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## Court decisions

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### Abstract (Article Summary)

Recent court decisions dealing with a variety of issues are discussed, including: 1. the meaning of "other-owned car" in relation to an injured party's ability to recover under a parent's insurance policy; 2. the duty of an insurer to defend its insured in a personal injury action; 3. the exclusion of watercraft liability from a tenants policy endorsement; 4. the apportionment of damages in an accident involving a rented truck; 5. how no mention of prejudgment interest in a contribution agreement affected the outcome; 6. no auto insurance coverage for injuries sustained by a police officer in pursuing an uninsured motorist who had fled the car on foot; 7. denial of opportunity to cure noncompliance; 8. a reduction of uninsured motorist coverage because a car was used without permission; 9. car rental companies' specification of covered drivers; and 10. guaranty fund's denial of coverage for "other insurance" obligation.

### Full Text (3068 words)

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Inoperable car was not "other-owned" car

In December 1988, Pamela Santana was seriously injured in an accident while driving a car owned by Joseph Owens. Pamela was living at home with her mother, Marilyn Windnagle. The second car involved in the accident was uninsured. Pamela was paid the limits of Owens' policy, and she then claimed the underinsured benefits under a policy issued by Auto-Owners to her mother. Coverage was denied. The company relied upon the following language in its policy:

"If you are an individual, we extend this coverage. We will pay bodily injury damages which you are legally entitled to recover from the owner or driver of any uninsured motor vehicle. We give this same protection to any relative living with you who does not own a car."

At the time of the accident, Pamela owned a 1979 Trans Am but it was inoperable. In fact, it had no engine until it was replaced in April 1988. At or about that time, the engine was again removed, and the car was put on blocks until after the accident. The engine was replaced in June 1989.

The trial court entered judgment for Pamela and the company appealed.

The higher court concluded that the 1979 Trans Am, which was inoperable, on blocks and without an engine, was not "other-owned car" within the meaning of the policy. Pamela was entitled to recover under her mother's policy. (The higher court, in a later hearing on motion to certify the record to the Supreme Court of Ohio, agreed that its decision might be in conflict with *Miller v. Shelby Mutual Insurance Co.*, 253 N.E.2d 801, and the record was certified for

review and final decision. That court ruled there was no conflict and dismissed the appeal.) *Santana v. Auto Owners Insurance Company*, Appellant--No. L-92-262--Court of Appeals of Ohio, Lucas County--April 30, 1993-632 North Eastern Reporter 2d 1308.

Passenger sues driver: insurer has duty to defend

On March 4, 1989, Michelle Patterson filed a personal injury action against William Tice, Jr., to recover for personal injuries sustained by her as a passenger in her car, but which was driven by Tice. She alleged that his negligence while driving her car caused her injuries.

Patterson's policy with State Farm provided liability and uninsured/underinsured limits of \$100,000.

William Tice, Sr. and Cathy Tice, the parents of the driver, had a policy issued by Motorists with limits of \$50,000.

Neither Tice nor his parents notified Motorists of the accident or the pending suit. On June 10, 1989, Patterson's attorney notified that company of the accident and pending action. That letter stated that Tice had just recently furnished that attorney with the policy issued to his parents. The letter further stated that Tice was residing in his parents' home at the time of the accident.

Motorists answered with a letter dated July 14, 1989, stating that the driver of the car involved in the accident was not an insured under its policy. No explanation was offered.

In February 1990, a default judgment for \$400,000 was entered against William Tice, Jr.

In January 1991, Patterson filed her action against Motorists to reach the proceeds of its policy. The company answered by claiming that Tice was not insured because he was not a resident of his parents' household, and was not driving the car at the time of the accident. It asked for jury trial. State Farm paid the limits of its policy, and Patterson assigned to it her rights. The company's request for a jury trial was refused, and the lower court found that Tice was the driver and was living with his parents at the time of the accident. Therefore, he was an insured under Motorists' policy. It ordered Motorists to pay to State Farm the \$54,000 limits of its policy. Motorists appealed.

Motorists contended that any duty to defend Tice was waived because of the insureds' failure to notify it of the accident and pending action.

