2019 SUMMARY OF TORT AND INSURANCE LAW

Insurance Perspectives

ROLFES HENRY

Professionals in Action. Partners in Service.

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Professionals in Action. Partners in Service.

"It's not what you look at that matters. It's what you see."

-- Henry David Thoreau

Dear Business Partners and Friends:

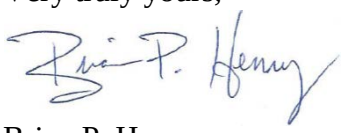
Understanding perspective is critical – in business, in our personal lives, in how we interact with each other on a daily basis. Without a "fair degree of perspective," as my mother used to say, we have a tendency to inflate conflicts unnecessarily, underestimate challenges, or otherwise fail to approach a problem in the most optimal fashion. But "perspective" is not an objective position; it is, by definition, subjective.

In the legal world, understanding the various perspectives of an issue is of critical importance. Whether providing a client advice, assessing a case's positional value, or considering the practical and functional costs of litigation, having a measured and contemplative perspective is crucial. The problem is, perspectives can be very different depending on the angle from which one considers an issue. As Thoreau noted, the initial "top sheet" viewpoint might not matter in the least; what is likely much more important is what else that first view allows you to see.

This year marks our Firm's 30th year in business. Over the course of those three decades, we have been proud to have worked with our business partners on an enormous range of issues – from national insurance coverage representation to local commercial disputes; from premises liability cases to product liability cases; and everything in between. We have attempted to approach every assignment with a "fair degree of perspective," seeing beyond the surface and addressing the true heart of the issue presented. We continue to see our job as not simply doing what clients ask of us, but rather to also interject some perspective into the discussion, so that the most optimal outcome is achieved.

On behalf of all of us at Rolfes Henry, we thank you for trusting our perspective for the last thirty years. We look forward to continuing our service to all of you.

Very truly yours,



Brian P. Henry
Firm President

30 YEARS ANNIVERSARY

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I. STATUTES OF LIMITATIONS TABLE – STATE BY STATE COMPARISON

Claim Type	Ohio	Kentucky	Indiana	Michigan	Florida
Assault & Battery	1 year R.C. §2305.111	1 year K.R.S. §413.140	2 years I.C. §34-11-2-4 (1)	2 years M.C.L.A. §600.5805 (2)–(4)	4 years Fla. Stat. §95.11(3)(o)
Bodily Injury Due to Negligence	2 years R.C. §2305.10	Auto Acc. – 2 yrs. K.R.S. §304.39-230 BI Claims/other than auto accs.– 1 yr K.R.S. §413.140	2 years I.C. §34-11-2-4 (1)	3 years M.C.L.A. §600.5805(10)	4 years Fla. Stat. §95.11(3)(a)
Personal Property Damage Due to Negligence	2 years R.C. §2305.10	2 years K.R.S. §413.125	2 years I.C. §34-11-2-4 (2)	3 years M.C.L.A. §600.5805(10)	4 years Fla. Stat. §95.11(3)(a)
Wrongful Death	2 years R.C. §2125.02	1 year (from appt.) K.R.S. §413.180	2 years I.C. §34-23-1-1	3 years M.C.L.A. §600.5805(10)	2 years Fla. Stat. §95.11(4)(d)
Libel, Slander, Defamation	1 year R.C. §2305.11	1 year K.R.S. §413.140	2 years I.C. §34-11-2-4	1 year M.C.L.A. §600.5805(9)	2 years Fla. Stat. §95.11(4)(g)
Bad Faith	4 years R.C. §2305.09(D)	5 years K.R.S. §413.120	2 years I.C. §34-11-2-4(2)	N/A	5 years Fla. Stat. §95.11(2)(b) (breach of contract action)
Contract in Writing	8 years R.C. §2305.06	15 years K.R.S. §413.090(2)	10 years I.C. §34-11-2-11	6 years M.C.L.A. §600.5807(8)	5 years Fla. Stat. §95.11(2)(b)
Contract not in Writing	6 years R.C. §2305.07	5 years K.R.S. §413.120(1)	6 years I.C. §34-11-2-7(1)	6 years M.C.L.A. §600.5807(8)	4 years Fla. Stat. §95.11(3)(k)
Fraud	4 years R.C. §2305.01(C) Identity Fraud 5 years R.C. §2305.09(C)	5 years K.R.S. §413.120(12)	6 years I.C. §34-11-2-7(4)	6 years M.C.L.A. §600.5813	4 years Fla. Stat. §95.11(3)(j)

II. THE STATE OF OHIO

A. FREQUENTLY CITED OHIO STATUTES

1. General Considerations in Insurance Claims Management

Ohio Administrative Code § 3901-1-54
Unfair Property/Casualty Claims Settlement Practices

This provision is not a statute but is part of the state regulations governing insurers. It governs unfair settlement practices in the handling of property and casualty claims. Numerous minimum standards of conduct for claims representatives are set forth.

Although the code expressly provides violations of the code may result in disciplinary action being taken by the Department of Insurance, violations do not lead to civil liability, even on first-party claims.

R.C. § 2111.18
Settlement of Minor's Claims

All settlements of personal injury claims of minors must be approved by the probate court of the county where the minor resides.

Amended by 2009 Ohio SB 106 to change the amount of net settlement from $10,000.00 or less to $25,000.00 or less after payment of fees and expenses. Additional language added includes: "In the settlement, if the ward is a minor, the parent or parents of the minor may waive all claim for damages on account of loss of service of the minor, and that claim may be included in the settlement."

R.C. § 3737.16
Release of, or Request For, Information Relating to Fire Loss by Insurance Company

Civil authorities investigating property fire losses (including the fire marshal, a fire department chief, local law enforcement, or the county prosecutor) may request an insurance company investigating a property fire loss to release any information in its possession concerning the loss.

R.C. § 4505.11
Salvage Titles

If it is economically impractical to repair a vehicle and the insurer has paid the owner an agreed sum for the purchase of the vehicle, the insurer shall obtain the title and within thirty (30) days obtain a salvage title.

If the owner retains possession of the vehicle, the insurer cannot pay the owner to settle the claim until the owner first obtains a salvage title.

R.C. § 4509.51
Automobile Minimum Liability Limits

The statute requires minimum automobile liability coverage limits (per accident) of: (1) $25,000.00 for bodily injury or death of any one person in any accident; (2) $50,000.00 for bodily injury to or death of two or more persons in any one accident; and (3) $25,000.00 for injury to property of others in any one accident.

R.C. § 4509.53(D)
Motor Vehicle Insurance Policy Applications

The written application of insurance is part of a motor vehicle liability policy.

2. Clarification of Facts and Legal Duties

R.C. § 2317.48
Action for Discovery

When information and facts surrounding a case are difficult to obtain, a person claiming to have a cause of action, or a person against whom a cause of action has been filed, may bring an action for discovery. A discovery action allows such party to explore the strengths of the complaint or defense without subjecting the party to the potential penalties associated with frivolous lawsuits.

R.C. §§ 2721.01 *et. seq.*
Declaratory Judgment Actions

This chapter allows parties to file suit to have the court determine the validity of a contract and/or the rights of the parties under the contract. This is the most effective tool for resolving disputes on the availability or amount of insurance coverage available.

A plaintiff who is not an insured under a policy cannot bring a declaratory judgment action against a third party's insurer to determine if coverage is available for a claim until or unless a final judgment has been placed of record awarding the plaintiff damages against the insured.

R.C. § 4123.01(A)(1)(c)
"Employee" Under Construction Contract

The statute sets out specific factors to determine whether a person is an "employee" under a construction contract.

3. Uninsured Motorist Coverage

R.C. § 3937.18
UM/UIM Coverage

(A) Effective October 31, 2001, an insurer no longer has a duty to offer UM/UIM coverage to its insured with the sale of a policy. As a result, there will no longer be any requirement that a rejection or reduction in coverage be in writing.

(B) The statute contains a five factor test for who is an "uninsured motorist."

(C) UIM coverage is not excess coverage.

(D) To recover UM/UIM an insured must prove all elements which would be necessary to recovery from the uninsured or underinsured motorist.

(E) Workers compensation benefits do not offset UM/UIM recovery.

(F) Insurers may preclude both inter-family and intra-family stacking in their policies.

(G) On wrongful death claims, any claim for a single death is subject to the per person limit on coverage.

(H) An insured has a three-year statute of limitations to assert a UM/UIM claim, assuming they did not destroy the insurer's right of subrogation.

(I) A vehicle available for the regular use of the insured, a family member, or a fellow household member can be deemed an uninsured vehicle.

(J) The UM/UIM insurer is entitled to subrogate, standing in the shoes of its insured.

(K) The statute does not prohibit inclusion of underinsured motorist coverage.

(L) These requirements only apply to policies meeting the financial responsibility requirements or to umbrella policies.

R.C. § 3937.44
Per Person Limits

For both liability and UM/UIM coverages, only the per person limit is available for recovery for each person suffering a bodily injury or for each decedent.

4. Statutory Subrogation Rights

R.C. § 2744.05
Immunity of Political Subdivisions to Subrogation Claims

Political subdivisions are immune to any subrogation claim brought by an insurer.

R.C. § 3937.18(J)
UM/UIM Claims

In the event of payment to an insured for an uninsured/underinsured motorist claim, the insurer making such payment is entitled to the proceeds of any settlement or judgment resulting from the exercise of the insured's rights against a legally liable party. This right is limited by relevant insolvency proceedings.

R.C. § 3937.21
Subrogation

If an insurance company pays to, or on behalf of, it's insured any amount later determined to be due from another insurer, it shall be subrogated to all rights of the insured against such insurer.

R.C. § 4123.93
Workers' Compensation Subrogation Rights

This statute became effective April 9, 2003, and therefore applies only to injuries occurring on or after that date. It restores subrogation rights of the Ohio Bureau of Workers' Compensation and self-insured employers. For claims where the injury occurred prior to April 9, 2003, there is no right of subrogation.

Employees now must notify the lienholder if there is a third-party who is responsible for their injuries so that there is a reasonable opportunity to assert their subrogation rights. Responsible parties include UM/UIM insurers.

If an employee is not made whole, then the statute prescribes a formula for *pro-rata* distribution of any recovery between the employee and lienholder.

If there is the potential for future payments by the lienholder, a portion of the recovery is to be put in an interest-bearing trust account to protect any future lien.

5. Liability and Damages Considerations

R.C. § 1533.181
Immunity – Recreational User Claims

The statute provides where a premises owner may be immune from claims by a recreational user of the premises.

R.C. § 2125.01 *et. seq.*
Wrongful Death Actions

A wrongful death action can only be brought by the executor or administrator of the decedent's estate.

The decedent's surviving spouse, parents, and children are rebuttably presumed to have been damaged by the death.

All other family members must prove their entitlement to damages.

R.C. § 2305.402
Trespass Liability Statute

A possessor of real property does not owe a duty of care to a trespasser except to refrain from willful, wanton, or reckless conduct that is likely to cause injury or death. However, this section builds back in a duty on the part of the possessor of real property if the possessor knows or should know a trespasser is in a position of peril and fails to exercise ordinary care to avoid injury, death or loss. The statute also recognizes duties toward child trespassers, which a Court would need to construe based on a balancing test weighing the danger of an artificial condition against the burden of eliminating danger to child trespassers. The statute further recognizes duties toward rescuers of child trespassers.

R.C. § 2307.22
Allocation of Damages

If there are multiple defendants at fault, any defendant who is more than 50% at fault is subject to joint and several liability for the plaintiff's economic damages. Intentional tortfeasors also are subject to joint and several liability for economic damages. All other at-fault defendants are liable only to the proportionate extent of their liability. All at-fault defendants are only proportionally liable for non-economic damages.

If there are multiple defendants at fault, and no one defendant is more than 50% at fault, then the at-fault defendants are liable only to the proportionate extent of their liability for both economic and non-economic damages. For injuries occurring prior to April 8, 2003, there is joint and several liability among joint tortfeasors for economic damages.

Note below, under R.C. 2315.33, if a plaintiff is more than 50% at fault, then recovery against any defendant is barred.

R.C. § 2307.25
Right of Contribution

This statute only applies to claims where the injury occurred on or after April 8, 2003. A right of contribution will exist only if two or more tortfeasors are subject to joint and several liability.

R.C. § 2307.28
Set-offs for Damages

This statute only applies to claims where the injury occurred on or after April 8, 2003. A non-settling defendant is entitled to a set-off from any award of damages from what a plaintiff has already recovered from any settling party. This right exists even if the settling party is not found to be liable. This overrules *Fildelholtz v. Peller*, (1998), 81 Ohio St. 3d 197, which required a finding the settling party was liable before a set-off could be imposed.

R.C. § 2307.711
Comparative Fault in Product Liability Actions

Assumption of risk is a defense in product liability claims. Depending upon the nature of the assumption of risk, it can be an absolute bar to a plaintiff's recovery, without any comparative fault analysis, or serves as a proportionate basis for reducing damages and liability. This statute took effect in April 2005.

R.C. § 2315.18
Caps on Compensatory Damages

There are no caps on economic damages. There are no caps on non-economic damages for "catastrophic" injuries, which are defined as "permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system, or permanent physical functional injury that permanently prevents the injured person from being able to independently care for and perform life-sustaining activities." With respect to "non-catastrophic" injuries, non-economic damages are capped at the greater of $250,000.00 or three (3) times the amount of economic damages, with an absolute maximum of $350,000.00 per plaintiff or $500,000.00 per occurrence. Thus, if an individual plaintiff incurs more than $83,333.00 in economic loss damages, the cap for non-economic damages increases from $250,000.00 to $350,000.00.

R.C. § 2315.20
Collateral Benefits

A defendant in a tort action may introduce evidence of certain collateral benefits for the plaintiff, with stated exceptions. One such exception is if the source of collateral benefits has a federal, contractual or statutory right of subrogation.

R.C. § 2315.21
Punitive or Exemplary Damages

Effective April 2005, a defendant now has an absolute right to bifurcate a trial on a punitive damage claim.

Punitive damages are capped at one to two times the amount of any compensatory damage award. In the case of a small employer or private individual, punitive damages are capped at two times the amount of damages or ten percent of their net worth.

R.C. § 2315.33
Comparative Fault

If a plaintiff is more than 50% at fault, they are barred from recovery. If a plaintiff is not barred from recovery, the recovery is reduced in proportion to their percentage of comparative fault under procedures set forth in R.C. 2315.34. As to apportionment of fault among joint tortfeasors, where plaintiff is 50% or less at fault, see discussion of R.C. **§** 2307.22 above.

R.C. § 2317.02
Waiver of Physician-Patient Privilege

By filing a tort action, a plaintiff waives any physician-patient privilege and the defendant is entitled to obtain the entirety of the plaintiff's medical records.

R.C. § 2323.44
Rights of Subrogee

Notwithstanding any contractual or statutory provision to the contrary, the rights of a subrogee asserting a subrogation claim against a third party will be diminished in the same manner as the injured party's interests are diminished. Either party may file a suit under Chapter 2721 to resolve any disputes that may arise from the distribution of the recovery in the tort action.

R.C. § 2745.01
Employer Intentional Torts

This statute took effect April 7, 2005. It reflects the latest legislative effort to codify employer intentional torts. An employee making such a claim must now either prove the employer intended to injure them or that the employer acted with the belief that injury was substantially certain to occur. Substantial certainty is considered a deliberate intent to cause injury, disease, or death. The statute goes on to provide that the deliberate removal of a safety guard or any misrepresentation of a toxic or hazardous substance creates a rebuttable presumption of an intent to injure.

R.C. § 3109.09 and § 3109.10
Parental Liability

Vicarious liability of the parents is limited to $10,000.00 where their child willfully damages property or commits a theft offense (R.C. § 3109.09) and where their child has assaulted someone (R.C. § 3109.10). However, the statute does not limit liability of parents for their own acts or omissions.

R.C. § 3929.06
Insurance Money Applied to Judgment

Once a final judgment is entered in favor of a plaintiff against a person insured against such liability, after thirty (30) days the judgment creditor may file a supplemental complaint directly against the insurer to pay the amount of the unpaid judgment against the insured.

R.C. § 3929.25
Extent of Liability Under Policy (Valued Policy Statute)

The valued policy statute applies to any structure insured against loss by fire or lightning. In case of a total loss the insurer shall pay the amount of the policy; however, if the policy requires actual repair or replacement of the structure, then the amount paid shall be as prescribed by the policy.

R.C. § 3929.86
Fire Loss Claim – Payment of Property Taxes

Where fire damage to a structure exceeds $5,000.00, the statute sets forth procedures for payment of delinquent property taxes from the insurance proceeds.

R.C. § 3937.182
No Insurance for Punitive Damages

Motor vehicle policies cannot insure against punitive damages.

R.C. § 4123.741
Fellow Employee Tort Immunity

An employee may not bring suit against an employer or fellow employee for injuries sustained as a result of the negligence of the employer or fellow employee.

The injury must have occurred within the scope and course of employment and be compensable under Workers' Compensation laws.

The statutory immunity does not apply to intentional torts.

R.C. § 4399.18
Liquor Liability Claims

This statute limits the scope of claims against a tavern due to actions of an intoxicated person resulting in injury to a third party.

R.C. § 4513.263
Seatbelt Defense

This statute became effective April 2005. A defendant may now interject evidence the plaintiff failed to wear a seatbelt. This evidence is not admissible for the purposes of establishing liability but can be utilized to establish a plaintiff's injuries would not have occurred or not have been as severe, had a seatbelt been worn.

6. Insurance Fraud

R.C. § 2913.47(B)(1)
Presenting Fraudulent Claims

A person commits insurance fraud if, while acting with purpose to defraud or knowing the person is facilitating a fraud, the person presents or causes to be presented any written or oral statement that is part or in support of an application for insurance or a claim for a benefit under a policy of insurance, knowing the statement, in whole or in part, is false or deceptive.

R.C. § 2913.47(B)(2)
Fraud in the Application or Claim for Insurance

It is illegal to assist, aid, abet, solicit, procure, or conspire with another to prepare or make any written or oral statement intended to be presented to an insurer as part or in support of an application for insurance or a claim for a benefit under a policy of insurance, knowing the statement, in whole or in part, is false or deceptive.

R.C. § 2913.47(C)
Penalties

First Degree Misdemeanor—Fraudulent claims in an amount less than $999.99.

Fifth Degree Felony—Fraudulent claims between $1,000.00 and $7,499.99.

Fourth Degree Felony—Fraudulent claims between $7,500.00 and $149,999.99.

Third Degree Felony—Fraudulent claims of $150,000.00 or more.

R.C. § 3904.01(T) and § 3904.03
Pretext Interviews

A "pretext interview," as defined in R.C. § 3904.01(T), is an interview whereby a person, in an attempt to obtain information about a natural person, performs one or more of the following:

(1) Pretends to be someone else;

(2) Pretends to represent another entity;

(3) Misrepresents the true purpose of the interview; and/or

(4) Refuses to identify himself/herself.

An insurer is generally prohibited from using pretext interviews to obtain information in connection with an insurance transaction; however, a pretext interview may be undertaken to obtain information for the purpose of investigating suspected criminal activity, fraud, material misrepresentation, or a material non-disclosure in connection with an insurance claim.

R.C. § 3904.13

Disclosure of Personal or Privileged Information by an Insurance Carrier

An insurer is prohibited from disclosing any personal or privileged information about an individual collected or received in connection with an insurance transaction, unless the disclosure is necessary for detecting or preventing criminal activity, fraud, material misrepresentation, or a material non-disclosure in connection with an insurance action.

Disclosed information must be limited to that which is reasonably necessary to detect or prevent criminal activity, fraud, material misrepresentation, or a material non-disclosure in connection with insurance transactions.

When the above conditions are met, disclosure may be made to law enforcement or other governmental agencies to protect the interest of the insurer in preventing and/or prosecuting fraudulent claims or if the insurer reasonably believes illegal activities have already been conducted by the individual.

R.C. § 3911.06

False Answer in Application for Insurance

An insurer is prohibited from denying recovery under a policy of insurance on the basis the applicant gave false answers in his application, unless it is proved the answer was willfully false, fraudulently made, material, and induced the company to issue the policy.

The agent or insurance company must have no prior knowledge of the application's falsity or fraudulent nature prior to issuing the policy of insurance.

R.C. § 3929.87

Time for Determination in Arson Investigation

The Fire Marshall has ninety (90) days after a fire loss in excess of $5,000.00 to determine whether the loss was caused by arson.

R.C. § 3937.42 and § 3937.99

Exchange of Information With Law Enforcement and Prosecuting Agencies

An insurer has a legal obligation to notify law enforcement authorities when it has reason to suspect its insured has submitted a fraudulent motor vehicle claim.

Failure to notify the proper authorities constitutes a fourth degree misdemeanor.

R.C. § 3999.21

Insurance Fraud Warnings

All application and claim forms issued by an insurer must contain the following warning: *Any person who, with intent to defraud or knowing he is facilitating a fraud against an insurer, submits an application or files a claim containing a false or deceptive statement is guilty of insurance fraud.*

Failure to include the warning is not a valid defense for insurance fraud.

R.C. § 3999.31

Immunity for Providing or Receiving Information Relating to Suspected Fraudulent Insurance Acts

No person is subject to liability for libel or slander by furnishing information to the Superintendent of Insurance relating to suspected fraudulent insurance acts. This immunity extends to any such information provided to any law enforcement official and any other person involved in the detection or prevention of fraudulent insurance acts.

R.C. § 3999.41

Anti-Fraud Programs

Every insurer is now required to adopt a written anti-fraud program. This program must include procedures for detecting insurance fraud.

Additionally, this program is to identify the person(s) responsible for the anti-fraud program.

Those not yet engaged in the business of insurance must submit a written plan within ninety (90) days after beginning to engage in the business of selling insurance.

R.C. § 3999.42

Notice to Department of Insurance of Suspected Fraud

Requires an insurer to notify the Ohio Department of Insurance whenever it suspects insurance fraud (as established in the Theft Fraud Law under R.C. § 3917.47) involving a claim of $1,000.00 or more.

B. OHIO STATUTES OF LIMITATIONS

ONE YEAR

Claim Type/Section	Statute Period
Assault and Battery R.C. § 2305.111	One year from the date of assault or battery. If the identity of the person committing the assault or battery is unknown, the statute of limitations begins on the date plaintiff either learns the identity of the person or should have learned the identity of the person, whichever comes first.
Medical Malpractice R.C. § 2305.113	One year from the date of the malpractice incident. If the act of medical malpractice is not discoverable within one year, the plaintiff has one year from the date plaintiff knew or should have known of the malpractice, not to exceed four years from the date of malpractice.
Libel, Slander, Defamation R.C. § 2305.11	One year from the publication of the defamatory act.

TWO YEARS

Claim Type/Section	Statute Period
Bodily Injury Due to Negligence R.C. § 2305.10	Two years from the date of incident.
Wrongful Death R.C. § 2125.02	Two years from the date of death.
Personal Property Damage Due to Negligence R.C. § 2305.10	Two years from the date of incident.
Product Liability Claims R.C. § 2305.10	Two years from the date of injury.

THREE YEARS

Claim Type/Section	Statute Period
UM/UIM Claims R.C. § 3937.18	Three years from the date of the accident. If the wrongdoer's insurer becomes insolvent, then the plaintiff has one year from the date of insolvency to make the UM/UIM claim, even if it is more than three years after the accident.

FOUR YEARS

Claim Type/Section	Statute Period
Intentional Infliction of Emotional Distress R.C. § 2305.09	Four years from the date of incident.
Damage to Real Estate R.C. § 2305.09	Four years from the date the damage occurred.
Fraud R.C. § 2305.09	Four years from the alleged act of fraud.
Breach of Covenant to Provide Adequate Insurance R.C. § 2305.09	Four years from the date inadequate insurance is discovered.
Tort of Bad Faith R.C. § 2305.09	Four years from the alleged act of bad faith.
Torts, Rights not Otherwise Enumerated R.C. § 2305.09	Four years after the cause thereof accrued.

Claim Type/Section	Statute Period
Statutorily Created Actions R.C. § 2305.07	A liability created by statute, other than forfeiture or penalty, must be brought within six years of the date the claim arose.
Breach of Contracts Not in Writing R.C. § 2305.07	Six years from the date plaintiff's claim first arose.
Breach of Contracts in Writing R.C. § 2305.06	Amended by 2012 Ohio Senate Bill 224 to reduce the statute of limitations period for actions based upon a breach of a written contract to eight (8) years. The new law shortens the period within which a lawsuit may be brought for breach of contract actions accruing both before and after the effective date of September 28, 2012. For claims that accrued prior to September 28, 2012, the limitations period is the earlier of: eight years from September 28, 2012; or the expiration of the limitations period in effect prior to the enacted of 2012 SB 224, which is 15 years from the date of the breach.
Minor's Claims - Claims of Incompetent Persons R.C. § 2305.16	The limitation period for any minor's claim does not begin until the minor reaches age 18. If a plaintiff is incompetent when injured, the limitation period does not begin until plaintiff is found competent.
Appeals R.C. § 2505.07	Unless otherwise provided by law, 30 days after the entry of the judgment or appealable order, whichever comes last. In a civil case, 30 days after service of notice of judgment and its entry.

C. SIGNIFICANT OHIO COURT DECISIONS

1. Supreme Court Decisions

a) Insurance Coverage Decisions

Ohio N. Univ. v. Charles Constr. Servs., Inc., Slip Opinion No. 2018-Ohio-4057
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2018/2018-Ohio-4057.pdf

A Subcontractor's Faulty Work Does Not Meet the Definition of an "Occurrence" Under a General Contractor's CGL Policy

The Ohio Supreme Court extended its prior rationale in *Westfield Ins. Co. v. Custom Agri Sys., Inc.*, 133 Ohio St.3d 476 (2012), in which it previously held that property damage caused by a contractor's own faulty workmanship does not involve an "occurrence" defined as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." Ohio lower courts had been recognizing an exception, treating faulty subcontractor work as constituting an occurrence with respect to claims against the general contractor. In this case, however, the Supreme Court of Ohio extended the rationale of *Custom Agri* and determined a subcontractor's faulty work also is not considered an "occurrence" under a CGL policy.

b) Governmental Immunity Decisions

Pelletier v. Campbell, 153 Ohio St.3d 611, 2018-Ohio-2121
http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2018/2018-Ohio-2121.pdf

A City Has No Obligation to Remove Foliage That is Not on a Stop Sign

Plaintiff was injured when she entered an intersection and collided with another vehicle, and brought a personal injury action against the city and other parties. Plaintiff alleged that their failure to maintain the grassy area between the street and sidewalk known as the "devil strip" caused overgrown foliage to block the stop sign from her view. The court found that the stop sign was in repair because it was in good or sound condition and because the foliage was not on the stop sign. Therefore, the city had no obligation to remove the foliage and is immune from liability under R.C. 2744.02(B)(3). The court reasoned that because foliage cannot be removed from a stop sign if it is not on the stop sign, the exception to governmental immunity does not apply.

c) Other Significant Decisions

LGR Realty, Inc. v. Frank &London Ins. Agency, 152 Ohio St.3d 517, 2018-Ohio-334
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2018/2018-Ohio-334.pdf

Delayed-Damage Rule Does Not Apply to Causes of Actions Alleging Negligent Procurement or Negligent Misrepresentations of Insurance Policies When the Policy Language is Clear

Plaintiff, a real estate company, brought a negligence action against defendant, a commercial insurance agency, alleging that the defendant failed to secure the appropriate liability policy to protect it from a lawsuit and that defendant misrepresented that the policy would cover the lawsuit. Defendant argued that plaintiff's claim was time barred by statute of limitations in R.C. 2305.09.

