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Cases Noted

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MUNICIPAL CORPORATIONS — TORTS — ESTABLISHMENT AND MAINTENANCE OF PUBLIC HOSPITALS — *Holt v. City of Cincinnati*, 4 Ohio App. 2d 119, 212 N.E.2d 630 (1964). — Plaintiff brought a negligence action against the defendant for personal injuries sustained while plaintiff was a patient in a municipally owned and operated hospital. The hospital is associated with the University of Cincinnati College of Medicine and its staff is composed of members of the College of Medicine faculty who are permitted to use the hospital facilities and charge fees to the patients treated. The only persons admitted to the hospital are patients of the doctors on the staff of the college. The defendant asserted governmental immunity as a defense but the court held that governmental immunity is based on the use and availability of the hospital to the public at large and not to a selected segment of the public. In the absence of proof of unrestricted public use, judgment must be rendered against the municipality in its proprietary capacity.

SOCIAL SECURITY AND PUBLIC WELFARE — MANDATORY AGE RETIREMENT — DISCHARGE FOR JUST CAUSE — *Marcum v. Ohio Match Co.*, 4 Ohio App. 2d 95, 212 N.E.2d 425 (1965). — Appellee, a former employee of the defendant company was involuntarily retired at age sixty-five pursuant to a closed-shop labor contract between the company and a local union. Appellee applied to the Ohio Bureau of Unemployment Compensation for unemployment benefits which were denied. The court, in a case of first impression at the appellate level, affirmed the denial, stating that compulsory retirement pursuant to the labor contract was a discharge for "just cause in connection with his work" and thereby rendered the employee ineligible for unemployment benefits. The court observed that employees accepting contractual benefits, such as pensions, must also abide by their contractual duties, even those arising from a closed-shop agreement.

NEGLIGENCE — MINOR DEFECT IN STEP ON PRIVATE PREMISES — NO LIABILITY ON OWNER OF PREMISES FOR SUCH DEFECT — *Helms v. James Dickey Post No. 23, American Legion, Inc.*, 5 Ohio St. 2d 60, 213 N.E.2d 734 (1966). — Plaintiff brought a negligence action against the defendant for personal injuries sustained when the heel of her shoe was caught in a defective stairway on defendant's property. The defect consisted of an irregular hole about one-fourth inch in diameter and one-half inch in depth in one of the steps. In a 4-3 decision, the majority of the court sustained defendant's demurrer, ruling that the condition of the sidewalk was a slight defect which as a matter of law, did not form the basis for a charge of negligence to be decided by a jury. The court stated that the owner or occupier of private premises is not an insurer.

WITNESSES — CONFIDENTIAL RELATIONS AND PRIVILEGED COMMUNICATIONS — PHYSICIAN-PATIENT PRIVILEGE — *Hammonds v. Aetna Cas. & Sur. Co.*, 243 F. Supp. 793 (N.D. Ohio 1965). — Plaintiff brought an action against defendant for inducing a physician to breach the confidential relationship between the plaintiff and the physician by disclosing information related to the physician by the plaintiff-patient. The court held that as a matter of public policy an implied promise of secrecy exists between a physician and patient and that this promise extends beyond the privilege of prohibiting the physician from testifying in court on matters disclosed through the physician-patient relationship. In addition, the court stated that once the physician-patient relationship is established, a contract between the parties arises and that an implied condition of the contract is the doctor's warranty "that any confidential information gained through the relationship will not be released without the patient's permission. . . ." The court went on to hold that a third party who induces a physician to breach this duty may be held liable for damages to the patient.

INCOME TAX — DEPRECIATION DEDUCTION — EXPENDITURES BY LESSOR TO ACQUIRE RENEWAL OF A LEASE — *Bender v. United States*, 246 F. Supp. 189 (N.D. Ohio 1965). — Plaintiff-lessors, purchased several lots adjoining their leased premises,

razed the buildings thereon, and constructed a parking lot, for the sole purpose of acquiring a long-term renewal of a lease from their food market tenant. In a case of first impression, the court held that the demolition costs, broker's commission, and legal fees, as well as the total purchase price of the lots in excess of the appraised market value of the land, were capital expenditures attributable to the securing of the new lease and entitled lessors to depreciation deductions which could be amortized over the life of the lease pursuant to section 167 of the Internal Revenue Code of 1954.

