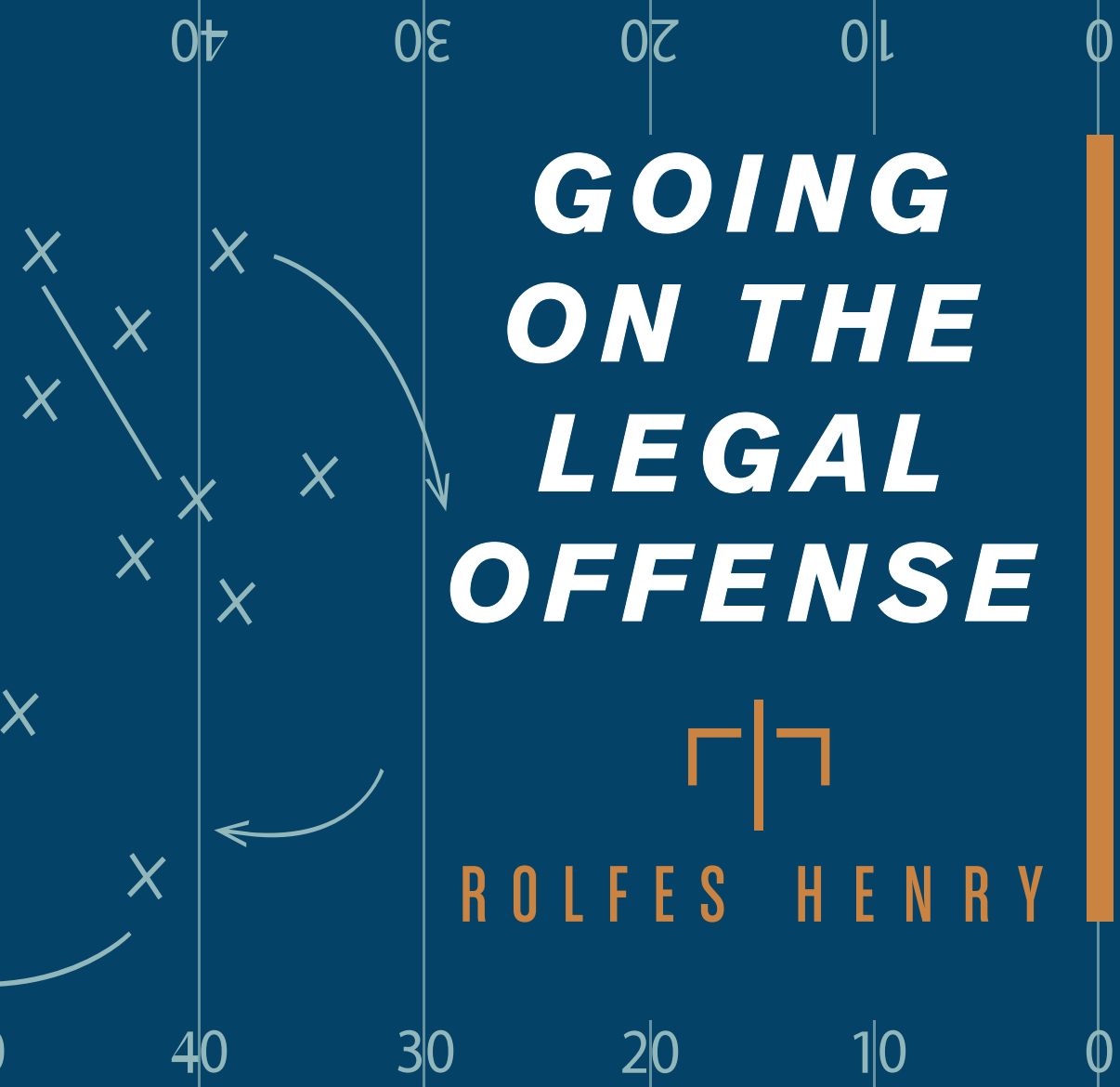
2020 SUMMARY OF TORT AND INSURANCE LAW



GOING ON THE LEGAL OFFENSE

ROLFES HENRY

ROLFES HENRY

Professionals in Action. Partners in Service.

"The best defense is a good offense."

-- Jack Dempsey

Dear Business Partners and Friends:

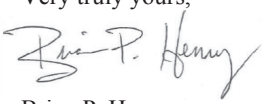
Several years ago, our Firm made a purposeful move away from describing our insurance practice as "insurance defense," instead choosing to utilize the phrase "insurance services." The reasons for the change were varied, but mostly centered around the idea that "defense" is only one aspect of how we attempt to serve our clients' interests. As you all know, our world of insurance services ranges from "traditional" insurance defense to insurance coverage analysis to subrogation, and everything in between. At the core of those services, however, is the foundational element of *advancing* the matter towards the best result for you, rather than "treading water" while others take the lead.

Like day and night, "offense" and "defense" are naturally co-dependent, as one cannot exist without the other. But all too often, "defending" a case devolves into merely "waiting" – waiting on submissions from an opponent, waiting on bringing a matter to the Court's attention, or waiting for some case element to perfectly crystallize when, in reality, that almost never happens. While prudence in the practice of law is worthwhile, the value of *action* cannot be overstated – purposeful, principled, targeted *action* designed to win the day.

For more than thirty years, you have entrusted us with your most complex cases and claims, your most challenging questions and conundrums. That trust has been given in large measure because of our Firm's commitment to advancing your interests – "going on offense" – rather than waiting for something to happen. Our work for you is not about servicing lines of business – it is about serving your interests. And in 2020, to expand on the metaphor, we will continue to strive to advance the ball, move down the field, and score the touchdown for you in whatever form that comes.

On behalf of all of us at Rolfes Henry, we thank you for the opportunity you give us every single day to zealously represent you and your interests, and to employ what Jack Dempsey described as the "best defense" – a good offense. We look forward to continuing that service in 2020.

Very truly yours,



Brian P. Henry
Firm President

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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 an 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
Setoffs 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 present 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) Other Significant Decisions

State ex. rel. Pacheco v. Indus. Comm., 2019-Ohio-2954
http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2019/2019-Ohio-2954.pdf

Temporary Total Disability is not Payable if the Employer Makes Work Available Within the Claimant's Capabilities, and the Job Offer Must be Made in Good Faith.

Where two physicians reported that the claimant could perform sedentary work while employed in light-duty work, but the claimant did not disclose to anyone that he could do the work, the court found there was evidence that the claimant was capable of performing light-duty work. However, the Supreme Court of Ohio disagreed that the light-duty job offer was not made in good faith because that is a factual determination that must be made by the Industrial Commission.

Rieger v. Giant Eagle, Inc., 2019-Ohio-3745
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2019/2019-Ohio-3745.pdf

Causal Connection to Prior Bad Incidents Found Lacking; Causal Connection in Context of Negligent Entrustment Found Lacking

The plaintiff was hit and injured by another patron inside of Giant Eagle, who was driving a Giant Eagle motorized cart. The Supreme Court of Ohio determined Giant Eagle should have been granted a directed verdict at trial as the victim failed to present evidence that the cause of more than 100 prior incidents involving motorized carts at Giant Eagle stores was the result of the motorized-cart drivers' lack of instruction and training. Regardless of the fact Giant Eagle did not provide training to customers who used its motorized carts, there was no evidence that training would have prevented the subject accident to support a negligent entrustment claim.

New Riegel Local Sch. Dist. Bd. of Educ. v. Buehrer Grp. Architecture & Eng'g, Inc., 2019-Ohio-2851, 2019-Ohio-5040
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2019/2019-Ohio-2851.pdf

Ohio's Construction Statute of Repose Applies to All Causes of Action, Whether Sounding in Tort or Contract

The Certificate of Completion for a construction project was March 3, 2004. This date served as the most favorable for a school attempting to file a construction defect lawsuit. However, the suit was not filed until April 30, 2015, which was more than ten years after the latest possible date of substantial completion.

The Supreme Court of Ohio determined the trial court correctly granted judgment on the pleadings to the contractor based upon the statute of repose, as there were no longer any outstanding claims against the contractor, and the claim against the contractor's surety also failed.

The Supreme Court of Ohio determined R.C. 2305.131, the construction statute of repose, applied to all causes of action, whether sounding in tort or contract, that sought to recover damages for bodily injury, an injury to real or personal property, or wrongful death that arose out of a defective and unsafe condition of an improvement to real property against a person who performed services for the improvement to real property or a person who furnished the design, planning, supervision of construction, or construction of the improvement to real property.

2. Appellate Court Decisions

a) Insurance Coverage Decisions

AKC, Inc. v. United Specialty Ins. Co., 2019-Ohio-2809 (9th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/9/2019/2019-Ohio-2809.pdf

Where an Exclusion in the Policy did not Include the Additional Language "Sewage," it was Susceptible to Multiple Interpretations, Which Lead to Liberal Policy Interpretation Favoring the Insured.

The insured filed a breach of contract claim to recover for its services performed in cleaning up a sanitary sewer backup. The insurer denied coverage setting forth the exclusions for "water" and "mudslide or mudflow." The Court of Appeals concluded that if the insurer wanted to include "sewage" from coverage it could have added those words. Since this exclusion was reasonably susceptible to more than one interpretation, it was construed strictly against the insurer.

Napier v. Ickes, 2019-Ohio-2700 (5th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/5/2019/2019-Ohio-2700.pdf

An Insurer's Policy Excluded Coverage Only if the Injury was Expected or Intended Under the Intentional Acts Exclusion.

When a boy shot a gun with the intention of causing injury, the policy precluded coverage for the incident under the intentional acts/injury exclusion in a homeowner's policy based on the doctrine of inferred intent. The Court of Appeals determined there was no requirement for the insured to intend any specific injury. Rather, the only requirement was that the insured intended or expected to cause an injury in order for the exclusion to apply.

Badders v. Century Ins. Co., 2019-Ohio-1900 (2nd Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/2/2019/2019-Ohio-1900.pdf

An Insurer does not Have a Duty to Defend or Indemnify an Insured When the Policy has an Exclusion for Personal Injuries and Property Damage That Resulted From any Legally Cognizable Form of Assault.

The Court of Appeals determined an insurer did not have a duty to defend or indemnify the insured for injuries caused to the underlying plaintiff because the policy's exclusion for personal injuries and property damage "arising out of or resulting" from "any actual, threatened or alleged assault or battery" applied to exclude coverage for personal injuries and property damage that resulted from any legally cognizable form of assault, without respect to whether the assault was criminal or tortious/civil.

Steinborn v. Farmers Ins. of Columbus, Inc., 2019-Ohio-1745 (5th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/5/2019/2019-Ohio-1745.pdf

The Insurer's Policy Permitted it to Pay the Hospital Where the Insured Incurred Medical Bills Directly.

The insurer settled a claim directly with the at-fault party's insurance carrier after the insured signed a form assigning the hospital benefits for payment of care and treatment. The insurer's right of reimbursement arose from its payment, which expressly described the hospital invoice paid by the insurer. There was no dispute that the bill had been submitted and was included in the insured's settlement.

Milestone Invest. Ents., Inc. v. Mt. Vernon Fire Ins. Co., 2019-Ohio-2732 (5th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/5/2019/2019-Ohio-2732.pdf

The Failure of the Insured to Correct a Loss Control Condition Caused the Cancellation of the Contract, not any Failure or Delay in Communication by the Individual Who Obtained Coverage for the Insured Through the Insurer.

When the insurer cancelled the policy because the insured did not comply with the written loss control recommendations, it did not constitute a breach of contract. The insured asserted the insurer breached the contract and acted in bad faith by failing to provide requested clarification regarding compliance with the loss control recommendations. However, the insured failed to correct the condition and likewise did not seek additional time to comply with the loss control recommendation. The Court of Appeals determined the written loss control recommendations did not take effect only when the insured clearly understands the recommendations.

Deen v. Ansted, 2019-Ohio-3125 (6th Dist.)
http://www.supremecourt.ohio.gov/rod/docs/pdf/6/2019/2019-Ohio-3125.pdf

The Lower Court Should Allow a Jury to Decide Whether the Grandson's Choice to Bring Alcohol on a Boat was a Minor or Gross Deviation from the Scope of Permission Given by His Grandparents, the Homeowners.

An individual drowned in a private lake after falling/being pushed off a boat operated by a non-resident grandson of the boat owners. The lower court concluded that the grandson's decision to bring alcohol on the boat was a gross deviation from the scope of permission given by the grandparent/homeowners. However, the Court of Appeals concluded it was a jury issue to decide whether the grandson's choice to bring alcohol on the boat was a minor or gross deviation from the scope of permission provided by the grandparents.

