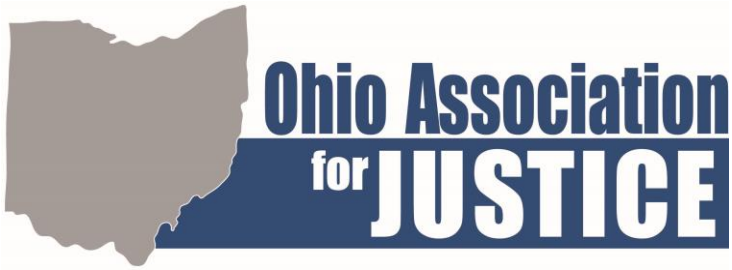

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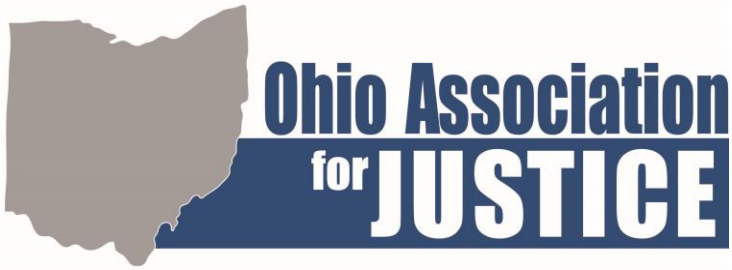
General PI Session



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Are Jurors Influenced by What They Wish to Believe?

Ed Lazarus

Are Jurors Influenced By What They Wish or Need To Believe?

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The preeminent social psychologist, Lee Ross, and his colleagues conducted an interesting experiment, recently published in Psychological Science[1], demonstrating that the evaluation of scientific evidence is shaped more by what a person desires to be true than what they initially believed to be true.

The study recruited subjects who believed that home child care was superior to day care. Half of the subjects were conflicted about the issue and indicated that they intended to use day care for their children. The subjects were motivated to believe that day care was as good as home care. The un-conflicted group indicated that they intended to use only home care.

The subjects were given two fictional studies. Half of the subjects were led to believe study 1 favored day care and study 2 home care while the other half of the subjects were led to believe the opposite for studies 1 and 2. After reading the studies, the subjects evaluated which of the two studies provided more valid conclusions, listed the strengths and weaknesses, and then evaluated the persuasiveness of each study. The subject's last task was to evaluate which form of childcare would have a better effect on child development.

The results of the study dramatically showed subjects were more persuaded by scientific evidence that confirmed what they wished to be true than what they initially believed to be true. Subjects who initially indicated that they intended to send their children to daycare, even though they felt home care to be superior, were unconsciously motivated to favor scientific evidence that was consistent with their desire to believe day care would not adversely affect their children. When these subjects were exposed to two studies reaching opposite conclusions, they shifted their belief from their initial position and concluded that home care was no better than day care.

The un-conflicted subjects, those who intended to use home care, maintained their strong initial belief that home care was superior. The un-conflicted subject did not alter their initial belief even though they were exposed to a scientific study that was inconsistent with their belief and instead favored the study that confirmed their belief.

The Ross study is important for trial lawyers, and corroborates the Jury Bias Model, that despite the evidence, jurors search for evidence during the trial that favors their beliefs and, perhaps, what they need to believe. Jurors typically face conflicting evidence at trial. Jurors likely will

favor the evidence that confirms beliefs and what they wish to believe even in the face of scientific evidence to the contrary. The quality and persuasiveness of the scientific evidence is filtered through the jurors' wishful thinking rather than an objective evaluation of the merits of the science. Knowing what jurors need to believe is essential.

The implicit assumption of the civil justice system is that jurors objectively weigh the evidence, are free from bias, and that the best science applied to the facts determines who wins and loses. This assumption is contrary to decision-making science.

