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State Supreme Court Update

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Ohio

Acuity v. Masters Pharmaceutical, Inc., 169 Ohio St.3d 387, 2022-Ohio-3092, 205 N.E.3d 460

- At issue was whether Acuity, an insurer, had a duty to defend Masters Pharmaceutical, Inc. ("Masters") against lawsuits by various cities and counties (the "Governments") for economic losses due to the opioid epidemic.
- Masters held insurance policies with Acuity, which mandated that Acuity defend Masters against suits seeking "damages because of bodily injury."
- The Governments alleged Masters' failure to monitor opioid orders led to economic losses such as increased law-enforcement expenses, judicial expenditures, prison and public-works costs, emergency and medical-care-services costs, substance-abuse-treatment expenses, and lost economic opportunity.
- The Governments asserted claims for public nuisance, negligence, and, in a majority of the complaints, violations of the Racketeer Influenced and Corrupt Organization Act, among other laws.

Acuity cont.

- Pursuant to Masters' commercial general-liability insurance policies with Acuity, Acuity had a duty to defend Masters against lawsuits seeking "damages because of bodily injury." Acuity argued that damages for societal or unidentified injuries did not constitute "damages because of bodily injury."
- Masters disagreed, arguing that the economic losses the Governments sustained were caused by the opioid epidemic, which in turn was caused by numerous opioid-related injuries sustained by their citizens, citing overdose statistics.
- Upon examining the policies, the Court rejected a broad interpretation supporting bodily injury damages in this context. Instead, the Court held that the phrase "damages because of bodily injury" required more than a tenuous connection between the alleged bodily injury sustained by a person and the damages sought. According to the Court, a sufficient connection would exist where the damages sought are for losses asserted by (1) the person injured, (2) a person recovering on behalf of an injured person, or (3) a person or organization that directly suffered harm because of another person's injury.
- Here, none of the aforementioned situations were present, and the Governments simply tied their alleged economic losses to the aggregate economic injuries they have experienced because of the opioid epidemic.
- Accordingly, the suits did not seek "damages because of bodily injury," and Acuity did not have a duty to defend Masters.

Emoi Servs., L.L.C. v. Owners Ins. Co., 170 Ohio St.3d 78, 2022-Ohio-4649, 208 N.E.3d 818

- EMOI Serivces, L.L.C. (“EMOI”), a computer software company, was the victim of a ransomware attack when a hacker illegally gained access to EMOI’s computer systems and encrypted files. As a result of the attack, when a file was opened, a ransom note appears notifying the user that the files were encrypted and unavailable, but that the files could be returned to normal upon payment of three bitcoins.
- EMOI paid the ransom, received a decryption key, and restored most files, but an automated phone system remained encrypted.
- EMOI filed a claim with its insurer, Owners Insurance Co. (“Owners”), which Owners denied, citing the Data Compromise and Electronic Equipment endorsements of EMOI’s insurance policy.
- The Electronic Equipment endorsement covered direct physical loss or damage to covered media, but Owners argued there was no such loss.
- EMOI subsequently sued Owners for breach of contract and bad faith.

Emoi Servs., L.L.C. cont.

- The policy required "direct physical loss of, or direct physical damage to, electronic equipment or media."
- EMOI argued that software was covered under the policy irrespective of physical damage, but the Court insisted on direct physical loss or damage to covered media.
- Computer software, being intangible, could not undergo direct physical loss or damage, according to the Court.
- The policy was deemed not to cover "physical damage" to computer software without concurrent physical damage to the hardware storing the software.

Krewina v. United Specialty Ins. Co., 2023-Ohio-2343

- Brown County Care Center (the "Center") had a liability policy with United Specialty Insurance Company ("United"), which excluded coverage for assault and battery.
- A resident at the Center attacked Plaintiff, another resident, during the policy period, leading to severe injuries.
- Plaintiff initially settled with the Center, agreeing to a stipulated entry of final judgment against the Center. Plaintiff then initiated a declaratory-judgment action against United to collect the judgment.
- At issue was whether United's insurance policy covered Plaintiff's injuries, or if the assault-or-battery exclusion applied.

Krewina cont.

- The Court emphasized the importance of interpreting insurance policies based on their language and plain meaning.
- The Court examined the exclusion, noting its clear language excluding coverage for bodily injury arising from assault or battery.
- Since the policy did not define "assault" or "battery," the Court applied the plain and ordinary civil-law definitions.
- The Court then concluded that the attack on Plaintiff qualified as an assault under the policy's exclusion, denying coverage. The undisputed evidence reflected that Plaintiff was attacked by a resident with a knife, and this act constituted a willful attempt to cause harm through force and would have placed a reasonable person in fear or apprehension of such harm.