BANKRUPTCY — CHAPTER X REORGANIZATION — GOOD FAITH REQUIREMENT — *In the Matter of Liberty Mortgage Corp.*, 245 F. Supp. 858 (N.D. Ohio 1965). — Debtor's petition for corporate reorganization under Chapter X of the Bankruptcy Act was dismissed for failure to satisfy that portion of the act's good faith requirement which demands a reasonable expectation that the plan of reorganization can be effected. Bankruptcy Act §§ 141, 146, 52 Stat. 887 (1938), 11 U.S.C. §§ 541, 546 (1964). The court observed that the debtor's business of buying real estate and then reselling it on land contract could not possibly generate sufficient cash flow to permit acquisition of new properties for resale. Accordingly, the court concluded that a reorganization which could effect no more than a protracted plan of liquidation failed to meet the good faith test of the Bankruptcy Act.

CONSTITUTIONAL LAW — ARMED SERVICES — WILLFUL FAILURE TO REPORT FOR INDUCTION — *United States v. Mitchell*, 246 F. Supp. 874 (D. Conn. 1965). — Defendant was convicted of willful failure to report for induction into the armed service in violation of the Universal Military Training and Service Act. In denying defendant's motion for a judgment of acquittal or a new trial, the court stated that the personal belief of an inductee that the United States is committing crimes against peace and humanity, and is violating treaties concerning war and self-determination is no defense to a charge of willful refusal to report for induction.

CONSTITUTIONAL LAW — SELF-INCRIMINATION — COMMENT BY JUDGE — *State v. McRae*, 4 Ohio App. 2d 217, 211 N.E.2d 875 (1965). — The defendant was convicted in common pleas court of grand larceny. During its deliberations the jury asked the court whether or not the state could have required the defendant to take the witness stand and testify. In response to the question, the trial judge answered by quoting article I, section 10 of the Ohio Constitution which states that "No person shall be compelled, in any criminal case, to be a witness against himself." The court of appeals held that the judge's comment was not improper in the light of Griffin v. California, 380 U.S. 609 (1965), and did not prejudice or imply guilt on the part of the defendant.

LABOR RELATIONS — CONTRACTS — ARBITRABILITY — WHO DETERMINES — *Strauss v. Silver Cup Bakers, Inc.*, 353 F.2d 555 (2d Cir. 1965. — The plaintiff-company brought suit to compel arbitration of a proposal to cut back deliveries under a contract clause providing for arbitration of "all disputes." The union refused, claiming the proposal would eliminate fifty-five jobs and was excluded from arbitration by an exemption clause. The court held that where there are two equally plausible clauses in a contract, one providing for arbitration of disputes and the other denying it in specific cases, the question of arbitrability is for the courts to decide. The intent of the parties at the time the contract is drafted governs, and the court is not reaching the merits of the controversy through an indirect procedure when it passes on the scope of an exclusionary clause.

MUNICIPAL CORPORATIONS — GOVERNMENTAL FUNCTIONS — LIABILITY OF CITY FOR INJURY RESULTING FROM NUISANCE — *Gabris v. Blake*, 5 Ohio App. 2d 57, 214 N.E.2d 247 (1966). — While attempting to cross a street at a crosswalk plaintiff was impaled by a metal strip protruding from the side of a passing police cruiser. Plaintiff brought an action against the city. The court held that while the city is immune from liability based on the police officer's negligence because the officer was

performing a governmental function, the city was nevertheless liable for maintaining a nuisance on the streets in violation of Ohio Revised Code section 723.01 requiring the city to keep the streets free from nuisances. The court found that the meaning of nuisance within the statute was not limited to conditions in the physical structure of the street or public grounds, but rather that it extended to such things as police vehicles operating on the streets.