ISCO Industries, Inc. v. Great Am. Ins. Co., 2019-Ohio-4852 (1st Dist.)
https://www.supremecourt.ohio.gov/rod/docs/PDF/1/2019/2019-Ohio-4852.pdf

Policy-Mandated Claim Notice Provision Upheld; no Need to Prove Prejudice

The Court of Appeals upheld a claim denial where the insured did not provide notice of a claim within the policy-required 90 days. The insurer did not need to prove prejudice, as such a requirement was inapplicable when the policy provided a specific timeframe for when claims must be reported.

Murray v. Auto-Owners Ins. Co., 2019-Ohio-3816 (6th Dist.)
https://www.supremecourt.ohio.gov/rod/docs/PDF/6/2019/2019-Ohio-3816.pdf

Insured Must Produce Proof of Accidental Physical Loss

The insured initially purchased a home out of foreclosure. The insured next attempted to sell the home under a land contract and two other persons took possession of the home under the land contract arrangement. After two years the land contract arrangement was unsuccessful, and the insured retook possession of the home. During the repossession, the insured identified property damage and submitted a homeowner's insurance claim. The Court of Appeals found the insured failed to meet his burden to establish a covered loss because he never presented evidence of extraordinary damages caused by the land contract tenants. The receipts the insured provided for repairs to the property did not meet the required burden of proof to show accidental direct physical loss.

Fireman's Fund Ins. Co. v. Hyster-Yale Grp., Inc., 2019-Ohio-1522 (8th Dist.)
https://www.supremecourt.ohio.gov/rod/docs/PDF/8/2019/2019-Ohio-1522.pdf

No Duty to Defend Asbestos Litigation When Date of Injury Outside of Policy Period

The Court of Appeals found the insurer could withdraw its defense of an insured/defendant in asbestos lawsuits in cases in which there was indisputable, reliable evidence that the date of an underlying asbestos injury clearly occurred outside of the effective policy period. Under both Ohio and Oregon law, the insurer's duty to defend would attach if the allegations in the underlying complaint fell under the policy coverage, and both states permitted the use of extrinsic evidence to determine that as a matter of law, there was no duty to defend claims for harms that did not occur within the policy period.

City of Cincinnati v. Metro. Design & Dev., LLC, 2019-Ohio-364 (1st Dist.)
https://www.supremecourt.ohio.gov/rod/docs/PDF/1/2019/2019-Ohio-364.pdf

Duty to Defend Landslide Litigation with City; Fees for Criminal Attorney not Covered When CGL Policy Excludes Coverage for Criminal Acts

The Court of Appeals found an insurer had a duty to defend an insured/company against a lawsuit filed by the city related to a landslide. This determination was reached because the city's original complaint alleged property damage and sought an injunction ordering the home construction company/insured to spend money to stabilize a hillside near where it had been excavating. Therefore, the property damage caused by the landslide was arguably covered by the insurance policy, such that insurer's duty to defend was triggered. The Court of Appeals also held that while an award of attorney fees to the insured's personal counsel was proper, an award of attorney fees to a criminal defense firm advising the insured on the likelihood of criminal prosecution resulting from the landslide was incorrect. The commercial general liability insurance policy specifically excluded coverage for any damage caused by criminal acts of the insured.

Artisan & Truckers Cas. Co. v. United Ohio Ins. Co., 2019-Ohio-3 (4th Dist.)
https://www.supremecourt.ohio.gov/rod/docs/PDF/4/2019/2019-Ohio-3.pdf

Primary and Excess Coverage in Trucking Liability Litigation

This insurance case addressed whether competing policies were primary or excess. The first insurer's policy provided primary liability coverage while the second insurer's policy provided excess coverage in the underlying litigation because the issuance of the first insurer's policy terminated the second insurer's coverage of a tractor. Because the trailer's power unit was no longer insured by the second insurer, the language and intent of the second insurer's policy determined the trailer coverage was rendered to be in excess. The Court of Appeals also found the second insurer was entitled to reimbursement from the first insurer because both policies had a limit of $1,000,000 and the first insurer was responsible for $1,000,000 of the $ 1.35M underlying judgment. This left the second insurer responsible for the remaining sums.

b) UM/UIM Decisions

Brummitt v. Seeholzer, 2019-Ohio-1555 (6th Dist.)
https://www.supremecourt.ohio.gov/rod/docs/PDF/6/2019/2019-Ohio-1555.pdf

Alleged Unfair Claims Settlement Practices Act Violations are not Bad Faith Evidence

An insured/victim of an auto accident sued the tortfeasor and additionally his own insurance company for its failure to provide uninsured/underinsured benefits allegedly due and owing. The Court of Appeals determined that in a bad faith case, the trial court should not have allowed a "bad faith" expert witness to testify about alleged violations of the Unfair Claims Settlement Practices Act. The Court of Appeals held that because violations of the Ohio Administrative Code do not create a private cause of action, this was not the appropriate bad faith standard.

Willis v. Farmers Ins. of Columbus, Inc., 2019-Ohio-516 (9th Dist.)
https://www.supremecourt.ohio.gov/rod/docs/PDF/9/2019/2019-Ohio-516.pdf

Subrogation Rights Remain Pending When not Addressed by Trial Court Order

The Court of Appeals found an insurer was not an aggrieved party and lacked standing to pursue an appeal of a trial court's order awarding damages to the insureds against an uninsured driver. Because the order did not explicitly render judgment against the insurer, and the order did not address subrogation rights, the issue of the insurer's subrogation rights remained pending.

c) Employment Decisions

Turner v. Dimex, L.L.C. 2019-Ohio-4251 (4th Dist.)
https://www.supremecourt.ohio.gov/rod/docs/PDF/4/2019/2019-Ohio-4251.pdf

Equipment Safety Guard in Employer Intentional Tort Claim Must Keep Victim Away from Zone of Danger

In an employer intentional tort claim, the Court of Appeals determined a forklift backup alarm was not an "equipment safety guard." Therefore, summary judgment to the employer was appropriate because the backup alarm did not shield the operator from exposure or injury. While the backup alarm may have alerted the employee to being in the zone of danger, the alarm would not have

kept him away from the zone of danger. Furthermore, the fact the forklift's backup alarm had not functioned for several days before the employee's injury was not sufficient to show the employer deliberately removed the backup alarm.

d) Premises Liability Decisions

Green v. Zack, 2019-Ohio-4944 (5th Dist.)
https://www.supremecourt.ohio.gov/rod/docs/pdf/5/2019/2019-Ohio-4944.pdf

Landlord not Responsible in Dog Bit Litigation

A jogger was injured by a dog bite and sued the landlord of the premises where the dog bite occurred. The Court of Appeals determined summary judgment was properly granted to the landlord as landlord did not maintain possession and control over the leased premises and the landlord did not share any common areas of the property with the tenant. Therefore, the landlord could not be held responsible as a harborer of the tenant's dog under either R.C. 955.22 or common law.

Tate v. Natural Nails, 2019-Ohio-4062 (8th Dist.)
https://www.supremecourt.ohio.gov/rod/docs/PDF/8/2019/2019-Ohio-4062.pdf

Expert Testimony Needed to Establish Causal Connection of Infection to Activity at Salon

A customer alleged her finger became infected following a salon's negligent performance of manicure services. The Court of Appeals determined the customer's lawsuit was properly dismissed because the customer did not present any evidence of actually receiving a manicure at the defendant's store prior to the infection diagnosis. The lawsuit was also properly dismissed as the existence and cause of a bacterial infection were not matters of common knowledge for a juror and had be demonstrated with expert medical testimony, which the customer failed to present. The customer also needed to present evidence of how the nail salon was allegedly negligent via proper salon sanitation techniques, which the customer likewise failed to present.

Whalen v. T.J. Automation, Inc., 2019-Ohio-1279 (3rd Dist.)
https://www.supremecourt.ohio.gov/rod/docs/PDF/3/2019/2019-Ohio-1279.pdf

Recreational Activity Doctrine Upheld in Child Drowning Death

A wrongful death action followed the drowning death of child who attended a party hosted by a commercial defendant. The court determined the child was engaged in swimming and other water-based recreational activities in a retention pond when the child drowned. The Court of Appeals upheld summary judgment to the defendant on the basis of the recreational activity doctrine. Under this doctrine, a plaintiff who voluntarily engages in a recreational activity or sporting event assumes the inherent risks of that activity and cannot recover for injuries sustained in engaging in the activity unless the defendant acted recklessly or intentionally in causing the injuries. Swimming was determined to be a recreational activity and drowning was determined to be an inherent risk of swimming. The parents assumed responsibility for watching their child swim. To the extent the hosts assumed any duty to supervise the child, their negligent supervision did not render the recreational activity doctrine inapplicable.

e) Governmental Immunity Decisions

Gilbert v. City of Cleveland, 2019-Ohio-3517 (8th Dist.)
https://www.supremecourt.ohio.gov/rod/docs/PDF/8/2019/2019-Ohio-3517.pdf

Recreational Immunity Upheld for City Following Trip Injury

The plaintiff appeared at a public park to watch her sons play basketball. When she exited the vehicle she was riding in, she stepped onto a concrete walkway entrance of the park. She saw her sons, began waving at them, and began walking toward them. However, after several steps, she fell after stepping into a hole that was exposed in the concrete walkway. The specific hole had been exposed when a city employee, in order to gain access inside the park with a city vehicle, removed a wooden barrier or post from the hole that was in the middle of the walkway entrance.

The Court of Appeals upheld a summary judgment ruling in favor of the city. Because the victim's injury was caused by the condition of the premises, and because she was a recreational user of the park, the city was immune from liability pursuant to R.C. 1533.181.

Despite the fact a city employee created the hazard that caused the victim's injuries by removing the wooden post from the hole in the walkway, to access the inside of the park with a vehicle, the city's alleged creation of a hazard on the premises did not affect the city's immunity.

Covington v. Univ. of Cincinnati Coll. of Med., 2019-Ohio-3456 (Court of Claims of Ohio)
https://www.supremecourt.ohio.gov/rod/docs/PDF/13/2019/2019-Ohio-3456.pdf

Physician Granted Immunity as Acting on Behalf of State University When Treating Victim

A doctor accused of medical malpractice worked for both a private medical group and as a professor on a state university's teaching staff. A governmental immunity defense turned on whether the doctor was acting on behalf of the state when he treated the victim. In upholding the governmental immunity defense, the Court of Claims found the doctor was educating a resident at the time he treated the victim, including deciding to discharge the victim, the doctor discussed the decision with a resident during rounds, and the doctor had ordered the resident to prepare the discharge summary and advise the patient and family of the details of a follow-up plan.

f) Other Significant Decisions

Loukinas v. State Farm Mut. Auto. Ins. Co., 2019-Ohio-3300 (1st Dist.)
https://www.supremecourt.ohio.gov/rod/docs/PDF/1/2019/2019-Ohio-3300.pdf

Insurer not Required to Produce Work Product and Attorney-Client Privileged Materials During Breach of Contract Phase of Bifurcated Bad Faith Litigation

In a breach of contract and bad faith action, which has been bifurcated, the insurer is not required to disclose materials protected by the work-product doctrine or attorney-client privilege contained in its claims file, or to produce its representatives for depositions regarding these matters, prior to the resolution of the underlying declaratory-judgment and breach-of-contract claims.

Johnson v. Abdullah, 2019-Ohio-4861 (1st Dist.)
https://www.supremecourt.ohio.gov/rod/docs/PDF/1/2019/2019-Ohio-4861.pdf

Medical Malpractice Expert Required to Devote at Least 50% of Time to Clinical Practice

In a medical-malpractice case, the Court of Appeals determined trial court was wrong to allow a physician to testify as an expert defense witness. The defense failed to establish the physician devoted at least one-half of his professional time to the active clinical practice of medicine as required by Evid. R. 601(D) in his position as the chief operating officer of a hospital. Specifically, 90 percent of the expert's job involved administrative work far removed from patient care.

Pariano v. Perrotti, 2019-Ohio-4219 (9th Dist.)
https://www.supremecourt.ohio.gov/rod/docs/PDF/9/2019/2019-Ohio-4219.pdf

Primary Assumption of the Risk Inapplicable in R.C. 3701.81(A) STD Disclosure Case

The Court of Appeals rejected a primary assumption of the risk defense asserted by the tortfeasor when the tortfeasor did not inform the victim of a sexually transmitted disease prior to engaging in unprotected sex with the victim for the first time. The Court of Appeals found subsequent sexual relations did not allow the assumption of the risk defense to be asserted. Furthermore, the Court of Appeals determined there should not have been a comparative negligence instruction given to the jury based upon the victim engaging in unprotected sex.