We are, after all, naive realist and believe that we perceive things as they are. See, Ross, L., & Ward, A. (1996). Naive realism in everyday life: Implications for social conflict and misunderstanding. In T. Brown, E. S. Reed, & E. Turiel (Eds.), Values and knowledge. The Jean Piaget Symposium Series (pp. 103–135). Hillsdale, NJ: Erlbaum.

Naively, we expect other reasonable people to see things as we do if exposed to the same information. Trial lawyers may believe, all too willingly, that jurors will perceive the evidence in the same way they do; after all, trial lawyers fall prey to the same naïve realism that all people do and believe they perceive the evidence as it is. Trial lawyers are not immune from this bias blind spot simply because of their professional training. People do not readily recognize their biases. Trial lawyers are no exception.

In evaluating their cases, trial lawyers often fail to recognize how their biases affect their judgment and juror bias affects juror judgment. Trial lawyers must become behavioral realists and litigate their cases understanding how jurors evaluate evidence rather than how they wish jurors would evaluate the evidence. The implication is that we must build our case from the bottom-up, starting with what the jurors must believe for plaintiff to win, rather than from the top-down, what trial lawyers and their experts believe the evidence shows! Once we know what jurors must believe, then, and only then, can we know how to build the case consistent with juror beliefs and wishes. Jurors should not be required to change how they perceive the world as a prerequisite to winning.

Not only do trial lawyers contend with beliefs and wishes that have developed through the jurors unique life experience, now they must contend with anti-plaintiff beliefs that have resulted from politically motivated campaigns to instill an anti-plaintiff bias. In litigation, the trial lawyers must identify the most common case specific event schemas and anti-plaintiff bias schemas. Both tasks are essential to success in civil litigation in today's environment. Ignoring what we now know about human behavior and how jurors process information is simply inexcusable.

In a dram shop case, for instance, what particular event schemas are important? What safety precautions do people believe a bar should institute to prevent a customer from becoming intoxicated and killing or maiming someone as a consequence? People have unconscious maps about how a bar operates and what is a reasonable way to protect the public. It matters little what the experts and research show if it is incongruent with event schema driven beliefs. Once the juror beliefs are identified then the task of discovering the science that confirms those event schemas or unconscious maps can begin. Jurors will resist evidence inconsistent with their unconscious maps as the Ross study demonstrates.

One common event schema operating in dram shop cases is that the person who drinks is in the best position to protect against the harm resulting from his drinking. Jurors reflexively find it unfair to ask a business to protect someone from himself. Another common event schema that often arises in this context is that people who know alcoholics or heavy drinkers have unconscious maps about how these people behave.[2] One legal issue in these cases is proving the level of intoxication at the time wreck was the result of the alcohol ingested at the bar. The time between the drunk leaving the bar and the wreck is critical to decision making. People with experience with alcoholics have maps about how these people behave such as, "oh he probably stopped somewhere after leaving the bar and bought a six pack" or "these people always keep liquor in the car, and he must have been drinking in his car after left the bar". Such maps serve to excuse the conduct of the bar. If you identify these unconscious maps then demonstrating there was no time to stop for liquor and that the police did not find liquor in the car at the time of the wreck is easily addressed during discovery. Seemingly minor issues like these, left unaddressed at trial, can have devastating consequences. Knowing the unconscious maps at work and who your jurors are can prevent a misstep like this.

Another goal is to discover the impact of the anti-plaintiff bias. Do the facts elicit suspicion about the plaintiff? Did the plaintiff act like the tort reformer's prototypical plaintiff that was the exemplar for the anti-plaintiff bias? Do people feel victimized by specific lawsuits like these? In other words, is the public more concerned about lawsuits personal impact than in a just result? Have you presented a case so complex, that people find it is easier to conclude that stuff happens rather than struggle to understand the facts? Finally, do people believe that if the plaintiff had been personally responsible, the harm would have been avoided? People disfavor protecting people from themselves. If the plaintiff had the ability to prevent the injury he better have a great explanation why he failed to do so.

