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## Addressing Allegations of Criminal Acts by Employees

By Thomas Wolf and Cari Sheehan



The news has recently been replete with numerous articles and commentary about domestic abuse as a result of the high profile cases of Ray Rice and Adrian Peterson in the National Football League. The high profile of these cases will likely bring closer scrutiny to the reactions of all



employers when employees are alleged to have committed similar crimes. With the ability of social media to quickly disseminate

information, accurate or not, a “socially unaccepted” reaction by an employer to the allegations against an employee can have a devastating effect upon business.


Domestic violence is defined by Chapter 2919 of the Ohio Revised Code, IC 35-31.5-2-78 of the Annotated Indiana Code and KRS 403.720 of the Kentucky Revised Statutes. The offense is essentially defined as the use of physical force or deadly weapon committed against a family or household member.

One of the difficulties for an employer of an employee charged with this offense is

long-standing American doctrine that one is presumed to be innocent until proven guilty. In the days of social media and the rush to condemn others based upon accusation, the failure to take immediate action can condemn the employer for the actions of the employee, whether a later conviction is obtained or not. To protect the integrity of the business, we recommend the following actions:

### Collectively Bargained Employees

For employers who have union employees, or employees subject to a CBA, the first step is to review the Agreement for



guidance. The terms of the contract should include a provision for punishable offenses, including termination. Often, the CBA will include bargained provisions for personal behavior. The terms may include personal behavior while in the course and scope of employment, and designate specific consequences for offenses, usually increasing in severity for multiple offenses. The CBA will also often spell out terminable offenses, which may include criminal activity or violent acts. In light of the fallout from the recent NFL issues, including domestic violence in future CBAs may be considered.

If the current CBA addresses activities outside of the workforce, the CBA should include a procedure that must be followed before punishment can be administered. The CBA can provide for a suspension pending the outcome of a criminal matter. If a union is involved, keeping the union representative involved and following the procedure in the CBA will be necessary to avoid possibly repercussions from the employees.

If there is no policy in place governing an employer's right to terminate an employee for reasons related to personal conduct, under Ohio law, the presumption is that an employee is at-will. Given this presumption, an employer may terminate an employee for any reason or no reason at all, within the bounds of the law. The Ohio Supreme Court has recognized an exception to this presumption, however, holding that "the right of employers to terminate employment at will for 'any cause' no longer includes the discharge of an employee where the discharge is in violation of a statute and thereby contravenes public policy." *Dean v. Consol Equities Realty #3*, 182 Ohio App.3d 725, 727, 2009-Ohio-2480 (1st Dist. 2009), citing *Greeley v. Miami Valley Maintenance Contrs., Inc.*, 49 Ohio St.3d 228 (1990).

Because termination of an employee for a reason that somehow contravenes public policy is a risky maneuver for any employer to take, the employer must be consistent in handling termination of an employee for the reason of violating a provision

concerning personal conduct. For example, if an employer terminates an African American at-will employee following a high-profile allegation of domestic violence, yet allows a white employee to keep his position following a similar incident, such practice could raise issues of wrongful termination in violation of Ohio law prohibiting racial discrimination, and thus violating public policy. Consistency in the practice of dealing with employees who engage in criminal activity outside the workplace is crucial to ensuring an effective protocol that limits potential liability for the employer taking action.

Generally, it is an effective practice for employers to include in their employee handbook or policies and procedures manual a provision concerning the personal conduct of employees. An even more effective policy would be to include an employee code of conduct that provides a broad basis for an employer to take the steps necessary for disciplining or even terminating an employee, when the employer is faced with the negative effects associated with an allegation of criminal activity outside the workplace.

A code of conduct should affirm the presence of both private and public life for individuals while reminding employees that external perception may not make the same distinction. It is also important to keep in mind that conduct outside the workplace, i.e. criminal activity, can carry a greater business risk when that employee is working out in the field versus being localized to a single office.

An example of language that could be utilized in a provision concerning criminal activity by an employee could include:

Employees must consider that whether they are at work or enjoying private time, employees likely will be viewed as a representative of \_\_\_\_\_. At all times, employees must comply with local law and provisions, state laws, and federal laws.

Illegal behavior, behavior that brings \_\_\_\_\_ into disrepute, as well as allegations of illegal behavior, or allegations of behavior

that brings \_\_\_\_\_ into disrepute, will be referred to \_\_\_\_\_ and handled according to the processes outlined below.

Any instances of allegations of criminal activity or actual commission of criminal activity by an employee, whether inside or outside of the workplace, will constitute cause for discretionary discipline, including, but not limited to, suspension with pay, suspension without pay, and/or termination.