The court on appeal found that once Motorists was notified by Patterson's lawyer of the facts, Motorists waived the notice requirement, and was required to intervene in the action to determine its duty to defend Tice. By making its own "casual determination that it had no duty to defend Tice in the underlying action, Motorists became bound by the factual conclusions arising from the default judgment."

The evidence that Tice was living in his parents' household was conflicting, since Tice and his parents insisted that he was not living with them. The higher court said that the trial court filed 10 separate findings of fact in its determination that Tice was living with his parents. Each of the findings was based on credible evidence, and the trial court's finding would not be overturned on appeal.

Since Motorists was barred from raising any question as to the driver of the car, the judgment entered in the trial court against Motorists was affirmed.

*Patterson v. Tice; State Farm Mutual Insurance Company; Motorists Mutual Insurance Company*, Appellant--No. 93AP020010--Court of Appeals of Ohio, Tuscarawas County--November 3, 1993-632 North Eastern Reporter 2d 962.

Tenants policy endorsement excludes watercraft liability

David Lawson and his wife, Dianne, rented property in Elyria, Ohio, and had secured a tenants' policy, including liability coverage, from Ohio Casualty.

On June 16, 1990, Dianne was seriously injured in a boat accident in Lorain Harbor. The boat was owned by

Frederick Rowe and was being operated, for pleasure and with Rowe's permission, by David Lawson.

Mrs. Lawson filed two separate suits to recover damages and David joined as plaintiff in one of them. A counterclaim was filed against him in that action and a third-party complaint was filed against him in the other. He tendered defense of both to Ohio Casualty, and the company provided defense, but did so under a reservation of rights. The company thereafter filed this action for declaratory judgment that it was not obligated to defend or indemnify David.

The policy issued to the Lawsons consisted of a cover sheet and eight attached forms, which were listed on the cover sheet. David's claim of coverage was based upon certain provisions of an earlier form.

Form CPL-1 provided liability coverage for the insured while operating a watercraft owned by someone else if he was doing so for pleasure and not business.

However, the last form listed on the cover sheet was DF2284, and warned in large print at the top: "THIS ENDORSEMENT CHANGES THE POLICY PLEASE READ IT CAREFULLY."

In brief, the court found that the policy provided liability coverage to the named insureds for claims arising out of their rental of the property located at 752 Infirmary Road. The policy did not cover anything related to the use of watercraft.

The judgment entered in the trial court in favor of the company was affirmed.

Ohio Casualty Insurance Company, Inc. v. Lawson, Appellant--No. 92CA005458--Court of Appeals of Ohio, Lorain County--Motion to certify record to Supreme Court of Ohio was overruled--October 6, 1993--631 North Eastern Reporter 2d 1073.

Damages apportioned in accident with rented truck

Federal Insurance Company had issued a \$1 million business auto policy to Mirage Enterprises, a producer of movies. A \$500,000 policy had been issued on Erie Transfer Company, and another \$1 million policy had been issued Ryder Truck Rental. (Aetna Casualty & Surety, and the Superintendent of Insurance of New York, as Liquidator of Midland Insurance Company, were apparently involved but the record did not show to whom their policies had been issued.)

A pedestrian was struck and seriously injured by a truck rented by an independent contractor retained by Mirage to provide theatrical trucking services.

A settlement of \$1.75 million had been made, and the only question before the courts was the apportionment of damages.

The evidence showed that the truck involved in the accident was not owned, rented or used by the movie company.

The lower court found that primary coverage was provided by the policy issued to Ryder Truck Rental and the policy issued to Erie Transfer Company; therefore, the full amount of the policies should be applied to the settlement.

This finding was affirmed on appeal, and the action was remanded to the lower court for apportionment of the remaining \$250,000 among the excess insurance companies.

The court noted further that the insurance companies could not seek subrogation from their own insureds.

Federal Insurance Company et al v. Ryder Truck Rental, Inc., et al, Appellants--Court of Appeals of New York--January 18, 1994--631 North Eastern Reporter 2d 115.