Defendant reasoned that the cause of action accrued on the date the policy went into effect. Plaintiff argued that under the delayed-damage rule, its cause of action did not accrue until it suffered an "injury", which would have been the date the insurer denied plaintiff's claim. The court held that the statute of limitations period began to run when the insurance policy was issued. Additionally, the Court ruled, the delayed-damage rule does not apply to claims of negligent procurement or negligent misrepresentation when the policy at issue specifically excludes coverage.

Schwartz v. Honeywell Internatl., Inc., 153 Ohio St.3d 175, 2018-Ohio-474
http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2018/2018-Ohio-474.pdf

Theory of Cumulative Exposure to Various Asbestos-Containing Products is Insufficient to Prove that a Specific Product is a Substantial Factor in Causing an Asbestos-Related Disease

Plaintiff, as executor of his wife's estate, brought a products liability action against a defendant manufacturer alleging that his wife developed mesothelioma and died from exposure to asbestos dust from her father's periodic installation of defendant's brakes. The court held that defendant's motion for summary judgment should have been granted because plaintiff's claim of cumulative exposure did not meet the statutory requirement for an individualized finding of substantial causation by each defendant under R.C. 2307.96. The court reasoned that a theory of causation based only on a plaintiff's cumulative exposure to various asbestos-containing products is insufficient to demonstrate that exposure to asbestos from a particular defendant's product was a substantial factor in causing the plaintiff's asbestos-related disease.

Toledo v. State, 154 Ohio St.3d 41, 2018-Ohio-2358
http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2018/2018-Ohio-2358.pdf

Separation of Powers Doctrine Does Not Allow a Court to Enjoin the Legislature From Enacting New Laws, Unless Those New Laws are Alleged to be Unconstitutional

After finding statutes regulating local governments' use of traffic cameras unconstitutional, the trial court held the general assembly in contempt for passing new regulations that would withhold state funds from municipalities unless they complied with the new statutes. As a penalty for the contempt the trial court enjoined the state from enforcing the new laws. The Supreme Court held that in Ohio a statute cannot be invalidated or enjoined unless it is unconstitutional. The parties had not raised argument as to the constitutionality of the new laws in the trial court, and therefore, because of the separation of powers doctrine, the trial court did not have the authority to enjoin the state from enforcing the new statutes.

Portee v. Cleveland Clinic Found., Slip Opinion No. 2018-Ohio-3263
http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2018/2018-Ohio-3263.pdf

Ohio Saving Statute Does Not Apply to Actions Previously Commenced in Another State Court or in a Federal Court Located in Another State

Plaintiff filed a medical negligence claim against defendant in a federal court in Indiana. The federal court dismissed the case, without prejudice, finding that the court lacked personal jurisdiction over defendants. Plaintiff refiled the action in Ohio asserting that the claim was not barred by statute of limitations because of the Ohio Saving Statute. The Ohio Supreme Court held that if an action is commenced in a state or federal court, outside the state of Ohio, and fails otherwise than on the merits and the statute of limitations allowing for commencement of the

action has expired, the Ohio Saving Statute does not apply. The decision clarifies that the Ohio Saving Statute can only be used where the first action is commenced in the state of Ohio.

2. Appellate Court Decisions

a) Insurance Coverage Decisions

GrafTech Internatl., Ltd. v. Pacific Emps. Ins. Co., 2017-Ohio-9271 (8th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2017/2017-Ohio-9271.pdf

The Facts as Alleged in a Complaint Determine an Insurer's Duty to Defend

An insured manufacturer brought action against its liability insurer for declaratory judgment claiming the insurer had a duty to defend against workers' claims of injury from exposure to coal-tar pitch from the product supplied by the insured to the workplace. The court held that the pollution exclusion in the insurance policy applied. The court reasoned that the workers' complaints alleged that insured's products had the effect of making the environment impure, harmful, or dangerous and thus constituted "traditional" environmental pollution falling within the exclusion. Since an insurer's duty to defend is determined by the facts as alleged, the court affirmed that the insurer had no duty to defend.

Orthopedic & Neurological Consultants, Inc. v. Cincinnati Ins. Group, 2018-Ohio-185 (10th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/10/2018/2018-Ohio-185.pdf

Mere Reference to an Employment Contract in a Lawsuit Does Not Trigger Coverage Under an Employment Practices Liability Policy

Insured, a corporate entity in the business of heath care, brought an action for indemnification and duty to defend against insurer under an employment practices liability coverage policy. Insured claimed insurer's duties arose from another action in which insured's shareholders and real estate partners claimed that insured violated fiduciary and contractual obligations. The appellate court affirmed, granting the insurer's motion for summary judgement because the underlying claim by the insured's shareholders and real estate partners did not allege a violation of an employment agreement, and therefore was not covered by the employment practices liability policy.

Nationwide Mut. Fire Ins. Co. v. Pusser, 2018-Ohio-2781 (7th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/7/2018/2018-Ohio-2781.pdf

Policy Must Contain Clear Warning that a Misstatement as to Warranty About Drivers in Household Will Render the Policy Void

An automobile insurer filed a declaratory judgment action to determine whether it owed coverage to benefit the estate of a victim of a motor vehicle accident where the insured did not list the driver as a household member of driving age on their insurance application. The court held the policy did not clearly state a misstatement by an insured would render the policy void *ab initio*, and because the insurer failed to declare the policy void and return insured's premiums, the insurance policy was enforceable in favor of the unscheduled driver.

H.P. Mfg. Co., Inc. v. Westfield Ins. Co., 2018-Ohio-2849 (8th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2018/2018-Ohio-2849.pdf

Insurance Company May Defend Insured Before a Final Determination of Underlying Employer Intentional Tort Action

An insured manufacturer brought a declaratory judgment action to establish coverage for indemnity and defense for an employee's judgment on an employer intentional tort claim. The insurer defended the insured under reservation of rights. The appellate court found that the commercial liability policy at issue excluded coverage for bodily injury intentionally caused or aggravated by the insured and the insurer fulfilled its duty to defend the insured in the underlying intentional tort action. The court reasoned that a policy excluding coverage for bodily injury intentionally caused by the insured does not require the insurer to indemnify the insured. Because the plaintiff was found liable for an intentional tort, there was no duty to pay the damages for the bodily injury intentionally caused by the plaintiff. The court found that under a policy that excludes coverage for bodily injury intentionally caused by an insured, a final determination by a judge or jury is not required before the insurer can refuse to defend a claim alleging an employer intentional tort.

Allstate Ins. Co. v. Bowman, 2018-Ohio-4171 (3rd Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/3/2018/2018-Ohio-4171.pdf

Use of Motor Vehicle Exclusion in a Homeowner's Policy Precludes Coverage When Insured Supplies Intoxicants to Another Person who then Operates a Vehicle and Causes Harm

An insured under a homeowner's policy suppled drugs to his friend while at the insured's home. While allegedly under the influence of the drugs, the friend was involved in an auto accident that seriously injured one person and killed another. In construing the coverage under the insured's homeowner's policy, the trial court and the appellate court determined the motor vehicle exclusion was unambiguous and the insurer was not obligated to defend the insured. Additionally, the appellate court noted that other jurisdictions are in agreement with motor vehicle exceptions when the facts involve the impairment of a third party at an insured's home. The court noted that risks associated with motor vehicle accidents are not normally risks associated with home or property ownership. Therefore, the motor vehicle exception to the homeowner's policy precludes coverage when an insured supplies intoxicants to someone that is later involved in a car accident.

b) UM/UIM Decisions

Herman v. Sema, 2018-Ohio-281 (8th Dist.)
https://www.supremecourt.ohio.gov/rod/docs/pdf/8/2018/2018-Ohio-281.pdf

A Business Insurance Policy Does Not Cover Bodily Injuries Incurred While Working Outside the Course and Scope of Employment

Plaintiff, owner of a landscaping business, had an auto insurance policy covering plaintiff's vehicle for both personal and business use. Plaintiff was in an accident while employed by the Ohio Department of Transportation and while using an ODOT vehicle. Nevertheless, plaintiff filed an uninsured motorist claim with his insurer under the business auto insurance policy. Plaintiff argued that the policy did not contain specific language restricting coverage to the scope of employment. The court found there to be no coverage, holding that since a business was named on the policy as

the insured, the coverage only covers loss within the course and scope of employment, and did not cover Plaintiff while working for ODOT.

Hale v. State Farm Mut'l Ins. Co., 2018-Ohio-3035 (5th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/5/2018/2018-Ohio-3035.pdf

Summary Judgment is Not Proper When a Driver's Negligence Causes a Rapid Succession Accident and Insured's Potential Negligence May Have Caused a Break in the Causal Chain

An motorist filed suit against his UM carrier seeking uninsured motorist coverage after a grill fell out of the bed of an uninsured pickup truck into the road, causing the insured to stop, and in turn to be hit from behind by another motorist. The insured's UM carrier conceded negligence on part of the uninsured motorist, who fled the scene, but also argued its insured was negligent for failing to adhere to Ohio's assured clear distance statute. Additionally, the insurer argued that the ability of a following driver to stop coupled with insured's negligence broke the chain of causation traceable to the uninsured absconding driver. The appellate court found that summary judgment for the UM carrier was in error because reasonable minds could differ as to whether the following driver's ability to stop coupled with the insured's potential negligence broke the chain of causation implicating the uninsured motorist.

c) Employment Decisions

Roty v. Batelle Mem. Inst., 2017-Ohio-9125 (10th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/10/2017/2017-Ohio-9125.pdf

Statistics in a Disparate Impact Case are Discoverable and Relevant to Show a Disparate Impact

Older employees filed suit against employer and specific members of management for age discrimination stemming from employees' terminations during a period in which employer was reducing their workforce. The employees moved to compel the employer to produce discovery relating to the statistics of ages and positions of those included and not included in the reduction of the work force. The trial court denied the employees' motion based on a finding that each determination was made at a business unit level and any statistics on the age of the reduced workforce were not discoverable as irrelevant. The appellate court reversed, finding the trial court incorrectly decided that the employer's organization-wide statistics were irrelevant without first evaluating the information. The court held that where a disparate impact claim is alleged in regard to a company-wide reduction in force, a statistical analysis is likely to lead to relevant evidence that could help either the employee or the employer and therefore should be discoverable.

d) Premises Liability Decisions

Thayer v. B.L. Bldg. & Remodeling, L.L.C., 2018-Ohio-1197 (8th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2018/2018-Ohio-1197.pdf

Open and Obvious Doctrine Does Not Relieve an Independent Contractor of a Duty of Care, but the Open and Obvious Nature of the Hazard may be Relevant to Determine Breach of Duty

Plaintiff, a nurse, sued an independent contractor, for negligence after a trip and fall accident. While at work, plaintiff went to a kitchenette area that was under construction, tripped on a piece of wood, and fell through a partially constructed window opening. The appellate court found that

the defendant independent contractor owed a duty of ordinary care to plaintiff, but the open and obvious nature of the hazard may still be relevant in determining whether a duty of care was breached. The court held that there was a genuine issue of material fact as to whether defendant breached its duty of ordinary care and whether plaintiff was contributorily negligent in failing to observe and avoid the hazard.

Armstrong v. Lakes Golf & Country Club, Inc., 2018-Ohio-1018 (5th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/5/2018/2018-Ohio-1018.pdf

Business Owner Owes No Duty to Protect an Invitee from Dangers that are Known or are Obvious and Apparent

A guest sued a country club, for injuries he sustained when he stepped into a valve box between the parking lot and a patio bar at the club. The appellate court affirmed summary judgment for defendant. The court reasoned that under the open and obvious doctrine the business owner owed no duty to protect an invitee from dangers that are known to the invitee or are so obvious and apparent that invitee may be reasonably expected to discover the danger and protect themselves. The court concluded that the valve box was open and obvious and that defendant owed no duty to plaintiff.

Grady v. Karvo, Inc., 2018-Ohio-3053 (8th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/8/2018/2018-Ohio-3053.pdf

A Party Must be Shown to Have Exclusive Management and Control in Order to be Liable Under *Res Ipsa Loquitur*

Plaintiff brought a negligence action after tripping on a protruding bolt from a device installed in the sidewalk by defendant-subcontractor. The appellate court affirmed summary judgment for defendants because plaintiff failed to prove that the defendants proximately caused his injury. The court reasoned that the evidence did not establish defendant's responsibility for the protruding bolt or that they knew of the condition and failed to rectify it. Further, the court rejected plaintiff's argument for *res ipsa loquitur* because the evidence failed to show that the device installed in the sidewalk was under the exclusive management and control of defendant after installation.

Nicoll v. Centerville City Schools, 2018-Ohio-36 (2nd Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/2/2018/2018-Ohio-36.pdf

Attendant Circumstances Must Create a Greater Than Normal and Substantial Risk of Injury in Order to Negate the Open and Obvious Doctrine

In a slip and fall negligence action against a school district, the appellate court affirmed summary judgment for defendant. Plaintiff claimed her foot became stuck in a crack and caused her to break her ankle. Defendant moved for summary judgment claiming that the hazard was "open and obvious." Plaintiff argued that whether the hazard was open and obvious was a matter for the jury and that attendant circumstances – the need to focus on her children and the other people walking in to the school – diverted her attention from the open and obvious hazard. In affirming the summary judgment for the school district, the court concluded that the defect was open and obvious and that no attendant circumstances existed. The court explained that although plaintiff is not required to be constantly looking down while walking, the hazard posed by the curb and sidewalk would have been discoverable by a reasonable person. Additionally, none of the evidence

suggested that the crowded environment or the behavior of her children created a greater than normal risk requiring the application of the attendant circumstances doctrine.

Norris v. Riesbeck Food Markets, Inc., 2018-Ohio-54 (7th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/7/2018/2018-Ohio-54.pdf

A Hazard Must be Objectively Open and Obvious in Order to Support a Motion for Summary Judgment

Plaintiff slipped and fell in a grocery store. The defendant store claimed its employee had placed safety cones around the area after mopping, and before plaintiff fell. Plaintiff alleged that after turning from the center aisle to the rear aisle he did not see any hazard signs and only noticed the wet floor after he was already standing on the wet area. Plaintiff also claims that he was distracted because he had to try and avoid another shopper while turning. The appellate court reversed the granting of summary judgment in favor of defendant. The court reasoned that there was a genuine issue of material fact as to whether the wet floor hazard was objectively open and obvious to a shopper making a turn from a center aisle into the rear aisle. Additionally the court reasoned that viewing the evidence in plaintiff's favor, there remained a genuine issue of whether defendant's warning was adequate enough.

Jackson v. Akron Summit Cty. Library, 2017-Ohio-9298 (9th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/9/2017/2017-Ohio-9298.pdf

Open and Obvious Doctrine is a Complete Bar on Negligence Claims

Plaintiff brought suit against the public library for injuries she sustained after tripping and falling on the concrete outside of the library. The appellate court affirmed summary judgment for the library because the open and obvious nature of the hazard barred any negligence claims. The court reasoned that the height differential between the concrete slabs was observable and plaintiff was unable to put forth enough evidence to prove that the attendant circumstances distracted her and enhanced the danger of the fall.

e) Governmental Immunity Decisions

Thorton v. Lemon, 2018-Ohio-3150 (5th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/5/2018/2018-Ohio-3150.pdf

Mere Negligence Not Enough to Overcome Governmental Immunity

In a negligence action arising from the death of a pedestrian while she was crossing an intersection, summary judgment for the city was proper because the city was immune under R.C. 2744. The court determined that the timing of pedestrian signals would fall within the purview of a governmental function and therefore the city was entitled to blanket immunity unless an exception to immunity applied. The court found that the timing of the pedestrian signal at issue was not set with a malicious purpose, in bad faith, or in a wanton or reckless manner. The court found that allegations sounding exclusively in negligence and containing no allegations or evidence of malicious behavior, bad faith, or wanton or reckless behavior, did not create an issue of material fact and would not be sufficient to overcome immunity.

Thomas v. Lorain Metro. Hous. Auth., 2018-Ohio-2997 (9th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/9/2018/2018-Ohio-2997.pdf

Summary Judgment is Proper When a Political Subdivision Engages in a Proprietary Function and When Political Subdivision Fails to Argue Immunity under R.C. 2744.02(B)(2)

Plaintiff brought suit after he fell into an open water meter "crock" on defendant housing authority's property. The appellate court affirmed the denial of defendant's motion for summary judgment claiming governmental immunity. The court found that defendant conceded that it was engaged in a proprietary function pursuant to R.C. 2744.02(B)(2) because the water meter crock was related to the operation of the sewer system. Furthermore, defendant failed to challenge trial court's determination that the exception under R.C 2744.02(B)(2) applied.

Bartchak v. Columbia Twp., 2018-Ohio-2991 (9th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/9/2018/2018-Ohio-2991.pdf

Township is Immune from Liability for Death of Teenagers Who Intended to Use Intersection of Railroad Tracks and Roadway to Make Vehicle Go Airborne

Four teenagers died after using a railroad crossing to make their car go airborne, veering off the road after landing, and colliding with a tree. The parents of three of the teenagers brought a wrongful death action against the two bordering townships. The townships moved for summary judgment arguing sovereign political subdivision immunity under R.C. 2744. The trial court denied summary judgment in part as to the parents' claims that the townships failed to remove obstructions from the road, failed to keep the road in repair, and failed to have mandatory road makings. The appellate court found that the trial court erred by denying townships' motions. The appellate court reasoned that the intersection of the tracks and roadway did not constitute an obstruction, the slope and the unevenness of the road did not make the road "out of repair", and the teenagers would have ignored mandatory traffic control devices so the absence of mandatory traffic control devices did not contribute to the accident.

McDonald v. Lacy, 2018-Ohio-2753 (2nd Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/2/2018/2018-Ohio-2753.pdf

City Immune Under R.C. 2744 for Injuries Sustained by Motorist When Debris from City's Median and Monument Struck Motorist

A motorist sued for personal injury from flying debris generated by another motorist after hitting the median and a monument erected by the city. The appellate court affirmed summary judgment for city based on political subdivision immunity under R.C. 2744. The court found that the construction of the median and monument was part of the city's entryway enhancement project which is a governmental function and since there is no evidence that the city's conduct was wanton or reckless, the city was immune from liability.

f) Other Significant Decisions

McBride v. Butler, 2018-Ohio-1251 (3rd Dist.)
https://www.supremecourt.ohio.gov/rod/docs/pdf/3/2018/2018-Ohio-1251.pdf

Inherent and Foreseeable Risks of a Recreational Activity Makes Assumption of the Risk Doctrine Applicable

Plaintiff brought suit against defendants seeking recovery after being ejected from an all-terrain vehicle ("ATV"). The trial court granted the defendant insurance company's motion for summary judgment because the plaintiff assumed the inherent risks associated with the recreational activity of riding an ATV. On appeal, plaintiff argued that the assumption of risk doctrine did not apply because a genuine issue of fact remained as to whether plaintiff was truly engaged in a recreational activity. Plaintiff argued that she was merely using the ATV as transportation from one home to another on a public road. The appellate court held that the trial court did not err by granting the insurance company's summary judgment. The court concluded that losing control and flipping an ATV is a foreseeable and customary risk associated with riding an ATV.

Bolin v. Allstate Property &Cas. Ins. Co., 2018-Ohio-3396 (2nd Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/2/2018/2018-Ohio-3396.pdf

Negligent Performance of a Contract is Not a Valid Claim

Plaintiffs brought a declaratory judgment, breach of contract, negligent fulfillment of contractual duties, bad faith, and punitive damages action against insurer for denying coverage on personal and real property that was damaged by a fire. The appellate court found the trial court appropriately dismissed a cause of action for "negligent" fulfillment of contractual duties, because that is not a recognized tort claim.

Link v. Wayne Ins. Group, 2018-Ohio-3529 (3rd Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/3/2018/2018-Ohio-3529.pdf

Failing to Disclose Pets on an Insurance Application Renders a Policy Null and Void as a Matter of Law

Plaintiff was attacked by two dogs that resided with defendant's insured. Upon learning of the dog attack, defendant sent the insured a cancellation notice on the basis that the insured made a material misrepresentation on her insurance application by stating that she did not have any dogs on the premises. Plaintiffs, suing as third-party beneficiaries to insured's policy, appealed the trial court's determination that the defendant was entitled to summary judgment. The appellate court concluded that the plaintiffs were not, as a matter of law, third-party beneficiaries to the insured's insurance policy with the defendant. Further, because of the material misrepresentation the insurance policy was declared null and void as a matter of law and the defendant had no duty to defend or indemnify the insured.

Peterson v. Natl. Sec. Assocs., Inc., 2018-Ohio-2905 (10th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/10/2018/2018-Ohio-2905.pdf

Primary Assumption of Risk Might Not Apply if a Participant's Risk of Injury is Elevated Beyond the Ordinary Risk Associated With an Activity

Plaintiff brought suit after he was injured during explosives training at the Columbus bomb range. At the time of injury, plaintiff was a state trooper and a member of the special response team. Being a part of the special response team involved being trained in explosives. Defendants asserted that primary assumption of risk barred plaintiff's negligence claims. The trial court granted defendants' motion for summary judgment holding that detonating explosives is a dangerous activity and plaintiff was aware of the risk of injury. Therefore, primary assumption of risk completely barred any negligence claim. The appellate court reversed reasoning that although explosive training carries certain inherent risks, there is a genuine issue of material fact as to whether the participants were properly instructed and whether the inherent risks were elevated beyond the ordinary risks of explosive training. Therefore, there was an issue of fact to be resolved by the trial court to determine whether primary assumption of risk would be applicable.

Cintas Corp. v. Great Lakes Best One Tire & Serv., L.L.C., 2018-Ohio-2456 (11th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/11/2018/2018-Ohio-2456.pdf

Successor Corporation Will be Liable for Selling Corporation's Liability if Successor Corporation Expressly or Impliedly Agrees

Defendant successor corporation appealed a trial court finding that when it purchased the assets of a predecessor corporation, it assumed the liabilities of the predecessor including contractual liabilities to plaintiff Cintas. The appellate court found no reversible error in enforcing Cintas's contract against the defendant successor. Traditionally a successor corporation is not liable for the debts and obligations of the selling corporation. However, the purchase agreement between the defendant and the selling corporation, notwithstanding its being an "asset purchase," expressly stated that defendant assumed the selling corporation's liabilities, including the contractual liability toward plaintiff Cintas.

Block v. Battaglia, 2018-Ohio-4380 (11th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/11/2018/2018-Ohio-4380.pdf

Motion for Relief from Judgment Cannot be Used as a Substitute for an Appeal

Defendant homeowner failed to comply with discovery requests in a dispute with a neighbor over the property line, as well as over alleged civil assault. As a result, the court granted default judgment to the plaintiff. The defendant appealed, but the appeal was dismissed as untimely. The defendant then filed a Civil Rule 60(B) motion. However, all the issues the defendant presented under the 60(B) motion were present during the initial appeal. The court determined *res judicata* barred the 60(B) motion because while not a substitute for appeal, and must present issues which could not be considered in an appeal of the underlying judgment.

3. Federal Court Decision

Marshall Garber v. Heriberto Menendez, M.D., 888 F.3d 839 (6th Cir. 2018)
http://www.opn.ca6.uscourts.gov/opinions.pdf/18a0082p-06.pdf

Ohio's Tolling of Statute of Limitations Does Not Violate the Dormant Commerce Clause

Plaintiff was a minor when defendant treated him for a fever, constipation, and back pain, after which plaintiff became a paraplegic. Minors in Ohio have one year to sue their doctors after they turn eighteen (18). When plaintiff tried to sue defendant in May 2017, the one year statute of limitations had run. However, Ohio also tolls the statute of limitations if the defendant leaves the state. Here, defendant retired to Florida before the one year statute of limitations had run. Defendant argued that the differential treatment of residents and non-residents violated the Dormant Commerce Clause of the United States Constitution. The Sixth Circuit Court of Appeals held that the Ohio statute draws no distinction based on residency and that the law applies equally to Ohio residents and non-Ohio residents. The court reasoned that many states offer benefits to their in-state residents and that if those residents move out of the state they lose that benefit. The defendant lost the benefit of the medical malpractice statute of limitations by moving out of the state. Therefore, the tolling of the statute of limitations did not violate the Dormant Commerce Clause, and the action was not barred.

Terry Martin, et al. v. Behr Dayton Thermal Prods., et al., 896 F.3d 405 (6th Cir. 2018)
http://www.opn.ca6.uscourts.gov/opinions.pdf/18a0139p-06.pdf

The Sixth Circuit Adopts a Broad View When Certifying Class Action Issues

Plaintiffs brought a toxic tort class action claiming that defendants contaminated the groundwater of a neighborhood. The district court denied plaintiffs' motion for certification as a class but did certify seven issues for class treatment under Rule 23. Defendants appealed. The court found that the district court properly certified the issues for class action because the issues could be answered once and in the same way to each plaintiff. Furthermore, the most efficient way to advance the litigation was to certify the issues class in order to promote economies of time, effort, expense and to promote uniformity in deciding the issues.

These cases were pending at the time this summary was printed. To confirm whether the Supreme Court has issued a decision in any of these cases, we invite you to visit our website at http://www.rolfeshenry.com.

III. THE COMMONWEALTH OF KENTUCKY

A. FREQUENTLY CITED KENTUCKY STATUTES

1. Automobile Insurance

K.R.S. § 304.20-020
Uninsured Vehicle Coverage; Insolvency of Insurer

No automobile insurance policy shall be issued unless it provides coverage for injuries caused by the owners or operators of uninsured motor vehicles. An insured shall have the right to reject such coverage in writing. The term "uninsured motor vehicle" shall be deemed to include an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability of its insured due to insolvency.

If an insurer becomes insolvent within one year after an accident, the insured's uninsured motorist coverage is protected against such insolvency. Further, nothing in the statute may prevent an insured from pursuing the more favorable terms and conditions provided in his/her policy than what is provided in the statute. The insurer required to pay under this provision is entitled to the settlement proceeds recoverable from the assets of the insolvent insurer, if any.