Ultimately, if an employer determines that there are pending allegations of criminal activity, the employer has three options:

**1. Keep the employee**-This is a good option if the employee is a long-standing, hard-working employee with no prior misconduct, a good performance record, and minor allegations. After performing an investigation, you may realize that the company's exposure to liability will be minimal, even if no action is taken.

**2. Suspend the employee without pay pending resolution of the charges**-This may be a good option if you suspect the allegations are true and could expose the company to negative publicity and affect its business. This allows the company to "take action" without going through a full-fledged termination prior to any investigation.

**3. Terminate the employee**-This should only be done if the employer is certain that the employee's conduct will affect the company. Otherwise, the company exposes itself to liability for wrongful discharge, or defamation and invasion of privacy claims if the charges end up being unfounded or the allegations are determined to be untrue. Also keep in mind that the employee could still file for unemployment compensation following termination, as misconduct outside of the workplace may be insufficient to disqualify the employee from receiving unemployment benefits.

## Conclusion

The use of social media and the instant transfer of information poses a risk to the reputation of a business. In the current

atmosphere bring to the forefront by the recent publicity surrounding alleged criminal activity by NFL players, any employee accused of similar crimes can bring adverse publicity to an employer. A swift response is the best strategy, but waiting until an event occurs can compound the problem.

All employees should take a new look at the documents addressing employee behavior and employer response. If a CBA exists, the terms should be reviewed. If the terms do not adequately address non-employment behavior, at the least, the next bargaining session should include a discussion.

A Handbook or Policies and Procedures Manual should be reviewed and updated. Clear guidelines should exist. Most importantly, even application of the policies must be implemented when faced with a possible violation to avoid the "Ray Rice" fallout from affecting your company.

## The Danger of Customer Collisions Held Open and Obvious in Ohio

By Carrie Masters Starts and Gregory Guice



The Ohio Appellate Second District Court of Appeals recently held that Ohio retailers have no duty to warn customers of the danger of colliding with one another, since this type of danger is to be expected in a retail setting, i.e. that it is open and obvious. This issue often comes into



play via the motorized methods of moving about the premises offered to customers by retailers. These vehicles and the customer operators may at times be involved in unforeseen collisions or interactions with other customers causing injuries. Indeed, customer collisions are somewhat common even when motorized carts are not involved and it is simply a collision between customers pushing non-motorized carts. As a corollary, the court also held that retailers have no duty to erect store displays under a customer's eye level in order to obviate the risk of these customer collisions.

The Second District Court of Appeals decision in *Johnson v. Wal-Mart Stores E., L.P.*, 2nd Dist. No. 25972, 2014-Ohio-2998, makes it clear that store owners will not be responsible for these unforeseeable cart collisions and that there is no duty to take affirmative action to lower store displays in order to decrease the risk of such collisions. In *Johnson*, the plaintiff, Janet Johnson, was shopping at Wal-Mart with her husband, William Johnson (who was actually using a motorized cart himself). They proceeded to the jewelry department after entering the

store. After picking out what they wanted, Mrs. Johnson left her husband to look for another item. Upon leaving her husband, Ms. Johnson walked down the large aisle in the front of the store, directly behind the cash registers toward the garden center. As she was walking down the aisle, Mrs. Johnson saw another customer, Dana Buchanan, in a motorized shopping cart on the right side of the aisle. At that point, Mrs. Johnson stopped to look at a display of pillows in the middle of the aisle. After looking at the pillow, she continued to proceed down the aisle. Suddenly, the motorized cart driven by Dana Buchanan appeared around the display and hit Mrs. Johnson.

Mrs. Johnson brought suit against the store to recover for the injuries that she sustained in this collision. She alleged that the store was negligent by failing to: (1) inform the user of the motorized cart of its proper use and operation; (2) warn the user of the risks of using motorized carts; (3) warn Johnson of the risks of motorized cart use; and (4) not to erect displays in its store-long, fifteen foot wide, aisles that would obstruct a customers' vision.

The Court of Appeals ultimately concluded that: (1) there was neither any allegation, nor any evidence, that the motorized cart was being used or operated improperly, other than the fact that the user, Dana Buchanan, and Johnson, collided just beyond a display in the middle of an aisle; (2) the store had no duty to warn either Johnson or Buchanan of the danger of their colliding with one another, since

that danger would be obvious to any reasonable customer; and (3) the store had no duty not to erect displays above eye-level in its store-long, fifteen-foot wide, aisles.

