective nature of the plaintiff's conduct in encountering it. Here, the question is whether, under an objective standard, the danger would have been discernible to a reasonable person. The doctrine applies where the invitee has an opportunity to observe and perceive the dangerous condition in order to avoid it.

Importantly, Ohio courts have held that a person does not have to actually see the dangerous condition prior to the fall in order for the condition to be open and obvious. Rather, the determinative issue is whether the condition is observable, and no duty to warn exists where the condition could have been seen had a person looked. Critically, the open and obvious nature of the danger is established if the plaintiff admits that had she looked down, she would have seen the danger. Moreover, a plaintiff's testimony that she was able to see the condition after the fall establishes that the condition was visible to an ordinary observer looking directly where she was walking, thus triggering the open and obvious doctrine. For example, in *Wilson v. Big Bear Stores Co.,* 12th Dist. Warren No. CA93-09-070, 1994 Ohio App. Lexis 1442 (April 4, 1994), the court applied the doctrine where the plaintiff had no trouble seeing the rug that caused her fall when she entered the store, nothing obstructed her view, and the store was well lit; combined, the plaintiff could have been reasonably expected to discover and protect herself against the rug.

Furthermore, a plaintiff's actual knowledge of the existence of a hazardous condition prior to the time of his or her fall, by itself, also establishes that the condition was an open and obvious as a matter of law. Here, the open and obvious doctrine is based upon the invitee's knowledge of the danger. Under the open and obvious doctrine, the owner of the premises is under no duty to protect invitees from dangers which are known to such invitees. As such,

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when the invitee admits to knowing of the danger, summary judgment is easily granted. For example, in *Szarka v. Mt. Sinai Medical Ctr.,* 8th Dist. Cuyahoga No. 72058, 1997 Ohio App. Lexis 5700, (Dec. 18, 1997), the court held that the open and obvious doctrine applied to a water puddle where the facts indicated a prior awareness of the potential hazard on the part of the plaintiff. Similarly, in *Watts v. Richmond Run #1 Condo. Unit Owners Ass'n,* 8th Dist. Cuyahoga No. 99031, 2013-Ohio-2695 (June 27, 2013), the court held that the open and obvious doctrine applied where the plaintiff had already observed the dangerous condition that caused his fall before the event occurred.

Finally, where a plaintiff successfully traverses over the precise area where he or she later falls and sustains injuries, the plaintiff's claim is precluded under the open and obvious doctrine, as an invitee may not recover for an injury sustained on a defect he or she traversed on an earlier occasion. For example, in *Waller v. Madden,* 1st Dist. Hamilton No. C820339, 1983 Ohio App. Lexis 11799 (Feb. 20, 1983), a defendant premises owner was granted summary judgment where the plaintiff had successfully traversed a stairway ten minutes before the subject incident occurred.

As a corollary to the open and obvious doctrine, it has been recognized that there may be attendant circumstances which divert an individual's attention from the hazard and excuse his or her failure to observe it. As such, under the attendant circumstances doctrine, certain circumstances which distract an individual from exercising the degree of care an ordinary person would have exercised to avoid the danger may create a genuine issue of material fact as to whether a hazard is open and obvious. Although there is no precise definition of attendant circumstances, they would include "any distraction that would come to the attention of a pedestrian in the same circumstances and reduce the degree of care an ordinary person would exercise at the time." Here, the crucial inquiry is whether a customer exercising ordinary care under the circumstances would have seen and been able to guard him or herself against the condition.

III. Successful Applications of the Open & Obvious Doctrine to Defeat Premises Liability Suits

Two recent Ohio decisions exemplify how defense litigators can attack premises liability actions by utilizing the open and obvious doctrine to completely dispose of litigation instituted against property owners and operators.

