

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: Eighth District

Case Name: *Turner v. Ohio Bell Tel. Co.*, 2006-Ohio-6168

Decided: November 22, 2006 (posted November 22, 2006)

Issue(s): Negligent placement and maintenance of a utility pole /
Negligence per se / Qualified Nuisance / Absolute Nuisance

Summary of Opinion: Plaintiff's husband was killed when the car he was a passenger in drove off of the highway at a curve in the road and struck a utility pole located two feet and five inches from the berm of the road. Plaintiff brought suit against Ohio Bell Telephone Company ("Ohio Bell"), alleging that her husband's death had been caused by negligent placement of the utility pole, that the Ohio Bell was per se negligent under R.C. 4331.01, and that the placement of the utility pole constituted a nuisance. The trial court found that the utility pole did not "incommode" the public's use of the road and granted Ohio Bell summary judgment. On appeal, the Eighth District reversed the trial court on the issues of negligence and qualified nuisance, holding that material issues of fact existed on the issue of breach of duty. The appellate court recognized that a utility company has a duty to drivers with respect to the placement and maintenance of utility poles not only where such poles are located on the traveled portion of the road but also where utility poles are in such close proximity to the road that they constitute a danger to the traveling public. The Eighth District specifically rejected the contention that liability lies only for utility poles actually in the traveled portion of the roadway. In light of this ruling, the court held that there were material issues of fact as to whether the placement of the pole within four feet of the roadway constituted a breach of this duty given all of the surrounding circumstances such as, the curve in the road, the composition and grade of the berm, the presence of previous accidents involving this pole, the feasibility of relocating the pole. However, the Eighth District affirmed summary judgment as to absolute nuisance, finding that the placement of a utility pole within a right of way is not so abnormally dangerous that it can

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never be performed safely. The court also affirmed summary judgment as to negligence per se, holding that a utility company's statutory duty not to incommode the public use of the roadways is a general abstract duty.

Court of Appeals: Eighth District

Case Name: *Peterson v. Progressive Corp.*, 2006-Ohio-6175

Decided: November 22, 2006 (posted November 22, 2006)

Issue(s): "Betterment" deductions / Class Action

Summary of Opinion: Plaintiff had watercraft insurance through Progressive and filed a claim when his boat was damaged by an underwater hazard. Progressive agreed to repair the boat per the terms of his policy but deducted \$852.51 for "betterment", which it calculated as the difference in the fair market value of the boat prior to the accident and the fair market value of the boat after the repair. Plaintiff brought suit against progressive, arguing that the terms of his policy did not provide for such a deduction. Plaintiff also sought certification of a class action against Progressive for two groups of people; those people who actually had their recovery reduced for "betterment" and those people who had a watercraft policy with Progressive and were in danger of being exposed to such a reduction. The trial court granted Progressive summary judgment and denied class certification. On appeal, the Eighth District reviewed the language of Plaintiff's insurance policy and found that the policy gave progressive the option to either: (1) give Plaintiff the cash value of the damaged property; (2) the amount necessary to replace the damaged property; or (3) repair the damaged property to its pre-loss condition. The appellate court found that Progressive could have chosen any of these three options and that there were no provisions that specifically allowed Progressive to recover any additional value added to the property due to its repair. The court rejected Progressive's argument that a provision allowing for an adjustment in the limit of liability due to depreciation and physical condition at the time of the loss allowed for a "betterment" reduction. Significant to the court was the fact that Progressive had actually issued other policies that defined "betterment" and specifically allowed for a reduction in the increased fair market value of property due to repairs. However, the Eighth District refused to hold that Progressive was entitled to a "betterment" reduction absent such a specific clause and definition. The Eighth District also found that Plaintiff satisfied all of the requirements for a certification of a class action. Accordingly, the holding of the trial court was reversed and the cause was remanded.

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