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# The UPDATE

*News & Practice Pointers from OACTA*

## Winter 2015

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### PRESIDENT'S MESSAGE

By **James L. Mann**  
2015 OACTA President

I hope this finds each of you winding down a bit and ready to enjoy the holiday season with your families and friends.

As we enter this time of celebration and giving, please remember our veterans, those who gave so much to our country and yet find each day a struggle to survive. Contact Michael Renner at Operation Legal Help Ohio and volunteer some time to provide legal help to a veteran. Mike can be reached at (614) 236-6769 or at [mrenner@mvlap.org](mailto:mrenner@mvlap.org). The official name of the organization is Ohio Military/Veterans Legal Assistance Project and its number is 1-800-759-6182. Go to their website for more information.



If you cannot spare the time, or this type of work is not in your practice area, then you can still support our veterans through our Lawyers for Warriors project by buying a T-Shirt. It would be great to see every OACTA member, as well as members of their families proudly wearing a Lawyers for Warriors T-Shirt. The shirts are only \$26.00 and \$10.00 of the cost of every shirt goes to support Operation Legal Help Ohio. So for an investment of only \$26.00 you receive a great T-Shirt and a \$10.00 charitable donation. I have not seen any Black Friday deals that come close to that! To buy a shirt, contact EmbroidMe-Chillicothe at (740) 851-5807 or at [aking@embroidme-chillicothe.com](mailto:aking@embroidme-chillicothe.com).

Thank you for your support throughout the last year. It was a great year for OACTA. Please continue that support for John Garvey, our new president, as he leads us into OACTA'S 50th year.

**Upcoming Events**

**2016 OACTA  
Save the Date!**

**April**

Trial Tactics Boot Camp

**June**

Personal Injury  
Seminar

**August**

Governmental Liability  
Seminar

**September 6th**

Golf Outing  
Pinnacle Golf Club,  
Grove City, Ohio

**November 10-11th**

OACTA Annual Meeting  
Sheraton Columbus at  
Capital Square

**November 10th**

OACTA 50th  
Anniversary Gala  
The Ohio Statehouse

**Submit Articles  
to the  
Newsletter  
Committee:**

[Tony Brown](#)

[Ian Mitchell](#)

**Ohio Association of  
Civil Trial Attorneys**

Best wishes for the holiday season!

*James Mann*

**The 2015 OACTA Annual Meeting**

**Thank you to all the Exhibitors and Sponsors  
of the 2015 OACTA Annual Meeting:**

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The Two 2015 OACTA Diversity Scholarship recipients attended the Annual Meeting and were recognized: Rujeko Manungo and Ikechukwu Ekeke.



The new OACTA officers for 2016 were installed at the Annual Meeting.

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**The Update Spring  
Issue deadline is  
March 1, 2016**

#### **SUBMIT YOUR MEMBER NEWS**

OACTA is always looking for announcements for the "Member News" section of the Update. Please submit your news via email to:

[Tony Brown](mailto:Tony.Brown@oacta.org)

or

[Ian Mitchell](mailto:Ian.Mitchell@oacta.org)

## **OACTA Announces 2016 Law Student Diversity Scholarships**

The OACTA Law Student Diversity Scholarship is open to incoming second and third-year African American, Hispanic, Asian, Pan Asian and Native American students enrolled at Ohio law schools. Incoming second and third-year female law students enrolled at Ohio law schools are also eligible regardless of race or ethnicity. Other criteria for the scholarship include: Academic achievement in law school; Professional interest in civil defense practice; and Service to community and to the cause of diversity.

Up to two (3) scholarships in the amount of \$1,250 each will be awarded to successful applicants. Applicants are required to submit an application, law school transcript and a cover letter addressing the following: academic, personal and professional accomplishments, and why they should be selected as a recipient of the scholarship. Applicants may submit up to three letters of recommendation.

Applications will be available, beginning in January. The completed application and all other requested material must be received by April 15, 2016. Winners will be announced in June. Scholarship recipients will be recognized at the OACTA Annual Meeting in November.

OACTA members (and their firms or companies) are asked to consider making a contribution to this scholarship fund. The 2016 dues renewal forms and membership applications will include an option for a voluntary contribution. As a member of OACTA, we ask that you consider supporting this worthwhile initiative. Thank you, in advance, for your support.

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## CONGRATULATIONS TO THE 2015 OACTA AWARD RECIPIENTS

During the Annual Meeting on November 20th in Columbus, OACTA presented awards to recognize attorneys for their service to OACTA, the profession and the community.