In *Novik v. Kroger,* 3d Dist. Marion No. 9-11-21, 2011-Ohio-5737 (Nov. 7, 2011), Kroger was granted summary judgment based on the open and obvious doctrine in connection with a customer's fall over a mat located inside the store. In that case, situated in the vestibule of the store were several heavy-duty mats which were plainly distinguishable from the flooring below. Clara Novik fell and injured herself as she traversed the mats. After some time on the floor, Novik looked around and noticed that the mats had curled up on their corners and were "humped up" in various areas where they came together. At that point, she realized she had tripped over one of these "humped up" edges. On appeal, the court found that summary judgment was necessitated in favor of Kroger based on the open and obvious nature of the vestibule area mats. The court noted that Novik knew that mats were in the vestibule, as she had been in the store in excess of 100 times and had walked on the mats. In addition, there were no other difficulties that kept Novik from being able to see the condition of the mats had she looked, and there was nothing that otherwise obstructed or distorted her view of the mats. Combined, the court concluded that any danger posed by the mats was open and obvious had Novik looked down. Consequently, Kroger owed Novik no duty at the time of her fall.

A very similar result was seen in *Brant v. Meijer,* Inc., 2d Dist. Montgomery No. 21369, 2006-Ohio-6300 (Dec. 1, 2006), where the court invoked the open and obvious doctrine to bar a premises liability action where a store patron fell on a puddle of water inside a Meijer store. In that case, the store customer, April Brant, testified that she looked down at the floor to see what she slipped on after her fall and saw a clear liquid that seemed to be water. She estimated the puddle to measure approximately a foot in diameter. She further testified that she had no problem seeing the puddle when she looked down at it. Combined, the court found that the testimony made it clear that she would have been able to discover and avoid the puddle if she had exercised ordinary care in watching where she was going. The court highlighted the fact that her view of the floor was not obstructed, and her testimony that she saw the puddle after her fall established it was visible to an ordinary observer looking where she was walking. By looking elsewhere, the court concluded, Brant abandoned the duty imposed to look. Had she not done so, she would have seen the puddle. As a result, Meijer was entitled to summary judgment because the water puddle was open and obvious as a matter of law, relieving the store of any duty to warn its customer of the puddle's existence.

IV. The Final Word

As the above cases illustrate, Ohio courts have not hesitated to apply the open and obvious doctrine to bar a wide range of premises liability actions in their entirety. Accordingly, defense practitioners must carefully analyze the potential applicability of the open and obvious doctrine at the outset of any premises liability suit, as this stringent defense abrogates the duty to warn and completely precludes negligence claims where the doctrine applies. As a general rule of thumb, if the condition was in plain view and simply couldn't be missed or overlooked by a person exercising reasonable care, then the open and obvious doctrine applies. Where the doctrine appears to be potentially applicable, counsel should formulate an effective strategy to obtain the necessary factual evidence during discovery and depositions that will allow the premises owner to successfully utilize the defense as part of a well-supported summary judgment motion.

Armed with the right evidence, the successful assertion of the open and obvious doctrine via summary judgment can pay huge dividends for defense practitioners and their clients, allowing both to avoid not only the time and expense of trial and, but also the payment of any settlement dollars as well. Moreover, in addition to conclusively disposing of the lawsuit altogether, the open and obvious doctrine can be strategically leveraged to alter the playing field and significantly reduce the overall value of a claim during settlement negotiations. As such, premises liability defense practitioners are well-advised to make the open and obvious doctrine a mainstay in their litigation tool belts, and should seek to utilize this game-changing defense whenever possible.

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Impact of a Conviction to a Traffic Offense in Subsequent Negligence Action

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Mark Twain famously said "It ain't what you don't know that gets you in trouble. It's what you know for sure that just ain't so." Plaintiffs sometimes attempt to utilize traffic citations or convictions to traffic offenses in a subsequent negligence action as evidence of negligence or to establish negligence *per se.* There are multiple outcomes for a defendant of a traffic offense and each outcome has particular ramifications in a subsequent negligence action. This article will set forth the possible outcomes of a traffic offense and the consequence of each in the subsequent negligence action.