In determining that the store had no duty to warn users, and other customers, of the inherent dangers of motorized carts, the Court stated:

Blind intersections in stores are common occurrences. Johnson and Buchanan each knew that she could not see if anyone was approaching the intersection past the display from the other direction. The danger of collision or near-collision was not a hidden danger, since each was bound to know that there was a risk that another person might be entering the intersection at the same time.

The Court further concluded that whether or not the store instructed Buchanan concerning the proper use of the motorized cart was not a material issue in the absence of any actual allegation that Johnson's injuries were caused by the improper operation of the cart.

Mrs. Johnson also argued that the store had a duty to reduce the height of the display in its center aisle so that the intersection would not be blind; however, the Court determined that was not a reasonable precaution. Rather, the Court found that the same danger, i.e. a blind intersection, is present whenever an aisle contains merchandise stacked above

eye-level. The Court stated, “a reasonable customer knows this, and exercises caution when passing beyond the aisle, since there may be another customer coming from the other side.” The Court specifically concluded that requiring store owners to limit the height of merchandise, or displays stacked near the ends of aisles, to below eye-level is not a commercially reasonable requirement to ensure the safety of customers traversing the aisles. “It is an

unreasonable limitation upon the store owner, which would be imposed solely to avoid the unreasonable risk taken by customers who enter a blind intersection without thought to the possibility that another customer may be entering the same intersection from another direction at the same time.”

As the first motorized cart case to be decided in an Ohio Appellate Court,

the *Johnson* case is an important legal precedent for retailers. It reaffirms the common sense approach of Ohio’s open and obvious doctrine to situations of “blind intersections” and tall displays. And, it confirms that the burden remains on store patrons to appreciate the risk of customer collisions and be careful where they are walking in relation to other customers. In other words, store patrons are warned, watch where you’re going!

## Are Medical Write-Offs Admissible at Trial?

By Michelle Sheehan and John Dunn



The issue of the admissibility of the amount written off of medical bills by insurers (i.e. the difference between the original medical bill and the amount ultimately accepted by the medical provider) has been debated in Ohio for over a decade. While



it would appear that the issue should be settled, opponents of admissibility of this amount have offered ever increasingly creative arguments. The Ohio Supreme Court addressed the issue in the landmark case of *Robinson v. Bates*, 112 Ohio St.3d 17 (2006). In *Robinson*, the Ohio Supreme Court determined that the parties could present evidence of the amount of medical expenses billed and the amount of medical expenses actually paid so that the jury could consider both figures and determine the reasonable value of a plaintiff’s medical damages.

In response to this rationale, plaintiffs’ attorneys typically argue that the practical consequence is that a jury will ultimately be informed that insurance paid for the plaintiff’s medical bills, despite the traditional collateral benefit doctrine that prohibits the admission of testimony regarding insurance at trial.

Plaintiff’s attorneys have continued to seek loop holes to the Ohio Supreme Court’s

decision, requiring further clarification in *Jacques v. Martin*, 125 Ohio St.3d 342 (2010) and most recently in *Moretz, et al. v. Muakkassa*, Slip Opinion No. 2013-Ohio-4656. After the Ohio Supreme Court’s ruling in *Jacques*, most courts permit a party to present evidence of the amount of medical bills written off by insurers. However, at least one Ohio Common Pleas Judge has ordered that write offs are still not admissible and this rationale has been seized and relied upon by the plaintiffs’ bar.

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*“After the Ohio Supreme Court’s ruling in Jacques, most courts permit a party to present evidence of the amount of medical bills written off by insurers.”*

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Stark County Court of Common Pleas Judge Forchione has always advocated that these types of “write offs” are not admissible. See [The Quagmire of Medical “Write-Offs” and Bills](#) by Judge Forchione and published in Ohio Lawyer – September/October 2012. Recently, Judge Forchione distinguished the binding Ohio Supreme Court’s decisions and ruled that

despite the Court’s holdings, evidence of write offs is barred in his court room pursuant to Rules 401, 402 and 403 of the Ohio Rules of Evidence.

Evidence Rules 401 and 402 provide that “relevant evidence” is admissible. However, Rule 403(A) provides that “although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice of confusion of the issues, or of misleading a jury.” Using Rule 403(A) as his basis, Judge Forchione has determined that write offs are confusing for a jury and unfairly prejudicial despite our Supreme Court’s repeated holdings that the evidence of write offs are admissible. Because the prior Ohio Supreme Court case law did not analyze the potentially prejudicial effect of the write offs, yet another argument has been created to prohibit write offs at trial.