Building the case from the bottom up means discovering at the earliest opportunity what unconscious maps people use to evaluate the conduct of the defendant and the plaintiff.

People believe and need to believe they live in a safe world. People need to believe, for instance, that their hospitals are safe. If we frame the case to prove hospitals are unsafe, the plaintiff will encounter the same result Ross and his colleagues found in their research. Jurors will perceive the science and expert testimony to be congruent with their wish to believe their hospitals are safe.

Telling jurors that 98,000 people die every year in hospitals from preventable errors or that hospital negligence is the 4th leading cause of death will not persuade jurors that malpractice is a common occurrence or that it is more likely that plaintiff was one of the 98,000. Jurors, like everyone else, are loss averse. People do not want to lose what they already have. People feel safe and need to believe they are safe. Instilling fear in jurors is not the answer, as some might suggest. The answer is to accept that we all need to feel safe and protected, as Mandell[3] and others suggest, and to utilize that belief in framing the case.

For a discussion of framing the safety issue at trial, I invite you to join the AAJ Jury Bias Litigation Group and to attend the AAJ Case Framing Program, December 10, 2015, https://www.justice.org. There two excellent books being published December 1, 2015, that will help trial lawyers construct a winning case:

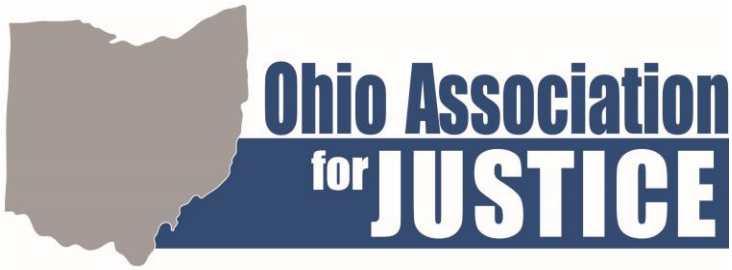
Tom Gilovich & Lee Ross, The Wisest One in the Room: How You Can Benefit from Social Psychology's Most Powerful Insights, 2015, See, http://www.amazon.com/

Mark Mandell, Case Framing, 2015, Trial Guides/AAJ Press

[1] Wishful Thinking: Belief, Desire, and the Motivated Evaluation of Scientific Evidence, Anthony Bastardi, Eric Luis Uhlmann, and Lee Ross, *Psychological Science, April 2011; first published on April 22, 2011*

[2] For this reason it is risky to allow jurors with personally relevant experience to sit. One cannot know what event schemas these people unconsciously hold. If you bet wrong these jurors can infect the other jurors with their personal event schemas and the trial lawyer cannot possibly predict the effect on deliberation. When in doubt, kick them out!

[3] See, Trial 2000 "OVERCOMING JUROR BIAS: IS THERE AN ANSWER?" Mark Mandell, posted April 14, 2011 jurybiasblog.com



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General PI Session

Straight from the Headlines: Dealing with Police Misconduct Cases

Michael Wright
Vandalia, OH

POLICE LIABILITY FOR FOURTH AMENDMENT VIOLATIONS

WRIGHT & SCHULTE, LLC.

130 W. SECOND ST, STE 1600

DAYTON, OHIO 45402

Presenting Attorneys Michael Wright and Robert Gresham

42 U.S.C.S. §1983

- CIVIL ACTION ASSERTING THE DEPRIVATION OF CONSTITUTIONAL RIGHTS:
  - INDIVIDUAL
  - PRIVATE REMEDY
  - SPECIFIC GOVERNMENT EMPLOYEE
    - LAW ENFORCEMENT OFFICER
    - CITY, COUNTY, STATE EMPLOYEES
    - MAYORS, GOVERNORS
- CLAIM MUST SHOW:
  - ACTUAL DEPRIVATION OF RIGHTS
  - RIGHTS WERE DEPRIVED BY A PERSON ACTING UNDER THE COLOR OF STATE LAW