Ciotto v. Hinkle, 2019-Ohio-3809 (6th Dist.)
https://www.supremecourt.ohio.gov/rod/docs/PDF/6/2019/2019-Ohio-3809.pdf

Unsecured Firearm did not Create Liability for Firearm Owner When Used by Son in Murder of Neighbor

A wrongful death lawsuit followed a shooting death where one neighbor's son killed another neighbor's son. The Court of Appeals determined the estate's lawsuit against the mother of the shooter was properly dismissed as the defendant mother did not owe or breach a duty to the decedent for her failure to secure her handgun. The Court of Appeals noted the shooter had no violent or criminal history, was not a fugitive, had an undiagnosed mental illness, and no other special relationship existed establishing such a duty.

Daso v. Creston Ins. Ctr., LLC, 2018-Ohio-5312
https://www.supremecourt.ohio.gov/rod/docs/PDF/9/2018/2018-Ohio-5312.pdf

Valued Policy Argument Rejected

A fire destroyed an insured's property. As the insureds losses exceeded the policy limits, he sued an insurer and insurance agency, including a theory under R.C. 3929.25 – Ohio's "valued policy" statute. The Court of Appeals held summary judgment was properly granted to the to the insurer and to the insurance agent on the insured's claim that the agent negligently failed to inspect the facility to determine its value under R.C. 3929.25. That section of the Revised Code was designed to prevent insurers from over-insuring property, in order to collect increased premiums, and subsequently paying less than policy limits if a building burned down resulting in a total loss. In the subject case, the insured did not allege the insurer over-insured the property and failed to pay policy limits during the claim.

3. Federal Court Decisions

Wells Fargo Bank, N.A. v. Allstate Ins. Co., Case No. 18-4206 (6th Cir. 2019)

6th Circuit Finds Arson to Abandoned Home is not Unambiguously "Vandalism or Malicious Mischief"

Wells Fargo Bank owned an insurance policy on an abandoned home that an arsonist set ablaze. The insurer refused to indemnify Wells Fargo for the loss, relying on a policy exclusion for damage caused by "vandalism or malicious mischief" after the property has been vacant for more than 30 days. Wells Fargo sued, arguing that other policy provisions confirm that fire damage is considered distinct from vandalism or malicious mischief.

The 6th Circuit determined the district court could not have said that the homeowner's insurance policy unambiguously permitted the insurer to deny coverage for arson under the vandalism exclusion because the policy's personal property coverage section listed fire loss separately from loss caused by vandalism or malicious mischief. Further, the policy's arson-reward provision contained the policy's lone mention of "arson," but did so in connection with fire, but not vandalism or malicious mischief loss. The district court was therefore required to resolve the ambiguity in favor of the insured-mortgagee.

Certain Underwriters at Lloyd's, London v. Sunbelt Rentals, Inc., No. 18-5617 (6th Cir. 2019)

All Risk Builder's Policy Subrogation Waiver Found Ambiguous

The 6th Circuit reversed summary judgment to an insurer because the all-risk builder's policy's subrogation waiver was ambiguous as to whether the insurer could sue a rental company for damages caused by the rental company's negligence. The subject policy included the following language: "will have no rights of subrogation against […] any person or entity, which is […] an Additional Insured." The court had determined the rental company was an additional insured under the policy and upheld this provision.

Mitchell v. Cal. Cas. Gen. Ins. Co., Case No. 3:18-cv-228 (S.D. Ohio December 17, 2019)

Unjust Enrichment Claim Barred in Litigation with Bad Faith and Breach of Contract

Following a wind and water loss, an insured sued the insurer for breach of contract, bad faith, and unjust enrichment. The District Court determined plaintiff insureds cannot bring unjust enrichment claims when they have also asserted breach of contract and bad faith allegations.

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.

C. SIGNIFICANT KENTUCKY COURT DECISIONS

1. Supreme Court Decisions

a) Other Significant Decisions

E.M. v. House of Boom Ky., LLC (In re Miller), No. 2019-SC-000625 (June 13, 2019)
http://opinions.kycourts.net/SC/2018-SC-000625-CL.pdf

Trampoline Park Cannot Rely on a Pre-Injury Liability Waiver Signed by a Minor's Parent in Light of the Capacity of the Parties and Public Policy Surrounding Such Waivers.

The pre-injury liability waiver signed by a parent on behalf of a minor child was unenforceable at the trampoline park because the parent had no authority to enter into contracts on the child's behalf absent specific circumstances. Additionally, pre-injury release waivers are generally disfavored and are strictly construed against the parties relying on them for public policy purposes. There were no public policy reasons to support the trampoline park's affordable recreational activities argument in the context of commercial activity because it had the ability to purchase insurance and spread the cost between its customers. On the other hand, children there do not have a similar ability to protect themselves from the negligence of others in the confines of the trampoline park.

Tryon Trucking, Inc. v. Medlin, 2019-SC-000212-WC (September 26, 2019)

Absolute Discretion of Workers Compensation Board Revoked

The Supreme Court of Kentucky overruled the prior ruling in *Campbell v. Hauler's Inc*., 320 S.W.3d 707 (Ky. App. 2010), that the Workers Compensation Board has "absolute" discretion to request further findings of fact from an Administrative Law Judge (ALJ). In revoking the "absolute" discretion standard, the Court remarked the Workers' Compensation Board still has wide latitude and deference in whether to remand a particular issue to the (ALJ) for additional findings and analysis.

Ashland Hosp. Corp. v. Lewis, 2018-SC-000276-DG (August 29, 2019)
http://opinions.kycourts.net/sc/2018-SC-000276-DG.pdf

Failure of Medical Malpractice Expert to Find Cause to Reasonable Degree of Medical Probability

A patient suffered a stroke after undergoing an angiogram. He thereafter instituted a medical malpractice action. He did not allege that the stroke itself was caused by negligence; rather, he alleged that the failure to examine and diagnose the stroke after the angiogram was negligent and caused injury greater than that which the stroke would have caused with earlier intervention.

The patient identified one expert. During his discovery deposition, the patient's expert criticized the treating doctor's failure to examine the patient when his symptoms were consistent with a stroke. However, the expert did not opine that the treating doctor could have limited the effects of the stroke through earlier intervention. When asked specifically whether he could state within a reasonable degree of medical probability that the treating doctor's post-procedure care was a substantial factor in causing harm to the patient, the expert responded that it was "impossible to tell."

The Supreme Court of Kentucky determined the *res ipso loquitor* exception was inapplicable and expert opinion evidence was required to establish causation. The expert testimony failed to raise a genuine issue of material fact as to the causation element required to maintain a medical malpractice cause of action. The doctor and hospital defendants were therefore entitled to summary judgment.

2. Appellate Court Decisions

a) Insurance Coverage Decisions

Joiner v. Ky. Farm Bureau Mut. Ins. Co., No. 2017-CA-000473 (August 2, 2019)
http://opinions.kycourts.net/COA/2017-CA-000473.pdf

An Insured Failed to Submit Proof of Loss to the Insurer Within Two Years of the Accident and his Claim that the Insurer Failed to Pay Basic Reparations Benefits was Properly Dismissed.

Pursuant to Ky. Rev. Stat. Ann. § 304.39-230(1), the insured was required to submit proof of loss within two years of the accident. The insured submitted an affidavit that contained too little information and failed to present the billing statement he had in his possession reflecting the fully paid medical bills. There was no dispute that the insured had a policy covering the vehicle that struck him, but his statement alone does not satisfy the statutory requirement of submitting reasonable proof of loss.

Batchelor v. Allstate Prop. & Cas. Ins. Co., No. 2018-CA-000387 (July 26, 2019)
http://opinions.kycourts.net/COA/2018-CA-000387.pdf

A Pecuniary Interest Must Exist at the Time of Contracting and Time of Loss or Else the Insurance Contract is Void from its Inception.

The insured had a policy covering the automobile, but her companion was the sole owner and titleholder of it. The mere use of the automobile is not sufficient to prove that an individual has an insurable interest without proof of payments on it. Even though the insured used the vehicle, she still had a vehicle of her own. In consideration of the fact that the insured's automobile was not financed by her and was not her primary mode of transportation, the mere association that the insured had with the automobile is not adequate to establish an insurable interest. Without an insurable interest, the policy will be found void.

Robinson v. Monroe Guar. Ins. Co., No. 2019-CA-001667 (July 12, 2019)
http://opinions.kycourts.net/COA/2016-CA-0016 67.pdf

When There is no Doubt that an Act has Violated a Statute and the Policy Excludes Coverage for any Violation of Statutes, it is Irrelevant Whether the Perpetrator Could be Identified and Convicted or not.

A child attending the insured's preschool suffered four lacerations on her vagina and coverage was subsequently sought. The preschool's insurance contained an exclusion for violations of any statute. Rather than speculating who the perpetrator was, the court focused on the language of the exclusion within the policy, which hinged on violations of statutes rather than convictions.

Primal Vantage Co. v. O'Bryan, NO. 2018-CA-000045-MR (November 15, 2019)
http://apps.courts.ky.gov/supreme/sc_opinions.shtm

Products Liability; Intention to Read Avoids Directed Verdict on Visible Warning; Applicability of Hunting Landowner's Immunity Statute

A products liability lawsuit followed serious injuries incurred during a fall from a hunting tree stand. The trial court, and later Court of Appeals, made several key rulings.

First, as to a failure to warn claim against the manufacturer, the Court of Appeals found the failure to warn adequately implicates not merely the content of the warning, but also its placement and visibility on the product. The warning on the subject product was affixed to the back of the ladder. The victim testified that if the tree stand had a visible warning, he would have read it and would never have climbed up the stand or allowed his son to do so. This testimony - that the victim would have read and followed a visible warning – constituted sufficiently probative evidence to overcome a motion for a directed verdict on a failure to warn claim.

Second, the Court of Appeals ruled on an apportionment issue. The landowner of the land where the victim was hunting admittedly had not maintained the tree stand and had not followed manufacturer instructions in leaving it outside continuously for years. However, the landowner had also received immunity per on KRS 150.645, the hunting landowner's immunity statute. The manufacturer alleged that the statute may preclude recovery but not apportionment. The Court of Appeals disagreed and turned to KRS 150.645(1) and KRS 411.182 and to show the landowner did not fall within any of the categories specified in the apportionment statute, as they were not parties, third-party defendants, or persons released.

Ky. Farm Bureau Mut. Ins. Co. v. Coates, NO. 2018-CA-001329-ME (October 25, 2019)
http://apps.courts.ky.gov/supreme/sc_opinions.shtm

Class Action Certification Against Insurer Upheld

The Court of Appeals upheld a determination that former insureds' claims against an insurer could proceed as a class action under Kentucky Rules of Civil Procedure 23. The litigation involves an allegation that the insurer's "dual-purpose" premium installment/cancellation notice is not effective to cancel automobile insurance policies under KRS 304.20-040 and that the insurer has illegally and ineffectively claimed cancellation of hundreds or thousands of other such policies.

Grayson Cty. Hosp. Found., Inc. v. Kelsey, NO. 2018-CA-000493-MR (October 18, 2019)
http://apps.courts.ky.gov/supreme/sc_opinions.shtm

"New" Medical Malpractice Expert Opinion at Trial Held to be not Substantively Different than Opinion Expressed in Deposition; Proof of Negligence Sufficient

This was a wrongful death/medical malpractice action filed after a hospital patient fell off a commode and suffered a brain injury.

A hospital argued it was deprived of a fair trial when the patient/estate's expert witness testified at trial that the hospital should have had a "no privacy" policy for certain patients while toileting. The hospital argued that this expert opinion was one not disclosed prior to trial in violation of Kentucky Rules of Civil Procedure 26.02(4) requiring the disclosure of experts and their opinions upon request by an opposing party. The Court of Appeals rejected this argument. It found the expert

specifically addressed toileting and high fall risk patients during a deposition. It found no reasonable person could be surprised about the expert's opinion at trial that a nurse should remain with a high fall risk patient during toileting except when the patient refuses assistance. The Court of Appeals found that while the wording used may have been different at her deposition, her opinion at trial was not substantively different than the opinion expressed in her deposition.

The Court of Appeals also found there was enough evidence of the hospital's negligence where the expert testified that if a nurse complies with the standard of care, falls can be prevented by having a nurse physically present while the patient is toileting. Another expert testified that the patient's fall and subsequent injury caused his death. This was deemed sufficient by the Court of Appeals to prove a negligence case.