Judgment of conviction after trial

A judgment of conviction after a trial on a traffic citation is likely not admissible and does not constitute negligence *per se* establishing liability against a defendant in a subsequent civil action for negligence. Indeed, such a finding by a trial court is reversible error according to one appellate court. *Conley v. Hayslip,* 12th Dist. Clinton No. CA90-12-024, 1991 WL 106023 (June 17, 1991).

In *Conley,* the defendant exited her driveway and was struck in the rear by a vehicle owned by the plaintiff. *Id.* at *1. The defendant was cited for failure to yield in violation of R.C. 4511.44 and was convicted in municipal court after entering a plea of not guilty. *Id.* In the subsequent civil trial for negligence, the trial court found the defendant negligent *per se* based on evidence of the failure to yield conviction. *Id.* The appellate court reversed finding that "it is well-settled principal of law that a judgment of conviction rendered in a criminal prosecution, absent a guilty plea, is not admissible as evidence in a civil case." *Id.* The court found that the admission of the conviction was reversible, prejudicial, error and reversed the matter for a new trial. *Id.*

The Conley court relied, in part, on an old, but apparently still instructive, case finding that a judgment of conviction in a criminal case following a not guilty plea is inadmissible in the subsequent civil action "to establish the truth of the facts on which it was rendered." *Wilcox v. Gregory,* 112 Ohio App. 516, 518, 176 N.E.2d 523 (9th Dist.1960). Similarly, the Eighth District Court of Appeals relied upon *Wilcox* to find that "a judgment of conviction, following a plea of not guilty to a violation of a penal statute or ordinance, is not admissible in a civil action against the accused growing out of the same offense. Thus, when the defendant did not plead guilty to the prior criminal charge, the plaintiff in the subsequent civil action must establish his case other than by introduction of the judgment of conviction." (internal citation omitted). *Cain v. State Farm Mut. Auto. Ins. Co.,* 8th Dist. Cuyahoga No. 37590, 1978 WL 218112, *3 (Aug. 10, 1978).

More recently, parties have continued to attempt to use a judgment of conviction as negligence per se in the subsequent civil suit. *See Brunner v. RJ Lipps, Inc.,* 1st Dist. Hamilton No. C-150601, 2016-Ohio-3231. In *Brunner,* the plaintiff and the defendant were in a motor vehicle accident wherein the defendant was cited and found guilty of an improper left turn following a trial in municipal court. *Id.* at ¶3-4. The plaintiff filed a motion for partial summary judgment on the issue of the defendant's negligence. Id. at ¶4. The trial court denied the motion and the appellate court affirmed. Id. at ¶10. With respect to the plaintiff's argument that the prior conviction established negligence per se, the appellate court found that "pursuant to R.C. 2307.60, only a final judgment of conviction "that adjudges an offender guilty of an offense of violence punishable by death or imprisonment in excess of one year is admissible as evidence in a subsequent action." (Internal quotations omitted). *Id.* at ¶14. Accordingly, *Brunner* found that the trial court could not rely upon the judgment of conviction in ruling on the motion because it was not a crime of violence such that R.C. 2307.60 would have rendered the evidence admissible. *Id. Brunner* makes clear that a conviction following a trial on a traffic offense is not admissible, assuming it does not meet R.C. 2307.60, nor does it establish negligence *per se.*

The ancillary argument of collateral estoppel

The plaintiff in *Brunner* further argued that under the doctrine of collateral estoppel, the defendant should be bound by the prior judgment in municipal court on the traffic violation and prevented from relitigating the issue of liability. *Id.* at ¶4. The appellate court found that allowing offensive collateral estoppel in such a case does not promote judicial economy because it encourages plaintiffs to adopt a "wait and see" mentality. *Id.* at ¶10. Moreover, *Brunner* found that collateral estoppel could not be used to preclude relitigating a driver's negligence because (1) a defendant does not have the same incentive to defend a traffic citation because the damages at stake in a civil case are not present in a traffic action; (2) the defenses available to a defendant in a civil action have no relevance and are not available in a traffic case; and (3) separate rules govern negligence actions as opposed to actions involving traffic citations. *Id.* at ¶12.