Neuro-Communication Servs. v. Cincinnati Ins. Co., 2022-Ohio-4379

- On March 9, 2020, Ohio declared a state of emergency due to COVID-19, leading to various orders by the Health Director, including non-essential surgery suspension and a stay-at-home order.
- Neuro-Communication Services, Inc. ("Neuro"), an audiology practice, ceased operations complying with the Shutdown Orders, leading to a loss of revenue. Neuro sought coverage from its commercial property insurers. The parties' general-coverage provision provided that the insurers would pay "for direct 'loss' to Covered Property at the 'premises' caused by or resulting from any Covered Cause of Loss." The term "loss" was defined as "accidental physical loss or accidental physical damage." "Covered Causes of Loss" was defined as "direct 'loss' unless the 'loss' is excluded or limited" in that part of the policy. *Id.* at ¶ 7.
- The insurers denied the claim, stating that Neuro's claim did not involve direct physical loss or damage to covered property. Neuro filed suit, alleging breach of coverage extensions.
- The Court was presented with the question of whether the presence of COVID-19 constituted direct physical loss or damage to property.

Neuro-Communication Servs. cont.

- The Court rejected Neuro's argument that the term "loss" includes a loss of use. Instead, for coverage to be provided there must be loss or damage to property that "is physical in nature." *Id.* at ¶ 17. Thus, "loss" does not include the ability to use property for business purposes. As such, there was no "direct 'loss'" as a result of Neuro's loss of use of its premises for business purposes during the shutdown.
- The term "direct 'loss'" in the policy required some loss or damage to covered property that was physical in nature, excluding loss of use.
- The Court also held that direct physical loss or damage to property did not arise from the general presence of COVID-19 in the community, the presence of COVID-19 on surfaces at a premises, or the presence on the premises of a person infected with COVID-19.
- The Court found that its decision aligned with a clear trend in other jurisdictions, where courts had generally ruled that the mere loss of use of a premises did not constitute direct physical loss in insurance claims related to COVID-19 shutdowns.

Sinley v. Safety Controls Technology, Inc., 2022-Ohio-4153

- Plaintiff, a maintenance worker at Superior Dairy, Inc. (“Superior”) suffered a severe hand injury while repairing a grinder machine and thereafter filed a lawsuit against Superior and others, alleging that Plaintiff's supervisor failed to warn him about missing safety mechanisms on the machine and intentionally activated it without warning, causing severe injuries. Sinley sought damages for pain and suffering, permanent injuries, loss of enjoyment of life, medical expenses, and statutory damages.
- Employees at Superior were members of a union and Superior had a collective bargaining agreement (“CBA”) at the time of Sinley’s injury. Articles IX and X of the CBA covered grievances and arbitration, respectively, defining grievances as employment-related controversies, excluding workers' compensation matters.
- Superior sought to stay the litigation and compel arbitration pursuant to the CBA.

Sinley cont.

- The Court noted the Ohio Arbitration Act ("OAA") and the Federal Arbitration Act ("FAA") support the enforceability of written arbitration agreements. However, the Court held that there is no presumption of arbitrability of an individual employee's claims under an arbitration clause in a CBA.
- Next, the Court considered whether Plaintiff's common-law intentional tort claim under R.C. 2745.01 is arbitrable. The Court found in the affirmative, which then required determining if the CBA contained a "clear and unmistakable" waiver of a judicial forum to address this claim.
- The Court emphasized that for a waiver to be clear and unmistakable, it must identify the claim by statute of cause of action. Here, the CBA provided a non-exhaustive list of laws and statutes subject to arbitration, as well as a general "without limitation" clause. The CBA, however, did not mention R.C. 2745.01, or even intentional torts generally.
- Given that the CBA did not mention or reference Plaintiff's intentional-tort claims either by statute or cause of action, the Court held that there was no language constituting a clear and unmistakable waiver. As such, the CBA could not be used to compel arbitration of Plaintiffs' claims.

Stingray Pressure Pumping LLC v. Harris, 2023-Ohio-2598

- Stingray Pressure Pumping, LLC (“Stingray”) sought tax exemption for six types of equipment used in fracking: a data van, blenders, sand kings, t-belts, hydration units, and chemical additives.
- The Board of Tax Appeals concluded that pumps used to inject the hydraulic mixture into the fracking wells and the manifolds used in conjunction with the pumps were tax exempt, but the above-six types of equipment were taxable.
- Subsequently, the legislature amended the relevant statute related to tax exemption for oil and gas production equipment. The BTA nevertheless reaffirmed its prior decision.

Stingray Pressure Pumping LLC cont.

- The Court's analysis began noting that historically, tax exemptions have been construed against the taxpayer. The Court reversed course, stating that tax statutes must be "read through a clear lens" and that the Court will henceforth apply the same rules of construction to tax statutes that it applies to all other statutes. *Id.* ¶ 22.
- Applying a plain and ordinary meaning to the tax exemption statute, the Court held that all of the fracking equipment, aside from the data van, were directly used in performing hydraulic fracking services, and thus qualified for exemption.
- Notably, the Court also held that the BTA's reliance on earlier decisions supporting taxation of these pieces of equipment was a legal error because those decisions applied the pre-amended version of the tax exemption statute.