Messer v. Universal Underwriters Ins. Co., No. 2017-CA-000293 (June 21, 2019)
http://opinions.kycourts.net/COA/2017-CA-000293.pdf

It was Reasonable for the Insurer to Refute the Allegations that its Insured was Liable for its Employee's Injury and Damages.

The insured's employee and a third-party collided, which resulted in both vehicles being totaled. The genuine issue regarding the insured's employee's liability was enough to sustain the insurer's reasonable basis for denying its employee was at fault, and therefore denied the third-party's claim as well. The third-party needed to establish that no reasonable jury could find him 100% at fault for colliding with the employee in order to eliminate the reasonableness of the insurer's dispute regarding the employee's liability.

Watson v. United States Liab. Ins. Co., No. 2018-CA-000475 (May 24, 2019)
http://opinions.kycourts.net/COA/2018-CA-000475.pdf

Third-Party Claims Against Insurers Generally Cannot be Maintained, and thus Cannot Accrue, Until After: (1) a Judgment Fixing Liability Against the Insured has Been Entered; or (2) the Insured Becomes Legally Obligated to Pay Pursuant to the Terms of the Insurance Contract.

A third-party sought to assert a third-party bad faith claim against the insured's insurer for violation of UCSPA. The third-party was severely injured and contested when the alleged bad faith claim accrued and what date the underlying claim was settled. The court determined the bad faith claim accrued when the insured executed the agreement that settled his claims against the third-party and was paid the settlement amount, which created a contract. Additionally, third-party bad faith claims against insurers asserted under the UCSPA are not an exception.

Dewitte v. Metro. Direct Prop. & Cas. Ins. Co., No. 2018-CA-000060 (April 12, 2019)
http://opinions.kycourts.net/COA/2018-CA-000060.pdf

The Child of the Insured was not Entitled to Coverage for Either UIM or PIP Benefits Under the Policy Due to the Undisputed Evidence that he no Longer Lived at the Insureds' Household at the Time of the Accident.

The child of an insured sought UIM coverage from his parents' policy and coverage was denied on the basis that the child was not covered under the policy. Although the child did not live in the same home and was not listed as a named resident, the insureds alleged the child was a household driver. Based on the language in the policy, the child had to be a resident of the household at the time of the accident in order to be covered as an eligible injured person.

Despain v. Hartford Fire Ins. Co., No. 2017-CA-001702 (May 24, 2019)
http://opinions.kycourts.net/COA/2017-CA-001702.pdf

In Workers' Compensation Cases, the Insurance Coverage Extends Only to the Particular Business Classification Named in the Policy.

An employee settled with his employer, the insured, which left the issues of whether the insurer owed a defense under the policy and indemnification. Since the insureds' claims fell under the Act, it followed that the insurer owed both the duty to defend and to indemnify the insured. Prior to the suit, the insurer filed reports of injury and paid workers' compensation income to or on behalf of the employee. In light of the facts known to the insurer in order to do the preceding, the initial pleadings were sufficient to trigger the duty to defend and subsequently indemnify.

Grange Prop. & Cas. Ins. Co. v. Chappell, No. 2017-CA-001418 (February 15, 2019)
http://opinions.kycourts.net/COA/2017-CA-001418.pdf

The Insurer had a Reasonable Foundation to Delay PIP Payments Based on the Sufficient Information Obtained During Discovery.

The insurer was not required to seek a court order to take the insured's recorded statements in order to determine the validity of the claims. It followed that the lower court's decision to award the insured 18% interest and attorney's fees for failing to obtain the order was erroneous. Furthermore, the lower court was required to make a finding that the insured's delay in payment was without reasonable foundation before making such an award.

Great West Cas. Co. v. Debord, No. 2016-CA-001050 (February 1, 2019)
http://opinions.kycourts.net/COA/2016-CA-001050.pdf

A Court's Finding that an Insured is Entitled to Coverage Under a Policy but Failing to Determine the Extent of that Coverage is not a Full Resolution of a Claim, Which Makes it Unreviewable.

Courts are unable to review judgments that do not resolve all the claims between parties without the language that it is "final and appealable" and that "there is no just reason for delay." The lower court in this case did not determine the amount of coverage or the costs in defending the insured. These claims remained interlocutory and the court of appeals was unable to hear it.

Alexander v. Trustgard Ins. Co., NO. 2017-CA-001324-MR (January 4, 2019)
http://apps.courts.ky.gov/supreme/sc_opinions.shtm

Dispute as to Extent and Severity of Injury Resulted in Dismissal of Third-Party Bad Faith Claim

The Court of Appeals upheld dismissal of a third-party bad faith claim against the insurer. The Court of Appeals first noted that in assessing the insurer's liability under a motor vehicle insurance policy, the Supreme Court of Kentucky has pointed out that two distinct questions are presented as to a bad faith claim: (1) "liability for the accident itself" and (2) "the extent and severity of . . . alleged injuries from the accident." Here, while liability for the accident itself was relatively clear, the extent and severity of the injuries alleged caused by the accident were not. Evidence was discovered indicating the plaintiff obtained shoulder surgery for an injury allegedly caused by the accident, but for which plaintiff had been diagnosed approximately a month before the accident. Evidence indicated this pre-existing shoulder injury may have been concealed during the discovery process by plaintiff. Based upon the facts, it was clear that the extent of the plaintiff's injuries was

not reasonably established, and a legitimate dispute existed between the plaintiff and third-party insurer, which negated any bad faith claim.

b) UM/UIM Decisions

Lynch v. Geico Gen. Ins. Co., No. 2018-CA-000492 (July 26, 2019)
http://opinions.kycourts.net/COA/2018-CA-000492.pdf

An Insured's UIM Claim is Independent of a Tort Judgment, and an Insured can Proceed Against the UIM Carrier Before Proceeding Against the Wrongdoer, or Simultaneously.

A two-year limitation period is reasonable for an insured to discover the extent of automobile liability insurance coverage the wrongdoer has and whether coverage will be sufficient for the suffered injuries. A wrongdoer is not an indispensable party in an action between an insured and his or her UIM carrier. Furthermore, it is not a requirement that the insured need to first obtain a verdict against the tortfeasor before filing suit against the UIM carrier.

Mefford v. GEICO Ins. Co., No. 2018-CA-000789 (May 31, 2019)
http://opinions.kycourts.net/COA/2018-CA-000789.pdf

Whether Kentucky or Indiana Law Applied for Enforcement of UIM Provision

The sole issue in this appeal was whether Indiana or Kentucky law applied to the enforcement of an insurance policy's UIM provision.

The Court of Appeals weighed the following factors: (1) the accident took place in Kentucky; (2) the decedents were Kentucky residents with Kentucky driver's licenses; (3) the one of the two decedent's vehicle was titled, purchased, and garaged in Kentucky; (4) the same decedent represented she was an Indiana resident; (5) the subject policy contained a choice of law provision, stating Indiana law applied to any contractual dispute between the parties; and (6) the UIM insurer was unaware of any connection between their insured/decedent and Kentucky that was relevant to their insurance contract.

In determining Indiana law was appropriate, the Court of Appeals focused on the fact the insured clearly expressed that her residence was in Indiana on the most recent policy renewal, which was twenty-three days before the fatality. Therefore, the trial court correctly applied Indiana law because it was where the parties understood the risk to be. Additionally, the Court of Appeals noted that even if they held Kentucky has the most significant contacts and, thus, Kentucky law should apply, the fraud and misrepresentation clause in the policy would apply to facts of this case. An insured cannot provide one set of facts to an insurance company to qualify for lower premiums and another set of facts to the court for purposes of avoiding or evading the contract's choice of law provision.

Uto-Owners Ins. Co. v. Spalding, No. 2017-CA-001474 (April 5, 2019)
http://opinions.kycourts.net/COA/2017-CA-001474.pdf

It is Unjust to Hold as a Matter of Law that an Insured is Precluded from Recovering UIM Benefits for Failing to Comply with the Notice Requirements in Ky. Rev. Stat. Ann. § 304.39-320(3).

Regardless of whether the notice requirement was contractual or statutory, the insured could not have given the required notice if the underlying existence of a UIM policy was denied or misstated by the insurance agent. Here, the insured could not be penalized for her failure to fulfill a requirement that she was unaware was applicable to her.

Shackelton v. Estate of Fries, NO. 2017-CA-000121-MR (August 2, 2019)
http://opinions.kycourts.net/coa/2017-CA-000121.pdf

For UM/UIM Claims Establishing "Legal Liability" does not Require the Plaintiff to Obtain a Judgment Against the Tortfeasor, nor does it Require the Plaintiff to File a Lawsuit Against the Tortfeasor

The tortfeasor defendant rear-ended the plaintiff. During pre-suit negotiations to settle the claim against the tortfeasor, the tortfeasor died. Unaware of the tortfeasor's death, the plaintiff initially sued the tortfeasor and his own carrier for UIM benefits. The plaintiff eventually learned of the tortfeasor's death and attempted to force open an estate for the tortfeasor and to amend the original complaint to substitute the estate for the tortfeasor. The trial court allowed the amended complaint but reserved for future ruling whether the amended complaint related back to the original complaint.

The estate in turn moved to dismiss the amended complaint arguing it did not relate back to the original complaint and was therefore out-of-time given the two-year statute of limitations. The UIM carrier moved under similar grounds, but also moved to dismiss because it was impossible for the plaintiff to establish liability on the part of the estate.

First, the Court of Appeals found that because the tortfeasor died before the complaint was filed, it was impossible for the estate to have had notice of the claim/lawsuit within the limitations period, as the estate did not exist within the limitations period. Therefore, the trial court correctly found that the amended complaint did not relate back to the filing of the original complaint.

Second, the Court of Appeals found that the trial court should not have dismissed the UIM claim because the UIM claim did not hinge on the viability of the insured's claim against the tortfeasor and the insured was not even required to bring a claim against the tortfeasor.

The Court of Appeals initially agreed that UIM benefits are not available if the plaintiff cannot prove the tortfeasor's fault. However, the court found nothing prevented the plaintiff from doing so in the subject case. The Court of Appeals found establishing "legal liability" does not require the plaintiff to obtain a judgment against the tortfeasor, nor does it require the plaintiff to file a lawsuit against the tortfeasor. The UIM case stands on its own. The dismissal of the plaintiff's negligence action against the tortfeasor did not prevent him from proving the tortfeasor's legal liability, i.e., fault and damages, in the UIM action against the UIM carrier.

c) Employment Decisions

Uninsured Emplrs' Fund v. TLC Cos., No. 2018-CA-001492 (March 29, 2019)
http://opinions.kycourts.net/COA/2018-CA-001492.pdf

Workers Compensation Carrier not Estopped from Denying Coverage as to Non-Leased Employees

In a workers' compensation case, the Court of Appeals noted the legislature provided a framework under which a PEO may contract with an employer to provide leased and insured employees without being bound to provide workers' compensation coverage for the employer's non-leased employees. As the statutory and regulatory language was clear on this point, the general public had no reasonable expectation that the filing of a notice of coverage with the DWC estopped the insurer from denying coverage even as to non-leased employees.

Cabrera v. JBS USA, LLC, No. 2017-CA-001658 (February 8, 2019)
http://opinions.kycourts.net/COA/2017-CA-001658.pdf

Entitlement to Up-The-Ladder Immunity

A workers' compensation claimant's negligence and premises liability claim against a pork processing facility operator were properly dismissed where the sanitation services the employer performed at the facility were recurrent, regular, and required by law. Therefore, by law the operator was entitled to up-the-ladder immunity. Furthermore, a wholly owned subsidiary was also entitled to up-the-ladder immunity where it was the joint owner and operator of the facility where and when the claimant sustained his injuries.

d) Governmental Immunity Decisions

Noel v. Welch, No. 2018-CA-000187 (March 15, 2019)
http://opinions.kycourts.net/COA/2018-CA-000187.pdf

No Waiver of Sovereign Immunity with Actions as to Self-Insured Retention Fund

The urban county government's (UCG) creation of a self-insured retention fund under Ky. Rev. Stat. Ann. § 67.180(1) did not waive sovereign immunity. The comprehensive automobile liability policy that was at issue was limited to indemnification and excluded the duty to defend, which did not constitute an express waiver of UCG's sovereign immunity defense.

e) Other Significant Decisions

Joiner v. Ky. Farm Bureau Mut. Ins. Co., NO. 2017-CA-000473-MR (August 2, 2019)
http://opinions.kycourts.net/coa/2017-CA-000121.pdf

Submission of Statement Medical Bills have been Fully Paid is not Medical Bill Sufficient to Trigger PIP Benefits

The Court of Appeals ruled in favor insurer denying an injured pedestrian's claim the insurer failed to pay PIP benefits because the pedestrian failed to submit proof of loss to the insurer within two years of the accident. The pedestrian's submission of a billing statement (showing medical expenses were fully paid) did not constitute a medical bill needed to trigger a claim for PIP benefits.

