



BYHLAW

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INSIDE THIS ISSUE

Construction Law

Legal Pitfalls of “Green Building” Design

Employment Law

No Common Law Action for Wrongful Discharge

Estate Planning

Advanced Directives Honor Your Wishes

Insurance Law

Ohio Supreme Court Rules that Bodily Injury Plaintiffs May Recover Fair Market Value of Home Health Care Provided by Spouse, But Not the Spouse’s Lost Wages

Upcoming Events

About BYHLAW

Legal Pitfalls of “Green Building” Design

By Thomas R. Yocum

“Green building” is catching on rapidly around the globe. Green building practices are intended to increase the efficiency with which buildings use energy, water and material resources, while

Continued on Pages 2 & 3

No Common Law Action for Wrongful Discharge

By Bradford C. Weber

In I previously wrote an article regarding wrongful discharge based on public policy. Specifically, that article addressed the “public policy” exception to the employment at will doctrine.

Continued on Page 3

Advanced Directives Honor Your Wishes

By Lisa M. Bitter

“Advanced Directives” are legal documents that help medical professionals and families honor your wishes during a health crisis when you cannot speak for yourself. There are two types of

Continued on Page 4

Ohio Supreme Court Rules that Bodily Injury Plaintiffs May Recover Fair Market Value of Home Health Care Provided by Spouse, but not the Spouse's Lost Wages

By Timothy P. Heather

On September 17, 2008, the Ohio Supreme Court decided Hutchings v. Childress, 2008-Ohio-4568. In Hutchings, the Court ruled that in a bodily injury lawsuit, an injured plaintiff may recover from the defendant the fair market value of home health care which is provided by the plaintiff's spouse, rather than by a hired home health care provider. The

Continued on Pages 4 & 5

Legal Pitfalls of "Green Building" Design, Continued from Page 1

reducing building impacts on human health and the environment during the construction, operation, maintenance and removal of the building. The economic desirability of an energy efficient building has been dramatically illustrated by the recent spike in energy costs.

As the U.S. Construction Industry jumps on board the green construction train, design professionals should be sure that all wheels are on the train before it leaves the station.

Design professionals must recognize that in this rapidly changing area of the construction industry, clarity and specificity in construction specifications are essential. As green building design and construction practices evolve, contractors are called upon to perform and construct in ways to which they are not necessarily accustomed.

Change carries risks: rapid change is a train wreck waiting to happen. A case in point is the author's recent experience with a specification for roof insulation in the construction of a new commercial building. A specification called for minimum "R" Factor of 12.1 or in thickness as required by local building code.

As it turned out, the locality had recently adopted the 2006 International Energy Conservation Code which, according to the owner, contained requirements for roof insulation of a minimum "R" Factor of 20.

The contractor bid the project based upon insulation with a 12.1 "R" factor, and was preparing to install this material, when the issue came to light. Naturally, a dispute arose, which is never helpful for the "efficient" and "environmentally friendly" performance of a construction project.

In this instance, questions arose as to whether a roofing contractor can reasonably be expected to investigate local building code requirements for roof insulation at the time of putting in a bid for roof work. Most roofing contractors would claim that this is not their responsibility. Roofing contractors, unlike electricians, plumbers, etc., are not typically licensed contractors who are required to demonstrate a familiarity with code requirements. Typically, roofing contractors would install a roofing system, as specified and per manufacturer's recommendations.

Legal Pitfalls of “Green Building” Design, Continued from Page 2

When new design requirements are applicable to a project, such as those which may be called for under the International Energy Conservation Code, design professionals would be well advised to take extra precautions to highlight these requirements as part of the specifications and drawings so as to bring them to the attention of contractors who historically and customarily have not found it necessary to familiarize themselves with detailed requirements of building codes.

Clarity and specificity on the part of the design professionals in identifying the green building requirements will facilitate construction of an environmentally friendly building for all.

No Common Law Action, Continued from page 1

This is a common law, and not a statutory doctrine.

Subsequent to that article, the Ohio Supreme Court decided Bickers v. Western & Southern Life Ins. Co. (2007), 116 Ohio St.3d 351. In that decision, the Supreme Court held that there was no common law action for wrongful discharge in violation of public policy for an employee who is terminated while receiving worker’s compensation benefits.

The claimant in Bickers was injured in the course and scope of employment. The employer, Western & Southern, did make an accommodation, providing a position for the employee within the restrictions set by her physician. However, the company ultimately terminated the employee while she was still receiving temporary total disability benefits related to her worker’s compensation claim. Claimant Bickers then filed a complaint for wrongful discharge, and alleged this was a wrongful termination in violation of the state’s public policy.

The Supreme Court of Ohio disagreed, and held that there was no common law public policy tort with respect to a wrongful termination for a claimant receiving worker’s compensation. The Court held that the exclusive remedy for an employee making such claims is under the worker’s compensation statute: specifically, ORC 4123.90.

In reaching this holding, the Court clarified its earlier opinion in Coolidge v. Riverdale Local School District (2003), 100 Ohio St.3d 141. Coolidge involved a teacher, who had been discharged for excessive absences while receiving worker’s compensation benefits. The Court limited its decision in Coolidge to considerations of “good and just cause” for termination under R.C. 3319.16 only. Specifically, they noted that Coolidge does not create a claim for wrongful discharge in violation of public policy, for an at will employee who is discharged for receiving worker’s compensation.

