

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 Travis Vieux at 937-224-3333 or email Travis at tjvieux@green-law.com.

Court of Appeals: Fifth Appellate District, Muskingum County

Case Name: Zanesville LLC v. Motorists Mutual Insurance Co.
(2007-Ohio-6448)

Decided: November 30, 2007 (Posted December 3, 2007)

Issue: Insurance Contract Interpretation, Collapse

Summary of Opinion: The Fifth District ruled that pursuant to the plain language of the insurance contract that Motorists was required to cover the partial collapse of a building that was then “controlled collapsed.”

Zanesville LLC had an insurance contract with Motorists Mutual to insure their building. The insurance contract included coverage for “physical loss or damage caused by collapse of a building or any part of a building insured under this coverage.” The contract further included that “Collapse does not include settling, cracking, shrinkage, bulging or expansion.”

On June 12, 2001, one of the partners of Zanesville arrived at the building and saw that the front part of the wall was separating from the building. Bricks and mortar had fallen from the structure. The wall was bowing out toward the street. Local building authorities were notified. An engineer for the agency observed a large gap in the wall

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and that the wall was separating from the top of the building along the length of the front of the building. The engineer also observed pieces of brick from the building on the ground. Based on the condition of the building, the engineer determined that it was in danger of imminent collapse and needed to be torn down. Zanesville LLC contracted with a demolition firm to “control the collapse.” When the demolition team arrived, part of the front wall had fallen. They used a backhoe to take the rest of the front wall down and then demolished the entire building.

Motorists denied the claim after determining that there had not been a “collapse” of the building. Zanesville sued for breach of contract and alleged bad faith. After cross motions for summary judgment, the trial court ruled in favor of Zanesville. Motorists appealed.

Looking to the plain language of the insurance contract, the court ruled that Motorists had contracted to insure collapse of the building or any part of the building. “Collapse” was not defined in the contract and was therefore given its common and ordinary meaning. The evidence showed that part of the wall had fallen prior to the controlled collapse. Total collapse of the building was not required.

Court of Appeals: Eleventh Appellate District, Trumbull County

Case Name: Melvin v. Badger School District Board of Education
(2007-Ohio-6403)

Decided: November 30, 2007 (Posted December 3, 2007)

Issue: Open and Obvious Doctrine, Attendant Circumstances

Summary of Opinion: The Eleventh District ruled that cracks in a sidewalk were open and obvious and that no “attendant circumstances” existed.

Cheryl Melvin was a letter carrier for the US Postal Service. She delivered mail to the Joseph Badger School and had done so for several years. There were a series of cracks in the sidewalk outside the school building, which Melvin had observed on prior occasions. On February 5, 2004, Melvin was returning to her vehicle after delivering the mail. She was carrying six to twelve letters in her hands, as well as her keys. As required by postal regulations, she was not looking where she was stepping, but rather at her postal truck. Melvin stubbed her toe and fell, suffering severe injuries. Melvin could not identify what caused her to fall, but she fell in the area of the cracks in the

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sidewalk.

Melvin filed suit against the school district and the school district filed for summary judgment. The trial court granted summary judgment based on the open and obvious doctrine. Melvin appealed.

Where a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises. When applicable, the open and obvious doctrine abrogates the duty to warn and completely precludes negligence claims.

Melvin argued that the cracks were not open and obvious since Melvin did not see them. The court rejected this argument because whether the injured party actually noticed the hazard is irrelevant. The issue is whether the condition is “observable.” If the injured party could have noticed the dangerous condition by looking, the condition is open and obvious. Because Melvin knew of the cracks and they were visible, they constituted an open and obvious danger.

Melvin next argued that “attendant circumstances” existed to override the open and obvious doctrine. Attendant circumstances include any distraction that would divert the attention of a pedestrian in the same circumstances and thereby reduce the amount of care an ordinary person would exercise. Attendant circumstances are all facts relating to a situation that would unreasonably increase the typical risk of a harmful result.

Melvin argued that carrying her letters and keys and also the postal service’s requirement that mail carriers look toward their vehicles constitute attendant circumstances. The trial court had ruled that the attendant circumstances must be of the property owner’s making in order to override the open and obvious doctrine.

The court ruled, firstly, that attendant circumstances are “any distraction” and need not be of the property owner’s making. However, the court ruled that carrying letters and looking to her vehicle were part of Melvin’s job and were not an attraction or distraction which an ordinary pedestrian would encounter.

Court of Appeals: Fifth Appellate District, Stark County

Case Name: Cincinnati Insurance Co. v. Grange Mutual Casualty Co.
(2007-Ohio-6470)

Decided: December 3, 2007 (Posted December 4, 2007)

Issue: Insurance Contract Interpretation, “Additional Insured”

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Summary of Opinion: The Fifth District ruled that a “loaned servant’s” negligence was attributed to the entity to whom he was loaned and was not an “additional insured” per the insurance contract.

Randy Carrico was an employee of Novak & Sons Painting. Novak was insured by Selective Insurance Co. Alvin Newman was an employee of SJD Construction Co. SJD was insured by Grange Mutual Casualty Co. Novak and SJD were subcontractors on an project for general contractor Drake Construction. Drake was insured by Cincinnati Insurance Co. Drake was an “additional insured” on both the Grange and Selective policies as required by the contracts with SJD and Novak.

Carrico died after being struck in the head by lumber thrown from the roof of a construction site. Newman threw the lumber. Carrico’s estate brought suit against Drake and SJD. Novak was never named a party in the wrongful death case. Cincinnati Insurance defended the case, but SJD and Novak refused to join. Drake settled and Cincinnati sought contribution from Grange and Selective.

The trial court determined that Newman was a “borrowed servant” of Drake. SJD had completed its operations on the construction site before the date of the accident, but Drake needed additional labor and “borrowed” Newman for the cleanup. The trial court entered summary judgment for SJD, finding that Newman was acting under the guidance and control of Drake, the general contractor.

The court reviewed the insurance contracts and ruled that the “additional insured” language in the SJD and Novak policies only covered the insured for negligence by the subcontractor or its employees when they were performing ongoing operations for the general contractor. Because Newman was on loan to Drake, he is considered an employee of Drake and Drake alone is liable for any negligent conduct by Newman.

The court further found that because Novak was never named as a defendant in the wrongful death case and no negligence was ever claimed against Novak that Selective Insurance’s coverage does not apply.

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