K.R.S § 304.39-010 - K.R.S. § 304.39-220
Personal Injury Protection / No-Fault Coverage

Unless specifically waived by the purchaser of automobile insurance, every purchaser in Kentucky is entitled to basic reparation payments to be paid without proof of fault for automobile accident injuries. The maximum amount of benefits to be paid out under the coverage is $10,000.00 per accident. The amount will be allocated to cover economic losses that are attributable to: medical expenses, work loss, replacement service loss, survivor's economic loss, and survivor's replacement service loss.

Once the limits of the no-fault coverage have been met, an injured party may pursue a third-party claim against the tortfeasor. The threshold requirements in order to pursue such a claim are that the damages either exceed $1,000.00, or that the injury sustained is a permanent disfigurement, a fracture to the bone, a compound, comminuted, displaced or compressed fracture, loss of a body member, permanent loss of bodily function, or death.

K.R.S. § 304.39-320
Underinsured Motorist Coverage

A tortfeasor's liability insurance is the primary coverage and the underinsured motorist coverage insurance is the secondary or excess coverage. Therefore, UIM coverage is payable only to the extent that judgment exceeds the tortfeasor's liability coverage. *Kentucky Farm Bureau Mut. Ins. Co. v. Rogers*, 179 S.W.3d 815, 818 (Ky. 2005).

(1) Every insurer shall make available upon request to its insureds underinsured motorist coverage.

(2) If an injured person agrees to settle a claim with the liability insurer and the settlement would not fully satisfy the claim for personal injuries so as to create an uninsured motorist claim, then written notice of the proposed settlement must be submitted by certified or registered mail to all underinsured motorist insurers that provide coverage.

(3) The underinsured motorist insurer then has a period of thirty (30) days to consent to the settlement or retention of subrogation rights.

(4) The underinsured motorist insurer is entitled to a credit against total damages in the amounts of the limits of the underinsured motorist liability policies in all cases. Nothing, however, including any payments or credits, reduces or affects the total amount of underinsured motorist coverage available to the injured party.

2. Negligence, Other Torts and Contribution

K.R.S. § 49.060

Legislative intent as to Sovereign Immunity in Negligence Claims

It is the intent of the General Assembly to preserve the sovereign immunity of the commonwealth, except in limited situations set forth in the statute. Except as specifically indicated otherwise, the commission shall have exclusive jurisdiction to hear claims for damages against the Commonwealth. This renumbered statute has been changed to allow multiple Commonwealth entities to assert immunity simultaneously and reflect the change in name of the "Board of Claims" to simply the "commission."

K.R.S. § 186.590

Minor's Negligence Imputed to Person Signing Application or Allowing Him to Drive

Any negligence of a minor under the age of eighteen (18), who has been licensed upon an application as provided by K.R.S. 186.470, will be imputed to the person who signs the application and they will be held jointly and severally liable for any damages caused by the minor's negligence. However, if the minor deposits or someone deposits on his behalf, a proof financial responsibility, the person who signed his application is not subject to liability. Motor vehicle owners who cause or knowingly permit a minor under age eighteen (18) to drive the vehicle on the highway, or who furnish a vehicle to the minor, will be jointly and severally liable for the damage caused by the minor.

K.R.S. § 405.025

Parent or Guardian Liable for Willful Damage to Property Caused by Minor

The parent or guardian of any minor, in his care and custody, against whom judgment has been rendered for the willful marking upon, defacing or damaging of any property, shall be liable for the payment of that judgment up to an amount not to exceed $2,500.00 and with cumulative damages not to exceed $10,000.

K.R.S. § 411.182

Comparative Negligence ("Allocation of fault in tort actions; award of damages; effect of release")

Under an action brought in tort, Kentucky apportions liability for a sustained injury in relation to each party's degree of fault. As between the parties, the jury is required determine how much at fault each party was, and then apportion damages accordingly (i.e. pure comparative negligence). Comparative negligence will not bar an entire recovery by the plaintiff, but will reduce the total amount of the plaintiff's award in proportion to their degree of fault. Parties can settle and discharge from liability in tort actions.

K.R.S. § 411.186

Assessment of Punitive Damages

In any civil action where claims for punitive damages are included, the jury, or judge if the jury trial has been waived, shall determine concurrently with all the other issues presented whether punitive damages may be assessed.

The trier of fact should consider the following factors when determining the amount of punitive damages to assess:

(1) The likelihood at the relevant time that serious harm would arise from the defendant's misconduct;

(2) The degree of the defendant's awareness of that likelihood;

(3) The profitability of the misconduct to the defendant;

(4) The duration of the misconduct and any concealment of it by the defendant; and

(5) Actions by the defendant to remedy the misconduct once it became known to the defendant.

K.R.S. § 411.190

Obligations of Owner to Persons Using Land for Recreation

An owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on the premises to persons entering for such purposes.

Nothing in this section limits in any way any liability which otherwise exists for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.

K.R.S. § 411.310

Presumptions in product liability actions

(1) There is a presumption that a product was not defective in product liability actions if the injury occurs more than five years after the date of sale to the first customer, or more than eight years after manufacture.

(2) The same presumption exists if the design, methods of manufacture and testing conform to the generally recognized and prevailing standards or the state-of-the-art in existence at the time the design was prepared and the product was manufactured.

K.R.S. § 413.241

Limitation on liability of licensed sellers or servers of intoxicating beverages; Liability of intoxicated person.

(1) The General Assembly finds and declares that the consumption of intoxicating beverages, rather than the serving, furnishing, or sale of such beverages, is the proximate cause of any injury, including death and property damage, inflicted by an intoxicated person upon himself or another person.

(2) Any other law to the contrary notwithstanding, no person holding a permit to serve intoxicating beverages shall be held liable to that person or any other person unless a reasonable person under the same or similar circumstances should know that the person served is already intoxicated at the time of serving.

(3) The intoxicated person shall be primarily liable with respect to injuries suffered by third persons.

(4) No protection exists for persons who cause consumption of alcoholic beverages by force or by falsely representing that a beverage contains no alcohol.

(5) This section shall not apply to civil actions filed prior to July 15, 1988.

3. Insurance Fraud

K.R.S. § 227.220

Duties of State Fire Marshal and Chief State Building Official Relating to Fire Loss (Only effective until January 1, 2019)

This provision details the State Fire Marshal's required actions and authorizations in the event of a fire loss. This provision also provides for the responsibility of the chief state building official.

K.R.S. § 227.250

Duty of Insurers to Report Losses from Fire, Lightning, Hazardous Materials, Flammable Liquids or Explosions

Insurers must report to the State Fire Marshal loss or damage caused by fire, lightning, hazardous materials, and flammable liquids or explosions that occur in or on property insured by the insurer in a manner prescribed by the State Fire Marshal. The State Fire Marshal may waive the reporting if, in his discretion, the losses are unimportant due to the small amount involved and to save time and expense.

K.R.S. § 227.260

Records of Fire Inspections, Investigations and Losses

State Fire Marshal shall keep a record of all fire inspections, investigations and fire losses occurring in this state and of facts concerning them. The records shall be public except for limited circumstances.

K.R.S. § 227.370

Inspection of Property by Fire Chief or Other Department Personnel - Inspection and Investigation Reports

Fire department is authorized to inspect all property for the purpose of ascertaining and causing to be corrected any conditions likely to cause fire loss, or determining the cause or origin of any fire loss, or discovering any violation of a law or ordinance relating to fire prevention and protection. A written report shall be made of the inspections.

K.R.S. § 304.12-230

Unfair Claims Settlement Practices

This statute imposes duties on insurers on both first-party and third-party insurance claims. Under the statute, claims are to be paid within thirty (30) days upon notice and proof of claim unless the insurer is able to demonstrate why the claim cannot or should not be paid. The statute imposes interest at an annual rate of twelve percent (12%) after the expiration of the thirty (30) day period. The statute also allows an insured to recover attorneys' fees for violations of this statute. However, this statute is limited by *Milby v. Liberty Life Assurance Company of Boston*, 102 F. Supp. 3d 922 (W.D. Ky. 2015), in which the court ruled that claims made under this statute are preempted when they are based on an ERISA-regulated plan.

K.R.S. § 304.14-100

Application as Evidence

If the insurer does not furnish a copy of the insurance application to the insured within thirty (30) days after the insurer has received written demand from the insured, then the application of insurance is not admissible in evidence in any action between the insured and the insurer that arises out of the policy. This provision does not apply to industrial life insurance policies.

K.R.S. § 304.14-110

Representations in Applications

All statements and descriptions in any application for an insurance policy will be deemed representations and not warranties. Misrepresentations, omissions, and incorrect statements will not prevent a recovery under the policy unless they are fraudulent, material to the acceptance of the risk or to the hazard assumed by the insurer, or if the insurer in good faith would not have issued the policy, issued it at a different premium rate, not have issued a policy in as a large amount, or would not have provided coverage for the hazard resulting in the loss if insurer had been informed of the true facts.

K.R.S. § 304.14-270

Forms for Proof of Loss Furnished

Upon written request by any person claiming to have a loss under any insurance contract, the insurer must provide forms of proof of loss to the insured. The insurer has no responsibility or liability for the completion of the proof of loss forms.

K.R.S. § 304.14-280
Claims Administration Not Waiver

Acknowledgment of the receipt of notice of loss or claim under the insurance policy, furnishing forms for reporting a loss or claim and receiving any such forms or proofs completed or uncompleted, investigating any loss or claim or engaging in negotiations for a possible settlement of a loss or claim, and making advance or partial payments under insurance policies, does not constitute a waiver of any provision of a policy or of any defense the insurer may assert.

K.R.S. § 304.20-160
Power of Authorized Agency to Require Insurer to Furnish Information Concerning Fire Loss

An authorized agency may require an insurer to release information or evidence in the insurer's possession deemed important to the investigation of a fire loss of suspicious origin. Such information may include, but is not limited to:

(1) Pertinent insurance policy information pertaining to such fire loss and any application for such a policy;

(2) Policy premium payment records;

(3) History of previous claims made by the insured;

(4) Material relating to such loss or potential loss.

Furthermore, when an insurer has reason to believe a fire loss may be of other than accidental cause, the insurer shall notify, in writing, an authorized agency.

Any insurer, or person acting in its behalf, or authorized agency who in good faith releases information in compliance with this section, shall not be held civilly or criminally liable.

K.R.S. § 304.47-060
Immunity for Cooperation with Law Enforcement

Under this statute an insurer is immune from civil liability if it notifies law enforcement authorities of suspected insurance fraud.

K.R.S. § 304.47-080
Insurers to Maintain Investigative Units

All insurers licensed in Kentucky must have a special investigative unit to investigate possible insurance fraud. The unit may be staffed either by employees of the insurer or individuals specifically contracted by the insurer to investigate.

4. Miscellaneous Statutes

K.R.S. § 304.1-090
"Principal Office" Defined

This statute defines "principal office" as the office from which the general affairs of the insurer are directed or managed.

K.R.S. § 304.14-060
Insurable Interest, Property

"Insurable interest" means any actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage or impairment. Contracts of insurance of property or of any interest in or arising from property are only enforceable for the benefit of those who have an insurable interest in the things insured at the time of the loss. This section does not apply to life, health or title insurance.

K.R.S. § 304.14-360
Construction of Policies

Every insurance contract will be construed according to the entirety of its terms and conditions as set forth in the policy, and as amplified, extended, or modified by any rider, endorsement, or application attached to and made a part of the policy.

K.R.S. § 304.14-380
Venue of Suits Against Insurers

Suits based on causes of action against an insurer upon an insurance contract must be brought in the county where the cause of action arose or in the county where the policy holder resides.

K.R.S. § 304.20-050
Arbitration Provision Not Binding

A provision agreeing to arbitrate any or all disputes contained in an automobile liability or motor vehicle liability insurance policy delivered, issued for delivery or renewed in Kentucky, is not binding upon the named insured or person claiming under him.

K.R.S. § 329A.070
Adjuster Licenses

The provisions of KRS 329A.010 to 329A.090 do not apply to:

(5) An insurance company, licensed insurance agent, staff or independent adjuster if authorized to do business in Kentucky, or an individual employed by an insurance company or licensed insurance agent to investigate suspected fraudulent insurance claims, but who does not adjust losses or determine claims payments, performing investigative duties limited to matters strictly pertaining to an insurance transaction; [referencing insurance adjusters].

K.R.S. § 342.690
Exclusiveness of Workers' Compensation Remedy

If an employer secures payments of Workers' Compensation for his employees, the liability of the employer shall be limited to such Workers' Compensation payments and shall be exclusive and in place of all other liability.

K.R.S. § 405.025

Parent or Guardian Liable for Willful Damage to Property Caused by Minor

The parent or guardian of any minor, in his care and custody, against whom judgment has been rendered for the willful marking upon, defacing or damaging of any property, shall be liable for the payment of that judgment up to an amount not to exceed $2,500.00 and not to exceed $10,000.00 in a cumulative amount. However, negligence may be imputed and a person may still be liable for damages exceeding this amount if the person gives the minor an operator's license to drive a motor vehicle and the minor causes such damages.

K.R.S. § 411.182

Allocation of Fault in Tort Actions - Award of Damages - Effect of Release

In tort actions when more than one party is at fault, the court will instruct the jury to answer interrogatories, and if no jury, will make findings indicating the amount of damages each claimant would be entitled if contributory fault is disregarded, and the percentage of total fault of all parties. In determining the percentage of fault, the trier of fact will consider the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed and the court will also determine the award of damages to each claimant in accordance with the findings and determine and state in the judgment each party's equitable share of the obligation to each claimant. A release, covenant not to sue, or other agreement between the claimant and a liable person, will discharge the liable person from all liability for contribution but will not discharge the liability of other liable persons unless it so provides and the claim of the releasing person against other persons will be reduced by the released persons' equitable share of the obligation.

K.R.S. § 411.184

Definitions - Punitive Damages - Proof of Punitive Damages

Punitive damages include exemplary damages and are damages other than compensatory and nominal damage. They are awarded to punish and to discourage the defendant and others from similar conduct in the future. The plaintiff must prove by clear and convincing evidence that the defendant acted toward the plaintiff with oppression, fraud, and malice. Punitive damages will not be assessed against a principal or employer for the act of an agent or employee unless they authorized, ratified, or should have anticipated the conduct. Punitive damages are not available for a breach of contract. Under *Williams v. Wilson*, 972 S.W.2d 260, 269 (Ky. 1998), the Supreme Court of Kentucky held that the definition of "malice" as provided in the statute is in violation with the jural rights doctrine and is therefore, unconstitutional. However, this case was treated negatively by *In re Air Crash at Lexington, Kentucky*, August 27, 2006, 5:06-CV-316-KSF, 2008 WL 2369785 (E.D. Ky. June 6, 2008).

K.R.S. § 413.120

Actions to be Brought Within Five (5) Years

The following actions shall be commenced within five (5) years after the cause of action accrued:

An action upon a contract not in writing, express or implied**.**

An action for personal injuries suffered by any person against the builder of a home or other improvements. This cause of action shall be deemed to accrue at the time of original occupancy of the improvements which the builder caused to be erected.


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B. KENTUCKY STATUTES OF LIMITATIONS

ONE YEAR

Claim Type/Section	Statute Period
Assault and Battery K.R.S. § 413.140(a)	One year from the date of assault and battery.
Bodily Injury Claims Other than from Automobile Accidents K.R.S. § 413.140(a)	One year from the date of injury. This statute applies to injuries caused by acts of negligence as well as those caused by intentional acts. This statute does not apply to bodily injuries stemming from automobile accidents.
Loss of Consortium K.R.S. § 413.140(a)	One year from the date of the incident.
Medical Malpractice K.R.S. § 413.140(e)	One year from the time the injury is first discovered or in the exercise of reasonable care should have been discovered. Any action must still be commenced within five years from the date the alleged act of negligence occurred.
Malicious Prosecution K.R.S. § 413.140(c)	One year from the date of the incident.
Libel, Defamation, or Slander K.R.S. § 413.140(d)	One year from the date of the incident.
Wrongful Death K.R.S. § 413.180(2)	If a person dies before the expiration of the applicable statute of limitations, the action may still be brought by their personal representative so long as it is commenced within one year of the appointment of the representative.
Product Liability K.R.S. § 413.140(a)	One year from the date of the bodily injury.

TWO YEARS

Claim Type/Section	Statute Period
Bodily Injuries from Automobile Accident K.R.S. § 304.39–230	Two years from the date of the accident or two years from the date of the last no-fault payment. Survivors and beneficiaries of a decedent have two years to make a claim for wrongful death.
Damage to Personal Property K.R.S. § 413.125	Two years from the date of injury or damage.

FOUR YEARS

Claim Type/Section	Statute Period
Product Liability K.R.S. §355.2-725	Four years from when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach if brought under a theory of breach of warranty.

FIVE YEARS

Claim Type/Section	Statute Period
Breach of Contracts Not in Writing K.R.S. §413.120(1)	Five years from the date the contract was breached.
Trespass on Real or Personal Property K.R.S. § 413.120(4)	Five years from the date of injury or damage.
Fraud K.R.S. § 413.120(11)	Five years from the date the fraud was discovered, but per K.R.S. § 413.130 no more than ten years after the date the fraud was perpetrated.
Intentional Infliction of Emotional Distress K.R.S. § 413.120	Five years from the date of the incident.
Bodily Injury Claims Against the Builder of a Home or a Person Making Improvements to a Home K.R.S. § 413.120(13)	This cause of action accrues at the time of original occupancy of the home, or occupancy after the improvements in question were made.
Statutory Claims K.R.S. § 413.120(2)	This applies to all claims for liability based upon a statute where no statute of limitations is provided by statute.
Bad Faith K.R.S. § 413.120(7)	Five years from the alleged act of bad faith, (when coverage is denied).

Claim Type/Section	Statute Period
Actions Upon Written Contracts(Pre-July 15, 2014) K.R.S. § 413.090	Fifteen years from the date of the breach.
Actions Upon Written Contract (Post-July 15, 2014) K.R.S. §413.160	Ten years from cause of action accruing.
Claims of Minors and Incompetents K.R.S. § 413.170	The statute of limitations does not begin to run until the minor reaches the age of majority or the incompetent plaintiff becomes competent.

OTHER

C. SIGNIFICANT KENTUCKY COURT DECISIONS

1. Supreme Court Decisions

a) Insurance Coverage Decisions

Am. Mining Ins. Co. v. Peters Farms, LLC, No. 2017-SC-000066 (Aug. 16, 2018)
http://opinions.kycourts.net/sc/2017-SC-000066-DG.pdf

Coverage – Meaning of "Accident"

An insured mining company mined coal from underneath a farmer's land while mistakenly believing the land belonged to a third party. The farmer filed suit, and sought payment from the mining company's liability carrier. The court held that the miner's mistaken belief was not a covered "accident" under the mining insurance policy because the mining company intended to mine the coal and its employees were under its complete control during the time of extraction. The court applied the "doctrine of fortuity" to analyze the mining company's intent and control, concluding the farmer had no right to recover under the "occurrence" provision of the insured's insurance policy because the miner's actions did not constitute an "accident" covered by the policy.

Martin/Elias Properties, LLC v. Acuity, No. 2016-SC-0000195 (April 26, 2018)
http://opinions.kycourts.net/sc/2016-SC-000195-dg.pdf

Coverage - Meaning of "Accident"

Plaintiff developer hired insured, a sub-contractor, to complete renovation work on the basement of a development property. The sub-contractor subsequently performed faulty workmanship causing the house to have an imminent risk of collapse. When the sub-contractor and insurer denied coverage, the court applied the doctrine of fortuity to analyze whether the faulty workmanship was an "accident" as covered in the "occurrence" provision of the insured's policy. Under the doctrine of fortuity, the court held that the sub-contractor had both intent and full control when conducting his work and therefore, the resulting damage to the structure was not fortuitous, and not covered under the policy as an "accident."

GEICO v. Houchens, No. 2014-CA-002017 (Nov. 1, 2018)
http://opinions.kycourts.net/SC/2016-SC-000546-DG.pdf

Coverage – Insurer Review of Medical Records

When a claimant receives treatment for his or her injuries and submits the medical bills to his or her insurer for reimbursement, the treatment is presumed to be reasonable under the Motor Vehicle Reparations Act. In this case, two claimants submitted chiropractic bills to their insurer, GEICO, after receiving treatment for injuries sustained in a car accident. After GEICO hired a group of doctors to conduct a paper review of the bills associated with the treatment, it denied coverage for large portions of the claimants' treatment because its doctors believed that the treatment was unnecessary. However, in finding for the claimants, the court ruled that there is a presumption of reasonableness when a claimant submits medical bills to an insurer for reimbursement. The court reasoned that an insurer cannot rely solely on a peer review of medical records and instead, should bring a direct claim against the medical provider if it wishes to dispute the reasonableness and necessity of treatment.

Travelers Indemnity Co. v. Armstrong, No. 2017-SC-000041-DG (Nov. 1, 2018)
http://opinions.kycourts.net/sc/2017-SC-000041-DG.PDF

Ky. Rev. Stat. 186A.220 and Car Dealers Ownership after Sale

A licensed motor vehicle dealer, "dealer A," sold a car at auction to another licensed car dealer, "dealer B." Dealer A did not relinquish a physical copy of the title to dealer B, but instead filed an untimely Notice to Clerk of Acquisition. Subsequently, an individual purchased the vehicle from dealer B, but the title remained in dealer A's name. The purchasing individual was involved in an accident and was fatally injured. The individual's estate brought suit against dealer A and its insurer. The Kentucky Supreme Court, in finding dealer A and their insurer were entitled to summary judgment, explained that Kentucky is a certificate of title state for purposes of determining ownership of a motor vehicle but Ky. Rev. Statute 186A.220 is an exception to that rule, for dealer-to-dealer transactions. Additionally, substantial compliance with the statutory requirements is sufficient to relinquish ownership. Therefore, dealer A, despite retaining possession of the title, was no longer the "owner" and they and their insurer were not liable for the individual's death.

b) Employment Decision

McCoy Elkhorn Coal Corp. v. Sargent, No. 2017-SC-000616 (Aug. 16, 2018)
http://opinions.kycourts.net/SC/2017-SC-000616-WC.pdf

Workers' Compensation – Safety Violation Enhancement Not a "Penalty"

A coal miner died in a workplace accident and his self-insured employer paid his estate workers' compensations death benefits. However, upon the employer's insolvency, the self-insured guaranty fund refused to pay the 30% safety violation enhancement. The issue was whether a guaranty fund could be held liable for enhancement amounts owed to a beneficiary when its contract excluded coverage for such amounts. Although the enhancement is sometimes referred to as a safety penalty, the court ruled that under Kentucky statute the self-insured guaranty fund is responsible for the employer's *entire liability*, including the safety violation enhancement. The court also concluded that the guaranty fund was responsible for interest on the unpaid amounts because these amounts were overdue benefits owed to beneficiaries.

Sunz Insurance Company v. Decker, No. 2017-SC-000257 (Apr. 26, 2018)
http://opinions.kycourts.net/SC/2017-SC-000257-WC.pdf

Workers' Compensation – Tardy Filing and Good Cause

The court held an up-the-ladder employer responsible for workers' compensation benefits to an uninsured employee due to its failure to file a coverage response (Form 111). An initial dispute, whether the employee was actually employed by the employer, was raised because the employer did not designate the employee as an "assigned employee" in the parties' service agreement. However, the court held that by failing to timely file the coverage response, the employer admitted the allegations (including that the employee was employed by the employer) set forth in the initial application for workers' compensation benefits.

Uninsured Employers' Fund v. Hoskins, No. 2015-SC-000637 (Dec. 14, 2017)
http://opinions.kycourts.net/SC/2015-SC-000637-WC.pdf

Workers' Compensation – Employee Leasing Agreement

A complex scheme of poorly-documented employment arrangements made it difficult for the court to determine for whom a Kentucky truck driver actually worked. The driver received checks from his employer's insurer, but that insurer's ownership was intertwined with two other insurers. The first insurer had no authorization to provide workers' compensation services to Kentucky employers, so when the employee sustained a work-related injury, the first insurer attempted to pass the burden to a second insurer (with authorization in Kentucky and overlapping ownership with the first insurer). The court ruled against the first insurer deciding that it could not pass the obligation to pay the workers' compensation benefits to the second insurer.

Uninsured Employers Fund v. Acahua, No. 2016-SC-000252 (Sept. 28, 2017)
http://opinions.kycourts.net/SC/2016-SC-000252-WC.pdf

Workers' Compensation – First-Class Mail Sufficient for Notice Despite "Undeliverable" Stamp

Delivery of workers' compensation claim by first-class mail complies with Kentucky's statute on proper notice. In this case, a worker was injured and filed a workers' compensation claim against his uninsured employer. After the administrative law judge joined the employer to the suit, the plaintiff sent a copy of the claim to the employer by first-class mail. Despite the postal service returning the mail with an "undeliverable" stamp, the court ruled that the delivery complied with Kentucky's statute on notice of service and rejected the defendant employer's argument that improper service terminated the administrative law judge's jurisdiction.

Superior Steel, Inc. v. Ascent at Roebling's Bridge, LLC, No. 2015-SC-000204 (Dec. 14, 2017)
http://opinions.kycourts.net/sc/2015-SC-000204-DG.pdf

Construction Contract – Subcontractor Not Entitled to Payment for Additional Work

A subcontractor and sub-subcontractor were retained by a general contractor to perform construction work on a 21-story condominium. After it was determined additional work, outside the scope of the initial contract, would need to be completed, subcontractor and sub-subcontractor completed the work without contracting for it. The court determined that no breach occurred when the general contractor failed to pay for the extra work. Additionally, the general contractor was not required under the initial contract to pay attorney fees for the subcontractor or sub-subcontractor, but the subcontractor and sub-subcontractor could bring an unjust enrichment claim against the landowner.

c) Governmental Immunity Decision

Board of Trustees of Kentucky School Boards Insurance Tr. v. Pope, No. 2015-SC-000664-TG (Sept. 28, 2017)
http://opinions.kycourts.net/sc/2015-SC-000664-TG.pdf

Governmental Immunity – School Board Insurance Trust Does Not Receive Immunity

A school board insurance trust, created by a school board association, is not granted governmental immunity if it fails the *Comair* test. Under the *Comair* test, an entity must either be created by an

entity that enjoys governmental immunity, or the entity must exercise a function that is integral to state government. Here, the insurance trust was created by a school board association pursuant to its own trust agreement, and not by local school boards themselves; thus, it was not created by an entity that enjoys governmental immunity. Further, the insurance trust failed the second part of the test because, while serving an important function, the trust did not provide a *function integral to state government* because the same insurance function provided by the trust is also provided by many other entities throughout the state.

