

OHIO CASE SUMMARIES

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Ohio case summaries will be provided on a continuing basis every Wednesday and Friday of each week (excluding holidays). Summaries include brief descriptions of cases decided in the past week by the Ohio Supreme Court and lower appellate courts on issues related to insurance law. To discontinue receiving this service, please call Sean McCormick at 937.224.3333 or send an email to smccormick@green-law.com.

Court of Appeals: Fifth Appellate District

Case Name: *Auto Owners Mut. Ins. Co. v. Kendrick*, 2009-Ohio-2169

Decided: May 4, 2009

Issue(s): General Commercial Liability Policy and *Res Judicata*

Summary of Opinion: John and Sonia Baxter sued Kendrick for breach of contract, breach of express and implied warranties, negligent performance of work, fraudulent misrepresentation, and violation of the Ohio Consumer Sales Practices Act relating to the construction of their new home. The Baxters supplied Kendrick with requests for admissions that he failed to answer. The Baxters moved for summary judgment, relying on their request for admissions that were deemed admitted by Kendrick under Civ.R. 36(A). The trial court awarded summary judgment to the Baxters on all counts.

It appears that Kendrick then made his insurer, Auto Owners, aware of the claim, and it brought a declaratory judgment action seeking no obligation to defend him in his dispute with the Baxters. The trial court granted Auto Owners motion for summary judgment because it had no duty to provide coverage since the breach of contract was not an "occurrence" under the policy. The Baxters appealed.

The Baxters argued that Auto Owners had to provide coverage to Kendrick because the faulty work of subcontractors was not covered under the exclusion clause contained in the policy, and therefore, constituted an "exclusion to an exclusion" whereby Auto Owners was obligated to cover the damages caused by the subcontractors.

The Fifth District Court of Appeals acknowledged the possibility that there may have

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been genuine issues of material fact regarding the failure of the subcontractors to perform their work in a workmanlike manner. However, since the Baxters had already won summary judgment on the grounds that Kendrick was solely responsible, they were precluded from raising the argument. Therefore, the court held that the trial court did not err in determining Auto Owners did not have to provide coverage for the breach of contract claim because it did not qualify as an “occurrence” under the policy.

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