The ***Excellence in Advocacy Award*** was presented to **Carolyn A. Taggart**, Porter, Wright, Morris & Arthur, LLP, Cincinnati, Ohio. ***The Distinguished Contributions to the Profession Award*** was presented to **Peter J. Hersha**, Nationwide Mutual Insurance Company, Columbus, Ohio. **Mark Kitrick**, Kitrick, Lewis & Harris Co., LPA, Columbus, Ohio, was the recipient of the ***Respected Advocate Award***. The ***Public Service Award*** was presented to **Judge Lisa Sadler**, 10th District Court of Appeals. **Neil F. Freund**, Freund Freeze & Arnold, Dayton, Ohio, received the ***Lifetime Achievement Award*** and **Natalie M. Wais**, Young & Alexander Co. LPA, Cincinnati, Ohio,



Jim Mann & Carloyn Taggart

received the **Outstanding Young Lawyer Award**. The **Committee Chair of the Year Award** was presented to **Lynn V. Luther**, Eastman & Smith, Toledo, Ohio. The **Frank Seth Hurd Member of the Year Award** was presented to **Michael M. Neltner**, Staff Counsel for the Cincinnati Insurance Company, Cincinnati, Ohio. OACTA congratulates these award recipients for their outstanding contributions and their dedication to the profession.

OACTA congratulates these 2015 award recipients for their outstanding contributions and their dedication to the profession!



Jim Mann & Peter Hersha



Jim Mann & Lynn Luther



John Garvey, Justice Evelyn Lundberg Stratton & Jim Mann



Jim Mann & Natalie Wais



Jim Mann & Neil Freund



Jim Mann & Michael Neltner



Jim Mann & Mark Kitrick



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## 2015 Annual Meeting

by John Garvey, III

At the Annual Award Luncheon during OACTA's 49th year, Immediate Past President Anne Marie Sferra administered the Oath to the Officers who will serve during OACTA's 50th year, and after the ceremonial passing of the gavel from newly minted Immediate Past President Jim Mann, President John Garvey gave the following remarks:

*"Thank you, Jim. My friends, we conclude another great year, and we have another great year planned ahead. Let's talk about 2016 for just a few moments. It will be a great year when you stay with us. It will be a great year if you continue to help us bring in more members to join OACTA for life. In all your packets there is the 2016 Calendar of Events. There is the Trial Tactics Boot Camp in March, the Personal Injury Seminar in June, the Governmental Liability Seminar in August, the Golf Outing in September, and the 50th Anniversary Gala on November 10, 2016.*

[Read More](#)

## Committee Updates:

### Professional Liability Committee Update

by Joseph Borchelt, Committee Chair

Have you ever represented a professional in a claim for malpractice? Have you ever consulted with professional clients on risk management issues? Do you simply have an interest in risk management for your own practice, or simply would like to obtain more information about what OACTA's Professional Liability Subcommittee is all about? If you answered any of those questions affirmatively, or know someone else who has, then the Professional Liability Subcommittee wants you.

The Professional Liability Subcommittee's goal for 2016 is to increase our membership and determine the most effective way to deliver services that benefit our current members. As such, our first order of business is to make a call for prospective members. We would ask that all current OACTA members consider membership in the Professional Liability Subcommittee, or pass along this update to someone who might be interested. In addition, we are welcoming new ideas on how to freshen up the Subcommittee, such as an updated website, a database of briefing or other information, the submission of articles to the Update or other outlets, and a quarterly conference call to evaluate and discuss trending and/or current issues.

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## Insurance Coverage Committee Update

by Michael Neltner, Committee Chair

*The following cases represent the more relevant insurance coverage cases (and a smattering of the remaining Employer Intentional Tort cases which we have undertaken to summarize) decided by the Ohio Supreme Court, Ohio federal courts, and lower state appellate courts in late 2014 and 2015 (to date). These summaries appear here chronologically in the order in which they were decided.\**

### OHIO SUPREME COURT

#### 1. HOME IS WHERE YOUR HEART IS - AND ALSO MOST OF YOUR STUFF

James Schill moved to Florida over 20 years ago but he continued to return to Ohio approximately two weeks per month to run his Ohio business, although he admittedly always intended to return to his Florida residence during that time. Further, his voting registration, title to his car, and all of his possessions were affiliated with the State of Florida and he owned no real property in Ohio over the past 20 years.

In spite of these facts, the Eighth District held that Mr. Schill's "domicile" was in Ohio and, therefore, his adult son, who was in his 50s and who lived in Ohio, was an "insured" under his father's Cincinnati Insurance Company ("CIC") umbrella policy and, therefore, the son had umbrella liability insurance coverage for a fatal auto accident that the son caused while operating a motor vehicle titled in the son's own name. The son also owned his own auto liability insurance policy issued by State Auto.

[Read More](#)

### Amicus Curiae Committee Update

by Benjamin C. Sassé & Jennifer K. Nordstrom, Amicus Curiae Committee Chairs

It's time for another annual update on the efforts of your Amicus Committee. OACTA filed amicus briefs in four appeals this year, including three Ohio Supreme Court amicus briefs. We also received decisions in other Ohio Supreme Court cases in which OACTA had filed briefs in the past. We summarize two wins from this year below, followed by a list of cases that remain pending.