Ritchie v. Turner, 2017-SC-000157-DG (November 1, 2018)
http://opinions.kycourts.net/sc/2017-SC-000157-DG.PDF

School Officials Entitled to Qualified Immunity for Claims of Sexual Abuse by a Teacher

On two separate occasions students and their parents brought a teacher's conduct to school officials' attention. Both instances involved an investigation by school authorities, but the second instance involved the teacher's resignation and spurred an investigation by the Kentucky State Police. The police investigation resulted in the teacher pleading guilty to a number of charges including sex-related offenses with minors. Four school officials were also charged and found guilty of failure to report child abuse. A parent of one of the children sued the school officials in their official and individual capacities. The Supreme Court of Kentucky found the officials were entitled to qualified immunity because the duties violated that the suit relied on were general discretionary duties. The plaintiff did not allege that any of the school officials were assigned to supervise specific relevant areas or make any factual claims that created a specific duty, therefore their duty to supervise was general and discretionary. Additionally, the requirement to report abuse is a discretionary action when a school official is determining whether there is reasonable cause to believe that a child has been or is being abused. Lastly, investigating claims regarding student-teacher relationships is a discretionary action. Therefore, the decision not to conclude a specific avenue of the investigation, if done in good faith, will not destroy qualified immunity.

d) Other Significant Decisions

Muncie v. Wiesemann, No. 2017-SC-000235-DG (June 14, 2018)
http://opinions.kycourts.net/sc/2017-SC-000235-DG.pdf

Stigma Damages – Partial Settlement of Actual Damages Does Not Preclude Stigma Damages

A home heating oil leak from a storage tank on unoccupied property flooded a nearby residence causing damage to the property. In a dispute between the property owners, the parties settled partially for repair costs and actual damages to the property, but the plaintiffs reserved claims for diminution of value to real estate due to the stigma resulting from the contamination. The court held that the case should be remanded to determine whether stigma damages exist in this case, and a partial settlement for actual damages does not preclude the recovery of stigma damages.

Maupin v. Tankersley, No. 2016–SC–000572-DG (Feb. 15, 2018)
http://opinions.kycourts.net/SC/2016-SC-000572-DG.pdf

Dog Bite – Strict Liability Plus Comparative Negligence

An owner of a dog is strictly liable for injuries caused by the dog to another person. However, the dog-owner can show that the victim failed to exercise reasonable care for his or her own safety with regard to the dog and thus reduce damages in proportion with the victim's comparative negligence. In this case, a woman crossing a dog-owner's property, was attacked by the property-owner's dogs causing serious injury to the woman. The dog-owner argued against strict liability, but the court disagreed. The court reversed the decision below because the defendant did, in fact, own the dogs and therefore, was strictly liable for injuries caused by his dogs because of his ownership alone. However, the court also remanded the case for a new trial so that a jury could determine whether the victim was comparatively negligent and if so, how much the damages should be reduced.

2. Appellate Court Decisions

a) Insurance Coverage Decisions

Johnson v. Capitol Specialty Insurance Corporation, No. 2017-CA-000171 (Ky. Ct. App. June 22, 2018)
http://opinions.kycourts.net/COA/2017-CA-000171.pdf

"Sponsor" Exclusions

After the death of a participant in an extreme 5k running event with obstacles, the owner of the event, who was required to obtain public liability insurance for the participants and spectators, was denied coverage. The court held that the policy was unambiguous in excluding sponsors of the event from coverage and because the owner of the 5k event helped to fund it, he was a "sponsor" under several definitions of the word. Thus, the court upheld the exclusion in favor of the insurer and against the owner of the event.

Brown v. Kentucky Farm Bureau Mutual Insurance Company, No. 2016-CA-000143 (Ky. Ct. App. Nov. 22, 2017)
http://opinions.kycourts.net/coa/2016-CA-000143.pdf

"Occurrence" or "Accident" – Intentional, Fatal Gunshot Not Covered

As executrix of her son's estate, plaintiff brought suit against the liability insurer of the defendant who shot her son. The court ruled that the insurer was not obligated to satisfy the judgment entered against the insured defendant because he intentionally shot the plaintiff's son and the intentional action could not be covered as an accident under the policy's "occurrence" provision. Further, the court said the accidental injury to plaintiff, the victim's mother, is not the relevant injury; rather, the intentional injury to plaintiff's son is the relevant injury for the exclusion provision.

Geico Indem. Co. v. Murad, No. 2016-CA-001907-MR (July 27, 2018)
http://opinions.kycourts.net/coa/2016-CA-001907.PDF

A Father Not Listed on the Certificate of Title or the Transfer of Title Document Does Not Possess an Insurable Interest in a Motor Vehicle

A father purchased an automobile policy for his son's vehicle. However, the son was the only person listed as an owner/buyer of the vehicle. The son obtained the transfer of title document well before the accident but did not attempt to register the vehicle until after the accident. Subsequent to the accident, the son attempted to add his father's name above his own on the transfer of title document. But the court determined the father did not have an insurable interest in the vehicle at the time of obtaining the insurance policy or at the time of the accident. Therefore, the insurance policy was void *ab initio* as a matter of law.

b) UM/UIM Decisions

Consolidated Insurance Company v. Slone, No. 2016-CA-001070 (Ky. Ct. App. Jan. 5, 2018)
http://opinions.kycourts.net/coa/2016-CA-001070.pdf

Underinsured Motorist – Anti-Stacking Clause Upheld as to Second Class of Insureds

A school board's automobile insurer included an anti-stacking clause in its policy and relied on that provision to deny the occupants and driver of a school bus underinsured motorist benefits when the school bus was rear-ended. The court relied on precedent to determine that these claimants were part of a "second-class" of insureds because they were neither named in the policy, nor family members of named members. Being a part of a "second-class" of insureds, the occupants and drivers were not entitled to stack the underinsured motorist benefits. Further, the court said that a representation by the insurer's agent that the policy would be stackable did not override the policy language.

Henry v. Travelers Personal Security Insurance Company, No. 2016-CA-001939 (Ky. Ct. App. Feb. 2, 2018)
http://opinions.kycourts.net/coa/2016-CA-001939.pdf

Uninsured Motorist – Choice of Law & "Owned But Not Scheduled" Exclusions

A father and his two children, residents of Tennessee, were involved in an accident causing severe injury to one child and death to the other. Because neither driver had liability insurance, the father brought a claim under the uninsured motorist provision of his mother-in-law's automobile insurance policy, premised upon plaintiffs living in her household. The insurer relied upon an "owned but not scheduled" exclusion for the vehicle, which was enforceable under Tennessee law. The court ruled that since the parties were residents of Tennessee, Kentucky law would only override applicable Tennessee law if there is a substantial Kentucky public policy at issue. Here, the court found no substantial public policy against the enforcement of an "owned but not scheduled" exclusion sufficient to override application of Tennessee law. Therefore, Tennessee law applied and the father was not entitled to coverage under his mother-in-law's policy.

c) Employment Decisions

Work4ce, Inc. v. Plataniotis, No. 2017-CA-000061 (Ky. Ct. App. Feb. 2, 2018)
http://opinions.kycourts.net/coa/2017-CA-000061.pdf

Workers' Compensation – Administrative Law Judge Bound by Parties' Stipulated Facts

A workplace injury sustained by a measurement technician resulted in a dispute, not between the parties, but between the parties and the administrative law judge as to when the injury actually occurred. The court overruled the workers' compensation board and the administrative law judge when it determined that an administrative law judge cannot determine that a date of injury is different than the date the parties agreed upon in a stipulation of facts. When parties stipulate to a fact, an administrative law judge has no authority to set the stipulation aside.

d) Premises Liability Decisions

HP Hotel Management, Inc. v. Layne, No. 2016-CA-001542 (Ky. Ct. App. Dec. 8, 2017)
http://opinions.kycourts.net/coa/2016-CA-001542.pdf

Premises Liability – Default Judgment Set Aside

A guest of a hotel brought a personal injury action against the hotel and hotel management for injuries allegedly sustained when she tripped and fell in the hotel's entranceway. The court set aside the default judgment entered below against the hotel because the hotel had a legitimate defense. The hotel did not receive actual notice, and the hotel acted almost immediately upon learning of the entry of default judgment. Further, the court noted that default judgments are generally not favored.

e) Governmental Immunity Decisions

Denise J. Teasley, M.D. v. Kentucky Board of Medical Licensure, and the Kentucky Board of Medical Licensure Appellees, No. 2017-CA-001748 (Ky. Ct. App. Sept. 14, 2018)
http://opinions.kycourts.net/coa/2017-CA-001748.pdf

Kentucky Board of Medical Licensure Entitled to Immunity

A South Carolina obstetrician and gynecologist brought suit against the Kentucky Board of Medical Licensures when it appeared that she would be denied a license to practice medicine in the Commonwealth. However, the court ruled that the suit was barred by governmental immunity because the medical professional's suit was aimed at reviewing and enjoining the actions by the Licensure Board, not solely enjoining ongoing violations of law.

f) Other Significant Decisions

Bryant v. Allstate Indem. Co, No. 2015-CA-001451-MR (February 24, 2017)
http://opinions.kycourts.net/coa/2015-CA-001451.PDF

Insurance Companies Can't Use CR 27.01 to Take Pre-Litigation Depositions as Alternative to Examinations Under Oath

Trial court granted an insurance company's "Petition to Compel Pre-Litigation Depositions" under CR 27.01. The appellate court reversed. First, the petition was granted the same day the parties were served. The court determined that granting a petition prior to service or on the same day of service is not reasonable in most circumstances. Second, the insurance company did not show there is substantial reason to expect an action will be brought by the company against the parties to be deposed. Lastly, the court explained that Rule 27 is to be used for the perpetuation of testimony and not for the purpose of discovery prior to the commencement of an action.

Merritt v. Catholic Health Initiatives Inc., No. 2016-CA-001470-MR (November 17, 2017)
http://opinions.kycourts.net/coa/2016-CA-001470.pdf

Self-Insurer Liability – Captive Insurers Not Included Under Unfair Claims Settlement Practices Act

Following the death of his wife and son due to pregnancy complications, husband brought a claim against physician's insurer and parent company. The court determined that as a foreign captive insurer (an entity not in the "business of insurance"), the company was not covered by the UCSPA. The court reasoned that the entity was created by the parent company solely for the purpose of self-insuring the parent company and it was not involved in risk-shifting or risk distribution. Therefore, the court dismissed the husband's bad faith claim against the foreign captive insurer.

Mosley v. Arch Specialty Fire Ins. Co., No. 2017-CA-001252-MR (September 28, 2018).
http://opinions.kycourts.net/coa/2017-CA-001252.PDF

Kentucky Unfair Claims Settlement Practice Act ("KUCSPA") and "Leveraging"

The administratrix of a miner's estate sued two insurers of various coal mining companies alleging bad faith based on "unfair leveraging" by the insurers. That is, the insurers refused to litigate the claims against two of their insureds separately and only making global settlement offers. The appellate court determined KUCSPA's prohibition against leveraging applies only to attempts to condition settlements under one portion of an insurance policy on another portion of an insurance policy where liability has become reasonably clear. However, in this case liability on the part of the insureds was not reasonably clear or beyond dispute, and the insurer did not leverage the payment of one claim under one coverage to obtain a favorable settlement of a second claim under a different coverage in the same policy. Instead, the insurer covered both insured parties under the same coverage in the policy. Therefore, the insurer did not violate the KUCSPA

Eastridge v. USAA Cas. Ins. Co., No. 2017-CA-000461-MR (August 24, 2018)
http://opinions.kycourts.net/coa/2017-CA-000461.PDF

Mere Technical Violation of Kentucky's Unfair Claims Settlement Practices Statute is Insufficient to Impose Liability Under the UCSPA

A motorist who was in a multi-vehicle accident sued another motorists' liability insurer for third-party bad faith in its claim handling. The court found that the plaintiff, while proving the insurer had some potential indemnity exposure, did not provide any affirmative facts to conclusively establish liability at the time the claim was brought to the insurer's attention. Additionally, although the insurer made some mistakes in its investigation such as documenting the totaled vehicle as having little to no damage, the Court held this rises to only the level of negligence and not the level of bad faith. Therefore, summary judgment in favor of the other driver's liability insurer was appropriate.

Crook v. Maguire, No. 2015-CA-000379-MR (May 11, 2018)
http://opinions.kycourts.net/coa/2015-CA-000379.PDF

Intentional Infliction of Emotional Distress Requires Expert Testimony but Emotional Damages under a Statutory Claim does Not

A doctor wrote fraudulent prescriptions in a patient's name and during a police investigation regarding this matter the police interviewed the patient. The patient sued the doctor for NEID, IIED, and violation of KRS 411.210, which creates a cause of action for identity theft. The suit was dismissed for lack of expert or scientific proof evidencing the damages. The appellate court affirmed the dismissal of the IIED and NEID claims because both require severe emotional distress to be actionable, and expert evidence is required to prove severe emotional distress. However, conduct that results in a party having a statutory cause of action only requires the victim supply testimony or evidence regarding the emotional distress caused by the conduct.

Feltner v. PJ Operations, No. 2016-CA-001536-MR (July 6, 2018)
http://opinions.kycourts.net/coa/2016-CA-001536.PDF

Going and Coming Rule Determined by Furtherance of Business or Interests

A delivery driver was on his way home from work when he struck and killed an individual. The individual's estate sued defendant for vicarious liability. The trial court ruled in favor of the defendant, granting summary judgment on the basis that the driver was not within his scope of employment. The appellate court affirmed this order stating, the determinative factor is not whether the driving of the vehicle was required by the driver's employment, but whether operating the vehicle was in furtherance of the defendant's business or interests. Because the driver was on his way home and in no way utilizing the vehicle to further the defendant's business or interest, the defendant was not vicariously liable for the accident.

Grego v. Jenkins, No. 2015-CA-001142-MR (January 13, 2017)
http://opinions.kycourts.net/coa/2015-CA-001142.PDF

No Church or Charitable Organization Exception to Requirements for Contractual Exculpation of Negligence

Plaintiff went to a church camp and plaintiff's mother signed a permission slip purporting to absolve the church of liability for injury or damage during plaintiff's participation at the camp. The plaintiff suffered an injury to her nose that ultimately required nose surgery. The plaintiff filed suit alleging negligence against the church and the church utilized the permission slip seeking summary judgment. Because it was not clear negligence of the church was included in the release, either explicitly or as the only reasonable construction of the contract language, negligence was not one of the included waivers. Additionally, the court declined to create an exception for churches or charitable organizations within Kentucky's standard for contracting around negligence.

CLK Multifamily Management, LLC v. Greenscapes Lawn & Landscaping, Inc., No. 2017-CA-000577-MR (April 27, 2018)
http://opinions.kycourts.net/coa/2017-CA-000577.PDF

Slip-and-Fall – Indemnification Clause Not Affected by Third-Party Suit

An apartment management company agreed with a snow removal contractor that the contractor would remove snow any time more than two inches accumulated. The parties also agreed that the management company would release the contractor from liability in all instances except when the contractor acted with gross negligence, bad faith, or willful misconduct. When a person was injured in a slip and fall, the apartment management company attempted to bring in the contractor as a defendant. The court held that the apartment management company contracted away its ability to hold the contractor liable for such negligence claims. The court held the exculpatory clause clearly and expressly contemplated such slip and fall scenarios and provided protection for the snow removal contractor. However, the management company argued that the indemnification clause allowed it to bring a claim against the contractor because a third-party (the injured party) is the plaintiff, and not the management company itself. But, the court ruled that the management company was still barred by its agreement with the contractor from bringing an indemnity claim against the contractor and that the injured party was free to name the contractor as a defendant and it chose not to.

D. SIGNIFICANT CASE PENDING BEFORE THE KENTUCKY SUPREME COURT

Lee Comley v. Auto-Owners Insurance Company, No. 2017-SC-000596

Homeowner's Coverage

The issues, involving potential coverage for damage to a home resulting from a nearby water main break, concern the scope of the "water damage" exclusions as to "water below the surface of the ground . . . which . . . flows, seeps or leaks through any part of a building.

Barbara Smith v. Bonnie Smith, No. 2017-SC-000348

Slip and Fall

Issues include whether the status of a visitor as an invitee, licensee, or trespasser continues to define the scope of the property owner's duty to the visitor.

Raymond Hayes, Et Al. v. D.C.I. Properties-D. Ky, LLC, Et Al., No. 2017-SC-000340

Trespasser and Attractive Nuisance

Issues include whether the 16-year-old plaintiff can recover for injuries sustained when he trespassed on the defendant's construction site.

Isaacs v. Sentinel Insurance Company, Limited, No. 2017-CA-000204

Underinsured Motorist Coverage

Issues include whether the shareholder of a law firm, organized as a professional services corporation (PSC), can use the corporation's underinsured motorist benefits to cover injuries sustained while operating a non-company auto (a bicycle).

Metzger v. Auto-Owners Ins. Co., No. 2016-CA-001625

Underinsured Motorist Coverage

Issues include whether a member of a limited liability company (LLC) can use the company's underinsured motorist benefits for bodily injuries sustained when the member was not operating a covered automobile.

These cases were pending at the time this summary was printed. To confirm whether the Supreme Court has issued a decision in this case, we invite you to visit our website at http://www.rolfeshenry.com.

IV. THE STATE OF INDIANA

A. FREQUENTLY CITED INDIANA STATUTES

1. Automobile Insurance

I.C. § 9-25-2-3
Financial Responsibility

Requires insurance in the following amounts:

(1) $25,000.00 per person;

(2) $50,000.00 per accident; and

(3) $25,000.00 property coverage per accident.

I.C. § 27-7-5-2(a)
UM/UIM Coverage

Requires insurers to offer UM/UIM coverage with every bodily injury liability policy of insurance in an amount not less than $50,000.00 or the limit of liability insurance, whichever is greater and which can only be rejected in writing.

I.C. § 27-7-5-4(a)
Uninsured Motor Vehicles

An uninsured motor vehicle is one without liability insurance or not otherwise compliant with the financial responsibility requirements of such laws of this or another state or where the insurer is unable to make payments to the limit of liability due to insolvency.

I.C. § 27-7-5-4(b)
Underinsured Motor Vehicles

An underinsured motor vehicle is one where the limits of coverage available for payment to the insured under all bodily injury liability policies covering persons liable to the insured are less than the limits of the insured's underinsured motorist coverage.

I.C. § 27-7-6-2
Definitions

This statute contains the definitions for "automobile insurance policy", and "automobile liability coverage".

2. Negligence, Other Torts and Contribution

I.C. § 7.1-5-10-15.5
Civil Liability for Furnishing Alcohol

A person who furnishes alcohol is not liable for civil action for damages caused by the intoxicated person, unless they actually knew the person was visibly intoxicated, and the intoxication of the person was the proximate cause of the injury or damage.

If a person, who is 21, suffers an injury or death, caused by voluntary intoxication, the person, the person's heirs, dependents or representative may not make a claim against the person who furnished the alcohol.

I.C. § 12-15-29-4.5
Medicaid Claim

Insurer must accept a Medicaid claim for a Medicaid recipient for three (3) years from the date of service. An insurer cannot deny a Medicaid claim solely based on the date of submission, type or format of the claim, method of submission or failure to provide proper documentation.

Insurer cannot deny a Medicaid claim solely due to lack of prior authorization. Insurer will conduct the prior authorization retrospectively when prior authorization is necessary. Insurer must adjudicate such claim as if it received prior authorization.

I.C. § 14-22-10-2.5
Entry Onto Premises of Another

A person, who enters a premise, without permission or payment of monetary compensation, for the purposes of hunting or fishing, does not have an assurance that the premise is safe.

The owner of a premise does not assume responsibility or incur liability for damage or injury caused by others persons using the premises.

I.C. § 22-3-10-1
Ban on Employer Waiver of Liability

Any contracts between an employer and an employee, or any contracts between an employee and any third-party, which purport to release the employer or third-party from any liability for damages arising out of the negligence of the employer or third-party are against public policy and declared null and void.

I.C. § 34-18-8-4
Medical Malpractice – Prerequisite to Commencement of Action

Prior to commencing a medical malpractice action in Indiana, the claimant's proposed complaint must be presented to a "medical review panel" for review, and the panel must provide an opinion regarding whether or not the evidence supports the alleged conclusions.

I.C. § 34-20-1-1
Product Liability Actions

The article governs all actions that are brought by a user or consumer against a manufacturer or seller for physical harm caused by a product regardless of the substantive legal theory or theories upon which the action is brought.

I.C. § 34-20-2-1
Product Liability

Liability exists for an unreasonably dangerous or defective product if the seller should reasonably foresee the consumer as part of a class of persons being exposed to the harm caused by the defective condition, the seller is engaged in the business of selling the product and the product reaches the user or consumer without substantial alteration.

I.C. § 34-20-2-2
Design Defect – Strict Liability

An action can be maintained even though reasonable care was used in the manufacture and preparation of the product and there is no privity of contract. However, reasonable care is a defense to design defect claims and those for failure to provide adequate warnings.

I.C. § 34-20-2-3
Strict Product Liability

An action for strict product liability for an unreasonably dangerous defective condition may only be brought against the manufacturer.

I.C. § 34-20-2-4
Circumstances Sellers are Considered Manufacturers

If a court cannot gain jurisdiction over a manufacturer, then the manufacturer's principal distributor or seller over whom the court can gain jurisdiction will be deemed the manufacturer of the product.

I.C. § 34-20-3-1
Product Liability – Statute of Limitations

A product liability action in negligence or strict liability must be commenced within two (2) years from the cause of action or within ten (10) years after the delivery to the initial user or customer. If the cause of action happens after eight (8) years but before ten (10) years of the date of delivery, the action may be commenced within two (2) years after the cause of action.

I.C. § 34-20-9-1
Indemnity in Product Liability Actions

A party held liable may seek indemnity from other persons whose actual fault caused the product to be defective.

I.C. § 34-23-1-1
Wrongful Death

Allows an action in wrongful death to be maintained by the personal representative of the decedent, if the decedent might have maintained an action had they lived. The action must be commenced within (2) years.

I.C. § 34-23-1-2(e)
Limitation of Certain Wrongful Death Damages

Damages for reasonable medical, hospital, funeral and burial expenses, and loss of adult person's love and companionship, are limited to $300,000.00.

I.C. § 34-31-4-1
Parental Liability

A parent is liable for no more than $5,000.00 in actual damages from damage caused by their child, if the parent has custody and the child is living with the parent.

I.C. § 34-44-1-3
Payments of Awards

Proof of payments shall be considered by trier of fact for determining the amount of any award and for any court review of awards considered excessive.

I.C. § 34-51-2-2
Comparative Fault of Governmental Subdivisions

Contributory negligence remains a complete defense to claims under the Tort Claims Act.

I.C. § 34-51-2-5
Comparative Fault Set-Off

Contributory fault of a claimant acts to proportionately reduce the total damages for an injury by the claimant's contributory fault.

I.C. § 34-51-2-6
Contributory Negligence as Complete Defense

Contributory negligence is a complete defense if a claimant's contributory fault is greater than the fault of all other persons whose fault proximately contributed to the claimant's damages.

I.C. § 34-51-2-10
Intentional Torts

A plaintiff may recover one-hundred percent of the compensatory damages in a civil action for an intentional tort from a defendant who was convicted after a prosecution based on the same evidence.

I.C. § 34-51-2-12
Contribution and Indemnity

In an action under this chapter, there is no right of contribution among tortfeasors. The right of indemnity is unaffected by this section.

I.C. § 34-51-2-14
Nonparty Defense

In an action based on fault, a defendant may assert that the damages of the claimant were caused in full or in part by a nonparty.

I.C. § 34-51-2-15
Nonparty Defense

The burden of proving a nonparty defense is upon the defendant who must affirmatively plead the defense.

I.C. § 34-51-2-16
Nonparty Defense

A nonparty defense must be pled if known. Nonparty defenses which become known after the filing of the answer must be raised with reasonable promptness. If the summons and complaint were served more than one hundred fifty (150) days prior to the expiration of the claimant's statute of limitations, nonparty defenses must be pled no later than forty-five (45) days prior to the expiration of that limitation of action; however, the trial court may alter these time limits to allow defendants a reasonable opportunity to discover the existence of a nonparty defense and allow the claimant a reasonable opportunity to add the nonparty as an additional defendant prior to the expiration of the period of limitations applicable to the claim.

I.C. § 34-51-3-2
Punitive Damages – Clear and Convincing Evidence

Any claim for punitive damages must be established by clear and convincing evidence to support an award.

I.C. § 34-51-3-4
Punitive Damages – Maximum Award

Any punitive damage award may not be more than the greater of:

(1) Three times the amount of compensatory damages; or

(2) Fifty Thousand Dollars ($50,000.00).

I.C. § 34-51-3-5
Punitive Damages – Mandatory Reduction

If a trier of fact awards punitive damages that exceed the maximum allowable award, the court shall reduce the punitive damage award to an amount no more than the greater of:

(1) Three times the amount of compensatory damages; or

(2) Fifty Thousand Dollars ($50,000.00).

3. Subrogation

I.C. § 27-7-5-6(a)
Subrogation for UM/UIM Payments

Provides that payment of UM/UIM coverage for damages operates to subrogate the insurer to any cause of action in tort which payee may have.

I.C. § 27-7-5-6(b)
Exception to the Right of Subrogation for UIM Payments

The insurer providing underinsured motorist coverage does not have the right of subrogation if it is informed of a bona fide offer of settlement which includes a certification of the liability coverage limits of the underinsured motorist and the insurer fails to advance payment in at least the amount of the offer within thirty (30) days.

I.C. § 34-51-2-19
Lien Reduction

Subrogation claims or other liens or claims arising out of the payment of medical expenses or other benefits as the result of personal injuries or death shall be diminished by the claimant's comparative fault or the un-collectability of the full value of the claim resulting from limited liability insurance or any other cause in the same proportion as the claimant's recovery is reduced. The lien or claim shall also bear a *pro rata* share of the claimant's attorney fees and litigation expenses.

4. Insurance Fraud

I.C. § 27-2-13-2
Release of Information by Insurer

Insurer must furnish policy information relevant to fire loss, history of claims of claimant, and materials relating to fire investigation, if requested by an authorized agency investigating a fire loss.

I.C. § 27-2-13-3
Arson Reporting

When an insurer has reason to believe a fire loss in which it has an interest is caused by a means that was not accidental, then the company shall notify an authorized agency in writing and provide that agency with all materials developed from the insurer's investigation of the fire loss. The insurer shall also provide the office of the State Fire Marshal a copy of any information provided under this section.

I.C. § 27-2-13-4
Arson Reporting

When an authorized agency receives information under this chapter, it may release or provide the same information to any other authorized agency to further its investigation. In addition, an insurer who provides information under this chapter has the reciprocal right to request and receive relevant information from that agency. Finally, an insurer or authorized agency, who releases or provides evidence or information under this chapter, is immune from any civil or criminal liability for providing the evidence or information.