Valentine v. Cedar Fair, L.P., 169 Ohio St.3d 181, 2022-Ohio-3710, 202 N.E.3d 704

- Laura Valentine purchased a 2020 season pass from Cedar Fair, L.P. ("Cedar Fair"), the owner of an amusement park. The season pass provided Valentine access to rides, shows, and attractions on regularly-scheduled operating days. However, Cedar Fair reserved the right to change dates and close for various conditions.
- After Valentine purchase the season pass, Cedar Fair announced its parks were closed due to the government-mandated shutdown due to the COVID-19 pandemic, and eventually re-opened the parks in July 2020.
- Valentine filed breach-of-contract and unjust-enrichment claims against Cedar Fair, alleging that Cedar Fair breached the season pass terms for the 2020 season and was unjustly enriched by not opening the park in May and June 2020.

Valentine cont.

- The Court ultimately affirmed dismissal of Valentine's claims.
- In property law, an admission ticket to an event or attraction is considered a revocable license, revocable generally at the landowner's will.
- The season pass purchased by Valentine for Cedar Point was a revocable license subject to terms and conditions, which stated that "[a]ll operating dates and hours are subject to change without notice. All rides are subject to closings and cancellations for weather or other conditions." *Id.* ¶ 7. The Court found that this language permitted Cedar Fair the right to adjust its dates of operation for any reason.
- The Court also held that this was not a case regarding complete failure of consideration, as Cedar Point did in fact open for the 2020 season. A court may not inquire into the adequacy of consideration, and thus the Court stated that Valentine received the benefit of her bargain, even if the 2020 season was shorter than she expected at the time she purchase the season pass.

Wildcat Drilling, L.L.C. v. Discovery Oil & Gas, L.L.C., 164 Ohio St.3d 480, 2020-Ohio-6821, 173 N.E.3d 1156

- Discovery Oil and Gas, LLC ("Discovery") contracted with Wildcat Drilling, LLC ("Wildcat") for oil and gas well drilling. The parties' agreement contained indemnification clauses regarding pollution and contamination, including that Wildcat was required to indemnify Discovery against any fine or penalty that resulted from pollution or contamination.
- The Ohio Department of Natural Resources ("ODNR") determined that Wildcat had violated Ohio law by improperly using brine water in its drilling operations, leading to a $50,000 fine, with Discovery paying the fine and seeking indemnification.
- Wildcat sued Discovery for non-payment; Discovery countersued, seeking indemnification for the ODNR fine.

Wildcat Drilling, L.L.C. cont.

- The Court addressed whether a contractually-negotiation indemnification clause is subject to the common law indemnification requirements set forth in the Supreme Court of Ohio's decision in *Globe Indemn. Co.*
- Under *Globe Indemn. Co.*, in order to be entitled to indemnification after a voluntary settlement, the indemnitee must prove that (1) proper and timely notice was provided to the indemnitor, (2) the indemnitee was legally liable to respond, and (3) the settlement was fair and reasonable.
- The Court found that parties can contract to override these requirements, but the intent must be clear.
- The specific contract in question did not explicitly indicate an intent to disregard common-law requirements. Specifically, the contract did not say unequivocally that Wildcat and Discovery intended to abrogate Ohio's common-law indemnification requirements, that Discovery could voluntarily settle a claim without first providing notice to Wildcat, or that Discovery could settle a claim for any amount it chooses.
- The Court, however, noted that no talismanic language is required, and a court must focus on the parties intent. Because the appellate court failed to consider the parties' intent, the case was remanded for the appellate court to address this issue.

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Kentucky

Ashland Hosp. Corp. v. Darwin Select Ins. Co., 664 S.W.3d 509 (Ky. 2022)

Insurance coverage litigation

- Insured was subject of a DOJ subpoena in 2011 seeking documents regarding potential health care offenses.
- Insured provided notice to is D&O insurer, which accepted coverage to defend the subpoena and related investigation.
- In addition, other insurers (professional liability and excess) were notified of the subpoena and DOJ investigation.
- Then, insured notified its professional liability insurer of a litigation hold letter for medical malpractice in addition to the DOJ subpoena, but the insurer argued no claim.
- Later, the insurer defended the medical malpractice suit under a reservation of rights and filed a declaratory action on coverage.