Conley v. Ky. Farm Bureau Mut. Ins. Co., NO. 2017-CA-000313-MR (December 21, 2018)

Legal Title to ATV and Policy Exclusions

The insurer issued a homeowner's insurance policy to plaintiff that excluded coverage for bodily injury arising from motor vehicle accidents. The Court of Appeals upheld a decision that an exception to the exclusion did not preserve coverage in a wrongful death action arising from an all-terrain vehicle (ATV) accident.

The Court of Appeals rejected plaintiff's contentions (1) he was not the legal owner of the ATV he was operating the day of the accident because he was not the legal titleholder on a certificate of title, and (2) the insurance policy is ambiguous in its use of the term "owner."

The Court of Appeals found titling of ATV's is governed by 601 KAR 9:205. Under Section 4 of that regulation, title of an all-terrain vehicle is transferred just like motor vehicles. A seller can comply with KRS 186A.215 by completing and signing the assignment of title section on the certificate of title and delivering it to the buyer. Once title is transferred in this manner, the buyer becomes the "owner."

The subject insurance policy language was not ambiguous but comported with established interpretations of Kentucky's title statutes. An "owner" of an all-terrain vehicle under the policy is the one holding legal title to it. And, during the discovery process, Conley admitted in his interrogatory responses that the ATV's executed title was delivered to him at purchase. However, Conley had not filed the title documents at the county clerks' office to register the transfer at the time of the accident.

Johnson v. Basil, NO. 2017-CA-000986-MR (April 12, 2019)

Loss of Consortium Claims were Merely an Item of Damages Recoverable for the Wrongful Death of the Decedent

This appeal addressed competing arguments for allocation of wrongful death benefits and parental loss of consortium claims in a wrongful death lawsuit.

A guardian on behalf of two minor children asserted two loss of parental consortium claims, while an estate asserted a wrongful death claim. The insurance proceeds were insufficient to fully compensate the competing claims. At the trial court, the guardian argued that the insurance proceeds should be allocated to the loss of parental consortium claims to the exclusion of the wrongful death claim. The guardian noted funeral expenses, administrative costs, and recovery costs are not deducted from the insurance proceeds in a loss of parental consortium claim. The trial court agreed with the guardian and ordered the insurance proceeds to be distributed as compensation for the loss of parental consortium claims.

The Court of Appeals reversed the trial court. It held claims of loss of consortium were derivative of the wrongful death claim insofar as both derive from the same injury, the wrongful death of the decedent. While there are multiple parties and claims, the minor children of the decedent were the only beneficiaries. Under those unique circumstances, the Court of Appeals found the claims of loss of consortium were merely an item of damages recoverable for the wrongful death of the decedent. Consequently, all recoverable damages needed be distributed in accord with the requirements of KRS 411.130 - the circuit court was to disburse the insurance proceeds to the

minor children after payment of funeral expenses, costs of administration, and costs of recovery per KRS 411.130.

Grange Prop. & Cas. Ins. Co. v. Chappell, NO. 2017-CA-001418-MR (February 15, 2019)

Insurer not Required to Obtain a Court Order for Discovery to Obtain a Recorded Statement on Strictly Accident-Related (Non-Medical) Information

The insured/claimant submitted a claim PIP where the insurer identified both medical and accident-related issues.

The trial court essentially concluded the insurer was required to petition the court for a discovery order to obtain the information it sought to determine the validity of the insured/claimant's claims, and that its failure to do so warranted an award of 18% interest and attorney's fees. The trial court never explicitly made a finding that the insurer's delay in payment was "without reasonable foundation."

The Court of Appeals referenced the Supreme Court of Kentucky's 2017 *Adams* decision in determining the insurer did not need to obtain a court order for discovery to obtain a recorded statement on strictly accident-related (non-medical) information.

Furthermore, the Court of Appeals followed the *Hamlet* rationale with respect to a claimant's cooperation to determine the insured was not entitled to pre-judgment interest and attorney fees. Specifically, the Court found the insured could not assert she had "clean hands" when the record revealed the lack of cooperation in the investigation phase which created the delay of which she complained in order to seek pre-judgment interest and attorney fees.

Cincinnati Ins. Co. v. Belt, NO. 2017-CA-000155-MR (April 5, 2019)

No Bad Faith Where Insurer had Reasonable Basis to Contest Coverage and Paid Policy Limits After Adverse Coverage Verdict

The appeal stemmed from a bad faith insurance case in which a jury awarded plaintiff a multi-million-dollar verdict in compensatory and punitive damages against an insurer related to its handling of a claim for benefits after plaintiff was injured while riding on a utility task vehicle (UTV).

The Court of Appeals determined the victim failed to prove a bad faith claim as she failed to establish that the insurer was obligated to pay her claim because coverage remained an issue to be decided. The insurer had a reasonable basis to contest coverage due to the fairly debatable factual disputes related to the tortfeasor (and whether he was in the course and scope of his employment as a volunteer for a corporation hosting the party) and tortfeasor's family (whether they were performing duties as managers of their commercial entity). The insurer's obligation to pay the claim did not arise with any certainty until the circuit court issued its opinion in the coverage action, after which the insurer paid policy limits.

Great West Cas. Co. v. Debord, NO. 2016-CA-001050-MR (February 1, 2019)

Orders Related to Both Entitlement to Coverage and Amount of Coverage Needed Before Trial Court Decision Becomes Appealable.

When a trial court orders an insured is entitled to coverage but does not determine the amount of coverage due and owing, its order is interlocutory, not final, and not ripe for appeal.

D. SIGNIFICANT CASE PENDING BEFORE THE KENTUCKY SUPREME COURT

Mosley v. Arch Specialty Fire Ins. Co, 2018-SC-000586-D, (2017-CA-001252)

The Supreme Court of Kentucky will address the following:

> The Court of Appeals' determination that an insurer did violate the Kentucky Unfair Claims Settlement Practice Act § 304.12-230, because liability on the part of insureds was not reasonably clear or beyond dispute;
>
> The Court of Appeals' determination the exclusivity of the Workers' Compensation Act could have provided the insureds with immunity, and the case had debatable issues of liability, including the complexity of the underlying matter and significant issues about the allocation of fault;
>
> The Court of Appeals' determination the insurer did not violate § 304.12-230(13) because it did not leverage the payment of a claim under one coverage to obtain a favorable settlement of a second claim under a different coverage in the same policy but covered both insured parties under the same coverage in the policy;
>
> The Court of Appeals' determination an administratrix never established that global offers on behalf of multiple insureds were prohibited by KUCSPA or Kentucky law.

Foreman v. Auto Club Property-Casualty Ins. Co., 2018-SC-000618-D (April 11, 2019)

The Supreme Court of Kentucky will address matters related to an intentional act exclusion under a homeowner's policy, the capacity of a mentally ill minor to form intent, and the interaction with the policy's innocent co-insured provision.

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 other 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

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.

TWO YEARS

C. SIGNIFICANT INDIANA COURT DECISIONS

1. Supreme Court Decisions

a) Other Significant Decisions

Morrison v. Vasquez, 124 N.E.3d 1217 (Ind. 2019)
https://www.in.gov/judiciary/opinions/pdf/06271901sd.pdf

Location of Registered Agent no Longer Determines Preferred Venue

The Supreme Court interpreted the amended venue rule such that the location of a registered agent for an organization is no longer a preferred venue. Instead, venue is preferred in the location of the organization's actual principal office.

Q.D.-A., Inc. v. Ind. Dep't of Workforce Dev., 114 N.E.3d 840 (Ind. 2019)
https://www.in.gov/judiciary/opinions/pdf/01231901msm.pdf

Driver for Driveaway Broker Classified as an Independent Contractor

The Supreme Court overturned the Department of Workforce Development's classification of a truck driver as an employee for purposes of unemployment benefits. The Court found that the driver was not under the employer's control or discretion because he was free to complete work in any manner he saw fit, and work for competitors. Additionally, the Court found that the employer was not engaged in driveaway services as part of their usual course of business, even though they marketed themselves as a provider of such services and registered with the Department of Transportation. Finally, the Supreme Court found that the driver ran an independently established business where he was accepted or declined jobs or work for other brokers.

2. Appellate Court Decisions

a) Insurance Coverage Decisions

Metal Pro Roofing, LLC v. The Cincinnati Insurance Company, 130 N.E.3d 653 (Ind. Ct. App. 2019)
https://www.in.gov/judiciary/opinions/pdf/08091901nhv.pdf

Fraudulent Inducement Claim in Insurance Contract Avoids Summary Judgement When Quotes for Coverage Represented Coverage for Computer Hackers

Two companies appealed the grant of a summary judgement for insurer when they made claims for coverage under insurance policies after the companies' accounts were hacked and over $78,000 was stolen. The trial court granted summary judgement for the insurer after finding that the losses were not covered under the terms of the policies. The companies amended their counterclaim alleging that even if the computer-hacking losses were not covered, language in insurer's quotes led them to believe coverage for computer hacking losses would exist if they purchased the coverage. Even though the representations contained a disclaimer that the complete statement of coverages was in the policy contract, the Court held that the companies' reliance on the description

of computer-hacking coverage represented a genuine issue of material fact on whether or not such reliance on the represented language was unreasonable in light of the disclaimer.

Auto-Owners Insurance Co. v. Shroyer, 127 N.E.3d 1200 (Ind. Ct. App. 2019)
https://www.in.gov/judiciary/opinions/pdf/06191901rrp.pdf

Child of Girlfriend Residing with Named Insured Qualifies as Insured Under Policy

The child of the insured's girlfriend living at the insured residence was injured in an accident. The insurer denied coverage under a homeowner's policy finding that child was an insured under the policy, which trigged certain policy exclusions. The Court of Appeals issued summary judgement for insurer after finding that the named insured cared for the child.

Glover v. Allstate Prop. & Cas. Ins. Co., No. 19A-CT-403, 2019 Ind. App. LEXIS 411 (Ct. App. Sep. 16, 2019)
https://www.in.gov/judiciary/opinions/pdf/09161901ebb.pdf

Insured not Entitled to Stacking UIM Benefits When Damages Received Exceeded UIM Coverage

The insured/decedent was a passenger involved in a three-car collision. The insured sought UIM benefits under the insurer's policy claiming that insurer was entitled to reduce UIM recovery by damages paid by liable drivers, but not by amounts paid by other insurance policies. The Appellate Court held that the insurer's policy provided that policy limits were to be reduced by "all amounts paid," not just those obtained by liable parties. Because the insured received amounts in excess of insurer's UIM policy limits, the Court held that insured was entitled to no further recovery under the policy.

b) Other Significant Decisions

G.F. v. St. Catherine Hosp., Inc., 124 N.E.3d 76 (Ind. Ct. App. 2019)
https://www.in.gov/judiciary/opinions/pdf/05061901par.pdf

Doctor's Disclosure of Private Medical Information Falls Outside the Purview of the Medical Malpractice Act

A doctor revealed confidential information about patient's diagnosis while a co-worker of the patient was in the room with him. The Court of Appeals held that the statement was not related to an inaccurate diagnosis or improper treatment. Because patient's suit dealt with the disclosure of the confidential information to the co-worker and the emotional damages that stemmed from such disclosure it was not subject to the limitations of the Medical Malpractice Act. Additionally, the patient's filing of a malpractice action with the Indiana Department of Insurance did not the prevent patient from pursuing a determination in the Circuit Court that the Medical Malpractice Act did not apply to his claims.

Weikart v. Whitko Cmty. Sch. Corp., No. 19A-CT-1224 (Ind. Ct. App. October 17, 2019)
https://www.in.gov/judiciary/opinions/pdf/10171902jgb.pdf

No Special Duty Found in Rape Reporting Case

The Court of Appeals found that a lawsuit brought by a student victim and her parents against a school and town alleging a school resource officer failed to report the student's allegation that she had twice been gang raped in violation of Ind. Code §§ 31-33-5-1 and 31-33-5-2(b) was properly dismissed. The student/parents admitted there was no private civil cause of action against a person who failed to report child abuse or neglect. They also failed to allege that the officer breached a special duty. The Court of Appeals found none of the officer's alleged actions narrowed his general public duty into a specific one owed to the student.