Courts have similarly been reluctant to allow a defendant to a negligence action to use collateral estoppel defensively when the plaintiff was previously found guilty of the traffic offense. In a Sixth District case, the plaintiff brought a negligence action against the defendant notwithstanding the fact that it was the plaintiff that was adjudicated guilty for failing to exercise due care when making a lane change. *Wolford v. Chekhriy,* 6th Dist. Lucas No. L-14-1103, 2015-Ohio-3085, ¶¶7-8. The defendant moved for directed verdict, claiming that the plaintiff was collaterally estopped from disputing that she was negligent, given her conviction on the traffic charge and that the violation of R.C. 4511.39 established negligence per se. *Id.* at ¶10. The trial court denied the motion, finding that because the plaintiff did not testify in the trial on the traffic charge, the issue was not fully and fairly litigated and thus, the elements of collateral estoppel were not met. *Id.* at ¶12. On appeal, the court affirmed but did not agree with the trial court that the plaintiff's failure to testify in the trial on the traffic case interfered with her ability to fully and fairly litigate the issue. *Id.* at ¶32. However, the appellate court found that the determination that the plaintiff violated R.C. 4511.39 was not tantamount to a finding that it was her sole negligence that caused her injuries because the municipal court judge did not make findings regarding whether the defendant violated any traffic law or whether it was the plaintiff's improper lane change that proximately caused her injuries. *Id.* at ¶35. Accordingly, the court found that the plaintiff was not collaterally estopped from litigating the issue of her negligence. *Id.* at ¶39.

However, *Wolford* muddied the waters with regard to whether a citation and conviction evidence were admissible in the civil action, as it was probative of the plaintiff's comparative negligence. *Id.* at ¶39. *Wolford* cited to a prior case which found that:

> The conviction may be admitted into evidence and accorded whatever weight the factfinder deems appropriate. It does not, however, preclude additional litigation involving the facts and legal issues underlying the conviction. * * * Similarly, testimony adduced at the criminal trial may be considered in the civil case when properly submitted. In the interest of fairness, however, we feel the defendant to the tort must be afforded an opportunity to present evidence rebutting or explaining the criminal conviction.

Id. at ¶39 quoting *Phillips v. Rayburn,* 113 Ohio App.3d 374, 381-82, 680 N.E.2d 1279 (4th Dist., 1996).

Wolford's reliance on *Phillips* on this point may have been misplaced. *Wolford* relied on *Phillips* for the proposition that the citation and conviction could be admitted as evidence. *Id.* However, *Phillips* analyzed a conviction of aggravated assault under R.C. 2903.12 which, pursuant to 2929.14(A)(3)(b)(4), is an offense of violence punishable by imprisonment in excess of one year. Therefore, the conviction in *Phillips* was properly admissible as evidence in accordance with R.C. 2307.60. *See Brunner, supra.* In contrast, it does not appear that the conviction for improper lane change in *Wolford* should have been admissible pursuant to R.C. 2307.60.

Wolford also muddied the waters with respect to negligence *per se.* The *Wolford* court suggested that the conviction of R.C. 4511.39 for an improper lane change constituted negligence *per se. Id.* at ¶36. In doing so, *Wolford* cited to a Tenth District Court of Appeals case which found that violations of R.C. 4511.21(A) and R.C. 4511.39 respectively constituted negligence *per se. Id.* at ¶36 quoting *Coronet Ins. Co. v. Richards,* 76 Ohio App.3d 578, 585, 602 N.E.2d 735 (10th Dist., 1991). However, in *Richards,* there was no discussion or indication of a prior conviction of the traffic offenses. *See Richards,* 76 Ohio App.3d 578. Notwithstanding, *Wolford and Richards* permitted evidence that the other driver was also negligent *per se* and of contributory negligence. *Wolford,* 2015-Ohio-3085 at ¶¶36, 39; *Richards,* 76 Ohio App.3d 578.