To date, it is unclear if other courts in Ohio will follow this same analysis, although plaintiffs’ attorneys are certainly relying on Judge Forchione’s opinions in their own briefing. Until the issue is further addressed by the Ohio Supreme Court, it appears the admissibility of write offs at trial will continue to be handled on a case by case basis in Ohio.



## FDA Issues Proposed Rule Changes To The Food Safety Modernization Act

By Holly Marie Wilson and Keona Padgett



About 48 million people (1 in 6 Americans) get sick, 128,000 are hospitalized, and 3,000 die each year from foodborne diseases, according to recent data from the Centers for Disease Control and Prevention. On September 19, 2014, FDA announced



potential changes to four rules within the Food Safety and Modernization Act ("FSMA"). The FSMA was signed into law in January 2011 in response to the many reported incidents of foodborne illness during the 2000s. The purpose of the FSMA is to better protect public health by strengthening the food safety system in enabling the FDA to focus more on preventing food safety problems rather than reacting to issues after they occur. The law also gives the FDA tools to hold imported foods to the same standards as domestic foods.

The FDA is currently proposing changes to four rules of the FSMA involving Produce Safety, Preventative Controls for Human Food, Preventative Controls for Animal Food and Foreign Supplier Verification Programs. The FDA states that these changes are aimed at strengthening food safety by shifting the focus to prevent food safety problems rather than responding to problems after the fact. Some of the notable changes introduced by the proposed rule are as follows:

### Very Small Business

Businesses designated as "very small business" will qualify for modified requirements and extended compliance timelines under the proposed rule. The FDA is proposing that a "very small business" be defined as a business that has less than \$2.5 million in total annual sales of animal food, adjusted for inflation. Approximately 4,325 facilities would be impacted by this proposed rule, or less

than 2% of the dollar value of all animal food produced in the United States.

### Animal Food

The FDA is also proposing to address the issue of the use of spent grains, which are by-products of alcoholic beverage brewing and distilling (e.g. wet spent grains, fruit or vegetable peels, liquid whey) which are commonly used for animal food. Human food processors already complying with FDA human food safety requirements, such as brewers, would not need to implement additional preventive controls except to prevent physical and chemical contamination when holding and distributing the by-product (e.g., ensuring the by-product isn't co-mingled with garbage). However, further processing a by-product for use as animal food (e.g., drying, pelleting, heat treatment) would require compliance with the preventive controls for animal food rule.

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*"About 48 million people get sick, 128,000 are hospitalized, and 3,000 die each year from foodborne diseases..."*

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### Product Testing and Monitoring

The FDA is also seeking comment on whether the preventive controls for animal food rule should require a facility, as appropriate to the facility, the food, and the nature of the preventive control to: (1) Conduct product testing to verify implementation and effectiveness of preventive controls and (2) Conduct environmental monitoring to verify implementation and effectiveness of preventive controls if contamination of finished animal food with an

environmental pathogen is a significant hazard. Supplier controls are proposed when the receiving facility's hazard analysis identifies a significant hazard for a raw material or ingredient, and that hazard is controlled before the facility receives the raw material or ingredient from a supplier.

If these provisions were to be included, the facility would have flexibility to determine the appropriate verification activity (such as onsite audit, sampling and testing, review of supplier's records) unless there is reasonable probability that exposure to the hazard will result in serious adverse health consequences or death to humans or animals. In that instance, an annual onsite audit of the supplier would be required unless the facility determines and documents that other verification activities and/or less frequent onsite auditing of the supplier provide adequate assurance that the hazards are controlled.

The FDA is expected to issue its final rules in 2015. Small businesses, a business that employs fewer than 500 persons and that does not qualify for an exemption, would have to comply two years after publication of the final rule. Very small businesses would have three years after publication of the final rule to comply. All other businesses, in the absence of an exemption, would have one year to comply.

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# A Store May be Liable for Plaintiff-Created Distractions

By Taylor Knight and Katie Lynn Farrell



In Ohio, premises owners are generally not responsible for dangerous conditions that are open and observable to patrons (i.e. the "open and obvious" doctrine). Ohio courts, however, have created an exception to the open and obvious doctrine when there are "attendant circumstances," (i.e., distractions that divert an ordinary person's attention from otherwise obvious dangers). This means that if a patron slips and falls in a store or restaurant on an observable object or spill, the owner may be held liable for the patron's injuries if the patron was prevented from paying attention to the object or spill due to distraction present on the property.

Until recently, Ohio courts held that these distracting attendant circumstances could not be caused by the patron themselves. Rather, the distraction had to be created by the store or restaurant. *Collier v. Libations*

*Lounge, L.L.C.*, 8th Dist. Cuyahoga No. 97504, 2012-Ohio-2390. This is because, generally, a premises owner has no control over a patron's personal actions.