Kim v. Vill. at Eagle Creek Homeowners Ass'n, 19A-SC-970, (Ind. Ct. App. October 17, 2019)
https://www.in.gov/judiciary/opinions/pdf/10171901jsk.pdf

Indiana ADR Rules Inapplicable to Small Claims Cases

The Court of Appeals found the Indiana Alternative Dispute Rules were not applicable to small claims cases. Therefore, the small claims court should not have dismissed a dog bite victim's case for refusing to attend mediation. The parties could not be ordered to attend any form of alternative dispute resolution, so the claim was pending in small claims court.

Hercamp v. Pyle, No. 18A-CT-2958, (Ind. Ct. App. October 10, 2019)
https://www.in.gov/judiciary/opinions/pdf/10101901jsk.pdf

No Negligent Entrustment by Rental Car Company to Impaired Renter/Driver

During early morning hours a tortfeasor was arrested for driving while intoxicated. At 7:00 a.m., while in police custody, the tortfeasor admitted to driving while intoxicated and conceded he was not sure if he was too intoxicated to drive at that time. At 11:32 a.m., after having been released from custody, the tortfeasor rented a car from a rental car company and was subsequently involved in an accident in which the plaintiff was injured. Plaintiff then sued the rental car company for negligent entrustment. The rental car company moved for summary judgment. In support of its argument that it could not have negligently entrusted the rental care because it had no actual knowledge of the tortfeasor's alleged intoxication, the rental car company presented evidence of (1) the rental agreement, and (2) request for admission responses from the tortfeasor agreeing he provided his license to the rental car company and asserted he was not intoxicated at the time of rental. The plaintiff/victim presented evidence regarding (1) the prior night's DUI arrest, (2) the statements to the officer about potential intoxication around 7:00 a.m., (3) the officer smelling alcohol around 7:00 a.m., (4) paperwork from the tortfeasor's co-workers about irritational behavior, (5) past citations for driving related offenses, and (6) the irrational behavior resulting in firearms being removed from the tortfeasor. The trial court and Court of Appeals held in favor of the rental car company because it did not have the required actual knowledge of the tortfeasor's intoxication. The Court of Appeals focused on the fact the past evidence presented by the plaintiff did not show actual knowledge of intoxication at the time of the rental at 11:32 a.m.

Glock v. Kennedy, 18A-CT-2486 (Ind. Ct. App. October 10, 2019)
https://www.in.gov/judiciary/opinions/pdf/10101901ebb.pdf

Summary Judgment Denied in Informed Consent Case

In an informed consent matter, the trial court did not err in denying a defendant's motion for judgment on the evidence where, based on the expert testimony, a finding that reasonable persons, if properly informed, would have rejected the proposed treatment was not against the great weight of the evidence, and where the evidence most favorable to the judgment, along with all reasonable inferences to be drawn from the evidence, supported the judgment with regard to this issue.

Henry v. Cmty. Healthcare Sys. Cmty. Hosp., 19A-CT-1256 (Ind. Ct. App. October 8, 2019)
https://www.in.gov/judiciary/opinions/pdf/10081901jgb.pdf

Sufficient Pleading of Medical Privacy Disclosure Cause of Action

The Court of Appeals found it was an error to dismiss a complaint under Indiana's liberal pleading requirements where the complaint included the operative facts necessary to make a negligence-based claim against the hospital by alleging a common law duty to protect the privacy, security, and confidentiality of her health records, a breach of that duty by the employee, and resulting damages.

Strickholm v. Anonymous Nurse Practitioner, No. 19A-MI-696 (Ind. Ct. App. November 21, 2019)
https://www.in.gov/judiciary/opinions/pdf/11211901cjb.pdf

Timeliness of Medical Malpractice Complaint

The following timeline was relevant to whether a plaintiff timely filed a medical malpractice complaint:

> On October 29, 2015, plaintiff/patient first visited the healthcare facility for an "Establish New Patient" visit to establish the provider as a primary-care provider. The patient's blood pressure was taken during the initial visit.
>
> On December 1, 2015, the patient returned to the medical provider for a "Comprehensive Care Visit" and the patient's blood pressure was taken again. The medical provided prescribed a medication to combat the patient's high blood pressure. It was recommended the patient return for a blood pressure check the following week.
>
> On December 8, 2015, the patient again returned to the medical provider for a "Nurse Check" to have his blood pressure checked. The blood pressure check was conducted by an LPN who electronically conveyed the test result to a physician in the office. The physician responded electronically and stated, "systolic much improved but diastolic still high, would recheck in 1-2 weeks and if still elevated then increase the medication."
>
> On December 11, 2015, at the latest, the medical provider electronically reviewed and approved the LPN's report of the "Nurse Check" but did not recommend any further testing or treatment at the time.

On December 15, 2015, the patient arrived at the emergency room with altered mental status and was diagnosed with hyponatremia, or low sodium. The next day he suffered cardiopulmonary arrest in the hospital's intensive-care unit.

On December 4, 2017, the patient filed a proposed complaint against the medical provider with the Indiana Department of Insurance.

The trial court and Court of Appeals addressed the two year statute of limitations for filing an action against a medical provider: "A claim [...] may not be brought against a health care provider based upon professional services or health care that was provided or that should have been provided unless the claim is filed within two (2) years after the date of the alleged act, omission, or neglect[.]" Ind. Code § 34-18-7-1.

The Court of Appeals determined there was genuine issues of material fact and it was an error for the trial court to dismiss the medical malpractice case on 2-year statute of limitation grounds as there was a genuine issue of material fact as to whether the medical provider indeed provided health care to the patient on December 11, 2015, during the medical provider's electronical review and approval of the LPN's report of the "Nurse Check" without any recommended further testing or treatment.

Madison Consol. Sch. v. Thurston, No. 19A-CT-797 (Ind. Ct. App. October 23, 2019)
https://www.in.gov/judiciary/opinions/pdf/10231902par.pdf

Estoppel for Asserting Notice/Timeliness Provisions of Tort Claims Act

The Court of Appeals found the governmental entity was estopped from asserting that victim failed to comply with the notice requirements in Ind. Code §§ 34-13-3-8(a)(1), 34-13-3-10 of the Indiana Tort Claims Act (ITCA) as the victim and her mother attempted to work with the governmental entity's insurer and relied on its instructions, assurances, and advice regarding waiting until medical treatment was completed prior to seeking a settlement and failing to inform the victim and her mother of the ITCA time requirements.

3. Federal Court Decision

Waldon v. Wal-Mart Stores, Inc., No. 19-1529 (7th Cir. 2019)
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2019/D11-26/C:19-1529:J:Brennan:aut:T:fnOp:N:2436321:S:0

No Constructive Knowledge of Dangerous Condition on Premises

In a premises liability action, the Seventh Circuit Court of Appeals, applying Indiana law, found a retail store should have prevailed on summary judgment as no reasonable jury could find the store had constructive knowledge of a hanger on the floor when approximately five to ten minutes before the customer/plaintiff's fall, an employee visually inspected the area where the customer fell and did not observe any hangers, debris, or other potential hazards on the floor.

Stewart v. Parkview Hosp., No. 19-1747 (7th Cir. 2019)
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2019/D11-26/C:19-1529:J:Brennan:aut:T:fnOp:N:2436321:S:0

HIPAA Violation does not Create Private Cause of Action

An Indiana statute – Ind. Code § 9-30-6-6(a) (2016) - requires medical staff who test a person's blood for diagnostic purposes to disclose the results of the test to a law enforcement officer who requests the results as a part of a criminal investigation, regardless of whether the person has consented to or otherwise authorized their release.

The plaintiff sustained serious injuries when he crashed his car while driving under the influence. An emergency room doctor treated the plaintiff and in doing so ordered a blood draw, which confirmed that he had been drinking. The police requested and received the blood-test results from the hospital's medical staff. The plaintiff later sued both officers for violating the Fourth Amendment by obtaining his test results without a warrant and the hospital's medical staff for violating the Health Insurance Portability and Accountability Act by disclosing the results.

The 7th Circuit Court of Appeals found that while the Health Insurance Portability and Accountability Act (HIPAA) prohibits the disclosure of medical records without the patient's consent, nowhere does the statute expressly create a private right of action to enforce this substantive prohibition.

D. SIGNIFICANT CASE PENDING BEFORE THE INDIANA SUPREME COURT

Estabrook v. Mazak Corp., 19S-CQ-00590 (Supreme Court of Indiana 2019)

The United States District Court for the Northern District of Indiana has certified a question of Indiana state law for the Court's consideration, pursuant to Indiana Appellate Rule 64.:

> Can the statute of repose codified in Ind. Code § 34-20-3-1(b) be extended by post-sale repair/refurbishment/reconstruction of the product and, if so, what is the appropriate test to be used to determine whether the seller has done sufficient work to trigger the extension?

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.

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

500.3009 Automobile liability or motor vehicle liability policy; limits; exclusion of named person; notice; documentary evidence of deleted coverages.

Sec. 3009.

(1) Subject to subsections (5) to (8), an automobile liability or motor vehicle liability policy that insures against loss resulting from liability imposed by law for property damage, bodily injury, or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle must not be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless the liability coverage is subject to all of the following limits:

(a) Before July 2, 2020, a limit, exclusive of interest and costs, of not less than $20,000.00 because of bodily injury to or death of 1 person in any 1 accident, and after July 1, 2020, a limit, exclusive of interest and costs, of not less than $250,000.00 because of bodily injury to or death of 1 person in any 1 accident.

(b) Before July 2, 2020 and subject to the limit for 1 person in subdivision (a), a limit of not less than $40,000.00 because of bodily injury to or death of 2 or more persons in any 1 accident, and after July 1, 2020, and subject to the limit for 1 person in subdivision (a), a limit of not less than $500,000.00 because of bodily injury to or death of 2 or more persons in any 1 accident.

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

(2) If authorized by the insured, automobile liability or motor vehicle liability coverage may be excluded when a vehicle is operated by a named person. An exclusion under this subsection is not valid unless the following notice is on the face of the policy or the declaration page or certificate of the policy and on the certificate of insurance:

Warning—when a named excluded person operates a vehicle all liability coverage is void—no one is insured. Owners of the vehicle and others legally responsible for the acts of the named excluded person remain fully personally liable.

(3) A liability policy described in subsection (1) may exclude coverage for liability as provided in section 3017.

(4) If an insurer deletes coverages from an automobile insurance policy under section 3101, the insurer shall send documentary evidence of the deletion to the insured.

(5) After July 1, 2020, an applicant for or named insured in the automobile liability or motor vehicle liability policy described in subsection (1) may choose to purchase lower limits than required under subsection (1)(a) and (b), but not lower than $50,000.00 under subsection (1)(a) and $100,000.00 under subsection (1)(b). To exercise an option under this subsection, the person shall complete a form issued by the director and provided as required by section 3107e, that meets the requirements of subsection (7).

(6) After July 1, 2020, on application for the issuance of a new policy or renewal of an existing policy, an insurer shall do all of the following:

(a) Provide the applicant or named insured the liability options available under this section.

(b) Provide the applicant or named insured a price for each option available under this section.

(c) Offer the applicant or named insured the option and form under this subsection.

(7) The form required under subsection (5) must do all of the following:

(a) State, in a conspicuous manner, the risks of choosing liability limits lower than those required by subsection (1)(a) and (b).

(b) Provide a way for the person to mark the form to acknowledge that he or she has received a list of the liability options available under this section and the price for each option.

(c) Provide a way for the person to mark the form to acknowledge that he or she has read the form and understands the risks of choosing the lower liability limits.

(d) Allow the person to sign the form.

(8) After July 1, 2020, if an insurance policy is issued or renewed as described in subsection (1) and the person named in the policy has not made an effective choice under subsection (5), the limits under subsection (1)(a) and (b) apply to the policy.

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.

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.

TWO YEARS

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

Shah v. State Farm Mut. Auto. Ins. Co., 157951 (Supreme Court of Michigan October 25, 2019)

Shah Ruling Regarding Unenforceability of Anti-Assignment Clauses Remains Good Law

The Michigan Supreme Court heard oral arguments but denied taking an appeal of the May 8, 2018, judgment of the Court of Appeals as it was not persuaded that the questions presented should be reviewed by the Supreme Court. Therefore, the 2018 Court of Appeals holding from *Shah*, which created significant assignment of benefits litigation after its ruling, stands. There the Court of Appeals found anti-assignment clauses in insurance policies were unenforceable to prevent the assignment of PIP benefits and were against public policy. However, under this framework plaintiffs are only entitled to recover those losses occurring no more than one year prior to the signing of the assignment of benefits and cannot recover for future benefits.