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Plea of no contest to traffic citation and conviction

A judgment of guilt after a plea of no contest is inadmissible in a subsequent civil trial. A Seventh District case found that Ohio Rule of Evidence 410(A)(2) prohibits the admission of a no contest plea to a traffic violation in a subsequent civil action which also extends to any subsequent conviction. *Riebe v. Hilton,* 7th Dist. Mahoning No. 11MA180, 2012-Ohio-1699, ¶12.

In *Riebe,* the plaintiff filed a negligence action against the defendant, alleging that the defendant failed to yield when making a left-hand turn. *Id.* at ¶2. The defendant was cited and pleaded no contest in municipal court to the citation for the failure to yield when making a left-hard turn in violation of local ordinance prohibiting the same. *Id.* Although not dispositive of the outcome in the case, the Seventh District found that Evid.R. 410(A)(2) prohibited the use of a no contest plea as evidence: "[E]vidence of the following is not admissible in any civil or criminal proceeding against the defendant who made the plea or who was a participant personally or through counsel in the plea discussions: * * * (2) a plea of no contest or the equivalent plea from another jurisdiction". The *Riebe* court cited the Supreme Court of Ohio with respect to the purpose behind the prohibition set forth in Evid.R. 410(A) finding that:

> The purpose behind the inadmissibility of no contest pleas in subsequent proceedings is to encourage plea bargaining as a means of resolving criminal cases by removing any civil consequences of the plea. The rule also protects the traditional characteristic of the no contest plea, which is to avoid the admission of guilt. The prohibition against admitting evidence of no contest pleas was intended generally to apply to a civil suit by the victim of the crime against the defendant for injuries resulting from the criminal acts underlying the plea. The plain language of Evid.R. 410(A) prohibits admission of a no contest plea, and the prohibition must likewise apply to the resulting conviction. To find otherwise would thwart the underlying purpose of the rule and fail to preserve the essential nature of the no contest plea. (Citations omitted).

Id. at ¶12 quoting *Elevators Mut. Ins. Co. v. J. Patrick O'Flaherty's,* 125 Ohio St.3d 362, 2010–Ohio–1043, 928 N.E.2d 685, ¶14; *see also Edwards v. Bolden,* 8th Dist. Cuyahoga No. 97390, 2012-Ohio-2501.

Paying fine on citation resulting in conviction

Traffic Rule 13(D)(3) provides that "[r]emittance of the fine and costs to the traffic violations bureau by any means other than personal appearance by the defendant at the bureau constitutes a guilty plea and waiver of trial whether or not the guilty plea and waiver of trial provision of the ticket are signed by the defendant." However, courts have held that pursuant to Evid.R. 410(A)(3), evidence of a defendant signing a citation and remitting the fine to the traffic violations bureau is not admissible in any civil proceeding against the defendant that made the plea. *Forbus v. Davis,* 5th Dist. Stark No. 1999-CA-382, 2000 WL 1459869, *1 (Sept. 25, 2000).

In *Forbus,* the defendant in a negligence action was cited for failing to maintain an assured clear distance in connection with the motor vehicle accident with the Plaintiff wherein the defendant allegedly rear-ended the plaintiff. *Id.* The defendant signed the citation and mailed the citation and waiver along with the payment of the fine the municipal court. *Id.* The defendant filed a motion in *limine* to preclude introduction of the citation at trial which the court sustained. *Id.* After a defense verdict, the plaintiff filed a motion for judgment notwithstanding the verdict or for a new trial on the grounds that the trial court excluded the citation from evidence. *Id.* These motions were overruled by the trial court and the plaintiff appealed. *Id.* The appellate court affirmed and found that the evidence of the signed citation and corresponding guilty plea is "clearly inadmissible" pursuant to Evid.R. 410(A)(3). *Id.; see also Hannah v. Ike Topper Structural Steel Co.,* 120 Ohio App. 44, 201 N.E.2d 63 (10th Dist. 1963).