Ashland Hosp. Corp. v. Darwin Select Ins. Co., 664 S.W.3d 509 (Ky. 2022)

- Insurer argued there was no coverage because insured invoked its D&O policy in response to the DOJ subpoena.
- Pertinent language stated coverage would not apply to a claim "based on, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving . . . any facts, matters, events, suits or demands notified or reported to, or in accordance with, any policy of insurance or policy or program of self-insurance in effect prior to October 16, 2012." *Id.* at 513.
- Prior notice exclusion language ***did not*** preclude coverage:
  - The DOJ subpoena did not constitute notice sufficient to give rise to a claim, so the prior notice exclusion could not apply.
  - A latent ambiguity should warranted resolution in favor of insured.
    - "The latent ambiguity arises from the disputed effect notice of the subpoena and investigation had on the applicability of Exclusion 15 as understood by a lay reader to specifically prohibit coverage of the Cardiac Litigation." *Id.* at 518.
  - Last, the subpoena was not a known liability precluding coverage because it did not constitute circumstances giving rise to a claim.

Commonwealth v. Timmons, No. 2021-SC-0271-WC, 2022 Ky. LEXIS 380 (Dec. 15, 2022)

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Commonwealth v. Timmons, No. 2021-SC-0271-WC, 2022 Ky. LEXIS 380 (Dec. 15, 2022)

If an employee falls down the front steps at her home on her way to an out-of-office work function, is she entitled to worker's compensation?

Commonwealth v. Timmons, No. 2021-SC-0271-WC, 2022 Ky. LEXIS 380 (Dec. 15, 2022)

Compensable Injuries

- Injuries that arise out of and in the course of employment are generally compensable.

Coming and Going Rule

- Exclusion from coverage for employee's travels to and from work, but . . .

Exception for Traveling Employees

- Where a worker's employment requires travel, injury occurring while employee is travelling may be work related.

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Commonwealth v. Timmons, No. 2021-SC-0271-WC, 2022 Ky. LEXIS 380 (Dec. 15, 2022)

Not a compensable claim!

"In [claimant's] case, the only service to her employer that she alleges she was providing at the time of her injury was her travel to the on-site training. And such travel certainly confers a benefit to her employer. ***But we find as a matter of law that such travel does not begin until an employee leaves her property and exposes herself to the common risks of the public street. So although [claimant] was injured while descending the front steps of her home, her travel had not yet begun for the purposes of the traveling-employee doctrine because she had not yet become exposed to the common risks of the street."*** *Id.* at *9.

Green v. Frazier, 655 S.W.3d 340 (Ky. 2022)

06/2018
- Kentucky resident purchased "new" truck from dealership.

09/2018
- Purchaser returned to the dealership to trade-in and found out his truck was actually in a wreck.

12/2019
- Purchaser sued the dealership in state court.

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Green v. Frazier, 655 S.W.3d 340 (Ky. 2022)

- The purchaser signed (multiple) arbitration agreements.
- When the dealership moved to dismiss, the purchaser argued that the provisions were unenforceable as unconscionable.
- "[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance[.]" *Id.* (quoting *Dixon v. Daymar Colleges Grp., LLC*, 483 S.W.3d 332 (KY 2015)).
  - The arbitration provisions themselves were neither procedurally nor substantively unconscionable.
- ***The Kentucky Supreme Court favors enforcing arbitration agreements.***

Hughes v. UPS Supply Chain Sols., Inc., No. 2021-SC-0444-DG, 2023 WL 5444612 (Ky. Aug. 24, 2023)

- Plaintiffs alleged that UPS violated Kentucky statutory law by failing to compensate class members for time spent complying with mandatory security procedures when entering/exiting facilities, but . . .
- Applicable federal law clarifies that certain activities are not compensable working time under the FLSA, including "preliminary" or "postliminary" activities.
- Kentucky statutory law, however, was ambiguous as to whether the portal-to-portal exceptions were adopted.

Hughes v. UPS Supply Chain Sols., Inc., No. 2021-SC-0444-DG, 2023 WL 5444612 (Ky. Aug. 24, 2023)

Does ambiguous Kentucky statutory wages and hours law incorporate the federal Portal-to-Portal exemptions?

In short, yes.

Hughes v. UPS Supply Chain Sols., Inc., No. 2021-SC-0444-DG, 2023 WL 5444612 (Ky. Aug. 24, 2023)

Kentucky Administrative Interpretation

- "For nearly half a century, the Kentucky Department of Workplace Standards has concluded that the Portal-to-Portal Action's compensation limits are part of the KRS Chapter 337 framework." *Id.* at *3.
- Legislative inaction also supported conclusion that Kentucky law "imports the Portal-to-Portal Act's exemptions." *Id.* at *4.

Federal Court Interpretation

- Two federal cases supported application of the exemptions:
  - *Integrity Staffing Solutions, Inc. v. Busk*, 574 U.S. 27 (2014) (holding that security screenings are noncompensable activities).
  - *Vance v. Amazon.com, Inc.*, 852 F.3d 601, 613 (6th Cir. 2017) (finding that KRS 337 incorporates the Portal-to-Portal Act's compensation limits on preliminary and postliminary activities).