It is anticipated the Michigan Court of Appeals and/or Michigan Supreme Court may again be asked to revisit the *Shah* holding a conflict panel under MCR 7.215(J)(3) as was requested in *Spine Specialists of Mich., PC v. Geico Indem. Co*., 343683 (Mich. Ct. App. August 15, 2019).

b) Other Significant Decisions

Drouillard v. Am. Alternative Ins. Corp., 157518 (Supreme Court of Michigan July 9, 2019)
http://publicdocs.courts.mi.gov/SCT/PUBLIC/ORDERS/157518_57_01.pdf

UIM Coverage and "Cause to an Object to Hit" Policy Language

An accident occurred where drywall left the bed of an unidentified truck; the drywall came to rest in the road; and, shortly thereafter, an ambulance collided with the drywall as the drywall lay stationary in the road.

The defendant/insurer policy, which ensured a medical services corporation included the following in its definition of an "uninsured motor vehicle":

> "A land motor vehicle or trailer" […] d. that is a hit-and-run vehicle and neither the driver nor [the] owner can be identified. The vehicle must hit, or cause an object to hit, an "insured", a covered "auto" or a vehicle an "insured" is "occupying". If there is no direct physical contact with the hit-and-run vehicle, the facts of the "accident" must be corroborated by competent evidence, other than the testimony of any person having a claim under this or any similar insurance as the result of such "accident."

The Supreme Court of Michigan found the Court of Appeals improperly granted summary disposition to the UM carrier. The Court of Appeals erred by concluding that the unidentified truck in this case did not "cause an object to hit the insured ambulance" when the ambulance hit the drywall left in the road by the truck. The Supreme Court of Michigan determined that by depositing the drywall directly in the path of an oncoming vehicle, the unidentified vehicle caused the drywall to come in contact with the oncoming vehicle; thus, whether the drywall was moving or was stationary at the time of the contact was not dispositive.

Dye v. Esurance Prop. & Cas. Ins. Co., 504 Mich. 167, 155784 (Supreme Court of Michigan July 11, 2019)
https://courts.michigan.gov/Courts/MichiganSupremeCourt/Clerks/Recent%20Opinions/18-19-Term-Opinions/155784.pdf

Owner or Registrant of a Motor Vehicle is not Required to Personally Purchase No-Fault Insurance for his or her Vehicle in Order to Avoid the Statutory Bar to PIP Benefits

This appeal presented the question of whether an owner or registrant of a motor vehicle involved in an accident was excluded from receiving statutory no-fault insurance benefits under the No-Fault act, MCL 500.3101 et seq., when someone other than an owner or registrant purchased No-Fault insurance for that vehicle.

Relying on *Barnes v Farmers Ins. Exch.*, the Court of Appeals concluded that "at least one owner or registrant must have the insurance required by MCL 500.3101(1), and 'when none of the owners maintains the requisite coverage, no owner may recover PIP benefits.'"

The Supreme Court of Michigan concluded that an owner or registrant of a motor vehicle is not required to personally purchase no-fault insurance for his or her vehicle in order to avoid the statutory bar to PIP benefits. Rather, MCL 500.3101(1) only requires that the owner or registrant "maintain" no-fault insurance, and the term "maintain," as commonly understood, means to keep in an existing state.

2. Appellate Court Decisions

a) Insurance Coverage Decisions

Skanska United States Bldg. v. M.A.P. Mech. Contrs., No. 340871, No. 341589 (Mich. Ct. App. March 19, 2019)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20190319_C340871_39_340871.OPN.PDF

No "Occurrence" Under CGL Policy When Evidence is Only of Contractor/Insured's Own Faulty Workmanship

This appeal involved a commercial liability insurance coverage dispute, arising from the faulty installation of parts in the steam heat system of a hospital construction project. The insurer appealed the denial its motion for summary disposition upon a finding there were factual issues as to whether the faulty installation caused an "occurrence" within the meaning of its insurance policy.

The Court of Appeals found the insurer should have prevailed on its coverage position at the trial court. The Court of Appeals ruled that it is an established principle of law that an "occurrence" cannot include damages for the insured's own faulty workmanship (rather, that of its subcontractor).

If, as the trial court ruled, the CGL policy did not cover defective workmanship within the scope of the original project under *Hawkeye*, then the summary disposition analysis turned on evidence of the scope of the repair and replacement work as compared to the scope of the original project. The insurer presented evidence to demonstrate that all the repair and replacement work was within the scope of the original project. Once the insurer presented this evidence, the burden shifted to plaintiff to present evidence that the repair and replacement work included tasks or property beyond the scope of the original project - beyond the scope of the contractor's own work product. Because the plaintiff presented no evidence or argument concerning the scope of its repair or replacement work, MCR 2.116(G)(4) required that summary disposition be entered against plaintiff.

This case has been accepted for appeal to the Supreme Court of Michigan.

Ill. Nat'l Ins. Co. v. AlixPartners LLP, 337564 (Mich. Ct. App. February 26, 2019)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20190226_C337564_64_337564.OPN.PDF

Late Notice Argument Rejected in Professional Insurance Coverage Dispute

This appeal involved a professional liability insurance coverage dispute. The plaintiff had unsuccessfully sued to recoup the payment of a multi-million-dollar arbitration award on defendant's behalf. After making the payment, the plaintiff determined it should not have paid, because the claim was not covered under any of the three professional liability insurance policies it issued to the defendant.

They argued that "claims first made and reported" policies only covered claims that were both made against defendant and reported by defendant to plaintiff during the policy period. The plaintiff concluded that two associated claims were one in the same claim because they both involved the same wrongful act, i.e. defendant's due diligence concerning an acquisition. Based on this conclusion, plaintiff decided that the claim was first made at a board meeting in December of 2007, or at latest in a March 2008 letter, but was not reported to plaintiff until August 2009 with notification of an arbitration complaint. The plaintiff insurer then applied the "claims first made and reported" language of the policy to find that the claim was not covered because it was not reported to plaintiff when first made in December 2007 or March 2008. In rulings which were highly fact specific, both the trial court and Court of Appeals rejected the plaintiff/insurer's late notice argument.

Farm Bureau Ins. Co. v. TNT Equip., Inc, 343307, (Mich. Ct. App. June 20, 2019)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20190620_C343307_49_343307.OPN.PDF

No Ability of Non-Insureds to Enforce Policy

This case arose from a fire that occurred at a storage facility owned by defendant. The plaintiffs were insurance companies. The plaintiff/insurer's insureds owned farm equipment that was stored at the storage facility at the time of the fire.

At the time of the fire, another insurer had issued to the storage facility a "Commercial Inland Marine" policy of insurance effect. Plaintiff/insurer's sought reimbursement from the storage facility's insurer for the amounts they had paid to their insureds for the damaged farm equipment.

The store facility insurer declined to pay the insurer/plaintiffs explaining that storage facility had exercised an option under the policy directing the insurer "to pay for the storage facility customer's deductibles and verifiable uninsured losses only." Because the storage facility had opted out of any other coverage, it was not obligated to pay any other amounts for damages to the farm equipment belonging to plaintiff/insurer's insureds.

The Court of Appeals first ruled that although the owners of damaged property might, in some circumstances, realize a benefit from a manufacturer having coverage for such damage, the subject policy contained no promise to directly benefit the plaintiff/insurer's insureds within the meaning of MCL 600.1405. Next, the Court of Appeals held that because the subject policy did not directly promise to act in relation to the plaintiff/insurer's insureds, their insureds did not rise to the status of third-party beneficiaries under the policy. They therefore had no right to seek to enforce the policy between a manufacturer and insurer. Third, the Court of Appeals held because the subject policy did not establish the plaintiff/insurer's insureds as insured under the policy, and they were likewise not third-party beneficiaries, and had no right to seek to enforce the policy.

State Farm Fire & Cas. Ins. Co. v. Ravenscroft, 345377 (Mich. Ct. App. September 17, 2019)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20190917_C345377_35_345377.OPN.PDF

Despite Mental Illness Resulting in Not Guilty by Reason of Insanity Criminal Determination, Insured Acted Intentionally and Non-Accidentally for Coverage Purposes Under Homeowners' Policy

The insured killed his wife, by stabbing her 24 times and striking her in the chest 13 times. Criminally, the insured was found not guilty by reason of insanity.

In response to a wrongful death action against the insured, the homeowner's insurer asserted it had no duty to defend or indemnify as the bodily injury to the wife did not constitute an "occurrence," and even if it did constitute an "occurrence," coverage was precluded because the homeowners policy excluded coverage for bodily injury which is expected or intended by the insured. The subject policy did not define "accident."

However, the Court of Appeals found "where the respective policies define an occurrence as an accident, without defining an accident," the Michigan Supreme Court has "repeatedly stated that 'an accident is an undersigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated and not naturally to be expected'." The insured need not act unintentionally in order for the act to constitute an 'accident' and therefore an "occurrence." The Court rejected the argument – for insurance coverage purposes - that mental illness caused the insured to lack the substantial capacity to appreciate the nature and quality of the wrongfulness of his conduct or to conform his conduct to the requirements of the law, and therefore his actions were non-intentional.

Pioneer State Mut. Ins. Co. v. Shadowens, 343716 (Mich. Ct. App. November 14, 2019).
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20191114_C343716_49_343716.OPN.PDF

No General Duty to Disclose New Members of Insureds' Household Absent Contractual Requirement or Direct Inquiry from Insurer

The insurer sought to void an auto policy based upon the insured's failure to disclosure that a particular person was residing was residing in a household during a two to three-month timeframe. The insurer moved under theories of silent fraud and actionable fraud. The Court ruled against the insurer. The Court rejected the insurer's argument that it's insured had a general "obligation and duty […] to inform the insurer of any change in the household," because the insurer did identify any contractual duty or law in support of that proposition. The common law duty to disclose newly acquired information expires with the consummation of the agreement. The Court also found the insureds only had a duty to fully and accurately respond to direct inquires by the insurer, of which there were none during the insurer's renewal process.

Yang v. Everest Nat'l Ins. Co., 344987 (Mich. Ct. App. August 27, 2019)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20190827_C344987_52_344987.OPN.PDF

Insurer Cannot Cancel Policy by Sending Notice of Cancellation Before Grounds for Cancellation Occur

At issue in this appeal was whether an insurer could cancel a policy by sending the statutorily required "notice of cancellation" to the insured before the grounds for cancellation had occurred.

The insurer sent the insured a bill requesting a premium payment for his no-fault insurance policy and informing him that the policy would be cancelled if payment was not received by the due date. The insured did not make the payment and he and his wife were subsequently injured in a pedestrian-automobile accident. The insureds sought coverage under the policy, and the insurer argued that it effectively cancelled the policy. The trial court disagreed and denied Everest's motion for summary disposition.

The Court of Appeals rejected the insurer's argument that it could cancel a policy by sending the statutorily required "notice of cancellation" to the insured before the grounds for cancellation have occurred. Such notice did not satisfy the Insurance Code, MCL 500.100 et seq., and was therefore ineffective.

b) No-Fault/PIP Decisions

Auto-Owners Ins. Co. v. Compass Healthcare PLC, 339799, (Mich. Ct. App. December 18, 2018) http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20181218_C339799(49)_RPTR_152o-339799-FINAL-I.PDF

Medical Providers Cannot Pursue Patient-Insureds Under Implied Contract Theory

The Court of Appeals held that medical providers cannot prevail against patient-insureds for bills not paid by insurers on a theory of implied contract. Such a theory of recovery would be both contrary to the purpose of the No-Fault Act and the implications would allow medical providers to circumvent the protective nature of the No-Fault Act. The Court of Appeals held medical providers can pursue patient-insureds for bills not paid by insurers, but they must do so expressly under the provisions of the No-Fault Act.

Sutton v. Mich. Auto. Ins. Placement Fac., 344194 (Mich. Ct. App. September 12, 2019) http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20190912_C344194_30_344194.OPN.PDF

Examination Under Oath Request by MACP Upheld

Examination Under Oath ("EUO") requests submitted by the Michigan Assigned Claims Plan (MACP) to a first-party PIP applicant are permissible where the MACP is not attempting to use an EUO as a condition precedent to payment of benefits, but rather is attempting to make a brief investigation into whether benefits were available in the first place in light of the fact a plaintiff has (1) not indicated whether he was authorized to drive a motor vehicle, and (2) not provided reasonable proof of his losses. "[A]n EUO provision designed only to ensure that the insurer is provided with information relating to proof of the fact and of the amount of the loss sustained - i.e., the statutorily required information on the part of the insured - does not run afoul of the statute."