W&S
WRIGHT & SCHULTE, LLC

§1983 CLAIMS CONT'D…

- 4TH AMENDMENT RIGHT VIOLATION
  - EXCESSIVE FORCE
- DUE PROCESS VIOLATION
  - WHEN STATE OFFICIALS' AFFIRMATIVE ACTION(S) DIRECTLY INCREASE VULNERABILITY OF CITIZENS TO DANGER OR PLACE THEM IN HARM'S WAY[1]
    - "STATE-CREATED-THEORY", *MCCLENDON V CITY OF COLUMBUS*, 258 F.3D 432 (5TH CIR. 2001)
      - MAN SHOT BY A CONFIDENTIAL INFORMANT WITH A GUN ALLEGEDLY BORROWED FROM A POLICE OFFICER COULD SUE LENDING OFFICER

WRIGHT & SCHULTE, LLC

MONELL CLAIMS

- LOCAL GOVERNMENT ENTITIES CANNOT BE SUED UNDER §1983 CLAIMS FOR INJURIES INFLICTED SOLELY BY ITS EMPLOYEES
  - ONLY LIABLE FOR DEPRIVATION OF FEDERAL RIGHTS CAUSED BY ITS OWN POLICY, CUSTOM, OR PRACTICE[1]
    - PLAINTIFF MUST IDENTIFY THE POLICY SET FORTH BY AGENCY UNDER WHICH OFFENDING EMPLOYEE WAS OPERATING
- SUCCESSFUL CLAIM REQUIRES AT LEAST **ONE** OF FOLLOWING **THREE**:
  - DEPRIVATION OF RIGHT CAUSED BY OFFICIAL POLICY
  - DEPRIVATION OF RIGHT CAUSED BY GOVERNMENTAL CUSTOM
  - DEPRIVATION OF RIGHT FOR FAILURE TO TRAIN

1. OHIO REVISED CODE 2744.02 (B)(2) 2744.03(A)(2)

STATUTORY CLAIMS
OHIO REVISED CODE

- GENERALLY A POLITICAL SUBDIVISION IS LIABLE FOR THE NEGLIGENT CONDUCT OF ITS EMPLOYEES[1]
- THE OHIO REVISED CODE PROVIDES POLITICAL SUBDIVISION IMMUNITY, HOWEVER, IF:
  - THE CONDUCT WAS REQUIRED OR AUTHORIZED BY LAW; or
  - THE CONDUCT WAS NECESSARY OR ESSENTIAL TO THE EXERCISE OF POWER; or
  - THE CONDUCT OR FAILURE TO ACT WAS WITHIN THE DISCRETION OF THE EMPLOYEE WITH RESPECT TO ENFORCEMENT POWERS, BY VIRTUE OF THE DUTIES AND RESPONSIBILITIES OF THE OFFICE OR POSITION OF THE EMPLOYEE[2]

1. OHIO REVISED CODE 2744.02
2. OHIO REVISED CODE 2744.02 (B)(2)

STATUTORY CLAIMS CONT'D.

- SUCCESSFUL REBUTTALS TO POLITICAL SUBDIVISION IMMUNITY:
  - THE ACTIONS OR OMISSIONS OF THE EMPLOYEE WERE MANIFESTLY OUTSIDE THE SCOPE OF EMPLOYEE'S EMPLOYMENT OR OFFICIAL RESPONSIBILITIES
  - THE ACTIONS OR OMISSIONS OF EMPLOYEE WERE WITH MALICIOUS PURPOSE, IN BAD FAITH, OR IN A WANTON, RECKLESS MANNER[1]
    - WANTON MISCONDUCT IS DEFINED AS THE FAILURE TO EXERCISE ANY CARE TOWARD THOSE TO WHOM A DUTY OF CARE IS OWED IN CIRCUMSTANCES IN WHICH THERE IS GREAT PROBABILITY THAT HARM WILL RESULT[2]
    - RECKLESS CONDUCT IS CHARACTERIZED BY THE CONSCIOUS DISREGARD OF INDIFFERENCE TO A KNOWN OR OBVIOUS RISK OF HARM TO ANOTHER THAT IS UNREASONABLE UNDER THE CIRCUMSTANCES, AND IS SUBSTANTIALLY GREATER THAN NEGLIGENT CONDUCT[3]