I.C. § 27-2-13-5
Arson Reporting

When an authorized agency is investigating a fire that it believes to have been caused by arson it may, in writing, order an insurer to withhold payment of any policy proceeds on the damaged or destroyed property for up to thirty (30) days from the date of the order. The insurer may not make a payment during that time, except as follows:

(1) Emergency living expenses;

(2) Emergency action necessary to secure the premises;

(3) To prevent further damage to the premises; or

(4) To a mortgagee who is not the target of the investigation of the authorized agency.

I.C. § 27-2-14-2
Vehicle Theft Reporting

If an insurer has reason to believe that a vehicle theft claim made by an insured is fraudulent, the insurer shall notify, in writing, an authorized agency of the suspected fraudulent claim and provide the agency with all materials developed from the insurer's investigation.

I.C. § 27-2-14-3
Vehicle Theft Reporting

An authorized agency investigating a vehicle theft may, in writing, require an insurer investigating the loss to release any and all relevant information or evidence considered important to the authorized agency, including:

(1) Pertinent policy information (including a policy application);

(2) Policy premium payment records;

(3) History of prior claims made by the insured; and

(4) Material relating to the investigation, including:

a) Statements;

b) Proofs of Loss; and/or

c) Other relevant evidence.

I.C. § 27-2-14-4
Vehicle Theft Reporting

An authorized agency provided with information under this chapter may release or provide the same information to any other authorized agency to further its investigation. In addition, an insurer who provides information under this section has the reciprocal right to request and receive relevant information from that agency. When requested, the agency shall provide the requested information within a reasonable time, not exceeding thirty (30) days. Finally, an insurer or authorized agency that releases or provides evidence or other information under this chapter is immune from civil or criminal liability for providing that information.

I.C. § 27-2-16-3
Claim Forms

All preprinted claim forms required by an insurer as a condition of payment of a claim must contain a statement which clearly states the following: *"A person who knowingly and with intent to defraud an insurer files a statement of claim containing any false, incomplete, or misleading information commits a felony."*

I.C. § 27-2-19-7
Immunity for Exchange of Information

An insurer, attorney, or investigative agency that receives and provides information pursuant to the requirements of the Indiana Code in good faith is immune from liability arising from the act of receiving, or the act of providing the information.

I.C. § 36-8-17-7
Fire Investigation

A fire department must investigate and determine the cause of fire in their territory. If the fire chief believes a crime was committed, he must notify the division and submit a report. The report must include: (1) a statement of facts; (2) the extent of damage; (3) the amount of insurance; and (4) other information required in the commission's rules. To carry out this section, the fire department may: (1) enter and inspect property; (2) cooperate with prosecuting attorney; (3) subpoena witnesses and documents; (4) give oaths; (5) take depositions and conduct hearings; and (6) separate witnesses and regulate the course of proceedings.

5. Miscellaneous Statutes

I.C. § 22-3-2-6
Workers' Compensation – Exclusive Remedy

The Indiana Workers' Compensation Administration provides the exclusive rights and remedies granted to an employee by account of personal injury or death, by accident, while that employee is within the course and scope of his employment.

I.C. § 25-10-1-15
Admissibility of Chiropractor Testimony

A chiropractor's testimony relating to records or reports of a licensed medical physician may be admissible as evidence at trial if:

(1) The chiropractor is properly qualified as an expert; and

(2) The court is satisfied the information which the chiropractor testifies about is of the type reasonably relied on by other chiropractors.

I.C. § 27-4-1-4.5
Unfair Claim Settlement Practices

The statute sets forth certain actions/inactions which may constitute unfair claim settlement practices under Indiana law.

I.C. § 34-14-1-1
Declaratory Judgment

A court may declare rights, status, and other legal relations whether or not further relief is or could be claimed.

I.C. § 34-14-1-2
Declaratory Judgment

A person interested under a deed, will, written contract, or other writings or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have questions of construction or validity determined or obtain a declaration of rights, status, or legal relations thereunder.

I.C. § 34-50-1-4
Qualified Settlement Offer

This is essentially a codification of the Trial Rule 68 Offer of Judgment. When a qualified settlement offer is made pursuant to this statute, and not accepted, then the party rejecting the offer must ultimately obtain a more favorable judgment. If the rejecting party fails to obtain a more favorable judgment, the offering party is entitled to attorney's fees, costs, and expenses in an amount not to exceed $1,000.00. To be valid, a qualified settlement offer must:

(1) Be in writing;

(2) Be signed by the offeror or the offeror's attorney;

(3) Be designated on its face as a "qualified settlement offer";

(4) Be delivered to each recipient or the recipient's attorney by;

a) Registered or certified mail; or

b) Any other method that verifies the date of receipt;

(5) Set forth the complete terms of the settlement proposal in sufficient detail to allow the recipient to decide whether to accept or reject it;

(6) Include the name and address of the offeror and the offeror's attorney; and

(7) Expressly revoke all prior qualified settlement offers made by the offeror to the recipient.

I.C. § 34-51-4-8
Prejudgment Interest

If a court awards prejudgment interest, the court must determine the period during which prejudgment interest accrues, which may not exceed forty-eight (48) months. Generally, prejudgment interest will begin to accrue on the latest of the following dates:

(1) Fifteen months after the cause of action accrued;

(2) Six months after a medical malpractice claim is filed (if, I.C. § 34-18-8 and I.C. § 34-19-9 do not apply) or one hundred eighty (180) days after a medical review panel is formed to review a medical malpractice complaint; and

(3) In all cases, however, the court shall exclude any period of delay that the court determines is caused by the party requesting prejudgment interest.

B. INDIANA STATUTES OF LIMITATIONS

TWO YEARS

Claim Type/Section	Statute Period
Employment I.C. § 34-11-2-1	Except those based upon a written contract, within two years of the date of the act or omission complained of.
Medical Malpractice I.C. § 34-11-2-3	Within two years from the date of the act, omission or neglect complained of.
Personal Injury, Injury to Character and Injury to Property I.C. § 34-11-2-4	Within two years after the cause of action arises.
Product Liability I.C. § 34-20-3-1(b)	Within two years after the cause of action accrues; or not more than ten years after the delivery of the product to the initial user or consumer. However, if the cause of action accrues at least eight years but less than ten years after that initial delivery, the action may be commenced at any time within two years after the cause of action accrues.
Wrongful Death I.C. § 34-23-1-1	Within two years after the death of the decedent.
Bad Faith I.C. § 34-11-2-4(2)	Two years from alleged act of bad faith.
Workers' Compensation I.C. § 22-3-9-8	Within two years from the date the cause of action accrues.

C. SIGNIFICANT INDIANA COURT DECISIONS

1. Supreme Court Decisions

a) Insurance Coverage Decisions

Erie Indemnity Company for Subscribers at Erie Insurance Exchange v. Estate of Harris by Harris, No. 18S-CT-114 (Aug. 23, 2018)
https://www.in.gov/judiciary/opinions/pdf/06191801cmg.pdf

Uninsured Motorist Benefits – Decedent Did Not Qualify as "Others We Protect" Within UM Endorsement

The phrase "others we protect" in an employer's commercial automobile insurance policy is not ambiguous when it is located close to another identical phrase that outlines who can be included in the coverage. In this case, an insured was mowing his lawn when an uninsured motorist veered off the road, struck, and killed him. When the decedent's estate sought coverage from his employer's automobile insurer, the insurer denied the coverage because the insured was not occupying the company's automobile at the time of the accident. The estate argued that coverage should be extended because the phrase "others we protect" is ambiguous but the court disagreed and ruled for the insurer.

b) Other Significant Decisions

Cox v. Evansville Police Dep't, No. 18S-CT-447 (Sept. 13, 2018)
https://www.in.gov/judiciary/opinions/pdf/09131801lhr.pdf

Cities May be Liable for the Sexual Assault Committed by Its Police Officers

The Supreme Court of Indiana defined the scope of employment to encompass the activities that the employer delegates to employees or authorizes employees to do, plus employees' acts that naturally or predictably arise from those activities. Thus, the scope of employment, which determines the *respondeat superior* liability of an employer, can include acts the employer explicitly forbids. The court explained that cities assign police officers duties of law-enforcement and community-protection, and with these duties police are vested the power to detain, arrest, frisk, seize and even use deadly force. Therefore, a city can be liable for police officer's tortious acts arising naturally or predictably from those duties and powers. If a police officer commits a sexual assault by misusing official authority, the assault is within the scope of employment and the city is liable.

Care Group Heart Hospital, LLC v. Sawyer, No. 49S05-1710-PL-671 (March 23, 2018)
https://www.in.gov/judiciary/opinions/pdf/03231801lhr.pdf

Employment Contract – "Any Termination of Employment" Means Any Termination, Regardless of the Reason.

The court ruled that a hospital did not breach its agreement to pay out an owner-member's ownership interest upon the owner-member's termination. The hospital discontinued and redeemed its owner-member's ownership interest after its closely affiliated medical group terminated the cardiologist's employment in violation of the medical group's employment

agreement. The cardiologist argued that his contract with the hospital was one in the same as his employment contract with the medical group, and because the medical group breached the employment agreement when it terminated him, the hospital also breached its agreement by paying out the ownership interest. However, the court disagreed because the cardiologist consistently acknowledged that the two entities were separate and, further, that separate contracts should be interpreted separately.

Esserman v. Indiana Department of Environmental Management, No. 49S02-1704-PL-00189 (Nov. 2, 2017)
https://www.in.gov/judiciary/opinions/pdf/11021702ggs.pdf

Governmental Immunity – Department of Environmental Management Immune From Whistleblower Act Claims

The court held that an employee of a state agency could not bring a claim against the agency based on a retaliatory discharge under the False Claims and Whistleblower Protection Act because the agency enjoys sovereign immunity from such actions. Here, the Department of Environmental Management employee spoke up about an alleged wrongful disbursement of the department's excess-liability trust fund and the department fired her. The court disagreed with the employee's argument that the legislature sought to abrogate common-law sovereign immunity in whistleblower situations by including all employers in the federal act. The court said the legislature would have included language indicating such intent if it had wished to waive immunity. Without this language in the statute, the department, although an employer, is entitled to sovereign immunity from non-tort claims based on statute, such as the Whistleblower Act violation that the employee claimed here.

c) Medical Malpractice Decisions

Gresk for Estate of VanWinkle v. Demetris, No. 49S02–1711–MI–686 (May 10, 2018)
https://www.in.gov/judiciary/opinions/pdf/05101801msm.pdf

Confidential Medical Reports of Child Abuse are Not Protected by Indiana's Anti-SLAPP Statute

A doctor reported her diagnosis of child abuse to the Department of Child Services. The parents of the child were successful in disproving this diagnosis and filed a medical malpractice claim against the doctor. The doctor utilized the anti-SLAPP statute as a defense, claiming reports of child abuse fall within its protections of free speech. The Supreme Court of Indiana disagreed. Because the doctor was required by law to file the report upon making such a diagnosis, the report was not in the furtherance of her right of petition or free speech. And, because the report was confidential, it was not made in connection with a public issue. Therefore, medical malpractice claims based on child abuse reports will generally not be able to obtain dismissal under Indiana's anti-SLAPP statute.

Sedam v. 2JR Pizza Enterprises, LLC, No. 39S05–1703–CT–171 (Oct. 31, 2017)
https://www.in.gov/judiciary/opinions/pdf/10311701mm.pdf

Labor and Employment – Negligent Hiring Claim Precluded When Employer Admits Employee Was Acting Within Scope of Employment

When an employer admits that an employee was acting within the course and scope of his or her employment, absent special circumstances, negligent hiring claims are precluded. Here, Pizza Hut admitted that its delivery employee was acting within the scope of employment when she rear-ended a person operating a scooter, causing him to be tossed onto the road, run over, and killed by another motorist. The estate of the scooter operator brought an action against Pizza Hut for negligent hiring and against the employee for negligent operation of her car. However, the court held that according to the doctrine of *respondeat superior*, a plaintiff is precluded from also bringing a negligent hiring claim in most circumstances when an employer admits the employee was acting within the scope of employment.

Roumbos v. Samuel G. Vazanellis & Thiros and Stracci, PC, No. 45S03–1710–CT–635 (April 12, 2018)
https://www.in.gov/judiciary/opinions/pdf/04121801ggs.pdf

Legal Malpractice – Premises-Liability Within Legal Malpractice

When a premises liability claim underlies a legal malpractice claim, a law firm has the burden of negating the proximate-causation element of the plaintiff's claim by negating an essential element of the underlying premises-liability claim. Here, the law firm failed to negate a business visitor's assertion that chords and wires on a hospital floor were not known and not obvious to her, causing her to slip and fracture her femur. The court held that the obviousness of a risk is a question sometimes able to be resolved on summary judgment, but not in this case. The court remanded the case to determine whether the chords and wires lying on the hospital floor posed an obvious or known tripping risk.

Campbell Hausfeld/ Scott Fetzer Co. v. Johnson, 2018 Ind. LEXIS 580, *1 (November 1, 2018)
https://www.in.gov/judiciary/opinions/pdf/11011801shd.pdf

Interpretation of Ind. Code § 34-20-6-4, "Misuse of a Product," Allowing Summary Judgment to a Product Manufacturer

A product user was seriously injured after using a tool designed by a manufacturer. He subsequently alleged the tool was defective in design and that the manufacturer failed to provide adequate warnings. The Supreme Court of Indiana ruled in favor of the manufacturer under Ind. Code § 34-20-6-4, "Misuse of a Product," in determining: (1) the user misused the tool by failing to follow its directions and such misuse served as a complete defense for the manufacturer; (2) the user's misuse was the cause of his injuries and that misuse could not have been reasonably expected by the manufacturer; and (3) the user could have avoided injury had he not used a cut-off disc or worn safety glasses, but he did not do so and his multiple failures to follow the instructions were the cause of his injuries and taken together, could not be reasonably expected by a manufacturer.

2. Appellate Court Decisions

a) Insurance Coverage Decisions

Argonaut Midwest Ins. Co. . v. DLC Servs., 95 N.E.3d 208 (Ind. Ct. App. 2017)
https://www.in.gov/judiciary/opinions/pdf/12121701cjb.pdf

The Presumption of Prejudice Stemming From a Delay in Notice Requires Rebuttal Evidence to Avoid Summary Judgment

The insurer was informed of a pending lawsuit against one of its insureds two years after the incident underlying the suit occurred and six months after the lawsuit was filed. The policy at issue contained a provision creating a duty to promptly notify the insurer in the event of a claim or suit. Under the language of the policy, without such notice the insurer had no duty to defend and could not be held liable. As a result of the delay in notice, the insurer filed for a declaratory judgment and sought summary judgment on the issue of coverage. The trial court denied summary judgment. The appellate court reversed. In doing so, the appellate court found the delay in notice created a presumption of prejudice against the insurer. This presumption required the insured to provide some evidence that in this instance the insurer was not actually prejudiced from the delay. However, the insured merely claimed that as a result of other insurance companies' investigations, the relevant evidence had been preserved. The insured did not designate any evidence supporting their claim. Therefore, the insured did not overcome the presumption of prejudice resulting from a delay in notice and the insurer was entitled to summary judgment.

Spina v. Owners Ins. Co., 97 N.E.3d 314 (Ind. Ct. App. 2018)
https://www.in.gov/judiciary/opinions/pdf/03261801cjb.pdf

Whether the Duty to Defend and Indemnify Exists is a Question of Law for the Court and the Insured is Not Entitled to a Jury for the Determination

Plaintiffs were sued by DirecTV for theft of DirecTV's programming, and defendants determined they had no duty to defend or indemnify and denied coverage. The plaintiffs brought suit against defendants for breach of contract and requested a jury trial. The issue of defendant's duty to defend and indemnify was bifurcated and the court ruled the defendant had no such duties. The plaintiff appealed claiming his constitutional right to a jury trial was violated and the appellate court disagreed. The appellate court affirmed, holding that whether or not a duty to defend or indemnify exists is a question of contract interpretation and interpretation of a contract is a matter of law for a court.

b) Employment Decisions

Family Christian World, Inc. v. Olds, 100 N.E.3d 277 (Ind. Ct. App. 2018)
https://www.in.gov/judiciary/opinions/pdf/04171803en.pdf

The Right to Direct and Control Means, Manner, and Method of Work Requires Evidence of Actual Control Exercised, Otherwise the Factor is Neutral

Plaintiff parents sued defendant for wrongful death of plaintiff's daughter while the daughter was working as a babysitter for the defendant. The defendants contended that the plaintiff's exclusive remedy was contained under the Worker's Compensation Act because the death arose out of the

course of employment. The defendants claimed they had the "power and right to direct and control the means, manner, and method" of the daughter's work, and filed for summary judgment. The appellate court determined that without evidence the defendants actually utilized this right and actually directed or controlled the daughter's work, the leading factor was neutral. Of the remaining factors: the daughter did not work exclusively for the defendant, worked irregular hours, had discretion whether to accept or reject jobs offered, and was paid by the job. Therefore, she was an independent contractor, not an employee, and the plaintiffs could sue for wrongful death.

Dish Network v. Marsh, 98 N.E.3d 140 (Ind. Ct. App. 2018)
https://www.in.gov/judiciary/opinions/pdf/04251801rra.pdf

An Appellate Court Can Overturn a Negative Judgment of the Worker's Compensation Board Only if There is no Probative Evidence Supporting the Boards Conclusion

The defendant denied Workers Compensation for the injuries sustained by the plaintiff in a car accident while on the job. The defendant denied the benefits based on the plaintiff's failure to use her seatbelt, which was required under the defendant's safety policy. The plaintiff was ejected from the vehicle during the accident and substantial evidence was presented to suggest the plaintiff was not wearing her seatbelt. However, based on the plaintiff's testimony that it was her practice to wear her seatbelt, and testimony from her and her friend that she sustained bruising consistent with seat belt use, the board concluded the plaintiff was wearing her seatbelt. The defendant appealed this decision, but because of this conflicting evidence the appellate court refused to overturn the board's determination.

c) Other Significant Decisions

Bunger v. Brooks, No. 45A05–1709–CT–2165 (Ind. Ct. App. 2018)
https://www.in.gov/judiciary/opinions/pdf/04171801jsk.pdf

Medical Malpractice – Patient's Expert Failed to Show that Patient Would not Have Gone Blind but for the Cataract Surgery

No medical malpractice claim exists when a patient with macular degeneration several years earlier cannot prove that his blindness was the complication of cataract surgery. In this case, a patient who suffered from macular degeneration argued that he was not informed about all the potential risks of cataract surgery, and if he had been he would not have gone forward with the surgery, and thus he would not be blind. However, the court found that the patient did not present evidence showing that cataract surgery creates a greater risk of vision loss. Further, the patient's expert failed to show what the patient's vision would have been had he not had the surgery because his prior eye issues could have accelerated, resulting in vision loss. Therefore, the court ruled in favor of the doctor and affirmed the lower court's determination that the patient failed to prove causation in the claim.

Dulworth v. Bermudez, 97 N.E.3d 272 (Ind. Ct. App. 2018)
https://www.in.gov/judiciary/opinions/pdf/03151801par.pdf

General Inclusive Language in a Release, Without Language Limiting the Release to Specific Parties, Acts to Release Third Parties

Three parties were driving in a row with party one in front, party two in the middle, and party three in the rear. Party one stopped abruptly. Party two stopped before colliding with party one. Party three rear-ended party two. Parties two and three settled and party two signed a release that contained language releasing the parties to the agreement and "all other persons." Party two then brought suit against party one for negligently causing the collision. Party one utilized the agreement between parties two and three as a defense. The court of appeals determined that because there was no language limiting the phrase "all other persons," the agreement released party one of liability. Therefore, general inclusive language in a release, without limiting language accompanying it, acts to release non-parties.

Stachowski v. Estate of Radman, 95 N.E.3d 542 (Ind. Ct. App. 2018)
https://www.in.gov/judiciary/opinions/pdf/03141801nhv.pdf

Statutes and Ordinances do not Create Duties Under the Doctrine of Negligence Per Se

Plaintiffs tenant sued defendant landlord for negligence in maintaining a handrail at the rental premises. Negligence has three elements: duty, breach and cause. Plaintiffs conceded that under common law landlords do not have a duty to maintain the rental property after the tenants take possession. However, plaintiffs argued that a local ordinance required defendant maintain the handrail and therefore defendant owed them a duty under negligence per se. The appellate court explained that negligence per se dealt with the breach element and not the duty element. A common law duty must exist and then courts may choose to adopt the standard of conduct set forth in a statute or ordinance as the standard of conduct required under the pre-existing duty. A party must already owe a duty of reasonable care without the statute and because the defendant in this case did not, negligence per se was inapplicable.

Poythress v. Esurance Ins. Co., 96 N.E.3d 663 (Ind. Ct. App. 2018)
https://www.in.gov/judiciary/opinions/pdf/02091801mgr.pdf

Electronic Signatures for Rejecting UIM Coverage Satisfies the Writing Requirement of Indiana Code 27-7-5-2

Plaintiff purchased car insurance through defendant. Plaintiff was injured as a passenger in a friend's vehicle and defendant did not compensate plaintiff for her injuries. Defendant was granted summary judgment. Plaintiff appealed arguing there was no written rejection of UIM coverage as required by Indiana law. The appellate court found an electronic signature on a form that rejected UIM coverage satisfied 27-7-5-2 and plaintiff, having electronically signed such a form, had lawfully rejected UIM coverage.

Zurich Am. Ins. Co. v. Circle Ctr. Mall, LLC, 2018 Ind. App. LEXIS 412 (November 7, 2018).
https://www.in.gov/judiciary/opinions/pdf/11071801ehf.pdf

Reaffirmation of Standard for Discoverability of Privileged Materials in Bad Faith Cases

During a bad faith lawsuit, a discovery dispute arose regarding whether documents in the insurance company's claim file were protected by the work-product doctrine and/or the attorney-client and/or insurer-insured privileges. The court of appeals refused to extend a new exception or standard, referring to the previously established standard for discoverability in *Hartford Financial Services Group, Inc. v. Lake County Park & Recreation Board*, 717 N.E.2d 1232 (Ind. Ct. App. 1999), and held the sought-after materials could be protected by evidentiary privileges. The court explained a simple assertion that an insured cannot otherwise prove a case of bad faith does not automatically permit an insured to rummage through the insurers' claims file.

Hamilton v. Steak 'n Shake Operations Inc., 92 N.E.3d 1166 (March 7, 2018)
https://www.in.gov/judiciary/opinions/pdf/03071803rra.pdf

Premises Liability and Foreseeability of Injuries

The Indiana Court of Appeals reversed a summary judgment in favor of Steak 'n Shake Operations, Inc., appearing to broaden the duties owed by property owners to business invitees. In *Hamilton*, the issue was whether Steak 'n Shake owed a duty to protect a customer shot in the face during a conflict with another patron.

The plaintiff was eating at a Steak 'n Shake restaurant with her brother when a group of individuals began taunting and verbally threatening them over a period of thirty minutes. Restaurant employees witnessed the escalation of the threats but did not take any action until it appeared a physical altercation was imminent. Moments after instructing both parties to leave, the altercation turned physical and the plaintiff was shot.

The trial court granted summary judgment in favor of Steak 'n Shake, determining the event was not reasonably foreseeable and, therefore, there was no duty owed to the patron. However, the appellate court reversed, stating: "[the] foreseeability analysis should focus on the general class of persons of which the plaintiff was a member and whether the harm suffered was of a kind normally to be expected – without addressing the specific facts of the occurrence."

The *Hamilton* court used a very broad analytical framework, and determined the restaurant had knowledge of the escalating situation and should have known there was "some probability or likelihood" one of its patrons could be physically harmed.

Hoosier Ins. Co. v. Riggs, 92 N.E.3d 685 (March 7, 2018)
https://www.in.gov/judiciary/opinions/pdf/03071801mpb.pdf

Subrogation and Real Party in Interest

The Indiana Court of Appeals reversed a trial court ruling that a subrogated insurer was not a "real party in interest" for purposes of pursuing a breach of contract claim against its insured's tenant. The court held this type of subrogation action should be considered on a case-by-case approach, instead of there being an absolute rule, with consideration being given to the terms of the lease existing between the parties.

In *Hoosier*, a landlord's insurer sought to recover for fire damage allegedly caused by the defendant tenants. Pursuant to the lease agreement between the landlord and tenants, the premises were to be returned at the end of the lease term in as good condition as when the lease commenced, and the tenants were required to obtain fire insurance which listed the landlord as an additional insured under the policy.

In the underlying action, the trial court dismissed the breach of contract claim, determining that a subrogated insurer was not a landlord as defined by Indiana Code Section 32-31-3-3 and, therefore, was not a Trial Rule 17(A) "real party in interest" entitled to pursue a breach of contract claim.

Upon review, the Indiana Court of Appeals determined it was not a certainty the plaintiff was not entitled to any relief, as the lease needed to be considered to evaluate the parties' intent regarding the appropriate party to bear the risk of fire loss. The *Hoosier* court relied upon *LBM Realty, LLC v. Mannia*, which stated: "if a lease obligates a tenant to procure insurance covering a particular loss, such a provision will provide evidence that the parties reasonably anticipated that the tenant would be liable for that particular loss, which would allow another insurer who pays the loss to bring a subrogation action against the tenant."

The *Hoosier* court remanded and directed the trial court to analyze the lease and all other relevant and admissible evidence to determine the parties' expectations and weigh and balance the equities to determine the defendants' liability for the damage to the premises.

3. Federal Court Decisions

a) Insurance Coverage Decisions

Ranburn Corp. v. Argonaut Ins. Co., No. 4:16-CV-00088 (N.D. Ind. Mar. 28, 2018)

Defending Under a Broad Reservation of Rights and Subsequently Accepting Full Coverage for a Suit Does not Interfere With an Insurer's Right to Control Specific Aspects of the Defense

Indiana Department of Environmental Management brought an environmental claim against the plaintiff. The plaintiff notified their insurers, the defendants, and the defendants agreed to provide a defense for plaintiff under a reservation of rights. None of the defendant's reservations specifically reserved the right to control the environmental consultant assisting in the defense. After seven years of paying for the consultant hired by the plaintiff, the defendant's accepted full coverage of the suit and refused to continue to use the original consultant. The defendant's hired a new environmental consultant. The new consultant was refused access to the property and the

plaintiff continued using the original consultant. The defendants refused to pay the original consultant for their work and the plaintiff brought suit.

The district court determined that a waiver of rights required an affirmative act on behalf of the defendants. The broad reservation of rights letters issued by the defendants did not constitute such an affirmative act. Accordingly, the defendants did not waive their right to control the defense. Additionally, merely paying the defense costs while defending under a waiver of rights does not waive an insurer's right to withdraw its reservation of rights. Therefore, the defendant insurers had the right to take control of defense and decide which environmental consultant would work for the defense.