The Court’s decision in Bickers is significant for employers, as it limits an employee’s ability to sue for wrongful discharge, if worker’s compensation is involved. The Court noted the difficult policy choice between permitting and prohibiting the discharge of an employee who has been injured at work, because it inevitably creates a burden of some degree upon either the employer or the employee. The Court believes that the policy choice to deny employers the exercise of their employment at will prerogative and require them to hold open the jobs of injured employees for indefinite periods of time would burden employers with employees unable to perform the work for which they were hired, and create an inability to obtain permanent replacements. They noted this would be particularly onerous on small employers.

Advanced Directives, Continued from page 1

Advanced Directives in Ohio: The Durable Power of Attorney for Health Care and the Living Will. Before either document can be used, two physicians must determine that you have lost the capacity to make health care decisions for yourself.

The Durable Power of Attorney for Health Care document allows you to name an individual to provide consent or refusal for any type of health care. The Living Will document allows you to state in advance your desire to receive or withhold life support procedures if you are permanently unconscious or terminally ill and unable to make informed decisions. Regardless of which choice you make, the Ohio Living Will statute requires that comfort measures must be provided.

Anyone over the age of eighteen (18) years who is of sound mind can complete Durable Power of Attorney for Health Care and Living Will documents. The documents must be witnessed by two adults or can be notarized.

Advanced Directives spare your loved ones the burden of guessing your wishes and allows physicians to honor your requests. The use of Advanced Directives together with your other estate planning documents provides a complete benefit plan.

For more information on Advanced Directives and Estate Planning, contact Lisa M. Bitter, Esq., at Benjamin, Yocum & Heather LLP, 300 Pike Street, Suite 500, Cincinnati, OH 45202, (513) 721-5672, lbitter@byhlaw.com.

Ohio Supreme Court Rules that Bodily Injury Plaintiffs May Recover Fair Market Value of Home Health Care Provided by Spouse, but not the Spouse's Lost Wages – Continued from page 2

fact that the spouse was not charging for his or her services is irrelevant. So, too, is the income the spouse missed from his or her regular employment by taking time off from work so as to care for the injured spouse. Evidence must be shown as to the fair market value of the home health care services provided by the supporting spouse.

In Hutchings, Mrs. Hutchings of Dublin, Ohio suffered long-term brain injuries in a traffic accident caused by Defendant, Mr. Childress, who was in the scope of his employment with Central Ohio Paintball, Inc. Mr. Hutchings, a self-employed financial planner, took six weeks off from work after the accident to care for Mrs. Hutchings on a full-time basis and subsequently reduced his hours at his office in order to provide daily care for her, take her to various medical appointments, and assume household duties she formerly performed.

Ohio Supreme Court Rules that Bodily Injury Plaintiffs May Recover Fair Market Value of Home Health Care Provided by Spouse, but not the Spouse's Lost Wages – Continued from page 4

In writing for the 5-2 majority, Justice Pfeifer wrote:

“We find the majority approach to be the consistent and practical way to resolve the issue. The benefit of spousal care is measured in its emotional value, not its economic value. The emotional value of the care cannot be quantified. The only practical way for courts to value a family member’s care is to determine the economic value as if the care had been provided by a non-family member. In this case, the spouse providing the care is a stockbroker. Is the care that a stockbroker provides an injured spouse more valuable than the care provided by a spouse making the minimum wage? No. Does the value of a stockbroker’s support of his spouse fluctuate with the stock market? No. The care a spouse provides is not more valuable to an injured plaintiff because of the nature of the job held by the person providing the care.

“The issue is one of causation and foreseeability. A tortfeasor who caused an automobile accident would expect to be responsible for paying a mechanic’s rate for the repair of a plaintiff’s automobile, not the hourly rate of a surgeon who likes to tinker with automotive repair. Likewise, a tortfeasor would expect to pay the market rate for the care provided to the injured party, not the wages of a stockbroker who provided that care. A spouse’s choice to take a break from employment to provide care is only indirectly attributable to a tortfeasor’s actions. That choice is caused by a sense of obligation rather than by the accident. The benefit of spousal care inures to both the injured and uninjured spouse. The majority rule for compensation of spousal care, which allows recovery for the market value of the care provided, ensures that the benefit of that care does not inure to the tortfeasor.”

This case did not work out very well for Mr. and Mrs. Hutchings. At trial, the Hutchings only introduced into evidence the value of lost wages which Mr. Hutchings incurred while providing care for his wife. They did not attempt to introduce into evidence the fair market value of the services which Mr. Hutchings rendered, even though the trial court did not limit testimony about the fair market value of the care. The trial court had refused to allow the jury to consider and award damages based on Mr. Hutchings’ lost income, which had been affirmed on appeal. With the Ohio Supreme Court affirming the appellate court, Mr. and Mrs. Hutchings are simply out of luck with regard to obtaining compensation for the fair market value of Mr. Hutchings’ nursing care to Mrs. Hutchings.

Upcoming Events

Lisa Bitter will be a speaker for the Family Honors Program with The Spring Grove Cemetery at a dinner seminar at the Montgomery Inn Restaurant in Montgomery on Tuesday, November 18 at 6:00 p.m. The general theme of the seminar is "Successful Planning Strategies for Difficult Times." Lisa will be speaking on the topic of legal documents that every family needs. Please contact Lisa for additional details.

About BYHLAW

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