NEGLIGENCE — MUNICIPAL CORPORATIONS — FAILURE TO KEEP STREETS FREE FROM NUISANCE — *Fritz v. Columbus*, 5 Ohio St. 2d 53, 213 N.E.2d 930 (1965). — Plaintiff brought suit against the city of Columbus contending that the city created a nuisance by erecting a yield-right-of-way sign which the city had no duty to erect and which was obstructed by trees. It was alleged that the city's negligence in failing to keep the sign free from obstructions was the proximate cause of a collision between plaintiff's driver and a truck which failed to yield the right of way. The court held that plaintiff failed to state a cause of action since an obstructed sign is in fact no sign at all, and failure to erect a sign could not constitute a nuisance; therefore, the city was protected by governmental immunity.

LICENSES AND TAXES — REGULATION — CRIMINAL PROCEDURE — *Solomon v. Liquor Control Comm'n*, 4 Ohio St. 31, 212 N.E.2d 595 (1965). — Appellant, Liquor Control Commission, confiscated, without a search warrant, bottles of liquor from a bar and subsequently held a hearing and ordered suspension of the liquor permit for violation of the Liquor Control Act which prohibits dilution of whiskey. The appellee contended that the confiscated liquor was inadmissible as evidence since it was illegally obtained. The court held that when one applies for a liquor permit he agrees to the provisions of the Liquor Control Act which permits full inspection of his premises. Accordingly, the bottles of liquor were lawfully obtained and properly admitted into evidence.

CONTRACTS — MONOPOLIES — INJUNCTION — CIVIL PROCEDURE — *Perryton Wholesale, Inc. v. Pioneer Distrib. Co.*, 353 F.2d 618 (10th Cir. 1965). — Appellant, while engaged in the retail jobber business, encouraged five of appellee's employees to terminate their employment with appellee and become employees of the appellant. Each of the five employees had the express intent of taking their customers with them when they quit appellee's firm and joined appellant's company. The court held that in an industry relying heavily on an experienced sales force and knowledge of a customer's particular needs, the successful inducement of a competitor's trained employees to change jobs and to bring with them the customer lists, routes, and business methods of their former employer, is a violation of section 1 of the Sherman Act.

CRIMINAL LAW — CONTEMPT — *Harris v. United States*, 382 U.S. 162 (1965). — Petitioner refused to answer certain questions put to him by the grand jury on the ground of self-incrimination. He was then taken before the district court, which directed him to answer after he was guaranteed immunity from prosecution. Petitioner again refused to answer and was held in contempt under Rule 42(a) of the Federal Rules of Criminal Procedure. The Supreme Court reversed the court of appeals and overruled *Brown v. United States*, 359 U.S. 41 (1959), on the ground that petitioner's request for a hearing should have been granted under Rule 42(b) because 42(a) was not intended to cover the present fact situation but rather, was designed to provide a swift remedy for "exceptional circumstances . . . such as acts threatening the judge or disrupting a hearing or obstructing court proceedings."

WITNESSES — EXECUTORS AND ADMINISTRATORS — DEPOSITIONS — *Parks v. Ford*, 4 Ohio St. 2d 61, 212 N.E.2d 569 (1965). — Plaintiff was injured in an automobile accident with the defendant who subsequently died. The trial court denied the plaintiff the right to testify as to certain matters contained in the defendant's deposition. The Supreme Court of Ohio held that the plaintiff could testify on her own behalf with

respect to competent and relevant matters contained in the deceased defendant's deposition which had been taken by the defendant's attorney and properly filed in an action before the defendant's death, and which was admissible into evidence.

INJUNCTION — EMPLOYER'S RIGHT TO ENJOIN USE OF CONFIDENTIAL INFORMATION OBTAINED BY FORMER EMPLOYEES — *David Fox & Sons, Inc. v. King Poultry Co.*, 47 Misc. 2d 672, 262 N.Y.S.2d 983 (Sup. Ct. 1964). — Plaintiff, a wholesale poultry supplier, sought to enjoin two former employees from solicitation of all his customers by the employees from lists they had compiled while in his employ. The court granted the injunction nothwithstanding the lack of any employment contract prohibiting such action by the employees, stating that an employee in a position of trust and confidence gains an unfair competitive advantage not available to others in the industry when he obtains such confidential information. The court further held that the defendants were not enjoined as to any customers which they had brought with them to plaintiff's employ since such a practice was common in the industry.