Pleading guilty to a traffic offense

Pleading guilty to a traffic offense is likely admissible in the subsequent civil trial. Various cases have citied *Wilcox, supra,* to find that a plea of guilty to a traffic citation is admissible in the civil trial as an admission. *Schwable v. Coates,* N.D. Ohio No. 3:05 CV 7210, 2006 WL 1804023, *1 (June 28, 2006); *Gastle v. Millar,* 10th Dist. Franklin No. 82AP-582, 1983 WL 3427, *4 (Mar. 24, 1983); *Allstate Ins. Co. v. Cartwright,* 2d Dist. Montgomery Nos. 15472, 15473, 1997 WL 368370, *6 (June 27, 1999). However, such evidence is not conclusive of the party's negligence and therefore does not constitute negligence *per se. Gastle,* 1983 WL 3427, *4; *Schwable,* 2006 WL 1804023, *1.

However, as noted above, other cases have relied on Evid. R. 410(A)(3) for the proposition that a plea of guilty in a violations bureau is not admissible in any civil or criminal against a defendant that made the plea. *Goddenow v. Carbone,* 11th Dist. Lake No. 93-L-061, 1993 WL 548531, *3 (Dec. 17, 1993); *Forbus,* 2000 WL 1459869; *Hannah,* 120 Ohio App. 44. Therefore, although there is an argument to be made for the admissibility of a guilty plea to a traffic offense, a court will likely find that such a plea amounts to an admission and is admissible but not conclusive on the issue of negligence.

Conclusion

Based on the foregoing, Ohio courts will generally err on the side of excluding convictions of traffic cases in a subsequent negligence action unless the defendant pleads guilty to the traffic offense. Even then, there are arguments to keep the evidence out. In any event, the foregoing can serve as a quick guide to ascertain the ramifications of a client's prior traffic conviction in the subsequent civil suit.

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It's All Fun and Games Until Someone Gets Hurt

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When I grew up kids played pickup and backyard sports far more often than in organized leagues. We improvised our equipment and adapted to wherever we found space to play. This made our mothers cringe, and we were routinely warned it was only a matter of time before someone got hurt. Despite this, we emerged from our childhood intact, and are still able to laugh about it.

When people run, jump, and collide, no matter what precautions are taken, and no matter what their intentions are, someone will eventually get hurt. When we think of lawsuits and claims involving sports injuries, we usually think of injuries to spectators; claims against recreational and school leagues; or emerging CTE litigation. On a more basic level though, what are potential liabilities and defenses for more casual activities, such as pickup games or guests at a pool party?

Over the years, Ohio has tried to define and limit liability in these settings, both through statute and common law. While this provides certain levels of protection for participants and property owners, there is still confusion when analyzing liability.

Statutory immunity

R.C. 1533.181 provides immunity to owners, lessees, and occupants of property where recreational activities occur. One key to immunity is the recreational user must generally be able to use the premises without paying a fee. The statute provides immunity, regardless of whether or not the property in question is open for public use. Under the statute:

(A) No owner, lessee, or occupant of premises:
(1) Owes any duty to a recreational user to keep the premises safe for entry or use;
(2) Extends any assurance to a recreational user, through the act of giving permission, that the premises are safe for entry or use;
(3) Assumes responsibility for or incurs liability for any injury to person or property caused by any act of a recreational user.
(B) Division (A) of this section applies to the owner, lessee, or occupant of privately owned, nonresidential premises, whether or not the premises are kept open for public use and whether or not the owner, lessee, or occupant denies entry to certain individuals.