1. OHIO REVISED CODE 2744.03(A)(2)
2. *HAWKINS V IVY*, 50 OHIO ST 2D AT 117-118 (1977)
3. SEE *BLACK'S LAW DICTIONARY* (8TH ED. 2004) 1298 – 1299

QUALIFIED IMMUNITY DOCTRINE UNDER §1983[1]

- PROTECTS PUBLIC OFFICIALS FROM MONETARY LIABILITY WHEN THEIR CONDUCT DOES NOT VIOLATE ANY CLEARLY ESTABLISHED LAW. QUALIFIED IMMUNITY ESTABLISHMENT IS ANALYZED IN TWO STEPS:
  - DETERMINE WETHER THE ALLEGED FACTS, TAKEN IN A LIGHT MOST FAVORABLE TO THE PLAINTIFF, SHOW THAT THE GOVERNMENT OFFICIAL'S CONDUCT VIOLATED A CONSTITUTIONAL RIGHT, IF SO, THEN:
  - THE COURTS MUST ASK IF THE RIGHT WAS CLEARLY ESTABLISHED
    - A RIGHT IS CLEARLY ESTABLISHED WHEN IT IS CLEAR TO A REASONABLE OFFICER THAT HIS CONDUCT WAS UNLAWFUL RELATING TO THE PRESENTING SITUATION.
      - "IN THE LIGHT OF PRE-EXISTING LAW, THE UNLAWFULNESS MUST BE APPARENT."[2]

1. U.S.C.S. 42 §1983
2. *SAUCIER V KATZ* S. CT. 2151 (2001)

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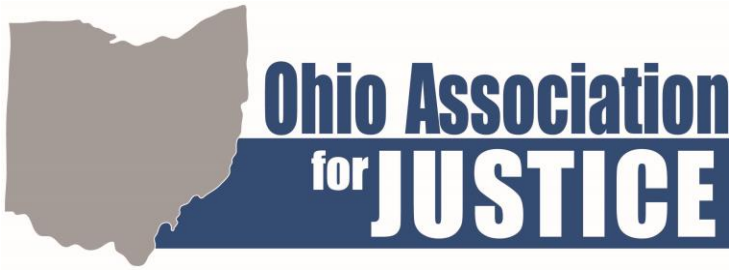

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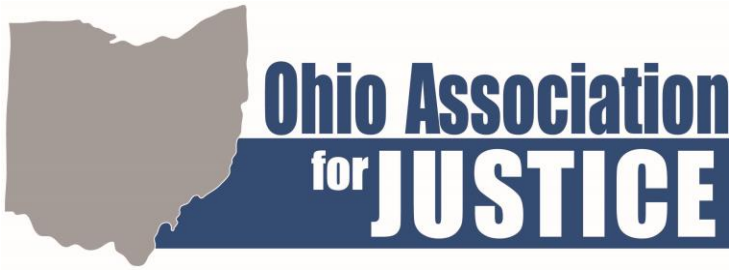
3D Imaging: a New Frontier in Visual Evidence

Jorey Chernett



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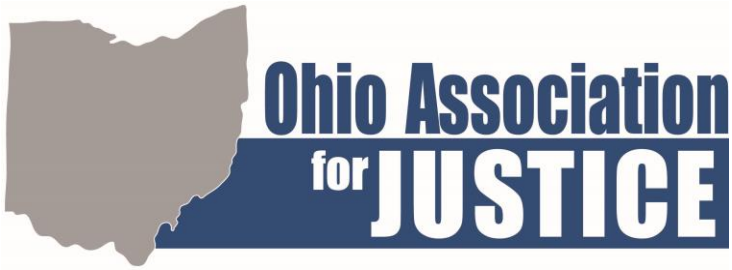
State Farm Exposed

