OHIO CASE SUMMARIES
A SERVICE OF
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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: Second District

Case Name: *Rosely v. Wells*, 2006-Ohio-6313

Decided: December 1, 2006 (posted December 1, 2006)

Issue(s): Uninsured Motorist Coverage / Definition of insured

Summary of Opinion: Plaintiff was injured in an automobile accident caused by an uninsured motorist while driving her own personal automobile in the scope of her employment. Accordingly, she brought suit against her employer's insurer, arguing that she was entitled to uninsured motorist ("UM") coverage under the employer's insurance policy. The trial court found that Plaintiff did not qualify as an insured under the terms of the policy and granted the insurer summary judgment. On appeal, the Second District recognized that Plaintiff was performing duties within the course and scope of her employment at the time of the accident. However, the terms of her employer's policy provided that an insured was "anyone occupying a covered auto." Covered autos were separately defined as any automobile owned by the employer. Plaintiff did not qualify as an insured because she was in her own personal car at the time of the accident. The Second District specifically held that the ambiguous language recognized by the Supreme Court in *Galatis* and *Scott-Ponzer* was not present in this policy language. Whereas the Supreme Court has held that a reference to "you" in the definition of an insured is ambiguous where "you" is a corporation, the reference to "anyone occupying a covered auto" is not ambiguous because it clearly refers to individuals rather than the corporation. The appellate court also recognized that the fact a "covered auto" was defined as "any car owned by 'you'" did not give rise to an ambiguity. The key to the decision was that the employer was not listed as the insured.

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Court of Appeals: Eighth District

Case Name: *Wilson v. Sanson*, 2006-Ohio-6269

Decided: November 30, 2006 (November 30, 2006)

Issue(s): Subrogation / First Right of Priority

Summary of Opinion: A family of three was injured in an automobile accident. The tortfeasor was insured by American Select Insurance Company ("American Select"), and the victims were insured by GMAC Insurance Company ("GMAC"). The victims also had health insurance through Kaiser Foundation Health Plan of Ohio ("Kaiser"). Kaiser began making payments for health expenses incurred, but informed neither American Select nor GMAC of a possible subrogation claim. American Select agreed to accept responsibilty for the accident and offered its $100,000 policy limit in exchange for the release of its insured. Based on this information, GMAC advanced $100,000 to the victims. GMAC paid the victims another $100,000, representing the difference between the American Select payment and the limit on the victims' underinsured motorist coverage. However, before American Select paid out the $100,000, Kaiser notified American Select that it had a medical payments lien of $141,319 arising out of medical services provided to the victims. GMAC demanded payment of the $100,000 it had advanced the victims, but American Select refused due to Kaiser's lien. Eventually, suit was filed in which GMAC and Kaiser both claimed superior subrogation rights to the $100,000 being offered by American Select. The trial court held that Kaiser had the first right of priority. On appeal, GMAC argued that Kaiser should be barred from recovery on the basis of laches and the make whole doctrine. The Eighth District rejected both arguments, holding that a seven month delay between the time Kaiser began paying the victims medical bills and the time it informed American Select of its subrogated interest did not give rise to laches. Furthermore, the make whole doctrine only applied to the issue of an insurer's right to subrogation as against an insured and had no application to the issue of priority between insurers. Finally, the Eighth District held that Kaiser had a contractual right to subrogation and GMAC had an equitable right. The appellate district then reversed the trial court's decision and remanded the cause because it held that both Kaiser and GMAC had equally enforceable subrogation rights. The Eighth District specifically rejected GMAC's argument that R.C. 3937.18(J) gave underinsured coverage superior subrogation rights and also rejected Kaiser's argument that the first insurer in time had was the first in right.

Court of Appeals: Eighth District

Case Name: *Burrows v. Glassman*, 2006-Ohio-6279

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Decided: November 30, 2006 (November 30, 2006)

Issue(s): Subrogation / First Right of Priority

Summary of Opinion: Plaintiff brought suit for a slip that occurred in the bathroom of a store owned by Defendant. She alleged that her fall was caused by some "substance" on the floor. However, she failed to produce any evidence regarding what the substance on the floor was and conceded that she had not seen, smelled, or touched the substance. The trial court granted Defendant summary judgment, and the Eighth District affirmed this decision, holding that Plaintiff's failure to identify the substance was fatal to her case. By failing to identify what caused her fall, Plaintiff failed to meet her burden of establishing a genuine issue of material fact relating to Defendant's breach of a duty of care to remove a dangerous condition or warn its customers of that condition. "Slipping on something whose existence cannot be proved will not lead to an actionable negligence claim."

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