Contribution agreement did not mention prejudgment interest

Bethlehem Steel had brought suit against the contractors who had constructed a defective coke oven battery. General Accident had issued a professional liability policy and INA had issued a comprehensive general liability policy. General Accident had assumed the defense after INA denied coverage under its \$1 million policy. However,

INA had then contributed its policy limits to a settlement of the case, but had reserved its right to litigate its duty defend.

The trial court found that INA had no liability under its policy, and ordered the return of the \$1 million which it had contributed.

This action was then ought to determine whether INA was entitled to prejudgment interest, and its legal fees.

On appeal it was decided that INA was entitled to interest at the statutory rate from the date of tender (March 13, 1985).

The court noted that it would have been prudent for INA and General Accident to have provided for interest in their agreement, both as to when it would be paid, and the rate. However, the court said that such an explicit provision was not required. The only requirement was that the debt be liquidated and due and payable. INA would not be "made whole" by the return only of the \$1 million.

The higher court concluded that INA was not entitled to recover its attorney fees and costs since it was defending its own rights.

The judgment entered in the trial court was affirmed in part, reversed in part, and the action remanded.

General Accident Insurance Co. v. Insurance Company of North America, Appellant--No. 62816--Court of Appeals of Ohio, Cuyahoga County--August 23, 1993--629 North Eastern Reporter 2d 1373.

No auto coverage for injury after leaving car

In December, 1989, while on duty as a police officer in Mason, Ohio, Todd Carter was on a high-speed chase of a car driven by David Burns, Jr., an uninsured motorist. Burns drove into the driveway of a mobile home park in an attempt to lose Carter and the latter followed. Burns lost control of his car and it collided with the police car. Burns then fled on foot and Carter chased him. During the chase, Carter slipped and fell on some icy ground, and sustained back injuries.

Carter filed suit against Burns, and secured a default judgment against him. State Farm intervened and filed a motion for summary judgment as to its liability.

State Farm contended its policy did not cover since the injuries were not caused by an accident arising out of the operation, maintenance or use of the uninsured vehicle.

The trial court found that the State Farm policy did not cover the accident, and that the company was not bound by the default judgment in favor of its insured. Carter then appealed.

The higher court concluded that Carter's injuries had nothing to do with Burns' uninsured automobile. The injuries were caused when the officer slipped and fell on the ice while he was chasing Burns on foot.

The judgment entered in the trial court in favor of State Farm was affirmed.

Carter, Appellant v. Burns, State Farm Mutual Automobile Insurance Company--No. CA93-02-016--Court of Appeals of Ohio, Warren County--October 4, 1993. (Motion to certify the record to Supreme Court of Ohio was overruled.) 630 North Eastern Reporter 2d 767.

Insured not given chance to cure noncompliance

On April 28, 1990, Glenn Crowell's house was destroyed by fire. He had secured a fire policy from State Farm, and he notified the company of the loss. He led this action for declaratory judgment on November 6, 1991. State Farm, in its answer to the complaint, asserted the insured had intentionally set the fire, or had caused it to be set; that he had also concealed or misrepresented material facts concerning the fire; had failed to complete an examination under oath; and had failed to produce a member of his household, Paula Hunter, for such an examination.

In April 1992, the company moved for summary judgment. In a response to that motion, the insured alleged that he was not represented by counsel at his examination under oath; that he refused to answer many questions which he did not believe were pertinent or material. He stated that he knew he was the target of an arson investigation, but that was subsequently dropped.

He offered to submit to a deposition at which he would answer all material questions, with the guidance of his attorney. He alleged that questions of disputed facts still existed, so that a summary judgment would not be appropriate.

In December 1992, the trial court granted the company's motion for summary judgment. It found there was no dispute as to any material fact, and the insured had breached the cooperation clause of the policy. The insured appealed.

The higher court pointed out that as soon as he learned the reasons for the company's denial of liability, the insured offered to submit to examination under oath and answer any and all relevant questions. The court said it was apparent that the insured did not understand the relevancy of questions into his financial background, and was offended by the nature of those questions. While the reasons for those questions might have been apparent to an attorney, the insured was not represented by an attorney, and knew he was suspected of arson. The court found that the insured should have been given the opportunity by the lower court to cure his noncompliance.

The judgment entered in the trial court was reversed, and the action was remanded for further proceedings. (The Presiding Justice did not agree, and filed a dissenting opinion.)