Mike Morse
Southfield, MI



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Death Certificates, Birth Certificates and our Journey to Marriage Equality at the SCOTUS

Al Gerhardstein
Cincinnati, OH

Al Gerhardstein was lead counsel in *Obergefell v. Hodges*, the case that started in Cincinnati and ended with Supreme Court recognition of marriage equality nationwide. He will recount the legal landscape for LGBT clients when he started the Obergefell litigation in 2013, the identification of clients appropriate for TRO's – those with dying spouses and in need of death certificates or on the eve of giving birth to babies and in need of birth certificates. He will also discuss co-counseling with national advocacy groups and preparing a "movement" case for SCOTUS review. It was just at the last convention winter convention when he received the decision from the Sixth Circuit reversing his wins at the District Court. It is only fitting that he recount the journey taken since then on this once in a lifetime case.

Is There a Pot of Gold at the End of the Rainbow for Ohio Employees?
Ohio LGBT Employment Law After *Obergefell*
By Jennifer L. Branch[1]

On June 26, 2015 the Ohio Supreme Court issued its landmark decision in *Obergefell v. Hodges* holding that the Fourteenth Amendment to the United States Constitution requires states to license and to recognize marriages between two people of the same sex. The immediate result of *Obergefell* was the issuance of marriage licenses, followed soon that day by weddings across Ohio.[2] *Obergefell* was a breakthrough decision in LGBT rights. Its effects on family law, probate law and even real estate law are just starting to be understood. But what protection, if any, does *Obergefell* offer employees? What if April and Susan get married one weekend and on Monday April comes to work and shows her friends her wedding photos. Can her supervisor fire her for marrying a woman? The answer is "No," if she is a public employee. But, as a private employee the answer has been "Yes;" but is it now "Maybe."

Public Employees and Equal Protection

Public employees are protected from irrational government discrimination under the Equal Protection Clause.[3] If April were a public school teacher, and we assume the school district employed women teachers married to men, but fired women teachers married to women, that would state a claim under 42 U.S.C.§ 1983 for violating the Equal Protection Clause. *See Glover v. Williamsburg School District.*[4] Public LGBT employees have been protected by the equal protection clause for years. In 2004 the jury was instructed in a case brought by a demoted transgender police sergeant that the equal protection clause "prohibits discrimination against public employees on the basis of an employees perceived sexual orientation, gender identity, transsexuality, or failure to conform to sex stereotypes." *Barnes v. City of Cincinnati*.[5] The Supreme Court in *Obergefell* furthered equal protection jurisprudence when it held that the right to marry is inherent to one's personal liberty and the Equal Protection Clause prohibits states from depriving same-sex couples of that right and liberty.

Private Employees and Title VII

If April were an accountant for Price Waterhouse she could be fired under Ohio law since O.R.C. § 4112.02 does not protect private employees from being discriminated against on the

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[1] Jennifer L. Branch is partners with Alphonse A. Gerhardstein. Gerhardstein & Branch Co. LPA, concentrates its practice in plaintiff's civil rights litigation including LGBT issues, police brutality, employment discrimination, prisoner rights, and women's reproductive rights. Al Gerhardstein was lead counsel for the plaintiffs in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

[2] For a description of the Obergefell litigation history see, Branch, J. (2015, September). "Life After Love Wins." *Ohio Lawyer*, September/October 2015 issue, pp. 8-11.

[3] *See, e.g. Enquist v. Oregon Dept't of Agriculture*, 128 S.Ct. 2146, 2155 2008; *Glover v. Williamsburg Local School District Bd. Of Educ*., 20 F. Supp. 2d 1160 (1998) (Judge Susan Dlott) (verdict for a gay school teacher whose employment contract was not renewed when the district found out he was gay; at trial teacher won reinstatement and damages); *Beall v London City School Dist. Bd. of Educ*., 2006 WL 1582447 (S.D. Ohio 2006)

[4] My partner and I tried Glover in 1998 at time when the law was still developing.