Hughes v. UPS Supply Chain Sols., Inc., No. 2021-SC-0444-DG, 2023 WL 5444612 (Ky. Aug. 24, 2023)

- Justice Thompson wrote a dissenting opinion questioning "what impact will this have on UPS workers in the class who must undergo extensive and potentially lengthy security screenings at the beginning and end of their shifts as mandated by federal laws applicable to package shipping companies." *Id.* at *6.
- "The majority opinion is wrongfully engrafting the Federal Law into Kentucky's Wage and Hour laws and then interpreting this law expansively to resolve a question that is premature to address." *Id.*

Toler v. Oldham Cty. Fiscal Court, 657 S.W.3d 914 (Ky. 2022)

Does an employer that files direct testimony from a physician in an ALJ worker's compensation proceeding through a medical written report have to use physician's licensed in Kentucky?

Yes.

Toler v. Oldham Cty. Fiscal Court, 657 S.W.3d 914 (Ky. 2022)

- Under KRS 342.033, "[a] party may introduce direct testimony from a physician through a written medical report. The report shall become a part of the evidentiary record, subject to the right of an adverse party to object to the admissibility of the report and to cross-examine the reporting physician." ***But . . .***

- KRS 342.0111 defines "physician" to mean "physicians and surgeons, psychologists, optometrists, dentists, podiatrists, and osteopathic and chiropractic practitioners ***acting within the scope of their license issued by the Commonwealth***."

Despite finding it more persuasive, the ALJ should have excluded the employer's report.

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Indiana

Cmty. Health Network v. McKenzie, 185 N.E.3d 368 (Ind. 2022)

- An employee of a health-care provider Community Health Network ("CHN") improperly accessed and disclosed information from numerous patients' confidential medical records. The employee's access and alleged disclosure of Plaintiffs' medical records, however, wasn't random. Rather, it was the latest chapter in a long-running family feud.
- The employee's actions went undetected by CHN for 8 months later until CHN received an anonymous tip that employee was viewing her own medical chart in violation of hospital policy. CHN investigated the allegations and fired the employee after discovering she had repeatedly accessed Plaintiffs' medical records. Further investigation revealed that the employee had also accessed the records of over 160 other patients, none of whom "received services" at the specific CHN entity that employed the employee.
- Plaintiffs initiated suit against CHN and the employee. They brought claims of *respondeat superior* and negligent training, supervision, and retention against the provider and claims of negligence and invasion of privacy against the employee.

Cmty. Health Network cont.

- First, the Court concluded that Plaintiffs' complaint was not subject to dismissal for lack of jurisdiction because the alleged misconduct did not fall within the purview of Indiana's Malpractice Act ("MMA").
- The MMA only encompasses tortious conduct that was (1) based on "health care" or "professional services" that (2) were, or should have been provided, "to a patient." *Id.* at 376.
- Here, the alleged tortious conduct did not occur in connection with the provision of "health care" services, as the alleged conduct did not occur during the course of Plaintiffs receiving treatment.
- The Court also held that the unauthorized access of Plaintiffs' medical records did not constitute a "professional service." The alleged conduct simply concerned CHN's internal business decisions and access protocols for medical records, which are directed inward to CHN employees, not outward to its patients. Further, Plaintiffs were not patients of any of the physicians for whom the employee was responsible for scheduling medical appointments and releasing medical records.
- Put simply, the alleged misconduct lacked a temporal connection to any care provided by CHN, and thus, the MMA was inapplicable.

Cmty. Health Network cont.

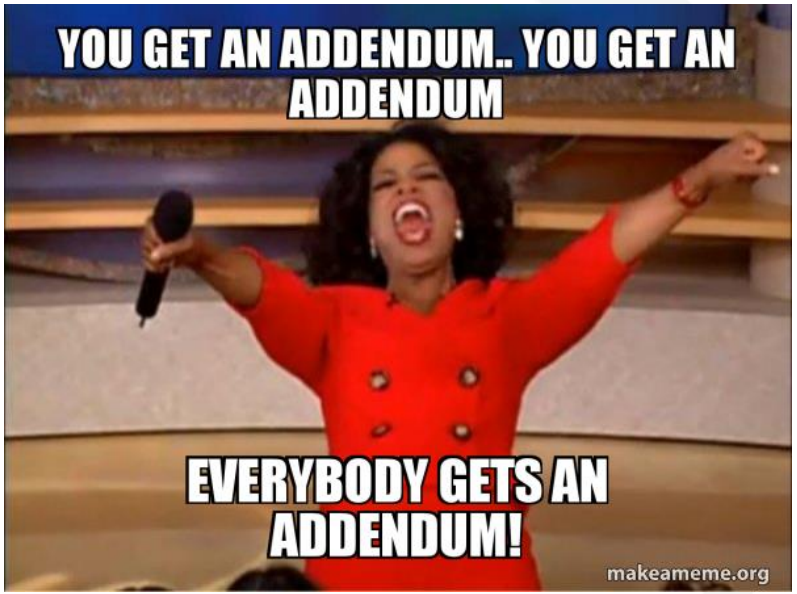
- Second, the Court found genuine issues of material fact as to whether the employee's conduct fell within the scope of her employment.
- The Court held that it was not dispositive that the employee's conduct was unauthorized and violated a confidentiality agreement, as the employee's actions could still be considered to "naturally or predictable ar[ise] from delegated employment activities within the employer's control." *Id.* at 378.
- The evidence reflected the employee had access to numerous patient files, including patients that did not receive medical services from the specific CHN entity for which the employee worked. The employee also was seemingly not provided with a clear understanding of the scope of her authority to access patient health information. And finally, other evidence established that CHN had the ability to run more robust reports to identify instances of improper health information access, but failed to do so.
- Thus, the Court found that Plaintiffs' negligent training, supervision, and retention and the doctrine of *respondeat superior* survived summary judgment.