The first case, *Hoyle v. DTJ Ents., Inc.*, 143 Ohio St.3d 197, 2015-Ohio-843, addressed ongoing confusion over the rebuttable presumption of intent in Ohio's employment intentional tort statute, while clarifying the scope of an insurance exclusion for acts committed with deliberate intent to injure. The underlying claim involved an employee who fell from scaffolding; his intentional tort claim argued that his supervisor's failure to require the use of bolts to secure the scaffolding was "equivalent to" deliberately removing an equipment safety guard, triggering the rebuttable presumption of intent in R.C. 2745.01(C). The insurance claim involved a request for a declaration that the insurer had no obligation to indemnify if the employer lost at trial, based on an exclusion barring coverage for acts committed with the deliberate intent to injure an employee.

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by Thomas Glassman

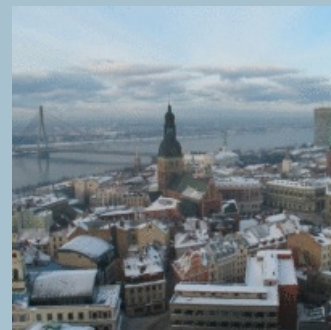
In 1991, I was in the midst of my second year of law school. It was all I could do just to juggle a fulltime job and four nights of classes a week. I barely had enough time to keep up with my favorite teams - there was no time to also keep up on world affairs. I was largely unaware of anything happening outside of my area code.

Without a doubt the biggest event of 1991 was the Soviet Union's collapse, an event many of us never imagined would occur in our lifetimes. 1991 saw many oppressed nations achieve the freedom and independence they had dreamed of for decades. Euphoria quickly gave way to stark practicalities - new nations had to develop new systems for virtually everything, including their legal and educational systems



The Soviet Union's demise led to the establishment of fifteen new nations.

In subsequent years, those nations met with markedly different degrees of success. Some continue as totalitarian regimes; some remain ineffective due to corruption and lethargy. Others, though, embraced their freedom and truly transformed themselves.



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**Utilizing the Doctrine of Judicial Estoppel to Defeat Legal Malpractice Claims**

## **I. Introduction**

Judicial estoppel precludes a party from assuming inconsistent positions in separate legal actions. If a party took one position in a prior legal action, he or she cannot take a different position on the same issue in a subsequent action. While the doctrine of judicial estoppel is intended to guard the judicial system against improper use, it also serves as a potential weapon that can be used to completely defeat a wide variety of legal malpractice claims and lawsuits as well.

## **II. Overview of the Doctrine of Judicial Estoppel**

Judicial estoppel is an equitable doctrine governed by equitable principles. It "protects the integrity of the judicial process by preventing a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding." Judicial estoppel is applied in order to "preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing suit an exigency of the moment." While similar to collateral estoppel, the two are not identical. Collateral estoppel prevents a party from re-litigating a position he took and lost. The doctrine of judicial estoppel prohibits a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party and advanced under oath in a prior court proceeding. Judicial estoppel may only be applied where the party making the inconsistent assertion was successful with the prior assertion. In Ohio, judicial estoppel applies where a plaintiff: (1) asserted a contrary position; (2) under oath in a prior proceeding; and where (3) the prior position was accepted by the court. However, judicial estoppel does not apply when the party's prior inconsistent position was a result of mistake or inadvertence.

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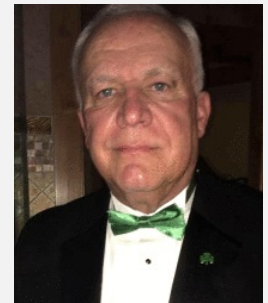
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## Member News

Smith Marshall, LLP is pleased to announce that **Kallen L. Dearnbarger** has joined the firm as an associate.

Long time OACTA member, **Terrence Kenneally**, started an Irish Studies program at Holy Name High School in Parma Heights, Ohio where he teaches Irish history and Irish literature. Terry has a Master's Degree in Irish Studies from John Carroll University. Mr. Kenneally has been practicing law, exclusively insurance defense law, for more than 37 years. During that time, he has tried more than 400 jury trials in over thirty counties in Ohio. He has achieved Diplomat status from the American Board of Trial Advocates. OACTA is proud of Attorney Kenneally's long-time membership, accomplished legal career and community involvement.



Weston Hurd LLP is pleased to announce that the following attorneys have been nominated by their peers and selected as 2016 Ohio Super Lawyers and Rising Stars!

*2016 Ohio Super Lawyers*

**Kevin R. Bush**

**W. Charles Curley**

**Ronald A. Rispo**

**Hilary S. Taylor**

*2016 Rising Stars*

**Steven G. Carlino**

OACTA MEMBERS: Please send us notable summary judgment, appellate, arbitration or trial victories so we can share your successes with the membership in the next issue of The Update!

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