[5] *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2004); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 575 (6th Cir. 2004).

basis of sexual orientation.[6] However, Title VII's prohibition on sex discrimination may protect her. Despite decades of attempts to amend Title VII, it does not protect LGBT employees.

If April changed her gender identity from male she would have greater protection. Title VII has been used to protect employees who change their gender identity while on the job, like the firefighter in *Smith* and the police sergeant in *Barnes*. Barnes successfully argued that when she was still identifying as male at work Barnes' supervisors perceived his feminine appearance, ambiguous sexuality, and lack of "command presence" (whatever that meant) as not masculine enough to be a sergeant. Title VII has prohibited such gender stereotyping since *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). And in 2012 the EEOC extended protections for a transgender police officer beyond sex stereotyping and found a violation under Title VII's prohibition of discrimination based on sex.[7] The EEOC used religion as an analogy. If an employee identified as Christian later converted to Judaism, the employer could not discriminated based on religion. The EEOC held the same is true of an employee changing his gender identity.

However, no court has yet found Title VII protects employees based on their sexual orientation. That could change. Soon after *Obergefell*, the EEOC ruled in *Baldwin v. Foxx* that Title VII's protection from sex discrimination protected an employee from sexual orientation discrimination.[8] The EEOC reasoned that if a man marries a man and is fired for marrying a man, he is being discriminated against based on sex because if the man had married a woman he would not have been fired. While *Baldwin* is an agency decision limited to federal employment law, its reasoning could be used by plaintiff lawyers to extend Title VII protections to private employees discriminated against on the basis of his or her sexual orientation.

Benefits for LGBT Employees

Will employers provide more employment benefits to same sex couples after *Obergefell*? Many Fortune 500 corporations already do.[9] Thirteen Ohio corporations, including law firms, earned a 100% rating from the Human Rights Campaign's Corporate Equality Index. Some employers have offered "domestic partner benefits" so same sex couples who could not marry in Ohio could share in their partner's employment benefits. These may fade away after same sex couples are given time to marry.

Only greater anti-discrimination laws and creative lawyering will reveal the full impact *Obergefell* will have in employment law in Ohio.

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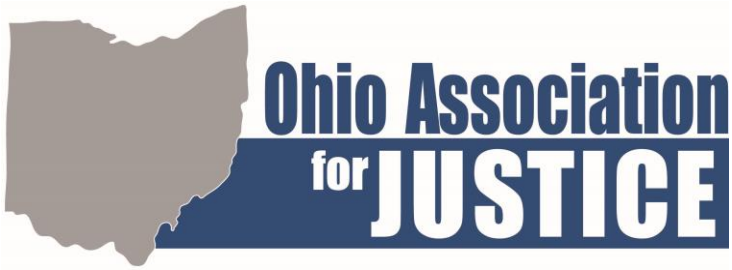
[6] *Burns v. Ohio State Univ. Coll. of Veterinary Med.*, 2014-Ohio-1190, ¶ 13 appeal not allowed sub nom. *Burns v. Ohio State Univ. Coll. of Veterinary Med.*, 139 Ohio St. 3d 1473 (App. 10th Dist. 2014).

[7] *Macy v. Holder*, 2012 WL 1435995 (EEOC Apr. 20, 2012) http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt

[8] *Baldwin v. Foxx*, (EEOC July 15, 2015) http://www.eeoc.gov/decisions/0120133080.pdf

[9] http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/documents/CEI-2015-rev.pdf



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Maximizing Client Recovery by Utilizing O.R.C. §2323.44 (Statutory Made Whole)

Matt Nakajima
Cincinnati, OH

Statutory Made Whole (R.C. § 2323.44)

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LANGUAGE:

Effective: September 29, 2015
2323.44 Distribution of recovery in tort action

(A) As used in this section:

(1) "Health care provider-sponsored organization" means an entity that is sponsored by hospitals, physician groups, other licensed health care providers, or any combination of hospitals, physician groups, or other licensed health care providers that are affiliated through common ownership or control and share financial risk for the purpose of delivering health care services.