Questions have arisen about whether R.C. 1533.181 applies only to property in its natural condition, or if immunity extends to property owners who modified their premises. The courts generally extend immunity where the modification relates to recreational activity. A good example is *Miller v. City of Dayton,* 42 Ohio St.3d 113, 537 N.E.2d 1294 (1989). Plaintiff was injured sliding during a softball game and claimed the ballfield was in a defective condition. Plaintiff argued Dayton should not be immune because the premises were extensively modified to include dugouts, fences, and other manmade structures and conditions. The Supreme Court rejected this argument, and noted the focus should be on the nature and scope of the activity for which the premises are being used.

Pauley v. City of Circleville, 137 Ohio St.3d 212, 998 N.E.2d 1084 (2013) involved a serious sledding accident at a city park. Plaintiffs argued Circleville modified the property by adding dirt mounds near a sledding hill, creating a hazardous condition, so immunity should not apply. The Supreme Court rejected this argument, noting under the statute no duty of care was owed by the city, and that since the plaintiff was a recreational user who used the park at no charge, the statute barred recovery. The Court noted holding otherwise thwarted the statute's purpose and would discourage property owners from making their land available for public use.

Paying a fee to enter the premises is viewed very differently from paying a fee to engage in certain activities after entering the premises. In *Moss v. Ohio Dept. of Natural Resources,* 62 Ohio St.2d 138, 404 N.E.2d 742 (1980), the plaintiffs entered a state park at no charge. One plaintiff brought her own boat into the park but purchased food and gas while in the park. Another party rented a canoe in the park. Since the fees paid were not to enter the premises,

but rather just for particular activities, the statute provided immunity to the DNR.

On the surface, the statute looks clear and straightforward. The conclusion seemingly is it protects property owners from most claims stemming from casual recreational activity. But wait, there's more...

Assumption of risk as a bar to recovery

Ohio recognizes other defenses for homeowners and participants, under a totally different theory. For decades, the Ohio Supreme Court recognized participants in recreational and athletic activities assume the ordinary risks of the activity, and are barred from recovery unless a defendant's actions were reckless or intentional. *Marchetti v. Kalish,* 53 Ohio St.3d 95, 559 N.E.2d 699 (1990). *Thompson v. McNeill,* 53 Ohio St.3d 102, 559 N.E.2d 705 (1990). *Gentry v. Craycraft,* 101 Ohio St.3d 141, 2004-Ohio-379, 802 N.E.2d 1116, noted primary assumption of risk applies regardless of the participant's age. The risk must be so inherent to the activity that it cannot be eliminated.

What exactly is recreational activity?

Whether you are evaluating the statute's applicability or the feasibility of an assumption of risk defense, the definition of "recreational activity" is much broader than you may think. In *Gentry,* an 11-year-old boy and a 9-year-old boy were building a chair and the 4-year-old brother of one of the boys was watching nearby. One boy struck a nail with his hammer, causing it to fly and hit the 4-year-old in the eye. The Supreme Court described this as "typical backyard play, which falls within the definition of a recreational activity," and recovery was thus barred.

Miller recognized a very broad definition of recreational activity, including "jogging in the park, tinkering with a model airplane or reading poetry to satisfy a school homework assignment." *Miller* at 42 Ohio St.3d 115.

The fine print on the back of a sports ticket recognizes assumption of risk generally absolves teams and stadiums from liability from foul balls, broken bats, etc. In a more informal setting though, it is not always clear who is and is not a spectator. One example is *Sword v. Altenberger,* 5th Dist. No. 07-COA-029, 2008-Ohio-2513. During recess on a snowy school day, several third and fourth grade boys played football. Plaintiff played football with his friends initially, and then decided to do something else. He moved slightly away from where the other boys were playing and began building a snowman. One of the football players accidently ran into him, causing injury. Plaintiffs sued the other boy and his parents. A core issue was whether the injured boy was a spectator, thereby trigging primary assumption of risk. Summary judgment was affirmed, as plaintiff continued to watch his friends playing football while building his snowman, and thus was a spectator, and primary assumption of risk applied.