V. THE STATE OF MICHIGAN

A. FREQUENTLY CITED MICHIGAN STATUTES

1. General Considerations in Insurance Claims Management

M.C.L.A. § 29.4
Reporting of Fires; Release of Information by Insurance Companies

Fire investigators and fire prevention officials may request an insurer investigating a fire loss of real or personal property release all information in possession of the agent relative to the loss. If an insurer has reason to suspect a fire loss was caused by incendiary means, the insurer must notify the fire investigating agency and furnish them with all relevant material acquired during its investigation of the fire loss.

M.C.L.A. § 29.6
Fire Marshal Investigative Authority

State fire marshal may investigate and inquire into fire cause and origin that results in death or property damage, and without restraint or trespass liability.

M.C.L.A. § 257.1106
Death, Injury or Damages Caused by Uninsured Motorist; Application for Payment from Fund

Where the death of or personal injury or property damage to any person or property is occasioned by an uninsured motor vehicle, any person who would have a cause of action against the owner or driver of the uninsured motor vehicle in respect to the death or personal injury or property may make application for payment out of the Motor Vehicle Accident Claims Act fund for all damages in respect to the death or personal injury and for damages in excess of $200.00 in respect to property damage.

M.C.L.A. § 257.1123
Maximum Payments for Death, Injury or Property Damage

In respect to applications under the Motor Vehicle Accident Claims Act for payment of damages arising out of motor vehicle accidents, the secretary shall not pay out of the fund:

(1) More than $20,000.00, exclusive of costs, on account of injury to or the death of one person, and, subject to such limit for any one person so injured or killed, not more than $40,000.00, exclusive of costs, on account of injury to or the death of two or more persons in any one accident; and

(2) More than $10,000.00, exclusive of costs, for loss of or damage to property resulting from any one accident.

M.C.L.A. § 436.1801(3)
Liquor Liability

Right of action of person killed, injured, or damaged by unlawful sale or providing of alcohol to minor or visibly intoxicated person, if the unlawful sale is proven to be a proximate cause of the damage, injury or death.

M.C.L.A. § 500.2006

Timely Payment of Claims or Interest; Proof of Loss; Calculation of Interest; Exemptions

An insurer must pay on a timely basis to its insured the benefits provided under the terms of its policy, or, in the alternative, the insurer must pay to its insured twelve percent interest on claims not paid on a timely basis. Failure to pay claims on a timely basis or to pay interest on claims is an unfair trade practice unless the claim is reasonably in dispute.

An insurer shall specify, in writing, the materials that constitute a satisfactory proof of loss not later than thirty (30) day after receipt of a claim, unless the claim is settled within the thirty (30) days. If proof of loss is not supplied as to the entire claim, the amount supported by proof of loss shall be considered paid on a timely basis if paid within sixty (60) days after receipt of proof of loss by the insurer.

An "insurer" now includes a nonprofit dental care corporation.

M.C.L.A. § 500.2026

Unfair Claims Practices

(1) Unfair or deceptive acts or practices in the business of insurance include, but are not limited to:

   a) Misrepresenting pertinent facts or insurance policy provisions relating to coverage at issue;

   b) Failing to acknowledge promptly or to act reasonably and promptly upon communications with respect to claims arising under insurance policies;

   c) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

   d) Refusing to pay claims without conducting a reasonable investigation based upon the available information;

   e) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed; and

   f) Failing to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.

(2) The failure of an insurer to maintain a complete record of all the complaints of its insureds which it has received since the date of the last examination is an unfair method of competition and unfair or deceptive act or practice in the business of insurance.

M.C.L.A. § 500.2845

Insured Real Property Fire Proceeds

If a claim is filed for a loss to insured real property due to fire or explosion and a final settlement is reached on the loss to the insured real property, an insurer shall withhold from payment twenty-five (25) percent of the actual cash value of the insured real property at the time of the loss or twenty-five (25) percent of the final settlement, whichever is less. For residential property, the twenty-five (25) percent settlement or judgment withheld shall not exceed $6,000.00 adjusted annually beginning June 1, 1999, in accordance with the Consumer Price Index.

M.C.L.A. § 500.4503
Fraudulent Insurance Acts

In general, a person commits insurance fraud if they present or prepare any oral or written statement supporting an application or claim for insurance while knowing the statement is false, either in whole or in part. Updated in 2015.

M.C.L.A. § 500.4507
Release of Information to Authorized Agency or Insurer

Upon written request by an authorized agency, an insurer may release to the authorized agency, at the authorized agency's expense, any or all information that is considered important relating to any suspected insurance fraud. An authorized agency may release information on suspected insurance fraud to an insurer upon a showing of good cause. This information may include, but is not limited to, the following:

(1) Insurance policy information relevant to an investigation, including any application for a policy;

(2) Policy premium payment records that are available;

(3) History of previous claims made by the insured, and/or

(4) Information relating to the investigation of the suspected insurance fraud, including statements of any person, proofs of loss, and notice of loss.

M.C.L.A. § 500.4509
Report of Information Concerning Insurance Fraud

In the absence of malice in a prosecution for insurance fraud, any person who cooperates with an authorized agency or complies with a court order to provide evidence or testimony is not subject to civil liability with respect to any act concerning the suspected insurance fraud, unless that person knows that the evidence, information, testimony, or matter contains false information pertaining to any material fact or thing.

M.C.L.A. § 500.4511
Violations; Penalties

A person who commits insurance fraud is guilty of a felony punishable by imprisonment for not more than four (4) years or a fine of not more than $50,000.00, or both, and restitution. A person who enters into an agreement or conspiracy to commit insurance fraud is guilty of a felony punishable by imprisonment for not more than ten (10) years or by a fine of not more than $50,000.00, or both, and shall be ordered to pay restitution.

2. Automobile Insurance

M.C.L.A. § 500.3009
Minimum Auto Insurance Limits

An automobile liability policy insuring against loss resulting from liability imposed by law for property damage, bodily injury, or death suffered by any person arising out of the ownership, operation, maintenance, or use of a motor vehicle shall not be issued to any motor vehicle unless the liability coverage is subject to a limit, exclusive of interest and costs of:

(1) Not less than $20,000.00 because of bodily injury to or death of one person in any one accident, and subject to that limit for one person;

(2) To a limit of not less than $40,000.00 because of bodily injury to or death of two or more persons in any one accident; and

(3) To a limit of not less than $10,000.00 because of injury to or destruction of property of others in any accident.

The policy, or declaration page, must have the proper warning on its face for the insured to exclude a named person from coverage.

M.C.L.A. § 500.3010
Loss or Damage Caused by Fire or Explosion to Motor Vehicle

An automobile insurer shall not pay a claim of $2,000.00 or more for loss or damage caused by fire or explosion to an insured motor vehicle until a report has been submitted to the fire or law enforcement authority designated and the insurer has received from the insured a copy of the report.

This section does not apply to accidental fires or explosions. If the insurer or the fire or law enforcement authority designated determines that the fire or explosion may not be accidental, the insurer shall notify the insured of the requirement for a report under this section by no later than thirty (30) days after the determination.

M.C.L.A. § 500.3105
Personal Protection Benefits; Accidental Bodily Injury

(1) Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle.

(2) Personal protection insurance benefits are due without regard to fault.

(3) Bodily injury includes death resulting therefrom and damage to or loss of a person's prosthetic devices in connection with the injury.

(4) Bodily injury is accidental as to a person claiming personal protection insurance benefits unless suffered intentionally by the injured person or caused intentionally by the claimant. Even though a person knows that bodily injury is substantially certain to be caused by his act or omission, he does not cause or suffer injury intentionally if he acts or refrains from acting for the purpose of averting injury to property or to any person, including himself.

M.C.L.A. § 500.3107

Allowable Medical Expenses and Accommodations

Personal protection insurance benefits are payable for the following:

Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services, and accommodations for an injured person's care, recovery, or rehabilitation;

(1) Work loss consisting of loss of income from work an injured person would have performed during the first three (3) years after the date of the accident if he or she had not been injured. The statutory maximum is based upon a schedule which is periodically adjusted for inflation;

(2) Replacement services or expenses, not exceeding $20.00 per day, reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he or she had not been injured, an injured person would have performed during the first three (3) years after the date of the accident, not for income but for the benefit of himself or herself or of his or her dependent; and

(3) Personal protection insurance benefits payable under subsection (1) does not cover (a) persons 60 years of age or older, or (b) the medical use of marijuana.

M.C.L.A. § 500.3112

Payees of Personal Protection Benefits; Payments as Discharge of Liability

Personal protection insurance benefits are payable to or for the benefit of an injured person or, in case of his death, to or for the benefit of his dependents. Payment by an insurer of personal protection insurance benefits discharges the insurer's liability to the extent of the payments unless the insurer has been notified in writing of the claim of some other person. If there is doubt about the proper person to receive the benefits or the proper apportionment, the insurer and the claimant may apply to the circuit court for an appropriate order. In the absence of a court order the insurer may pay:

(1) To the dependents of the injured person, the personal protection insurance benefits accrued before his death without appointment of an administrator or executor; and

(2) To the surviving spouse, the personal protection insurance benefits due any dependent children living with the spouse.

M.C.L.A. § 500.3113

Persons Not Entitled to Personal Protection Benefits

A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident:

(1) The person was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle;

(2) The person was the owner or registrant of a motor vehicle involved in the accident and failed to maintain the security for payment of benefits under personal and property protection insurance;

(3) The person was not a resident of Michigan, was an occupant of a motor vehicle not registered in Michigan, and was not insured by an insurer which has filed a certification for nonresidents;

(4) The person operating was named as an excluded operator; and/or

(5) The person was operating an excluded motor vehicle.

3. General Liability Considerations

M.C.L.A. § 418.131
Employer-Employee Recovery; Remedies

The right to the recovery of Workers' Compensation benefits shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease resulting from the employment. An employer can be held liable for an intentional tort where an employee is injured as a result of a deliberate act of the employer and the employer specifically intended the injury. An employer is presumed to have intended to injure the employee if the employer had knowledge that an injury was certain to occur and willfully disregarded that knowledge.

M.C.L.A. § 600.1483
Medical Malpractice Damages Cap

In a medical liability action, total noneconomic damages recoverable by all plaintiffs against all defendants are limited to $280,000.00, adjusted annually for inflation, except in cases where the plaintiff is hemiplegic, paraplegic, or quadriplegic due to an injury to the brain or spinal cord, or where the plaintiff had permanently impaired cognitive capacity, or the plaintiff has had a permanent loss of or damage to a reproductive organ, then noneconomic damages shall not exceed $500,000.00.

M.C.L.A. § 600.2913
Parental Liability for Minor Child's Willful Injury or Damage

Person or organization can recover damages in an amount not to exceed $2,500.00 from parent(s) of resident minor child of parent(s) when the minor has willfully or maliciously caused injury or damaged property.

M.C.L.A. § 600.2922
Wrongful Death Actions

Whenever the death of a person is caused by a wrongful act, neglect, or fault of another and the act would have entitled the party injured to maintain an action and recover damages if death had not ensued, the party that would have been liable shall be liable to an action for damages. Every action under this section shall be brought by, and in the name of, the personal representative of the estate of the deceased. The people entitled to damages by being damaged by the death only include the decedent's spouse, parents, children, descendants, grandchildren, brothers and sisters, grandparents, the children of the decedent's spouse, and those who are devisees under the will of the deceased, and those entitled to share in the state under the laws of intestate succession.

M.C.L.A. § 600.2925a
Contribution Between Tortfeasors

When two or more persons become jointly or severally liable in tort for the same injury to a person or property, there is a right of contribution among them even if a judgment has not been recovered against all or any of them.

The right of contribution exists only in favor of a tortfeasor who has paid more than his *pro rata* share of the common liability, and his total recovery is limited to the amount paid by him in excess of his *pro rata* share. A tortfeasor against whom contribution is sought shall not be compelled to make contribution beyond his own *pro rata* share of the entire liability.

M.C.L.A. § 600.2946
Product Liability Actions

In product liability actions, evidence that a product was in accordance with the prevailing industry standards at the time is admissible. A manufacturer or seller is not liable unless a plaintiff establishes that the product was not reasonably safe at the time the specific unit of the product left the control of the manufacturer or seller and, according to generally accepted production practices at the time, a practical and technically feasible alternative production practice was available that would have prevented the harm without significantly impairing the usefulness or desirability of the product to users and without creating equal or greater risk of harm to others.

There is a rebuttable presumption that the manufacturer or seller is not liable if the aspect of the product allegedly causing the harm was in compliance with federal or state standards, or was in compliance with regulations or standards relevant to the event causing the death or injury promulgated by a federal or state agency responsible for reviewing the safety of the product. However, noncompliance does not create a presumption of negligence.

M.C.L.A. § 600.2946a
Product Liability Actions; Caps on Damages

In an action for product liability, the total noneconomic damages shall not exceed $280,000.00, adjusted annually for inflation, unless the defect in the product caused either the person's death or permanent loss of a vital bodily function, in which case the total amount of damages for noneconomic loss shall not exceed $500,000.00.

In awarding damages in a product liability action, the trier of fact shall itemize damages into economic and noneconomic losses. Neither the court nor counsel for a party shall inform the jury of the limitations. The court shall adjust an award of noneconomic loss to conform to the limitations.

M.C.L.A. § 600.2959
Comparative Fault

In a tort action, the court shall reduce the damages by the percentage of comparative fault of the person upon whose injury or death the damages are based. If the plaintiff's percentage of fault is greater than the aggregate fault of the other person or persons, whether or not parties to the action, the court shall reduce economic damages by the percentage of comparative fault of the person upon whose injury or death the damages are based, and noneconomic damages shall not be awarded.

M.C.L.A. § 600.6304
Joint and Several Liability

The trier of fact must allocate liability among nonparties, even in medical malpractice cases where the plaintiff is not at fault, before joint and several liability is imposed on each defendant. Once joint and several liability is determined to apply, joint and several liability prohibits the limitation of damages to each defendant's respective percentage of fault.

M.C.L.A. § 691.1407
Governmental Immunity from Tort Liability

A governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function.

An officer, employee, member, or volunteer of the governmental agency is immune from tort liability caused while acting on behalf of the government agency if the following three conditions are met:

(1) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority;

(2) The governmental agency is engaged in the exercise or discharge of a governmental function; and

(3) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

The immunity does not extend to providing medical care or treatment to a patient, except in search and rescue operations.

Judges, legislators, and the highest elected executive official are immune when acting within the scope of his or her judicial, legislative, or executive authority.

4. Miscellaneous Statutes

M.C.L.A. § 24.264
Declaratory Judgment Actions

Unless an exclusive procedure or remedy is provided by a statute governing the agency, the validity or applicability of a rule may be determined in an action for declaratory judgment when the court finds that the rule or its threatened application interferes with or impairs, or imminently threatens to interfere with or impair, the legal rights or privileges of the plaintiff.

M.C.L.A. § 600.2157
Waiver of Physician-Patient Privilege

In any personal injury or malpractice suit, if the plaintiff produces a physician as a witness who has treated the patient for the injury or for any disease or condition for which the malpractice is alleged, that patient is considered to have waived the privilege provided in this section as to another physician who has treated the patient for the injuries, disease, or condition. Preempted by *Thomas v. 1156729 Ontario Inc.*, 979 F. Supp. 2d 780 (E.D. Mich. 2013).

M.C.L.A. § 600.6303

Collateral Source Benefits; Subrogation

In a personal injury action in which the plaintiff seeks to recover expenses, evidence that the expense or loss was paid or is payable by collateral source is admissible. The collateral source provider is joined after a verdict for the plaintiff is rendered and before a judgment is entered on the verdict. If the court determines that all or part of the plaintiff's economic damages are payable by a collateral source, the court will reduce the part of the judgment which represents damages paid or payable. This reduction shall not exceed the amount of the judgment for economic loss or that portion of the verdict which represents damages paid or payable by a collateral source.

Within ten (10) days after a verdict for the plaintiff, plaintiff's attorney shall send notice of the verdict to all persons entitled by contract to a lien against the proceeds of plaintiff's recovery. If a contractual lienholder does not exercise the lienholder's right of subrogation within twenty (20) days after receipt of the notice of the verdict, the lienholder shall lose the right of subrogation.

B. MICHIGAN STATUTES OF LIMITATIONS

ONE YEAR

Claim Type/Section	Statute Period
Libel, Defamation, or Slander M.C.L.A. § 600.5805(9)	One year for an action charging libel or slander.
Disability of Infancy or Insanity at Accrual of Claim M.C.L.A. § 600.5851	If the person entitled to bring an action is under eighteen years of age or not mentally competent at the time the claim accrues, the person shall have one year after the disability is removed, through death or otherwise, to make the entry or bring the action.
Actions for Personal or Property Protection Benefits; Notice of Injury M.C.L.A. § 500.3145	An action for recovery of personal protection insurance benefits for accidental bodily injury may not be commenced later than one year after the date of the automobile accident causing the injury unless written notice of injury has been given to the insurer within one year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. An action for recovery of property protection insurance benefits shall not be commenced later than one year after the accident.

TWO YEARS

Claim Type/Section	Statute Period
Assault, Battery, or False Imprisonment M.C.L.A. § 600.5805(2)-(4)	Two years for a person charging assault, battery, or false imprisonment. Five years for a person charging assault or battery against: his or her spouse or former spouse, an individual with whom he or she has a child in common, an individual with whom he or she has had a dating relationship, or a person with whom he or she resides or formerly resided.
Malicious Prosecution M.C.L.A. § 600.5805(5)	Two years from the date of the underlying criminal action being terminated in favor of the accused.
Medical Malpractice M.C.L.A. § 600.5805(6), § 600.5838(a)	Two years for an action charging malpractice, or within six months after the plaintiff discovers, or should have discovered, the existence of the claim, whichever is later. However, except as otherwise provided in section 600.5851(7) or (8) regarding minors, the claim shall not be commenced later than six years after the date of the act or omission that is the basis of the claim.
Fraudulent Concealment of Claim or Identity of Person Liable, Discovery M.C.L.A. § 600.5856	If a person who is or may be liable for any claim fraudulently conceals the existence of the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within two years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim, although the action would otherwise be barred by the period of limitations.

THREE YEARS

Claim Type/Section	Statute Period
Bodily Injuries for Claims Not Otherwise Specified by Statute M.C.L.A. § 600.5805(10)	Actions to recover damages for injuries to person or property must be brought within three years from the time of accrual.
Wrongful Death M.C.L.A. § 600.5805(10)	Three years after the time of the death for all actions to recover damages for the death of a person.
Product Liability Claims M.C.L.A. § 600.5805(13)	Three years from when the cause of action accrues. The cause of action accrues when a plaintiff by exercise of reasonable diligence discovers, or should have discovered, that he or she has a possible cause of action. However, in the case of a product that has been in use for not less than ten years, the plaintiff, in proving a prima facie case, shall be required to do so without benefit of any presumption.

FOUR YEARS

Claim Type/Section	Statute Period
Breach of Contract for Written or Oral Sale M.C.L.A. § 440.2725	Four years from when the cause of action has accrued. A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. By the original agreement the parties may reduce the period of limitation to not less than one year, but may not extend it.

SIX YEARS

Claim Type/Section	Statute Period
Damages for Breach of Contract M.C.L.A. § 600.5807(8)	Six years for actions to recover damages or sums due for breach of contract, starting from the date that the claim accrued.
Damage to Property by Engineers, Contractors, Architects M.C.L.A. § 600.5839(1)	Six years for actions against architects, professional engineers, or contractors arising from improvements to real property.
Death or Injury Arising from Improvements to Real Property M.C.L.A. § 600.5839	Six years after the time of occupancy of the completed improvement, use, or acceptance of the improvement, or one year after the defect is discovered, or should have been discovered, provided the defect constitutes the proximate cause of the injury or damage and is the result of gross negligence. No such action shall be maintained for more than ten years after the time of occupancy of the completed improvement, use or acceptance of the improvement.
Uninsured/ Underinsured Motorist Coverage M.C.L.A. § 600.5807(8)	In the absence of a contractual limitations provision, suit for UM/UIM benefits is governed by the six-year statute of limitations applicable to contract actions, not the three-year period applicable to claims for injury to person or property.

FIFTEEN YEARS

Claim Type/Section	Statute Period
Foreclosure of Mortgages M.C.L.A. § 600.5803	No person shall bring or maintain any action or proceeding to foreclose a mortgage on real estate unless he commences the action or proceeding within fifteen years after the mortgage becomes due or within fifteen years after the last payment was made on the mortgage.

C. SIGNIFICANT MICHIGAN COURT DECISIONS

1. Supreme Court Decisions

a) No-Fault/PIP Decision

Bazzi v. Sentinel Ins. Co., (Mich. July 18, 2018)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/SCT/154442_180_01.pdf

Trial Courts are to Determine Whether Voiding PIP Benefits to Third Parties is Equitable When an Insurance Policy is Void *Ab Initio*

Plaintiff brought an action against insurer seeking PIP benefits under the no-fault act for injuries he received while driving a vehicle leased by his mother. Although plaintiff's mother leased the vehicle in her own name, the vehicle was insured through a commercial policy issued to a limited liability company whose resident agent was plaintiff's sister. The insurer filed a third-party complaint seeking to rescind the policy on the basis that plaintiff's mother and sister had procured the policy through fraud. The trial court granted the insurer default judgment against plaintiff's mother and sister thereby rescinding the policy. The insurer then moved for summary disposition of plaintiff's PIP benefits claim arguing that the policy was void *ab initio* because it had been rescinded for fraud and therefore precluded plaintiff's recovery under the policy. The trial court denied the insurer's motion, concluding that plaintiff had a valid claim for PIP benefits under the innocent-third-party rule. On appeal, the Michigan Supreme Court ruled that a claim to rescind a contract is equitable in nature and therefore in the sound discretion of the trial court. The Michigan Supreme Court held that the trial court must balance the equities to determine whether a party is entitled to the rescission that the party seeks, and should not be granted when the result would be unjust or unequitable. The court further noted that an insured's fraud in an application of insurance does not automatically allow the insurer to rescind the policy with respect to third parties. The court found that in this case even though the policy was void *ab initio* because of the fraud, the trial court should determine whether it is equitable to rescind the policy between the insurer and the plaintiff.

b) Other Significant Decisions

Bailey Ann Marie Noble v. Inn at Watervale, Inc., (Mich. April 6, 2018)
http://publicdocs.courts.mi.gov/SCT/PUBLIC/ORDERS/155380_69_01.pdf

Michigan's Recreational Land Use Act Shields Landowners From Liability During Recreational Activities

Plaintiff's mother brought an action after the minor child was injured on defendant's beachfront property on Lake Michigan. The child stepped on hot coals that were the remnants of a beach fire while she was building sandcastles, throwing stones, and playing in the water. The Michigan Supreme Court held that the district court properly granted summary disposition in favor of the defendant. The court found that the recreational land use act ("RUA") applied to this case. Under the RUA the plaintiff must establish gross negligence or willful and wanton misconduct by an owner, tenant, or lessee in order to bring a cause of action for injuries to a person who is on the land of another without paying the owner, tenant, or lessee of the land valuable consideration for

any outdoor recreational use of the land. Furthermore, the court held that the child's activities fell within the plain meaning of "any other outdoor recreational use."

Bertin v. Mann, (Mich. July 25, 2018)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/SCT/155266_64_01.pdf

Inherent Risks in a Recreational Activity are Those That are Reasonably Foreseeable

Plaintiff brought suit against defendant alleging that defendant was negligent in operating a golf cart when defendant hit the plaintiff while the parties were playing a round of golf. The issue before the court is whether getting hit by a golf cart is an inherent risk of golfing. If it is an inherent risk, then the defendant owed a duty only to refrain from reckless misconduct and cannot be held liable for negligent conduct. If getting hit by a golf cart is not an inherent risk, then defendant will be held to the negligence standard of conduct. The court held that inherent risks in a recreational activity are those that are reasonably foreseeable by the participants. Further, the court concluded that foreseeability of the risk is a question of fact. The factual circumstances to be considered to determine foreseeability include, among other things, the general characteristics of the participants, the general rules of the activity, and any regulations prescribed by the venue where the activity is taking place.

Trowell v. Providence Hospital and Medical Centers, Inc., (Mich. July 23, 2018)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/SCT/154476_60_01.pdf

Evidentiary Hearings are Improper to Determine Whether Plaintiff's Claims Sound in Medical Malpractice or Ordinary Negligence

At issue was whether plaintiff's claims sounded in medical malpractice or ordinary negligence. If plaintiff's claims sounded in medical malpractice, they would be time barred by the two-year statute of limitations and defendant would be entitled to summary disposition. If plaintiff's claims sounded in ordinary negligence, then plaintiff's claims would not be barred. The Michigan Supreme Court held that a claim sounds in medical malpractice if the conduct on which the claim is based occurred in the context of a professional relationship and the claim raises questions of medical judgment beyond the common knowledge and experience of a jury. The court found that all but one of plaintiff's claims sounded in medical malpractice.

2. Appellate Court Decisions

a) Insurance Coverage Decisions

Woodring v. Phoenix Insurance Company, 324128 (Mich. Ct. App. June 28, 2018)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20180628_C324128_55_324128.OPN.PDF

Motor Vehicle Maintenance Exception is Still Good Law

Plaintiff brought suit, after slipping and falling at a self-serve car wash, seeking coverage under the No-Fault Act. Plaintiff parked the car but left it running. As she worked her way around to the rear of the car she slipped and fell suffering serious injury. The issue on appeal was whether the casual connection between the plaintiff's injuries and the motor vehicle was sufficient to allow recovery. The court reasoned that because the injury arose out of the maintenance of the vehicle it

is unnecessary to consider whether the vehicle was parked or not. The court held that most forms of vehicle maintenance require the vehicle to be in park. The court found that the maintenance exception is still good law and the there was a sufficient causal connection between the plaintiff's injuries and the maintenance of the motor vehicle.

Meemic Insurance Company v. Louise M. Fortson, 337728 (Mich. Ct. App. May 29, 2018)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20180529_C337728_33_337728.OPN.PDF

Fraud After the Procurement of an Insurance Policy Does not Make it Void *Ab Initio*

Defendants' son suffered extensive injuries after being thrown off the hood of a vehicle. The injured son received benefits under defendants' no-fault policy with plaintiff. For six years the defendants claimed to have provided around-the-clock attendant care to their son and requested payment from plaintiff for the services. After an investigation, the plaintiff concluded that the defendants had fraudulently represented the attendant-care services they claimed to have provided. The appellate court found that as a matter of law the defendants had committed fraud. Further, the court held that the son is properly considered an innocent third party. The court found that the insurer cannot use the fraud to void the policy *ab initio* because the fraud arose after the policy was procured. The court concluded that there are no grounds for automatic recession of the policy because it would be inequitable to the injured son. Lastly the court found that the parents were not insured persons under the policy when they committed fraud and therefore the fraud-exclusion clause in the policy is inapplicable and cannot be used to void the policy and deny the injured son's claims.

