

OHIO CASE SUMMARIES
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Ohio case summaries are brief descriptions of cases decided in the past week by the Ohio Supreme Court and lower appellate courts on issues related to insurance law. Except for holidays, these summaries will be provided Wednesday and Friday of each week. To discontinue receiving this service, please call Jared Wagner at 937-224-3333 or email Jared at jawagner@green-law.com.

Court of Appeals: Twelfth District

Case Name: *Westfield Natl. Ins. Co. v. Young*, 2006-Ohio-5839

Decided: November 6, 2006 (posted November 6, 2006)

Issue(s): Bodily harm limitation on UIM Coverage / Set-off provisions

Summary of Opinion: Plaintiff's daughter was killed in an automobile accident. The tortfeasor's insurance company paid \$261,000 to the daughter's estate. The settlement proceeds were evenly divided between Plaintiff and the daughter's father. At the time of the accident Plaintiff had underinsured motorist ("UIM") coverage with limits of \$250,000 per person and \$500,000 per occurrence. It was undisputed that Plaintiff's daughter was an insured under the policy. Plaintiff brought suit against her insurer individually and as the administratrix of her daughter's estate, arguing that both were entitled to UIM coverage. The trial court disagreed, finding that the language of the policy limited excluded wrongful death damages from UIM coverage. Furthermore, the trial court held that the insurer was entitled to a setoff of the entire \$261,000 and UIM coverage was not available to the daughter's estate either because this amount exceeded the \$250,000 per person limits of the insurance. On appeal, Plaintiff argued that the language of the policy was ambiguous and did not exclude wrongful death damages from UIM coverage and that only the portion of the settlement proceeds she actually received should be set off against her UIM coverage. Analyzing these claims, the Twelfth District acknowledged that the applicable law, Senate Bill 267, allowed insurers to exclude wrongful death damages from UIM coverage. However, the court found that the language "will pay compensatory damages for bodily injury which an insured person is legally entitled to recover from the owner or operator of an underinsured motor vehicle" provided coverage for wrongful death claims. Thus, the court overruled the portion of the trial court's decision finding that Plaintiff was not entitled to UIM coverage. Nevertheless, the court went on to hold that it was proper to set off the entire amount paid to the estate against UIM coverage rather than just the

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amount that Plaintiff actually received. Accordingly, because this amount exceeded the UIM coverage, neither Plaintiff nor the daughter's estate could recover and summary judgment was proper.

Court of Appeals: Twelfth District

Case Name: *McCumbers v. Yusa Corp.*, 2006-Ohio-5847

Decided: November 6, 2006 (posted November 6, 2006)

Issue(s): Premise Liability / Independent Contractor /
Inherently Dangerous Activity

Summary of Opinion: Plaintiff was injured while working as a general duty kitchen employee for Derringer Food Services ("Derringer"). Plaintiff was injured when she slipped in fell on the kitchen floor in the vicinity of a commercial dishwasher. YUSA Corp. ("YUSA"), had hired Derringer as an independent contractor to operate its kitchen and cafeteria. Plaintiff brought suit YUSA for negligence. YUSA moved for summary judgment on the grounds that a premise owner does not owe a duty of care to an independent contractor involved in an inherently dangerous activity for injuries that occur because of the inherently dangerous activity. The trial court agreed and granted YUSA summary judgment. On appeal, the Twelfth District reversed the trial court's decision, finding that working in an industrial kitchen or cafeteria is not an inherently dangerous activity as a matter of law.

Court of Appeals: Tenth District

Case Name: *Wells v. Michael*, 2006-Ohio-5871

Decided: November 7, 2006 (posted November 7, 2006)

Issue(s): Statute of Limitations / Savings Statute / Commencement of action

Summary of Opinion: Plaintiff was involved in a motor vehicle accident on October 30, 2001. The tortfeasor died of unrelated causes on January 31, 2002. On October 21, 2003, Plaintiff filed a complaint against the tortfeasor, alleging personal injuries. Service failed, but Nationwide, the tortfeasor's insurer, informed Plaintiff that the tortfeasor was dead. Eventually, Nationwide filed an answer denying liability. On February 20, 2004, Plaintiff voluntarily dismissed the action without prejudice pursuant to Civ.R. 41(A)(1). On February 10, 2005, Plaintiff opened the tortfeasor's estate and filed a complaint against the estate the next day, alleging the same claims as those raised in the 2003 complaint. In

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May of 2005, the estate moved for summary judgment on the basis that Plaintiff's claims were barred by the statute of limitations, which the trial court granted. On appeal, Plaintiff admitted that her claims were subject to the two year statute of limitation set forth in R.C. 2305.10; however, Plaintiff claimed that her original action was filed within this two year period and that she had one year from the date of the dismissal of this action to refile her claim under R.C. 2305.19(A). The Tenth District disagreed with Plaintiff, holding that R.C. 2305.19 applies only to actions commenced or attempted to be commenced within the appropriate statute of limitations time period. Plaintiff's filing of an action against the tortfeasor was nullity because he no longer existed at that time. Therefore, no action was commenced against the estate within two years of the accident. Pursuant to Civ.R. 3(A), Plaintiff was required to substitute the tortfeasor's estate for the tortfeasor and serve the estate within one year of the filing of the original complaint. Furthermore, service upon the deceased does not constitute an attempt to commence an action upon the deceased's estate.

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