Many Ohio courts recognize *preparing* for recreation activity is fundamentally different from *engaging* in recreational activity, and primary assumption of risk might not apply. In *Thomas v. Strba,* 9th Dist. No. 12CA0080-M, 2013-Ohio-3869, two adults were assembling tree stands for the upcoming hunting season. One was injured falling off of a tree, and sued his friend who owned the stands and the land. The appellate court concluded plaintiff was not involved in a recreational activity and thus his claims were not barred by assumption of risk. The court emphasized the accident occurred the day before hunting season started, and thus while hunting itself may be a recreational activity, preparing to hunt was not. Similarly, pulling down a soccer goal is not considered recreational activity. *Fuehrer v. Westerville City School District Board of Education,* 61 Ohio St.3d 201, 574 N.E.2d 448 (1991).

Recreational activities also include children playing at a gymnastics birthday party. *Main v. Gym X-Treme,* 10th Dist. No. 11AP-643, 2012-Ohio-1315. *Main* also held negligent supervision was not an exception to assumption of risk. It also includes children playing on a backyard trampoline. *Kelly v. Roscoe,* 185 Ohio App.3d 780, 925 N.E.2d 1006 (2009). An adult passing out candy at a parade who had a float run over her foot was found to be engaged in recreational activity. *Kinkade v. Noblet,* 5th Dist. No. 14CA4, 2014-Ohio-3172.

Sink or swim?

Things are never quite as clear as they may seem. This is particularly so with whether, when, if and how there is liability for claims involving swimming pools. *Loyer v. Buchholz,* 38 Ohio St.3d 65, 526 N.E.2d 300 (1988), held R.C. 1533.181 did not provide immunity to claims brought against the owners of a private pool by injured social guests. *Bennett v. Stanley,* 92 Ohio St.3d 35, 2001-Ohio-128, 748 N.E.2d 41, recognized the doctrine of attractive nuisance, and specially held a swimming pool qualified as

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an attractive nuisance when trespassers are involved.

Despite this, Ohio courts often apply assumption of risk to preclude liability for homeowners in drowning lawsuits. *Drury v. Blackston,* 3rd Dist. No. 1-15-39, 2015-Ohio-4725, held primary assumption of risk applied, regardless of the participant's age, and rejected plaintiff's argument it should not apply to children younger than 7, barring the claim of a 4 year-old boy. The Court concluded swimming was a recreational activity, and thus the homeowners were shielded from negligence claims. Absent recklessness or intentional misconduct, they could not be found liable under any theory. Even though the homeowner promised to supervise plaintiff, that did not prevent the application of primary assumption of risk. The Court also rejected plaintiff's efforts to apply attractive nuisance, noting the child in question was not a trespasser. The ultimate key was the child engaged in recreational activity, and the complaint only alleged negligence. Therefore, no duty of care was owed, and the claims were barred.

Similar approaches have been taken by other Ohio courts, noting the risk of drowning is open and obvious, even to very young children. *Mullens v. Binsky,* 130 Ohio App.3d 64, 719 N.E.2d 599 (1998). *Morgan v. Ohio Conference of the United Church of Christ,* 10th Dist. No. 11-AP-405, 2012-Ohio-453.

Who's keeping score?

Evaluating liability on recreational claims will always be a very fact-sensitive inquiry. Was the plaintiff engaged in a recreational activity? Does statutory immunity apply. Does assumption of risk apply? This will usually be a nuanced analysis. The definition of recreational activity is broad, but the cumulative facts will decide whether your client is called safe or out.

Tom Glassman is a Shareholder in the Cincinnati office of Bonezzi Switzer Polito & Hupp. He is a survivor of countless backyard football battles and full contact basketball games. As a father of four, his children now return the favor to him. Tom can be reached at tglassman@bsphlaw.com

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