Cmty. Health Network cont.

- Finally, the Court held that CHN was entitled to summary judgment on Plaintiffs' claim for *respondeat superior* liability premised on the employee's public disclosure of private facts.
- In order to be actionable, the information must be disclosed "to, or in a way that was sure to reach, the public or a large number of people." *Id.* at 383. The evidence only established that the employee, however, only disclosed the Plaintiffs' medical histories to members of her family.
- As such, CHN was entitled to judgment as a matter of law on this claim.

Decker v. Star Fin. Grp., Inc., 204 N.E.3d 918 (Ind. 2023)

- Plaintiffs, who had a checking account at Star Financial Bank ("SFB"), filed a class action complaint against SFB alleging the bank collected improper overdraft fees. Before the action was brought, however, SFB added an arbitration and no-class-action addendum to Plaintiffs' account agreement. SFB thus moved to compel arbitration.
- The Indiana Supreme Court held that the added addendum was not a valid amendment.



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Decker cont.

- Section 10 of the original account agreement allowed Star Financial to "change any term of [the] agreement." *Id*. at 921. The Court, however, found that this provision did not give Star Financial "a blank check to amend the agreement any way it saw fit to fend off threatened litigation." *Id*. at 921.
- The Court held that the "any term" language only allowed SFP to change specific terms existing in the original account agreement, and that Section 10 was not "a blank check to amend the agreement any way it saw fit to fend off threatened litigation." *Id*. at 921.

Decker cont.

- Because the original account agreement did not contain a general dispute-resolution procedure or a specific arbitration or no-class-action provision, SFP was improperly attempting to add new terms that differed from the original terms. As such, the addendum was not a valid amendment.
- Essentially, the Court emphasized the difference between a far-reaching power to amend "**this** agreement" and the narrower power to amend "**any term** of this agreement." *Id.*

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Indiana Right to Life Victory Fund, et al. v. Morales, 217 N.E.3d 517(Ind. Sept. 25, 2023)

- Plaintiff Indiana Right to Life Victory Fund ("Victory Fund"), a Super PAC, sought to receive a $10,000 contribution earmarked for independent expenditures from Plaintiff Sarkes Tarzian, Inc. ("ST"), a corporation.
- They refrained from this transaction due to the belief that Indiana state laws prohibited corporate contributions to Super PACs.
- Plaintiffs filed a lawsuit against various state officials, arguing that these laws were unconstitutional based on the United States Supreme Court's decision in *Citizens United v. Federal Election Commision*, 558 U.S. 310 (2010). Plaintiffs sought a declaratory judgment and injunction against the enforcement of these laws.

Indiana Right to Life Victory Fund cont.

- The Court stated that ST's contribution would only be legal under Indiana law if it were authorized by Sections 4, 5, and 6 of the Indiana Election Code. Only Section 5 was at issue before the Court.
- Section 5 permits contributions to a PAC so long as the contribution "is designated for disbursement to a specific candidate or committee listed under [S]ection 4" and the contribution does not exceed Section 4's dollar limits. *Id.* at 521.
- ST, however, sought to earmark its contributions to Victory Fund's **independent expenditures**. While Section 5 does not expressly prohibit these types of expenditures, the Court held that "silence if prohibition" because the Indiana Election Code states that contributions by a corporation or labor organization "are limited to those authorized by [S]ections 4, 5, ad 6 of this chapter." *Id.* at 522.
- Accordingly, the Court held that the Indiana Election Code prohibits corporate contributions to PACs earmarked for independent campaign-related expenditures.

Land v. IU Credit Union, 2023 Ind. LEXIS 635 (Ind. Oct. 24, 2023)

- Plaintiff maintained two checking accounts at IU Credit Union ("IUCU"), pursuant to an account agreement, whose terms were "subject to change at any time." IUCU agreed to notify members of any changes to the agreement's terms, either by mail or email.
- Plaintiff received an email from IUCU containing a second agreement which allowed IUCU to "modify the terms and conditions applicable to the services from time to time" and to "send any notice [to Plaintiff] via email." Under the agreement, Plaintiff was deemed to have received such notice "three days after it is sent."
- Plaintiff later received a proposed modification to the account agreement. The addendum added two provisions to the agreement: (1) either party could require arbitration to resolve disputes without the other party's consent, and (2) members were prohibited from initiating or joining a class-action lawsuit. The addendum provided the member a "right to opt out" of the arbitration provision if the member informed IUCU within 30 days of receiving written notice of the addendum. Otherwise, the provision became binding.