(2) "Injured party" means any person who claims any injury, death, or loss to person in a tort action or an estate that makes a survivorship claim due to injury, death, or loss to person, but not including a derivative claim, a claim made by a beneficiary in a wrongful death action pursuant to section 2125.02 of the Revised Code, or a claim for punitive damages arising from a person's claim of injury, death, or loss to person.

(4) "Recovery" means the amount obtained from a third party in a tort action or the amount obtained for a claim in connection with uninsured or underinsured motorist coverage.

(5) "Third party" means any individual, automobile insurance company, or public or private entity against which a person or estate has a tort action.

(6) "Subrogee" means any of the following:

(a) An insurance company doing business in this state;
(b) A self-funded plan providing health, sickness, or disability benefits;
(c) A health care provider-sponsored organization;
(d) Any person or entity that claims a right of subrogation by contract or common law.

(8) "Tort action" means a civil action for injury, death, or loss to person. "Tort action" includes any claim for damages for injury, death, or loss to person, whether or not a lawsuit is pending, or a claim in connection with uninsured or underinsured motorist coverage, but does not include a civil action for breach of contract or another agreement between persons.
(B) Notwithstanding any contract or statutory provision to the contrary, the rights of a subrogee or any other person or entity that asserts a contractual, statutory, or common law subrogation

claim against a third party or an injured party in a tort action shall be subject to all of the following:

(1) If less than the full value of the tort action is recovered for comparative negligence, diminishment due to a party's liability under sections 2307.22 to 2307.28 of the Revised Code, or by reason of the collectability of the full value of the claim for injury, death, or loss to person resulting from limited liability insurance or any other cause, the subrogee's or other person's or entity's claim shall be diminished in the same proportion as the injured party's interest is diminished.

(2) If a dispute regarding the distribution of the recovery in the tort action arises, either party may file an action under Chapter 2721. of the Revised Code to resolve the issue of the distribution of the recovery.

WHO DOES THE STATUTE APPLY TO?

- Applies to any party asserting a subrogation and / or reimbursement claim that is based on common law or contract.
- **Expressly includes:**
  - Insurance companies
  - Self-funded benefit plans
  - Medpays
  - Healthcare provider-sponsored organizations
  - PERS (state-based, self-funded plans)
- **Excludes:**
  - Medicare (A&B); Medicare C & D plans (federal / statutory)
  - VA / Tricare (federal / statutory)
  - Self-funded ERISA plans (federal / pre-emption)
  - Medicaid; and / or Medicaid MCOs (state/statutory)
  - Workers' Compensation Plans (statutory)

WHAT IS THE IMPACT?

- Impacts the contractual subrogation/reimbursement rights of insurance companies, health care providers and other benefit plan providers.
- Specifically implements the “Made Whole” rule – rule of equity that limits a health plan seeking a claim against the member’s tort settlement when the member is not compensated for all damages.
- Health plan’s claim must be reduced proportionally in the same proportion as the member’s recovery was reduced relative to the total value of the initial tort claim.
- Reductions of the initial tort claim may be attributed to:
    - comparative negligence,
    - legal limitations on tortfeasor liability, or
    - limitations on collectability (limited liability coverage or any other cause)
- disputes regarding pro-rata calculation and distribution of funds must be resolved through a declaratory judgment filed by either party.

QUESTIONS THAT HAVE ARISEN

- Is there an offset for procurement costs (attorney fees and case expenses)?
- Is the statute retroactive?
- If the injured party recovers less than the third party’s policy limits, does the statute still apply?