Westfield Ins. Co. v. Jenkins Constr., Inc., 337968 (Mich. Ct. App. September 6, 2018)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20180906_C337968_41_337968.OPN.PDF

General Contractor not Entitled to Indemnity of Liquidated Damages

A general contractor was retained by a public utility provider to make basin improvements and the general contractor subsequently retained a subcontractor to perform electrical work on the project. A heavy rainstorm, coupled with an electronic safety measure failure, caused the recently-completed basin to overflow, resulting in catastrophic structural damage to the basin. When the general contractor was not paid for its work, it brought suit. The subcontractor hired to complete the electrical work, and its insurer, brought a declaratory action against the general contractor arguing that an indemnity clause protected both parties from obligations to indemnify the general contractor. The court affirmed the lower court's decision in favor of the subcontractor and its insurer. The court reasoned that the general contractor paying liquidated damages to the utility provider does not require the subcontractor's insurer to indemnify the general contractor because liquidated damages are not the same as the "property damage" contemplated by the indemnity clause. Further, as with the subcontractor's insurer, the court held that the subcontractor itself was not obligated to reimburse the general contractor for the liquidated damages it paid to the utility provider.

Rochlani v Aaron, 336651 (Mich. Ct. App. September 4, 2018)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20180904_C336651_52_336651.OPN.PDF

Materially False Statements Regarding Damage Voids Policy

Homeowner was denied coverage for property damage caused by water pipes freezing and suddenly bursting. The insurer denied the claim based on the homeowner's misrepresentation of material facts, failure to notify the insurer of the damage, and failure to mitigate the loss; all of which were the homeowner's duty under the policy. The court agreed with the insurer that the homeowner voided the policy when she made material false statements regarding prior water damage to her home and thus, the insurer did not breach its contract with the homeowner when it denied her claim.

DKE, Inc. v. Secura Ins. Co., 333497 (Mich. Ct. App. November 6, 2018)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20181106_C333497_62_333497.OPN.PDF

Dominion and Control Standard

The appellate court reaffirmed that a wrongdoer must have "complete" dominion and control over the affairs of the plaintiff business in order for the wrongdoer's actions to be imputed to the plaintiff and thereby bar recovery under a policy. The lower court instructed the jury that if they found the wrongdoer had "sufficient" or "requisite" control over the business the wrongdoer's actions would void the policy protections. The appellate court reversed and remanded for new trial.

b) UM/UIM Decisions

Percy Baker v. Edward Darrell Marshall, 335931 (Mich. Ct. App. April 5, 2018)
http://publicdocs.courts.mi.gov/opinions/final/coa/20180405_c335931(45)_rptr_48o-335931-final-i.pdf

Failure to Raise Fraud in a Responsive Pleadings Constitutes a Waiver of the Fraud Defense

Plaintiff sustained injuries when a vehicle driven by defendant ran a red light and broadsided the vehicle in which the plaintiff was a passenger. At the time of the accident plaintiff had a no-fault policy and defendant was an uninsured motorist. Plaintiff submitted a claim for benefits to her insurer but it was denied. Plaintiff filed suit asserting that she was entitled to uninsured motorist benefits and first-party benefits under her policy. Insurer denied allegations that it had wrongfully failed to pay uninsured motorist benefits and asserted numerous affirmative defenses, which did not include an affirmative defense that the policy was void *ab initio* on the basis of fraud. Insurer later moved for summary disposition asserting that plaintiff was not entitled to uninsured motorist benefits because defendant-driver had a valid insurance policy. Insurer asserted that plaintiff had fraudulently misrepresented facts and that the fraud-exclusion clause in her policy applied and barred plaintiff from receiving any coverage. The appellate court held that the fraud defense is an affirmative defense and the failure to raise it in a party's responsive pleadings constitutes a waiver of that defense.

Jeremy Drouillard v. American Alternative Insurance Corporation, 334977 (Mich. Ct. App. February 27, 2018)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20180227_C334977(35)_RPTR_26o-334977-FINAL-I.PDF

A Hit and Run Vehicle Must Cause an Object to Hit the Insured in Order to Trigger Uninsured Motorist Coverage, Stationary Debris From Uninsured Motorist Not Enough

Plaintiff, an emergency medical technician, was involved in an accident while riding as a passenger in an ambulance driven by his partner. Plaintiff hit debris that was left behind as a result of a pickup truck accelerating to cross an intersection before the ambulance. As a result of the accident, plaintiff suffered injuries to his lumbar spine and was eventually disabled from work. Defendant denied uninsured motorist coverage because there was no uninsured motor vehicle involved in the accident. Defendant moved for summary disposition on this basis, but the trial court rejected defendant's arguments. The appellate court reversed. The court reasoned that reasonable minds could differ as to whether the pickup truck driver knew about the loss of the building materials that had caused the accident. However, summary disposition is appropriate for defendant because the debris was stationary at the time of the accident and therefore is not a hit-and-run situation, precluding plaintiff from uninsured motorist benefits under the insurance policy.

c) No-Fault/PIP Decisions

Bronson Methodist Hospital v. Farm Bureau Mutual Insurance Company of Michigan, 333275 (Mich. Ct. App. March 27, 2018)
http://publicdocs.courts.mi.gov:81/OPINIONS/FINAL/COA/20180327_C333275_51_333275.OPN.PDF

After the Ruling in *Covenant*, Health Care Providers Have no Statutory Standing to Bring Suit Against Insurance Carriers

Plaintiff provided medical services to patients and charged insurer for medical services and products. Included in the products charged to insurer were implant products. Defendant claimed it was policy to pay the wholesale cost of the implant product plus 50%. Plaintiff filed suit seeking the difference between what it billed for the implant products and what defendant paid. Additionally, plaintiff filed a motion for no-fault attorney fees under MCL 500.3148(1) based on its defendant's unreasonable refusal to pay the claim. The trial court granted plaintiff's motion for no-fault attorney fees. While the appeal was pending, the Michigan Supreme Court decided *Covenant.* The Appellate Court held that because of *Covenant*, plaintiff has no statutory standing to bring the suit in the first instance. The court remanded the case for further proceedings, to deal with post *Covenant* issues.

Maurer v. Fremont Insurance Company, 336514(Mich. Ct. App. September 18, 2018)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20180918_C336514_39_336514.OPN.PDF

An Action for Rescission Begins to Accrue at the Time the Application for Insurance is Submitted

Plaintiff was injured in an automobile accident in 2012. Almost two years after the accident, the insurer advised the insured that the policy was being rescinded retroactive to 2006 and therefore had no obligation to pay for plaintiff's medical expenses or wages lost related to the accident.

Plaintiff sought declaratory judgment arguing that she was entitled to PIP benefits and the insurer filed a counterclaim for rescission. The trial court granted summary disposition in plaintiff's favor determining that the insurer's rescission claim was not filed within the statute of limitations, the appellate court affirmed. The appellate court held that the insurer's claim for rescission accrued at the time the insured submitted the application for insurance. Since the application was submitted in 2006, the insurer had to file by 2012 to comply with the six-year limitations period for material and fraudulent misrepresentation.

Jawad A. Shah MD PC v. State Farm Mutual Automobile Insurance Co., 340370 (Mich. Ct. App. May 8, 2018)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20180508_C340370(37)_RPTR_63p-340370-FINAL-I.PDF

Anti-Assignment Clauses Prohibiting Assignments After a Loss has Occurred are Unenforceable

Plaintiffs appeal the trial court's order granting summary disposition in favor of defendant and denying plaintiffs' motion for leave to amend their complaint. Plaintiffs sought leave to amend their complaint after the ruling in *Covenant* providing that healthcare providers no longer possess a statutory cause of action against no-fault insurers. Plaintiffs obtained an assignment of rights from the insured to pursue payment of the no-fault benefits for healthcare services provided. The court held the anti-assignment clause in the insurance policy unenforceable to prevent the assignment and against public policy. However, the court concluded that the plaintiffs are only entitled to recover those losses occurring no more than one year prior to the signing of the assignment of benefits.

MIC Gen. Ins. Corp. v. Mich. Mun. Risk Mgmt. Auth., 341766 (Mich. Ct. App. October 18, 2018)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20181018_C341766_30_341766.OPN.PDF

No Profit Requirement Under MCL 500.3114(2); Government Hiring of Transportation Services is Government Sponsorship; and Vehicles Similar to Cargo Vans are not "Buses"

A non-profit organization was hired by a county to provide transportation services to elderly or disabled citizens. One of the organization's vehicles was involved in an accident and a passenger was injured. The court examined whether the transportation service is considered a government sponsored transportation program and whether the vehicle at issue was a bus. If both these questions were answered in the affirmative, the defendant would have been exempted from liability. It was determined that because the county government hired the non-profit organization for its services, it was a government sponsored program. The vehicle at issue was a Ford E-350 that could seat 9-10 individuals with a specialized wheelchair lift. The court determined the Ford E-350 is more akin to a cargo van and is therefore a "van" and not a "bus." Lastly, the court ruled that there is no "for-profit" requirement under MCL 500.3114(2), which provides that a passenger, injured in a motor vehicle operated in the business of transporting passengers, is to receive benefits from the insurer of the motor vehicle.

d) Premises Liability Decisions

Schmunk v. Olympia Entertainment, Inc., 334321 (Mich. Ct. App. March 20, 2018)
http://publicdocs.courts.mi.gov:81/OPINIONS/FINAL/COA/20180320_C334321_65_334321.OPN.PDF

The Substance of the Complaint Will Determine the Action and Relief

Plaintiff tripped and fell over a dolly that was being pulled by defendant's employee. The trial court concluded that plaintiff's claim sounded in ordinary negligence and not premises liability, so the open and obvious doctrine did not apply. Defendant argued that trial court erred by denying defendant's motion for directed verdict based on the open and obvious doctrine. The Appellate Court concluded that the plaintiff's complaint alleged that defendant was negligent in conduct, the focus did not involve a condition on the land. Additionally, the court found that the trial court properly denied a motion for summary disposition on whether defendant owed any duty at all to plaintiff. Defendant argued that it owed no duty to protect plaintiff from herself. The court reasoned that defendant's argument is actually about causation and not duty and that the doctrine of pure comparative negligence would distribute responsibility according to the proportionate fault of the parties.

Pugno v. Blue Harvest Farms LLC, 340142 (Mich. Ct. App. September 27, 2018)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20180927_C340142_40_340142.OPN.PDF

Res Ipsa Loquitor can be Applied to Premises Liability Cases

Plaintiff was injured while inspecting a malfunctioning air compressor on defendant's premises. A stack of pallets unexpectedly fell upon the plaintiff. Plaintiff brought suit alleging negligence and premises liability. Plaintiff argued that defendant's liability was proven based on the theory of *res ipsa loquitor*, the accident was of a kind that does not ordinarily occur in the absence of negligence. Defendant appealed arguing that plaintiff's claim sounded exclusively in premises liability and that *res ipsa loquitor* is inapplicable to premises liability claims. The appellate court agreed with defendant that plaintiff's claim sounded exclusively in premises liability, but the court found that the trial court did not err by allowing plaintiff to proceed on a theory of *res ipsa loquitor*.

Young v. Walton Oil, Inc., 333794 (Mich. Ct. App. February 6, 2018)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20180206_C333794_26_333794.OPN.PDF

Ice as a Matter of Law is Nearly Invisible and Therefore not Open and Obvious

Plaintiff slipped and fell on ice while walking toward a gas pump at defendant's place of business. The trial court dismissed plaintiff's complaint against the defendant ruling that there was no evidence that defendant had any notice of the icy condition and that the condition was open and obvious. The appellate court vacated the decision and remanded for further proceedings. The appellate court found that the plaintiff created genuine issues of material fact. The court reasoned that since neither the plaintiff nor the defendant could see the ice, the ice was not necessarily open and obvious upon casual inspection. Because ice is nearly invisible, as a matter of law the court concluded one would not expect an average person to be able to discern a nearly invisible thing on casual inspection. Further, the court held the duty of the defendant-owner is to not to casually

inspect the premises but to look for hazards and therefore a reasonable inference is that if defendant-owner claims he inspected the premises just before plaintiff's fall, he did so negligently.

e) Governmental Immunity Decision

Ryan Harston v. County of Eaton, 338981 (Mich. Ct. App. June 7, 2018)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20180607_C338981_41_338981.OPN.PDF

The Notice Provision in MCL 224.21(3) Governs When Bringing a Claim Against a County Road Commission

Plaintiffs brought suit after a motorist lost control of her minivan after driving through standing water on the roadway. The issue on appeal was whether the notice provision in MCL 224.21(3) in the highway code rather than the notice provision in MCL 691.1404(1) in the governmental tort liability act governs a claim brought against a county road commission. The appellate court held that MCL 224.21(3) applied and that plaintiffs were required to serve notice of defect upon the road commission and county clerk within 60 days. Further, the court determined that the road commission was not required to plead defective notice under MCL 224.21 as an affirmative defense. The court reasoned that governmental immunity is not an affirmative defense, rather, it is a characteristic of government and the plaintiff must plead in avoidance of governmental immunity.

f) Other Significant Decisions

Magley v. M&W Incorporated, 340507 (Mich. Ct. App. July 17, 2018)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20180717_C340507_32_340507.OPN.PDF

A Defendant Who Wrongfully Exerts Dominion Over Property is Not Shielded from Liability for Conversion on the Basis that the Action was Undertaken in Good Faith on Behalf of a Third-Party

Plaintiff defaulted on his tractor loan and defendant, acting on behalf of the creditor, repossessed the tractor. Plaintiff had attached a tank and sprayer to the tractor, which he owned outright. Defendant failed to return the tank and sprayer to plaintiff and even posted a picture of the tractor with the tank and sprayer on an auction's website. Plaintiff brought suit for conversion and the trial court granted summary disposition in favor of defendant on the theory that if there was any wrongdoing, defendant could not be held liable while acting on the creditor's behalf based on information provided by creditor. The appellate court reversed and remanded, holding that the trial court erred by concluding that defendant could not be held liable when acting as an agent for a third-party. The appellate court reasoned that defendant's mistaken belief that they had a right to the items is not a defense. The court found that questions of fact remained as to whether the items were accessions and whether defendant's conduct was lawful.

Nahshal v. Fremont Insurance Company, 336234 (Mich. Ct. App. June 21, 2018)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20180621_C336234_51_336234.OPN.PDF

Automatic Reversal Rule Does not Apply to Civil Lawsuits Even When There is an Improper Inquiry Into Religious Beliefs and Opinions

Insurer appealed as of right a judgment awarding plaintiff no-fault PIP benefits for a roll-over automobile accident. During trial, plaintiff's wife was questioned about her religious beliefs and opinions to help bolster her credibility. The appellate court held that the questioning of a witness about religious beliefs or opinions is impermissible, however, in this case the questioning did not warrant automatic reversal. The court held that the automatic-reversal rule does not apply to civil lawsuits and any improper religious belief or opinion testimony should be reviewed for prejudice on appeal. The court reasoned that no reversal was warranted in this case because the jury actually substantially reduced the wife's claims for services rendered to her husband, which indicates that the jury was not swayed by the improper inquiry into religious beliefs or opinions. Therefore, the error was harmless, and reversal not required.

Estate of Ezekiel D. Goodwin v. Northwest Michigan Fair Association, 333963 (Mich. Ct. App. July 3, 2018)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20180703_C333963_42_333963.OPN.PDF

Parental Immunity Does not Prevent a Jury From Apportioning Fault to a Negligent Parent

The appeal involved a wrongful death action filed by the mother of the deceased child. The 6-year old child was riding his bike on fairground property where he was hit by a truck. Following a jury trial, the court entered a judgment against the defendant in the amount of $1,000,000. Defendant appealed, arguing that the trial court erred by denying their request to name the father of the deceased child as a non-party at fault. The appellate court agreed with the defendant and remanded for a new trial. The appellate court reasoned that the child's father had a duty to supervise his child. The court concluded that a parent can be named as a non-party at fault notwithstanding the parental immunity doctrine. The defendant should have been able to argue the father's fault to the jury and the jury should have been allowed to apportion fault to the father.

Citizens Ins. Co. of Am. v. Sholtey, 337309 (Mich. Ct. App. October 25, 2018)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20181025_C337309_55_337309.OPN.PDF

Strict Compliance With MCL 500.3020(6) is Required for a Cancellation Notice to be Effective

The insured failed to pay the installments for vehicle insurance he had acquired. As a result, the insurance company sent the insured a one page cancelation notice on December 15, 2011. Approximately one month later the insured's daughter, driving the insured's vehicle, was involved in an accident. The insured made a claim under the policy and the insurance company denied the claim based on its earlier cancellation notice. The court ruled in the insured's favor because the notice sent by the insurance company was ineffective because it did not include the following language, as required by MCL 500.3020(6): "that the insured shall not operate or permit the operation of the vehicle to which notice of cancellation is applicable, or operate any other vehicle, unless the vehicle is insured as required by law."

3. Federal Court Decisions

K.V.G. Properties, Inc. v. Westfield Insurance Company, 900 F.3d 919 (6th Cir. 2018)
http://www.opn.ca6.uscourts.gov/opinions.pdf/18a0178p-06.pdf

Tenants' Illegal Activities Can Exclude Coverage Under an Insurance Policy

Plaintiff's tenants got caught growing marijuana in their rental units. Plaintiff's tenants caused substantial damage to the premises before the police caught them. Plaintiff speedily evicted the tenants and sought coverage from its insurers for nearly half a million dollars in related losses. Defendant-insurer denied the claims prompting the lawsuit. The district court granted summary judgment to the insurer reasoning that the damage was excluded by the policy and the Sixth Circuit affirmed. The Sixth Circuit concluded that the plaintiff's tenants engaged in criminal activity and therefore insurance coverage is excluded under the terms of the policy.

Auburn Sales, Inc. v. Cypros Trading & Shipping, Inc., 898 F.3d 710 (6th Cir. 2018)
http://www.opn.ca6.uscourts.gov/opinions.pdf/18a0162p-06.pdf

In Order to Prove Intentional Interference Under Michigan Law a Plaintiff Must Show "Intentional" Interference and "Improper" Interference

Plaintiff was a middleman selling Chrysler automotive parts to defendant. Defendant was prosecuted for selling counterfeit automobile parts, causing the manufacturer of the parts to terminate its supply agreement with the plaintiff. Plaintiff brought action against defendant, asserting claims for breach of contract and tortious intentional interference with a business relationship. The Sixth Circuit rejected plaintiff's argument that they need not prove intent as an element of tortious interference.

D. SIGNIFICANT CASES PENDING BEFORE THE MICHIGAN SUPREME COURT

Dye v. Esurance Property & Casualty Ins. Co., 912 N.W.2d 178 (pending)

Is an Owner/Registrant of a Motor Vehicle Entitled to PIP Benefits When no Owner/Registrant Maintains Security for Payment of Benefits Under PIP?

Plaintiff was injured in a motor vehicle accident and sought no-fault PIP benefits. The car plaintiff was driving was titled in his name, but the plaintiff's father had obtained insurance for the vehicle from Esurance. Esurance claims that co-defendant GEICO is the higher priority insurer, but GEICO denies liability. GEICO bases its argument on *Barnes v. Farmers Ins. Exch.*, which held that under MCL 500.3113(b) if none of the owners maintains the requisite coverage, no owner may recover PIP benefits. The trial court granted summary disposition in favor of plaintiff and Esurance against GEICO, but the Court of Appeals reversed. The issue before the court is whether an owner or registrant of a motor vehicle involved in an accident may be entitled to PIP benefits for accidental bodily injury where no owner or registrant of the motor vehicle maintains security for payment of benefits under PIP.

These cases were pending at the time this summary was printed. To confirm whether the Supreme Court has issued a decision in this case, we invite you to visit our website at http://www.rolfeshenry.com.

VI. THE STATE OF FLORIDA

A. FREQUENTLY CITED FLORIDA STATUTES

1. General Considerations in Insurance Claim Management

§ 86.011, Fla. Stat.
Declaratory Judgments

This statute gives the circuit and county courts of Florida the authority to declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed.

§ 95.03, Fla. Stat.
Contract Provision Shortening Limitations Period

This statute prohibits contract provisions which mandate an action based on the contract be brought in a shorter time period than prescribed in Florida's statute of limitations.

§ 95.10, Fla. Stat.
Cause of Action Arising in Another State

This statute prohibits a cause of action being brought in Florida if the cause of action arose in another state and the applicable statute of limitations of that state has lapsed.

§ 626.854, Fla. Stat.
Public Adjuster Prohibitions

Statute enacted to regulate public insurance adjusters and to prevent the unauthorized practice of law. The statute allows an insured to cancel a contract with a public adjuster within three (3) days of its signing or three (3) days following notification of the claim to an insurer without penalty to the claimant. The statute also contains provisions restricting the activities and fees allowable by public adjusters.

§ 626.9521, Fla. Stat.
Unfair Claims Practices; Penalties

The statute pertains to penalties imposed for an unfair or deceptive practice in the insurance business. The statute includes punitive fines for persons and insurers who commit an unfair claim practice.

§ 626.9744, Fla. Stat.
Settlement Practices Relating to Property Insurance

When a homeowner's insurance policy provides for the adjustment and settlement of first-party losses based on repair or replacement cost, physical damage incurred in making a repair or replacement which is covered may be included in the loss. When a loss requires replacement of items and the replaced items do not match in quality, color, or size, the insurer shall make reasonable repairs or replacement of items in adjoining areas, subject to consideration of relevant factors.

§ 627.405, Fla. Stat.
Insurable Interest Requirement for Property

No insurance contract of property shall be enforceable except for the benefit of persons having an insurable interest in the things insured at the time of the loss. The statute defines "insurable interest" as "any actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage or impairment."

§ 627.4136, Fla. Stat.
Non-joinder of Insurers

The statute requires for a person who is not an insured to obtain a settlement or verdict against a person who is an insured before a cause of action against a liability insurer can be maintained. An insurer has the right to insert a contractual provision into a liability insurance policy which precludes persons not designated as an insured from joining a liability insurer as a defendant.

§ 627.4137, Fla. Stat.
Disclosure of Certain Information Required

The statute requires insurers who provide liability coverage to disclose particular information upon written request of a claimant within thirty (30) days. This disclosure must be signed by a corporate officer, the insurer's claims manager, or superintendent, and must contain the following information: the insurer's name, the insured's name (or insureds' names), the limits of the liability coverage, a statement of any policy or coverage defense which it reasonably believes applies to the situation, and a copy of the policy. An insurer has a continuing duty to update this information to the claimant immediately upon discovering new facts relevant to the statement.

§ 627.4143, Fla. Stat.
Outline of Coverage

No private passenger automobile or basic homeowner's policy shall be delivered or issued for delivery unless an outline has been delivered prior to issuance or accompanies the policy. The statute lists what an effective outline of coverage for a private passenger motor vehicle insurance policy contains. The statute also requires a comprehensive checklist of coverage be delivered prior to issuance or delivery of a basic homeowner's policy. The statute lists what the comprehensive checklist of coverage must include.

§ 627.701, Fla. Stat.
Liability of Insureds, Coinsurance, and Deductibles

If an insurance policy or contract contains provisions requiring the insured to be liable as a coinsurer with the insurer issuing the policy, the statute lists the requirements the policy must meet to do so. The statute also contains restrictions on insurers and disclosure requirements for insurers for hurricane damage deductibles.

§ 627.70121, Fla. Stat.
Payment of Claims for Dual Interest Property

Effective for policies issued or renewed on or after Oct. 1, 2006, a property insurer shall transmit claims payments directly to the primary policyholder, payable to the primary policyholder only, without requiring a dual endorsement from any mortgage holder or lienholder, for amounts payable for personal property and contents, additional living expenses, and other covered items that are not subject to a recorded security interest.

§ 627.70131, Fla. Stat.

Insurer's Duty to Acknowledge Communications Regarding Claims; Investigation

An insurer shall review and acknowledge receipt of a communication with respect to a claim within fourteen (14) calendar days, unless payment is made within that time period or the failure to respond is caused by factors beyond the insurer's control. The acknowledgement requirement shall not apply to claimants represented by counsel beyond communications necessary to provide forms and instructions.

Within ten (10) working days after an insurer receives proof of loss, the insurer shall begin an investigation as is reasonably necessary.

Within ninety (90) days after an insurer receives notice of a property insurance claim, the insurer shall pay or deny such claim or a portion of the claim unless failure to pay is caused by factors outside the insurer's control.

§ 627.7015, Fla. Stat.

Alternative Procedure for Resolution of Disputed Property Insurance Claims

This statute sets forth a non-adversarial procedure for a mediated claim resolution conference as an effective, fair, and timely alternative to the traditional adversarial appraisal process.

§ 627.7016, Fla. Stat.

Insurer Contracts With Building Contractors

An insurer who offers residential coverage may contract with a building contractor skilled in techniques that mitigate hurricane damage. The insurer must guarantee the building contractor's work if the insurer offers policyholders the option to select the services of such building contractors. The insurance company is not liable for the actions of the building contractor.

§ 627.702, Fla. Stat.

Valued Policy Law

In the event of total loss to the insured property, the insurer's liability is the amount specified in the policy for which premiums were charged and paid. This statute does not deprive an insurer of any proper defense, and the insurer is never liable for more than the amount necessary to repair, rebuild, or replace the structure. An insurer is not prohibited from repairing or replacing damaged property at its own expense, without contribution on the part of the insured, except when an insured has purchased stated value coverage for a mobile home. Any insurer may provide insurance indemnifying the insured for the difference between the value of the insured property at the time of loss and the amount expended to repair, rebuild, or replace it.

§ 627.712, Fla. Stat.

Residential Windstorm Coverage Required

This statute requires a residential property insurance policy to provide windstorm coverage. However, an exclusion of windstorm coverage and an exclusion of coverage of contents must be available at the option of the policyholder. Certain criteria must be met for such exclusions.

§ 744.387, Fla. Stat.
Settlement of Minor's Claims

A settlement agreement of a minor's claim reached after an action has been commenced must be approved by the court having jurisdiction over the action. If a settlement agreement is reached before an action is commenced, the court may authorize the settlement if it will be for the best interest of the minor. If the net settlement exceeds $15,000.00, the court shall appoint a guardian on the minor's behalf.

2. Insurance Fraud

§ 627.409, Fla. Stat.
Representations in Applications and Warranties

A misrepresentation, omission, or concealment of fact in an application for an insurance policy may prevent recovery if it is material to acceptance of the risk, to the hazard assumed by the insurer, or if the insurer in good faith, would not have issued the policy, the same coverage, the same premium rate, or insured in as large an amount had the true facts been known.

§ 627.425, Fla. Stat.
Forms for Proof of Loss Furnished

On request of any person claiming to have a loss under an insurance contract, an insurer shall furnish forms of proof of loss. This statutory requirement does not include a responsibility on the insurer for completion of such proof.