Land cont.

- When Plaintiff received an email containing the addendum, the email did not mention the addendum, nor did the email subject line. Plaintiff would have needed to click a link to direct her to the addendum.
- Plaintiff also received a two-page monthly account statement via U.S. mail, which noted the addendum in bold, all-capital letters on the first page and directed Plaintiff to receive the updated terms included in the mailing.
- Plaintiff claimed she did not see either version of the addendum and therefore was unable to "opt out" of the arbitration provision.
- Plaintiff later filed a class-action complaint against IUCU, alleging wrongful assessment of overdraft fees, breach of contract, breach of duty of good faith and fair dealing, unjust enrichment, and a violation of Indiana's Deceptive Consumer Sales Act. IUCU moved to compel individual arbitration based on the addendum.

Land cont.

- Although Indiana recognizes a strong policy in favor of enforcing arbitration agreements, the Court noted that the "presumption in favor of arbitration without first determining whether the parties agreed to such a method of dispute resolution threatens to "frustrate the parties' intent and their freedom to contract." *Id.* at *5.
- Plaintiff argued that IUCU's failure to give reasonable notice, along with her silence in response to IUCU's offer, rendered the addendum invalid. IUCU, on the other hand, argued that it fulfilled its notice obligations by sending the addendum to Plaintiff according to the terms of the agreement and that Plaintiff's silence and inaction amounted to acceptance of the addendum.
- Although the Court found that Plaintiff received adequate notice of the account addendum, the Court held that Plaintiff's silence did not amount to assent. The Court found that the "mere fact that an offeror states that silence will constitute acceptance does not deprive the offeree of his privilege to remain silent without accepting." *Id.* at *13.
- Further, nothing in the agreement indicated that silence and continued use of Plaintiff's accounts would result in acceptance of any future modification of the original agreement. And no similar language was found in the addendum itself.
- Lastly, because the parties' previous dealings required Plaintiff to affirmatively agree to the terms of the original account agreement, the Court held that the addendum demanded the same—affirmative assent.
- Accordingly, the addendum was invalid and there was no enforceable agreement to arbitrate.

NCAA v. Finnerty, 191 N.E.3d 211 (Ind. 2022)

- Plaintiffs, former college football players, brought suit against the NCAA based on an alleged failure to implement reasonable concussion-management protocols to protect college athletes.
- Plaintiffs sought to depose the NCAA's President, Chief Legal Officer, and Chief Operating Officer. The NCAA moved twice, unsuccessfully, for a protective order to quash the depositions.
- Prior to addressing the merits of the appeal, the Court first held that the NCAA's second motion for a protective order, which the Court characterized as a "repetitive motion" or "motion to reconsider," can properly be certified for discretionary interlocutory review under Indiana Appellate Rule 14(B). Thus, the NCAA's failure to seek interlocutory review of the denial of the first motion did not defeat appellate jurisdiction.

NCAA cont.

- On the merits, the Court was asked to adopt the "apex doctrine." This doctrine applied a burden-shifting framework when a litigant seeks to depose a high-ranking official. If the high-ranking official moves to quash or seek a protective order, with an accompanying affidavit establishing the official's lack of relevant information, the burden shifts to the party seeking the deposition to show the official has "unique or superior knowledge of discoverable information." *Id*. at 219.
- The Court declined to adopt the apex doctrine because the doctrine's presumption that a high-ranking official should not be deposed unless the requesting party establishes a necessity for the deposition was in conflict with Indiana's respective discovery rules, which allows a party to take a deposition of anyone with discoverable information. *Id*. at 220.

NCAA cont.

- The Court provided, however, provided a legal framework that "harmonizes [the apex doctrine's] underlying principles with [Indiana's] existing discovery rules." *Id*. at 217.
- First, a party seeking a protective order must show, through affidavits and specific factual support, that the deponent qualifies as an apex official. *Id*. at 221.
- If the deponent qualifies as an apex official, a court must then determine if "good cause" exists to protect the official from annoyance, embarrassment, oppression, or undue burden, taking into account the official's status. *Id*.
- The party seeking to depose the official can negate or rebut a showing of good cause by providing specific facts demonstrating that (1) the official has relevant, personal knowledge; or (2) alternative methods of obtaining the information sought are unavailable, inadequate, or have already been exhausted. *Id.* at 222.