CRIMINAL LAW — ABORTION — CRIMINAL INTENT NECESSARY ELEMENT — *People v. Abarbanel*, 48 Cal. Rep. 336 (1965). — Defendant, a medical doctor, was charged with conspiracy to commit an illegal abortion and with committing an illegal abortion. He was acquitted of the first count but convicted of committing an illegal abortion. On appeal the court held that the criminal intent necessary to support a conviction of committing an illegal abortion is present when the abortion was performed for a purpose other than to save the mother's life. The applicable standard is whether the doctor in the good faith exercise of his best skill and understanding believed that the abortion was necessary to save the mother's life. Since the defendant-doctor had been acquitted of the conspiracy charge, it follows that the evidence could not show any criminal intent necessary to support the abortion charge.

PHYSICIANS AND SURGEONS — NEW TRIAL — *Morse v. Rapkin*, 24 App. Div. 2d 24, 263 N.Y.S.2d 428 (1965). — Plaintiff sued defendant-dentist for injuries sustained because of the defendant's lack of qualification for the type of dental procedure practiced and for departure from accepted dental practices. Defendant claimed, *inter alia*, that plaintiff's failure to follow his instructions as to oral hygiene caused or contributed to any condition from which plaintiff might be suffering. The appellate court held that the trial court erred when it charged the jury that the plaintiff must be free of contributory negligence in order to recover. Where the crux of the action is improper treatment, the patient's failure to follow instructions does not defeat the action. If plaintiff's failure to follow instructions increased the extent of the injury, the damages that could be recovered should be reduced. Plaintiff's alleged negligence does not lessen the effect of the original wrong.

WORKMEN'S COMPENSATION — OCCUPATIONAL DISEASES — CAUSAL CONNECTION BETWEEN HEART ATTACK AND WORK-LOAD — *Theil v. Industrial Comm'n*, 1 Ariz. App. 455, 404 P.2d 711 (1965). — Petitioner, widow of a deceased employee-comptroller of an insurance company, applied to the Arizona Industrial Commission for workman's compensation death benefits which were denied. The decedent, age 30 at his death, was devoted to his job and was emotionally involved with the company's problems. The company's burdensome financial position prompted the deceased to work long hours (up to eighteen hours per day) and sometimes over entire weekends. After suffering one mild heart attack the decedent decreased his work-load, but less than one month later he died of another attack. Medical testimony indicated that there was a direct causal relationship between the decedent's job and his death. Accordingly, on appeal the court ruled that under Arizona law the petitioner was entitled to death benefits.

CRIMINAL PROSECUTION — APPEAL — CLAIMED ERROR NOT PREVIOUSLY PRESENTED TO REVIEWING COURT — *City of Toledo v. Reasonover*, 5 Ohio St. 2d 22, 213 N.E.2d 179 (1965). — Defendant was tried and convicted of driving while under

the influence of intoxicants. He appealed the conviction on various grounds, and notwithstanding that he did not assert the ground that the sentence was too severe, the court of appeals found the sentence excessive and accordingly reversed and remanded the case. On appeal by the City of Toledo to the Ohio Supreme Court, the defendant, relying on Griffin v. California, 380 U.S. 609 (1965), a case which was decided after the court of appeals had rendered its decision in the instant case, contended that the court of appeals' decision should be affirmed because the trial court erred in permitting the prosecutor to comment on the defendant's failure to take the witness stand and testify. The Ohio Supreme Court held that where the sentence imposed by a trial court is within the limits authorized by appropriate ordinance and statute the court of appeals cannot hold that there was an abuse of discretion. The Ohio Supreme Court further held that after the decision in Malloy v. Hogan, 378 U.S. 1 (1964), every defendant who considered that he had been prejudiced by the prosecutor's comment on his failure to testify should promptly raise that question, and since defendant's case was submitted to the court of appeals after *Malloy*, he waived his claim to error by not raising the question at that time.