Glenn Crowell, Appellant v. State Farm Fire & Casualty Company--No. 5-93-0052--Appellate Court of Illinois, Fifth District--March 25, 1994--631 North Eastern Reporter 2d 418.

UM coverage reduced since car used without permission

Safety Insurance had issued a policy to Sumner Gordon which was in effect on October 20, 1990, when his son, Ross, was in a car driven by a friend, Derrick Capozzi. The car had been stolen, but Ross said he had been told that Derrick's uncle had loaned it to him. Apparently Ross asked Derrick to drive him to a friend's home. En route the car rolled over, and Ross was injured.

The policy issued Sumner Gordon provided for \$100,000 limit per person uninsured coverage, and he and Ross filed claim for the full amount. Safety believed it was obligated only for \$25,000 since Ross had been in a car that, at the time of the accident, was being used without the consent of the owner. Safety's policy reduced the uninsured benefits to \$25,000 if the insured was "using an uninsured auto without the consent of the owner."

The higher court determined that a belief by Ross that Derrick was using the car with the owner's permission was not relevant, if in fact the car had been stolen.

The judgment entered in the trial court was vacated, and judgment ordered declaring that Safety was liable only for \$25,000 for the injuries sustained by Ross.

Sumner Gordon et al v. Safety Insurance Company--Supreme Judicial Court of Massachusetts, Essex--May 5, 1994--632 North Eastern Reporter 2d 1187.

Car rental terms specify covered drivers

In June 1991 a Lincoln Town Car had been leased by Stephen Brewer from Hertz. The rental agreement expressly stated that Brewer was prohibited from permitting anyone other than his spouse, employer, employees, or fellow employees, to drive the car.

At the time of the accident involving the Lincoln, Dennis Kramer was driving the car with Brewer's knowledge and permission, but he did not fall within those permitted to drive by Hertz.

The trial court entered summary judgment in favor of Cincinnati Insurance Company, which had issued the policy to Hertz. Kramer appealed.

On appeal, the court said that since the Hertz contract specifically prohibited Brewer from permitting Kramer to drive, Kramer could not recover. Furthermore, Kramer could not recover under his policy issued by Leader National Insurance. His policy excluded coverage when he was operating a car without the owner's permission. Since Hertz, and not Brewer, owned the car, Brewer could not give him permission to drive.

The judgment entered in the lower court in favor of the insurance company was affirmed.

Cincinnati Insurance Company v. Kramer, Appellant; Leader National Insurance Company--NC-920628--Court of Appeals of Ohio, Hamilton County--November 10, 1993--632 North Eastern Reporter 2d 1333.

Guaranty fund won't cover "other insurance" obligation

In March 1985, Willie Harrell was a pedestrian when he was struck by an uninsured motorist. He owned a vehicle which was insured by Reliable. His wife, Lela, had a car on which a policy had been issued by Safeway. Both policies provided uninsured motorist benefits of \$15,000, and both contained identical "other insurance" clauses.

The Harrells filed an action for declaratory judgment against both companies, and the trial court found that, under the "other insurance" clauses, each company owed the insureds \$7,500 in coverage. Subsequently, Reliable became insolvent, and the Illinois Insurance Guaranty Fund intervened in the action. The Fund asserted that since Reliable was insolvent, it no longer constituted "other insurance," and Safeway should be held liable for the full \$15,000 of uninsured coverage.

The lower court agreed and Safeway appealed.

It was Safeway's contention that the insureds' rights had to be determined as of the date of the accident, and at that time Reliable was solvent.

On appeal, the court pointed out that the Fund was created for the purpose of providing limited protection to the public and not to insurance companies. It found that potential claims against the assets of the Fund should be reduced by the solvent company rather than the Fund.

The court found that Safeway was liable for the \$15,000 coverage under its policy.

Willie Harrell and Lela Harrell v. Reliable Insurance Company (Safeway Insurance Company, Appellant. Illinois Insurance Guaranty Fund.)--No. 1-90-1416--Appellate Court of Illinois, First District, Third Division--March 9, 1994--631 North Eastern Reporter 2d 296.

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