Indiana v. $2,435 in United States Currency, 2023 Ind. LEXIS 638 (Oct. 31, 2023)

- Alucious Kizer, during a traffic stop, fled his car and discarded a substantial amount of controlled substances. Alongside the drugs, $2,435 in cash was recovered. The State initiated a complaint to forfeit the money, alleging its connection to criminal activities.
- Kizer, representing himself, contested the claims and requested a jury trial.
- At issue before the Court was whether a claimant in an action brought under Indiana's civil forfeiture statutes has a constitutional right to trial by jury.

Indiana cont.

- The Court held that the right to a jury trial in Indiana extends to civil forfeiture actions.
- Under the Indiana Constitution, parties in a civil case have a right to a jury trial if the cause of action was (1) triable by jury at the adoption of the current constitution in 1851 or (2) essentially legal, not equitable, considering the nature of the complaint, the rights and interests involved, and the relief demanded.
- Applying this framework, the Court determined that Article 1, Section 20 of the Indiana Constitution safeguards the right to a jury trial for *in rem* civil forfeitures. The historical record for the state of Indiana strongly indicated the continuation of the common-law tradition of trial by jury in actions for property forfeiture.
- The Court further established that Kizer's action was legal, not equitable. Examining the early United States' civil forfeiture laws, the Court noted that the common law, as practiced in the country at the time of the adoption of the federal Constitution, provided a remedy *in rem* for forfeiture cases. Both English and American practices before and after 1791 acknowledged the jury trial of in rem actions as the established method for determining statutory forfeitures on land for breaching statutory prohibitions.

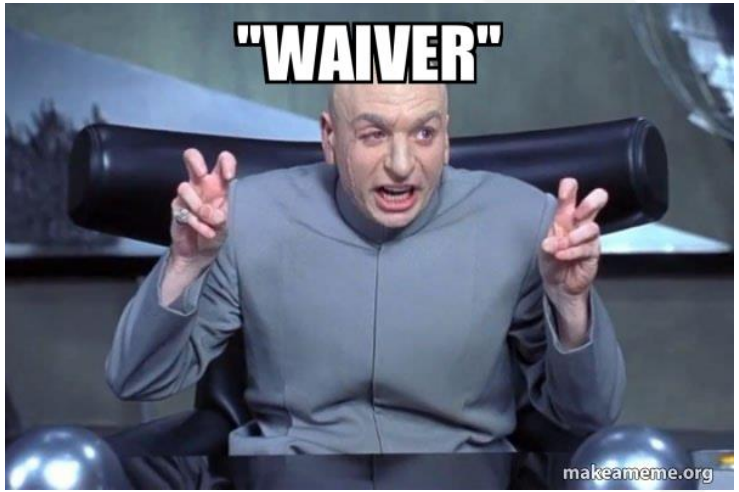
U.S. Automatic Sprinkler Corp. v. Erie Ins. Exch., 204 N.E.3d 215 (Ind. 2023)

- A landlord leased office space to four commercial tenants, one of which was Sycamore Springs Surgery Center, L.L.C. ("Sycamore"). Sycamore contracted with U.S. Automatic Sprinkler Corporation ("Automatic Sprinkler") to install and maintain a sprinkler system in its leased space. The agreement provided that "[n]o insurer or other third party will have any subrogation rights against" Automatic Sprinkler.
- The landlord contacted Automatic Sprinkler to inspect a leak in the system, and Automatic Sprinkler serviced the system. The system subsequently malfunctioned and caused a flood, resulting in property damage to Sycamore and the other commercial tenants.
- Sycamore's insurer, as subrogee, sued Automatic Sprinkler, and the commercial tenants sued Automatic Sprinkler for property damage.

U.S. Automatic Sprinkler Corp. cont.

- First, the Court held that Sycamore's insurer was barred from seeking subrogation recovery against Automatic Sprinkler because Sycamore waived the insurer's subrogation rights. The insurer had argued that the waiver did not apply because the landlord—not Sycamore—requested the inspection, and thus the damages stemmed from work completed outside the scope of the parties' agreement.

- The Court rejected this argument as the broad subrogation waiver was not conditioned on Sycamore's loss arising in any particular way. Further, although Sycamore did not explicitly authorize the work, the work constituted repair and emergency services that were authorized by the parties' agreement, and thus the work was not "so far removed from the subject matter of the agreement that the broad subrogation waiver c[ould] not apply." *Id.* at 224.



U.S. Automatic Sprinkler Corp. cont.

- Second, that Court found that the other commercial tenants' negligence claim against Automatic Sprinkler could not survive summary judgment. There was no contractual privity between these tenants and Automatic Sprinkler.
- The Court held that the scope of contractor liability to third parties only extends to instances in which the third party seeks recovery for (1) personal injury that was a foreseeable consequence of the negligence; or (2) property damage, so long as personal injury—even if not sustained—was a foreseeable consequence of the negligence.
- Here, the other commercial tenants only suffered property damage, and Automatic Sprinkler's alleged negligence did not pose a risk of personal injury to those tenants. As such, the other tenants' negligence claim failed as a matter of law.

Questions?

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Thank You