§ 627.426, Fla. Stat.
Claims Administration

The following does not constitute a waiver of any provision of a policy or any defense: acknowledgement of the receipt of notice of loss or claim under a policy; furnishing forms for reporting a loss or claim; giving information relative to a loss or claim; making proof of loss; investigating any loss or claim under any policy; or engaging in settlement negotiations.

A liability insurer shall not be permitted to deny coverage based on a particular coverage defense unless: (a) written notice of reservation of rights to assert a coverage defense is given to the insured within thirty (30) days after the insurer knew of the coverage defense, and (b) at least thirty (30) days before trial, the insurer gives notice of its refusal to defend the insured, obtains from the insured a non-waiver agreement setting out the specific facts and policy provisions upon which the coverage defense is asserted, or retains independent counsel mutually agreeable to the parties.

Fla. Stat. § 633.112
Investigation of Fire; Reports

Upon request, the state fire marshal shall investigate the cause, origin, and circumstances of every fire occurring in Florida where property has been damaged or destroyed where there is probable cause to believe that the fire was the result of carelessness or design.

§ 633.534, Fla. Stat.
False Statements to Insurers

This statute deems false statements, representations or willful concealments by a firefighter employer, to an insurer of Workers' Compensation insurance, a second degree misdemeanor. A person that does so in any matter within the jurisdiction of the division is also guilty of a second degree misdemeanor.

3. Automobile Insurance

§ 324.021, Fla. Stat.
Minimum Insurance Required

This statute requires motor vehicle insurance in the amounts of:

1. $10,000.00 in case of bodily injury to, or death of, one person in any one crash;
2. $20,000.00 in case of bodily injury to, or death of, two or more persons in any one crash; or
3. $10,000.00 in case of injury to, or destruction of, property of others in any one crash.

Commercial motor vehicles and nonpublic sectors have their own statutes setting out minimum required insurance.

§ 626.9743, Fla. Stat.
Settlement Practices Relating to Motor Vehicle Insurance

The statute specifies prohibited conduct in settling motor vehicle insurance claims and applies to both personal and commercial claims. When liability and damages owed are reasonably clear, an insurer may not recommend that a third-party claimant make a claim on his or her own policy solely to avoid paying the claim under the policy issued by that insurer. Methods for adjustment and settlement of a motor vehicle total loss are provided and include a cash settlement, a replacement motor vehicle, or another method agreed to by the claimant.

§ 627.4132, Fla. Stat.
Stacking of Coverages

The statute prohibits stacking of insurance policies when an insured is protected by any type of motor vehicle insurance policy. The insured is only covered to the extent provided on the vehicle involved in the accident. The stacking prohibition does not apply to uninsured motorist coverage.

§ 627.7263, Fla. Stat.
Rental and Leasing Driver's Insurance to be Primary

The valid insurance providing coverage for the lessor of a motor vehicle for rent or lease is primary unless otherwise stated. If the lessee's coverage is to be primary, the statute sets out the specific language which the lease agreement must contain in order for such coverage to be effective.

§ 627.727, Fla. Stat.
Uninsured and Underinsured Motor Vehicle Coverage

No motor vehicle liability insurance policy shall be issued unless uninsured motor vehicle (UMV) coverage is provided therein. An insured may make a written rejection of the coverage on behalf of all insureds under the policy. If the motor vehicle is leased, the lessee has the sole privilege to reject uninsured motorist coverage. The insurer shall notify the insured at least annually of the insured's options as to UMV coverage.

The term "uninsured motor vehicle" includes an insured motor vehicle when the liability insurer thereof: (a) is unable to make payment with respect to the liability of its insured due to its insolvency, (b) has provided limits of bodily injury liability for its insured which are less than the total damages sustained by the person entitled to recover damages, or (c) excludes liability to a nonfamily member whose operation of an insured vehicle results in injury to the named insured.

§ 627.7275, Fla. Stat.
Motor Vehicle Liability

A motor vehicle insurance policy providing personal injury protection must also provide coverage for property damage liability. Insurers shall make coverage available for bodily injury, death, and property damage arising out of ownership, use, or maintenance of a motor vehicle in an amount not less than $10,000.00 for injury or death of one person in any one crash, $20,000.00 for injury or death of two or more persons in any one crash, and coverage available for property damage in an amount not less than $10,000.00 for the injury or destruction of another's property.

§ 627.730, Fla. Stat.
Florida Motor Vehicle No-Fault Law

Florida statutes within the range of section 627.730 to section 627.7405 may be cited and known as the "Florida Motor Vehicle No-Fault Law."

§ 627.736, Fla. Stat.
Required Personal Injury Protection Benefits, Exclusions, Priority, and Claims

This statute provides required insurance policy benefits, including, to a limit of $10,000.00, eighty (80) percent of all reasonable expenses for necessary medical services, sixty (60) percent of any loss of gross income and loss of earning capacity per individual from inability to work, and death benefits equal to the lesser of $5,000.00 or the remainder of unused personal injury protection benefits per individual.

This statute also authorizes exclusions of benefits for injuries sustained while occupying another motor vehicle owned by the insured and not insured under the policy, for injury sustained by any person operating the insured motor vehicle without consent, for injury caused to one's self intentionally or for injury sustained while committing a felony.

§ 627.737, Fla. Stat.
Tort Exemptions; Limitation on Right to Damages; Punitive Damages

This statute exempts owners and operators of motor vehicles from tort liability to the extent that the benefits required for personal injury protection under Fla. Stat. §627.736 are applicable. In any tort action brought against the owner or operator of a motor vehicle, a plaintiff may recover damages in tort for pain, suffering, mental anguish, and inconvenience because of bodily injury or disease only in the event that the injury or disease consists in whole or in part of:

(a) Significant and permanent loss of an important bodily function.

(b) Permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement.

(c) Significant and permanent scarring or disfigurement.

(d) Death.

§ 627.7407, Fla. Stat.
Application of the Florida Motor Vehicle No-Fault Law

This statute revives the Florida Motor Vehicle No-Fault Law, effective January 1, 2008, after the law was repealed on October 1, 2007. This statute requires personal injury protection coverage for motor vehicle owners. The statute recognizes that vehicle owners were not required to maintain personal injury protection coverage from October 1, 2007 to January 1, 2008.

4. Negligence, Other Torts and Contribution

§ 624.155, Fla. Stat.
Bad Faith

This statute provides a civil remedy in the event an insurer does not attempt, in good faith, to settle claims toward its insured.

5. Miscellaneous Statutes

§ 627.4145, Fla. Stat.
Readable Language in Insurance Policies

Effective for policies written on or after Oct. 1, 1983, this statute requires that every insurance policy written in Florida pass a readability test and lists the criteria a policy must meet to be deemed "readable." The statute also lists types of policies to which the readability requirement does not apply.

§ 627.4265, Fla. Stat.
Payment of Settlement

In a case in which a settlement between a person and insurer has been reached, the insurer shall tender payment no later than twenty (20) days after such settlement is reached. If the payment is not tendered within twenty (20) days or another date agreed to by the parties, it shall bear interest at the rate of twelve (12) percent per year from the date of the settlement agreement.

§ 627.7142, Fla. Stat.
Homeowner Claims Bill of Rights

An insurer issuing a personal lines residential property insurance policy must provide a "Homeowner Claims Bill of Rights to a policyholder within 14 days after receiving an initial communication with respect to a claim, unless the claim follows an event that is the subject of a declaration of a state of emergency. The statute sets out the "Homeowner Claims Bill of Rights."

B. FLORIDA STATUTES OF LIMITATIONS

ONE YEAR

Claim Type/Section	**Statute Period**
Specific Performance of a Contract § 95.11(5)(a), Fla. Stat.	One year for an action for specific performance of a contract.

TWO YEARS

Claim Type/Section	**Statute Period**
Medical Malpractice § 95.11(4)(b), Fla. Stat.	Two years from the time the incident giving rise to the action occurred, or two years from the time the incident should have been discovered with due diligence. In no event shall the action be commenced later than four years from the date of the incident or occurrence out of which the cause of action occurred, with the exception of minor before their 18th birthday.
Wrongful Death § 95.11(4)(d), Fla. Stat.	Two years for an action for wrongful death.
Libel or Slander § 95.11(4)(g), Fla. Stat.	Two years for an action for libel or slander.

FOUR YEARS

Claim Type/Section	Statute Period
Bodily Injury due to Negligence § 95.11(3)(a), Fla. Stat.	Four years for an action founded on negligence.
Personal Property damage due to Negligence § 95.11(3)(a), Fla. Stat.	Four years for an action founded on negligence.
Trespass to Property § 95.11(3)(g), Fla. Stat.	Four years for an action for trespass on real property.
Fraud § 95.031(2)(a), Fla. Stat.	For an action founded on fraud, four years, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence. In any event, an action for fraud must be begun within twelve years after the date of the commission of the alleged fraud.
Breach of Contract not in Writing § 95.11(3)(k), Fla. Stat.	Four years for an action on a contract not founded on a written instrument.
Assault and Battery § 95.11(3)(o), Fla. Stat.	Four years for an action for assault and battery.
Malicious Prosecution § 95.11(3)(o), Fla. Stat.	Four years for an action for malicious prosecution.
Statutorily Created Liability § 95.11(3)(f), Fla. Stat.	Four years for an action founded on a statutory liability.
Rights not Otherwise Provided for § 95.11(3)(p), Fla. Stat.	Four years for any action not specifically provided for.

Products Liability § 95.11(3)(e), Fla. Stat. § 95.031(2)(b), Fla. Stat.	Four years for an action founded on the design, manufacture, distribution or sale of personal property not permanently incorporated into real property. Under no circumstances may a claimant commence an action for products liability to recover for harm allegedly caused by a product with an expected useful life of ten years or less, if the harm was caused by exposure to or use of the product more than twelve years after delivery of the product to its first purchaser or lessee who was not engaged in the business of selling or leasing the product or of using the product as a component in the manufacture of another product.

FIVE YEARS

Claim Type/Section	**Statute Period**
Contract in Writing § 95.11(2)(b), Fla. Stat.	Five years for an action on a contract founded on a written instrument.
Foreclosure of Mortgage § 95.11(2)(c), Fla. Stat.	Five years for an action to foreclose a mortgage.

OTHER

Claim Type/Section	**Statute Period**
Bad Faith § 624.155, Fla. Stat.	As a condition precedent to bringing an action of bad faith, an insurer must have been given sixty (60) days written notice of the violation. No action shall lie if, within sixty (60) days after filing notice, the damages are paid or the circumstances giving rise to the violation are corrected.
Minor's Claims § 95.051(1)(i), Fla. Stat.	Except as to claims of medical malpractice, the statute of limitations does not begin to run until the minor reaches the age of majority. In any other case, the action must be begun within seven years after the act or event giving rise to the cause of action.

C. SIGNIFICANT FLORIDA COURT DECISIONS

1. Supreme Court Decisions

a) Insurance Coverage Decisions

Harvey v. GEICO General Insurance Co., No. SC17-85, 43 Fla. L. Weekly S 375 (Fla. 2018*)*
https://www.floridasupremecourt.org/content/download/425459/4585448/file/sc17-85.pdf

Actions by the Insured That Contributed to an Excess Judgment Will not Allow an Insurer to Escape Liability for Bad Faith

Plaintiff was involved in a car accident that resulted in the death of the other driver. The defendant insurer quickly determined the plaintiff was at fault and contacted the estate of the deceased. The estate requested financial and asset information of the plaintiff. The defendant originally rejected the request, but after continued efforts by the estate, the defendant informed the plaintiff of the request for information. The plaintiff told the defendant that he would contact his attorney and asked that the defendant inform the estate of existing circumstances that would delay his response. However, the defendant failed to relay the message and shortly thereafter the estate filed a wrongful death suit against the plaintiff. The estate was awarded damages far in excess of the policy coverage. The plaintiff subsequently filed a bad faith claim against the defendant and won. The Fourth District reversed because the plaintiff's actions or inactions were partly responsible for the excess judgment. However, the Supreme Court of Florida rejected this view stating that an insured's actions will not let an insurer off the hook when evidence clearly established the insurer acted in bad faith.

b) Other Significant Decisions

Schoeff v. R.J. Reynolds Tobacco Co., 232 So. 3d 294 (Fla. 2017)
https://www.floridasupremecourt.org/content/download/323284/2900370/file/sc15-2233.pdf

Comparative Fault Statute Likely Will not Reduce Compensatory Damages Resulting From Both Negligence and Intentional Torts

The Supreme Court of Florida explained the comparative fault statute is statutorily prohibited from applying to intentional torts. The court determined the damages in this case could not be allocated among the intentional tort and simple negligence claims without violating the rule against double damages. Therefore, any reduction in damages would necessarily reduce the damages resulting from the intentional tort and violate the statutory prohibition. Thus, when a party is found to have committed negligence and intentional torts, and those damages cannot be allocated between the two, the comparative fault statute cannot be applied to reduce damages.

Nat'l Deaf Acad., LLC v. Townes, 242 So. 3d 303 (Fla. 2018)
http://www.floridasupremecourt.org/decisions/2018/sc16-1587_CORRECTED.pdf

A Claim is of Ordinary Negligence Unless it is Directly Related to Medical Care or Services That Require the Use of Professional Judgment or Skill

The Fifth District and the Supreme Court of Florida determined this claim was not one of medical malpractice but one of ordinary negligence. The Supreme Court of Florida explained the determinative inquiry is whether the claim required proving a breach of the prevailing professional standard of care, through the use of a medical expert. In doing so, the Supreme Court of Florida explicitly disagreed with the First District's opinion in *Shands*. Because the restraining method at issue was employed by non-medical personnel, for the protection of residents and employees, and did not require medical skill or judgment when deciding to utilize the method, it would not require the use of medical testimony to prove negligence. Therefore, the injury was not directly related to medical care and the case was one of ordinary negligence.

Odom v. R.J. Reynolds Tobacco Co., 254 So. 3d 268 (Fla. 2018)
https://www.floridasupremecourt.org/content/download/413899/4509417/file/sc17-563.pdf

No Cap on Noneconomic Damages of Adult Children in Wrongful Death Suits

The plaintiff, the daughter of a deceased smoker, sued the defendant, a tobacco company, for wrongful death. The plaintiff was awarded a multimillion-dollar jury verdict. The Fourth District overturned the award on the basis that a relationship between an adult child living independent of their parent cannot justify a multimillion noneconomic damages award. The Supreme Court of Florida reversed because the only statutory requirement for an adult child to receive noneconomic damages is that there is no surviving spouse. The court explained, there is no statutory cap or a requirement the adult child be financially dependent, and an award should only be held excessive when it evinces or carries an implication of passion, prejudice, corruption, improper influences, or the like. Therefore, the court determined there is not a noneconomic damage cap for adult children in wrongful death suits.

Joyce v. Federated Nat'l Ins. Co., 228 So. 3d 1122 (Fla. 2017)
https://www.floridasupremecourt.org/content/download/323359/2901059/file/sc16-103.pdf

Contingency Fee Multipliers Apply in Insurance Cases

The Florida Supreme Court rejected the view that contingency fees are only to be applied in rare and exceptional circumstances. In this insurance coverage dispute the Florida Supreme Court upheld the trial court's two step application of a contingency fee multiplier. First, the trial court determined the "lodestar amount." Then, utilizing the *Quanstrom* factors, the trial court applied a contingency fee multiplier of 2.0.

DeLisle v. Crane Co., SC16-2182 (October 15, 2018)
https://www.floridasupremecourt.org/content/download/413865/4508984/file/sc16-2182.pdf

Florida is a Frye State for Admissibility of Expert Testimony

The Florida Supreme Court held that Florida utilizes the Frye standard and not the Daubert standard. In doing so, the court overturned an appellate court and refused to adopt the amended Section 90.702 of the Florida Code that attempted to endorse the Daubert standard. The court also

stated that judges are not obligated to assess whether the methodology utilized by expert witnesses is reliable because that determination is to be left to the relevant scientific community.

Newton v. Caterpillar Fin. Servs. Corp., 253 So. 3d 1054 (Fla. 2018)
https://www.floridasupremecourt.org/content/download/413901/4509441/file/sc17-67.pdf

Dangerous Instrumentality Interpretation

The Florida Supreme Court further interpreted the dangerous instrumentality doctrine, which generally imposes vicarious liability upon the owner of a motor vehicle who voluntarily entrusts that motor vehicle to an individual whose negligent operation causes damage to another. The subject case dealt with an 8,000-pound loader used to clear private lots near public streets. Newton was an independent contractor. He was injured assisting the operator of the loader, who was not an independent contractor. Newton alleged Caterpillar was liable for the injuries he sustained from the operator's negligent operation of the loader, because the loader was a dangerous instrumentality. The Court first found, as a matter of law, that loaders are dangerous instrumentalities. Second, the Court found Newton's status as an independent contractor did not preclude him from protection under the dangerous instrumentality doctrine. The Court found its prior interpretation of the dangerous instrumentality doctrine did not treat construction workers different from the general public when injured in a public place. The Court found that while Newton may not have been a member of the unsuspecting public, the subject incident occurred on a public street. Finally, Newton employment status did not disqualify his accident from coverage under the dangerous instrumentality doctrine.

2. Appellate Court Decisions

a) Insurance Coverage Decisions

Citizens Prop. Ins. Corp. v. Salkey, 43 Fla. L. Weekly D 2560 (Fla. Dist. Ct. App. 2018)
https://edca.2dca.org/DCADocs/2014/3002/143002_39_11162018_08265395_i.pdf

Re-affirmation of Concurrent-Cause Doctrine and Burden of Proof

The Second District reversed a judgment rendered for the insureds on their breach of contract claim against the insurer because the jury instructions were confusing and may have misled the jury, causing it to conclude that the insureds had proved that their property was damaged by a sinkhole, a burden they did not have, and made it impossible for appellant to meet its burden of proving that no loss was sinkhole related. In so ruling, the court affirmed that the context of property insurance, the concurrent-cause doctrine, not the efficient-proximate-cause doctrine, is the appropriate theory of recovery to apply when two or more perils converge to cause a loss and at least one of the perils is excluded from an insurance policy. Regarding burdens of proof, the court found the insured submitting a claim under an all-risks policy has the initial burden of proving that the insured property suffered a loss while the policy was in effect. The burden then shifts to the insurer to prove that the cause of the loss was excluded from coverage under the policy's terms and conditions.

b) UM/UIM Decision

Amica Mut. Ins. Co. v. Willis, 235 So. 3d 1041 (Fla. Dist. Ct. App. 2018)
https://edca.2dca.org/DCADocs/2016/2319/162319_65_01172018_08311004_i.pdf

UM/UIM Coverage Must be Reciprocal to Liability Coverage

An insurance policy did not include golf carts within its definition of motor vehicles. However, the policy provided liability coverage for damages caused by the insured's use of a golf cart while simultaneously excluding UM/UIM coverage for damages sustained from another's use of a golf cart. The insured was hit by a golf cart and the insurance carrier denied UM/UIM benefits. The issue was whether an insurance company can provide liability coverage in excess of the statutorily required minimum but exclude reciprocal UM/UIM coverage, thereby maintaining the minimum statutory UM/UIM coverage. The appellate court determined Florida Statute 627.727(1) required any insurance policy providing liability coverage also provide a reciprocal amount of UM/UIM coverage.

c) Other Significant Decisions

Demase v. State Farm Fla. Ins. Co., 239 So. 3d 218, 219 (Fla. Dist. Ct. App. 2018)
http://www.5dca.org/Opinions/Opin2018/032618/5D16-2390.op.pdf

Bad Faith Claims do not Require an Underlying Civil Action

The trial court dismissed the claim because there was no underlying civil action that determined the insurer's liability and the extent of the insureds' damages, as required under § 624.155(1)(b). The appellate court reversed finding the payment of the claim after the 60-day cure period, provided in 624.155(3), constituted a determination of the insurer's liability for coverage and the extent of the insureds' damages. Therefore, an underlying action is not the only way to fulfill these two prerequisites under § 624.155(1)(b) and a bad faith claim can proceed after such a payment made outside the 60-day cure window.

Peoples Trust Ins. Co. v. Tracey, 43 Fla. L. Weekly 1684 (Fla. Dist. Ct. App. 2018)
https://www.4dca.org/content/download/384871/3298530/file/173945_1709_07252018_10053161_i.pdf

Insurers Can Compel Appraisal if They do not Wholly Deny a Claim

The defendant admitted coverage but, finding some of the damage was the result of causes not covered, limited the amount of the loss. The plaintiff obtained two estimates far in excess of the defendant's estimates and the defendant requested appraisal to resolve the discrepancies. The plaintiff filed a breach of contract claim and the defendant moved to compel appraisal but was denied. Because the defendant did not wholly deny the plaintiff's claim, they were able to compel appraisal of the disputes portion of the claim in an attempt to resolve the issue.

Markovits v. State Farm Mut. Auto. Ins. Co., 235 So. 3d 1018 (Fla. Dist. Ct. App. 2018)
https://edca.1dca.org/DCADocs/2017/1623/171623_1287_01032018_02540466_i.pdf

Service of a Complaint on the CFO of Florida Constitutes Service on the Insurance Company for Timing of Settlement Offers

The plaintiff served their complaint on the Chief Financial Officer of Florida (CFO) and three days later served the defendant. Then, 90 days after serving the CFO, but only 87 days after serving the defendant, the plaintiff served the defendant a settlement offer, which the defendant rejected. The plaintiff received a judgment more than 25 percent greater than the proposed settlement and moved for attorney's fees. The trial court denied the motion because the settlement proposal was served less than 90 days after the defendant was served the complaint. The First District reversed finding service on the CFO constituted service on the defendant under Fl. R. Civ. Pro. 1.442(b).

Jones v. Federated Nat'l Ins. Co., 235 So. 3d 936 (Fla. Dist. Ct. App. 2018)
https://www.4dca.org/content/download/188505/1672993/file/162579_1709_01172018_08481782_i.pdf

Insurers Bear the Burden When Insured Produces Evidence of a Covered Concurrent Cause

If the insured produces evidence of a covered concurrent cause for their claim, the insurer bears the burden of proof to establish that the insured's purported concurrent cause was either (a) not a concurrent cause, or was a *de minimis* cause, or (b) excluded from coverage by the insurance policy. If the insurer fails to satisfy this burden of proof, the insured is entitled to judgment in their favor.

Landers v. State Farm Fla. Ins. Co., 234 So. 3d 856 (Fla. Dist. Ct. App. 2018)
http://www.5dca.org/Opinions/Opin2018/011518/5D15-4032.op.mot%20reh.pdf

A CRN can be Filed Before the Completion of the Appraisal Process

The Fifth District found that Florida Statute 624.155(3)(d) does not require a final determination of coverage and damages before a CRN can be filed. The court explained that the purpose of a CRN is to facilitate and encourage good-faith efforts to timely settle claims before litigation. Therefore, a CRN filed during the appraisal process was valid and could be utilized for a subsequent bad faith claim.

Eckols v. 21st Century Centennial Ins. Co., 2018 Fla. App. LEXIS 17502
https://edca.5dca.org/DCADocs/2017/2904/172904_1260_12072018_08324407_i.pdf

"Owned Vehicle" Exclusion Found Ambiguous

The Fifth District found the following "owned vehicle" exclusion was ambiguous as to whether it applied to the motorcycle Eckols was riding when he was struck by an uninsured/underinsured motorist. *"A. We do not provide Uninsured Motorist Coverage for bodily injury sustained: 1. By an insured while occupying any motor vehicle owned by that insured which is not insured for this coverage under this policy. This includes a trailer of any type used with that vehicle."*

D. SIGNIFICANT CASES PENDING BEFORE THE FLORIDA SUPREME COURT

Progressive Select Ins. Co. v. Fla. Hosp. Med. Ctr., 236 So. 3d 1183, 1188 (Fla. Dist. Ct. App. 2018)
http://www.5dca.org/Opinions/Opin2017/111317/5D16-2333.op.pdf

How to Calculate Deductibles for PIP Benefits

The defendant insured an individual who was injured in a car accident. The insured's medical bills exceeded the deductible and his benefits under the policy were assigned to the plaintiff hospital. The hospital sent the defendant a calculation of treatment costs and defendants remitted payment that was less than the proffered amounts. The difference was a result of applying Florida Statute 627.739(2) before or after applying 627.736(5). The trial court and the Fifth District determined Florida Statutes required the deductible be applied to the total charges before applying section 627.736(5).

Restoration 1 of Port St. Lucie v. Ark Royal Ins. Co., No. 4D17-1113 (Fla. Dist. Ct. App. 2018)
https://www.4dca.org/content/download/402124/3447933/file/171113_1257_09052018_09123304_i.pdf

Insurance Policies Can Require the Consent of Mortgagees Before an Assignment of Post-Loss Benefits

Insureds had a policy on their house that included an anti-assignment provision disallowing the assignment of benefits without consent from all insureds and all mortgagees. The insureds' house sustained water damage. One insured hired the plaintiff to repair and fix the damage and agreed to assign to the plaintiff any benefits the insureds had under their policy. However, the insured did not obtain consent from either the other insured or the mortgagee before entering this agreement. The trial court dismissed the action because of the anti-assignment provision and lack of consent. The Fourth District affirmed. The Fourth District recognized the Fifth District has read Florida precedent broadly to create a blanket ban on any restriction regarding assignment of benefits under an insurance policy. However, the Fourth District read Florida precedent to ban only the requirement of insurer's consent because an insurer has no interest in who they must pay. However, other insureds and mortgagees have vested interests in who performs the repairs. Therefore, the Fourth District held policy provisions requiring consent from insureds and mortgagees regarding the assignment of benefits are enforceable. The Fourth District has certified a direct conflict with the Fifth District to the Florida Supreme Court, which has accepted discretionary review.

These cases were pending at the time this summary was printed. To confirm whether the Supreme Court has issued a decision in any of these cases, we invite you to visit our website at http://www.rolfeshenry.com.

State Departments of Insurance
Contact Information

Ohio Department of Insurance
50 W. Town Street
Third Floor – Suite 300
Columbus, Ohio 43215
(800) 686-1526
https://www.insurance.ohio.gov

Kentucky Department of Insurance
215 West Main Street
Frankfort, Kentucky 40601
(800) 595-6053
http://insurance.ky.gov

Indiana Department of Insurance
311 West Washington Street
Suite 103
Indianapolis, Indiana 46204
(317) 232-2385
http://www.in.gov/idoi/

Michigan Department of Insurance
611 W Ottawa Street
3rd Floor
Lansing, Michigan 48933
(877) 999-6442
http://www.michigan.gov/difs/

Florida Office of Insurance Regulation
200 East Gaines Street
Tallahassee, Florida 32399
(850) 413-3140
https://www.floir.com/


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