However, in *Gibson v. Leber*, 19 N.E.3d 997, 2014-Ohio-4542, (11th Dist.), the Eleventh District Court of Appeals held that a patron could cause the very distraction leading to their own injury and still recover from a premises owner. In *Gibson*, a patron sued Dairy Mart for injuries she received from falling in a pothole in the store's parking lot. The patron had parked her car and opened the car door. Her open door, however, blocked the pothole from her vision. The patron exited the car and fell into the pothole, injuring her wrist.

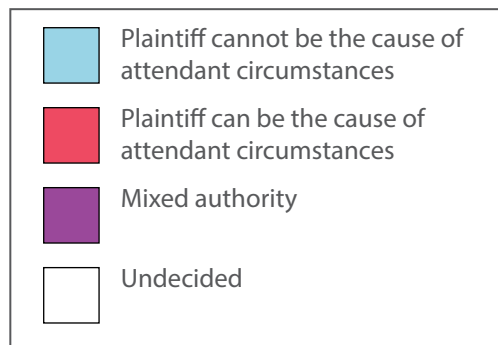
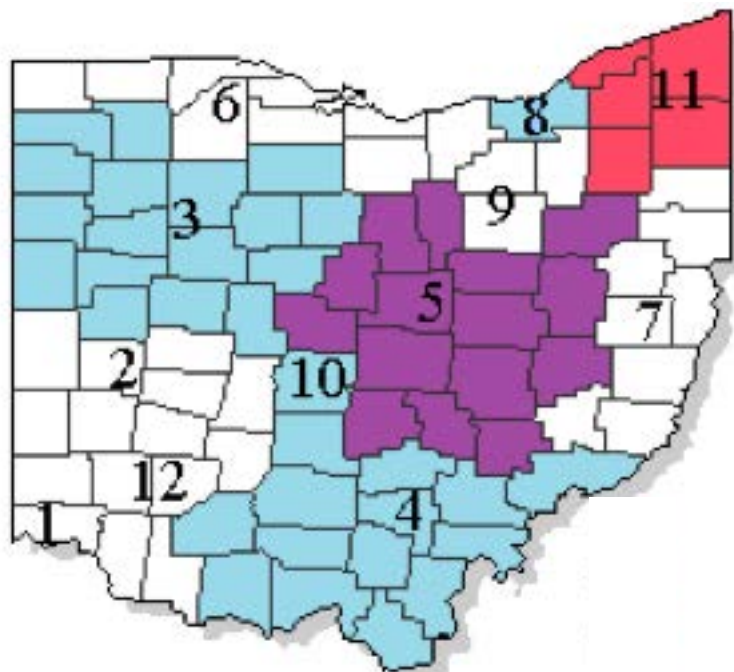
The trial court granted summary judgment for Dairy Mart, finding that the pothole was an "open and obvious" condition that a reasonable person would have seen and easily avoided. However, the Eleventh District Court of Appeals reversed the decision, finding that even if the pothole was open and obvious, the car door represented a distraction, (i.e. attendant

circumstance) that blocked her vision. The court held a jury could reasonably find that the shopkeeper should have foreseen that a customer might open their car door, blocking the pothole, and therefore should have fixed the pothole or warned patrons about it.

Fortunately, the Eleventh District's stance is still in the minority and most Ohio courts still hold that a patron's individual actions cannot constitute a distraction leading to premises owner liability.

The map to the left identifies varying authority throughout Ohio on whether a patron's actions can create attendant circumstances causing shopkeeper or restaurant owner liability for open and obvious conditions.

If you have any questions concerning *Gibson v. Leber*, would like a copy of the court's opinion, or have any questions with respect to the doctrine of attendant circumstances and premises liability, please contact a member of our Retail & Hospitality Practice Group.



## As Retail & Hospitality attorneys, we vigorously defend retailers of all size against not only the general liability 'slip and fall' cases, but also the high exposure false arrest and parking lot security claims.

Our attorneys work with self-insured retailers, general liability insurance carriers, and units of liability insurance carriers dedicated to specific insureds. We, at no charge, participate in safety and risk control seminars for the clients, and are available, again without charge, for periodic 'I have a question' calls from clients. Our goal is not just to be the premier defense counsel on these types of claims, but also to work with clients to minimize these claims.

An innovative and unique aspect of this practice group is its familiarity with and interaction with other practice areas that clients with premises liability exposure also have: employment and workers compensation claims. Several members of this group are members of other relevant groups because of the cross training important to our retail clients.

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