Piccione v. Gillette, 342826, (Mich. Ct. App. January 17, 2019) http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20190117_C342826(33)_RPTR_8o-342826-FINAL-I.PDF

Potential Serious Impairment for Purposes of No-Fault Act After Full Recovery from Injury

This appeal involved a third-party automobile negligence case. Under Michigan's No-fault Act, tort liability is limited. However, a person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. Serious impairment of a body function "means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."

The Court of Appeals held the trial court erred by granting summary disposition for defendants because there was a genuine issue of material fact regarding whether the three-year-old injured in the accident suffered a serious impairment of a body function. The injured child's parents testified that as a result of the impairment from the accident he was unable to go to school for two weeks, they had to help him go to the bathroom, and he was unable to engage in recreational sports after the accident. While after approximately three to four months the child was fully healed and able

to return to his normal life, the Court of Appeals found a jury could conclude that his general ability to lead his normal life was affected by the impairment for purposes of MCL 500.3135(5).

Turner v. Farmers Ins. Exch., No. 339624, No. 339815 (Mich. Ct. App. April 16, 2019)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20190416_C339624(67)_RPTR_33o-339624-FINAL-I.PDF

PIP Benefit Law as Relates to Rental Cars

Following two automobile accidents, Enterprise denied a request to pay personal protection insurance (PIP) benefits. Enterprise concluded that it was not financially responsible for the claimed PIP benefits, asserting that the Michigan No-Fault Act was inapplicable because the rental car involved in the accident was registered in Maryland and had not been operated in Michigan for more than 30 days at the time of the accident. The injured party's claim for benefits were thereafter assigned to Farmers by the Michigan Automobile Insurance Placement Facility.

On appeal, Farmers argued that Enterprise was higher in priority because Enterprise was self-insured and owned the vehicles involved in each of the accidents, and MCL 500.3114(4)(a) provides that PIP benefits must be paid by the "insurer of the owner or registrant of the vehicle occupied" regardless of whether the particular vehicle involved in the accident was actually insured or required to be insured.

The Court of Appeals found Enterprise was the owner and registrant of the vehicles at issue that were occupied by the injured parties respectively when each of the accidents occurred. Enterprise was self-insured. The issue then became whether Enterprise, as a self-insured entity that was the owner and registrant of the vehicles at issue, may be considered the "insurer of the owner or registrant."

The Court of Appeals went on to determine in the case of a qualified self-insurer under Michigan's No-Fault Act, the priority provision in MCL 500.3114(4)(a) refers to that self-insurer as the insurer of the motor vehicle's "owner or registrant," regardless of whether the particular vehicle involved in an accident was required to be covered by No-Fault security under MCL 500.3101(1) or MCL 500.3102(1). Therefore, Enterprise was higher in priority pursuant to MCL 500.3114(4)(a) and Farmers was entitled to summary disposition in its favor.

Johnson v. USA Underwriters, 340323, (Mich. Ct. App. May 14, 2019)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20190514_C340323_56_340323.OPN.PDF

No Policy Reformation Decision; Policies Issued with Collision and Comprehensive Coverages Only Do Not Contravene No-Fault Act

A driver obtained a collision and comprehensive coverage only policy during the purchase of a vehicle. The driver then stuck plaintiff, a bystander in a parking lot, with the vehicle. The insurer later denied any PIP coverage was due and owing as the policy did not provide for such coverage. The trial court held that insurer's practice of selling automobile insurance with certificates of insurance but without mandatory no-fault coverages amounted to "an intent to defraud" and denied the insurer's motion for summary disposition.

The Court of Appeals agreed with the insurer that the trial court erred when it reformed the insurance policy to include mandatory no-fault coverages because (1) there was no mistake or fraud by either party, (2) issuing insurance policies with collision and comprehensive coverages only does not contravene the No-Fault Act, and (3) public policy does not allow for reformation under the circumstances of this case.

Slocum v. Farm Bureau Gen. Ins. Co., No. 343333, No. 343409 (Mich. Ct. App. June 18, 2019)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20190618_C343333_68_343333.OPN.PDF

Dependents Entitled to the Cost of Obtaining Substantially Similar Policies to Those Provided Them by the Deceased's Former Employer

This appeal dealt with whether a deceased's dependents were entitled to the replacement cost of obtaining medical and dental benefits like those provided by the deceased's former employer or to the monetary value of the premiums paid by the former employer. The Court of Appeals recognized that the survivor's loss provisions of the No-Fault Act were designed to maintain the deceased's support of his dependents following his death. They therefore concluded that the dependents were entitled to the cost of obtaining substantially similar policies to those provided them by the deceased's former employer.

Newby v. Am. Zurich Ins. Co., 342741 (Mich. Ct. App. August 1, 2019)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20190801_C342741_39_342741.OPN.PDF

Ex Parte Interviews of Physicians Allowed in Context of No-Fault Investigations and Litigation, but No-Fault Act, not General Discovery Rules, Governs if and how Interviews Allowed

In an action for PIP benefits, the insurer sought a Qualified Protective Order (QPO) under HIPPA to in turn conduct *ex parte* interviews of the insured's physicians. The Michigan Supreme Court had previously addressed in *Holman v. Rasak*, a case outside the context of no-fault law, that *ex parte* interviews of physicians are permissible - if reasonable efforts have been made to obtain a QPO consistent with HIPPA. However, the *Newby* court disagreed with the insurer's assertion that general court rules (addressed in Holman), and not the No-Fault Act (not addressed in *Holman*), control the circumstances of a trial court granting or denying a QPO - in an action seeking PIP benefits.

Under the No-Fault Act, the insurer was required to establish good cause for seeking the discovery, including the proposed *ex parte* interviews of physicians. Fact specific to the *Newby* case, there was nothing unusual about the plaintiff's case that warranted *ex parte* interviews with plaintiff's treating physicians. Without "a particular and specific demonstration of fact," rather than "stereotyped and conclusory statements," the insurer did not establish good cause to support its motion for a QPO to in turn conduct the *ex parte* interviews.

Oaklawn Hosp. v. Auto-Owners Ins. Co., 343189 (Mich. Ct. App. July 30, 2019).
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20190730_C343189_35_343189.OPN.PDF

Consent to Treatment Forms do not Operate as Assignment of Benefit Forms

The Michigan Court of Appeals found a non-fault insured's signing of consent to treatment forms do not operate as assignment of benefit forms. The Court found while the insured requested that the medical provider provide medical treatment and he consented to health care being provided by the medical provider, PIP benefits had not accrued because allowable expenses had not yet been incurred.

The no-fault insured assigned benefits to the medical provider via the following clause:

> "I assign to [medical provider] all no-fault benefits presently due or past due incurred as a result of my automobile accident(s) and relating to the reimbursement of medical billings by [medical provider] I assign my right to recover no-fault interest and attorney's fees as it relates to the reimbursement of these medical billings. I am not assigning any future benefits."

The insurer sought to nullify this assignment of benefits with the following insurance policy provision"

> "Your rights and duties under this policy may not be assigned without our written consent."

The Michigan Court of Appeals upheld the assignment of benefits provisions and found against the insurers' anti-assignment policy provisions. The Court focused on MCL 500.3143 only addressing an assignment of future benefits; not addressing an assignment of past or presently due benefits. Because the insured did not assign any future benefits, and because the anti-assignment clause in the insurance policy was unenforceable as against public policy, the Court ruled in favor of the medical provider.

This and other Court of Appeals decisions were largely based on the 2018 holding in *Shah v State Farm Mut Auto Ins. Co*, 324 Mich. App 182; 920 NW2d 148 (2018).

c) Premises Liability Decisions

McCarty Ji Liang v. Guang Hui Liang, 341010 (Mich. Ct. App. May 16, 2019)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20190516_C341010_40_341010.OPN.PDF

Parental Immunity Barred Claims Against Parent Personally, but not Against Business Owned by Parent

A son sued his father for an injury the son incurred at the father's restaurant. The Court of Appeals held that parental immunity barred the negligence-based claims against the father in his personal capacity, but that the immunity doctrine had no bearing on the premise liability claim against the corporate entity restaurant.

Wilson v. BRK, Inc., 342449 (Mich. Ct. App. May 30, 2019)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20190530_C342449_23_342449.OPN.PDF

Open and Obvious Defense Denied as Related to Statutory Barrier-Free Requirements

This premises liability dealt with a fall from a wheelchair while exiting the defendant's property. Plaintiff alleged defendants' entranceway step violated a statutory duty under MCL 125.1352(1) and MCL 125.1351(b) owed to persons with physical limitations. The Court of Appeals denied the open and obvious doctrine was applicable to grant summary disposition to the defendant. The Court of Appeals also rejected defendants' logic that simply because the defendant/bar was never issued any violations or citations relative to the step in question, that defendant must have been in compliance with the statutory barrier-free requirements.

d) Governmental Immunity Decision

Buhl v. City of Oak Park, 340359 (Mich. Ct. App. August 29, 2019)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20190829_C340359_36_340359.OPN.PDF

2016 PA 419 does not Wholly Bar Personal Injury Claims Against Municipalities; Rather it Makes Available Common Law Defenses, Including the Open and Obvious Danger Defense

A plaintiff twisted her ankle on a sidewalk and sought liability against the local municipality. The Michigan Court of Appeals found 2016 PA 419 (which addresses the maintenance of sidewalks by municipalities) did not legally bar the plaintiff's injury action. However, the statue allowed the municipal corporation to assert common law defenses, including the open and obvious doctrine, which applied in the subject case to bar the plaintiff's claim.

e) Other Significant Decisions

Crego v. Edward W. Sparrow Hosp. Ass'n, 338230 (Mich. Ct. App. April 16, 2019)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20190829_C340359_36_340359.OPN.PDF

Medical Malpractice Experts Qualified Under MCL Section 600.2169

MCL Section 600.2169 governs the requirements for expert witnesses in medical malpractice cases. In *Crego*, the Court of Appeals found two experts were qualified under the statute. First, the two doctors were both board-certified OB-GYNs. There was no requirement under the statute that the patient's expert had to be an osteopathic physician, like the accused doctor. Second, the Court of Appeals found the relevant standard of practice or care associated with performing laparoscopic hysterectomies was set by reference to the practice of obstetrics-gynecology. Third, the Court of Appeals found the experts devoted a majority of professional time to the active clinical practice of obstetrics-gynecology during the year immediately preceding the alleged act of medical malpractice. Fourth, the Court of Appeals found the Legislature only demanded that an expert engage in the active clinical practice of the relevant specialty for the requisite period.

Hutchinson v. Ingham Cty. Health Dept., 341249 (Mich. Ct. App. May 9, 2019)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20190509_C341249(41)_RPTR_50o-341249-FINAL-I.PDF

Medical Malpractice Claim not Barred by Statute of Limitations When Plaintiff Could not Have Known of Issue Prior to Formal Cancer Diagnosis

This appeal involved a medical malpractice case. The Court of Appeals determined a plaintiff's claim was not barred by MCL 600.5838(a)(2) – the statute governing the timeframe within when medical malpractice claims must be asserted. The Court of Appeals found the plaintiff indeed initiated her claim within the six-month discovery period set forth by statute. The Court focused on the definitive diagnosis of breast cancer allowing the plaintiff to determine the medical facility was negligent in treating a lump. The Court of Appeals found that before the diagnosis, the plaintiff could not have known whether the lump was cancerous.

Scanland v. Beaumont Hosp. 342851 (Mich. Ct. App. October 3, 2019)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20191003_C342851_65_342851.OPN.PDF

Release Included Doctor and Physician Though not Formal Signing Parties to Release

Plaintiff alleged injuries from a hip implant and filed two different lawsuits. Plaintiff first sued the hip implant manufacturer. Plaintiff second sued the doctor and hospital where the hip replacement surgery was performed. Plaintiff settled the first lawsuit with a release, incorporating the following terms:

> "Released Party" and "Released Parties" means […] "any physicians, healthcare professionals, or hospitals connected with the prescription, implantation, use or removal of the [hip implant]"

The Michigan Court of Appeals upheld the doctor and hospital's position that they were included in and released by the language from the release in the first lawsuit. In so ruling, the Court rejected the plaintiff's allegations that the release did not apply to her claims raised against defendants because they failed to provide notice of a product recall, they were not parties to the release, they did not provide consideration, and they were not intended third-party beneficiaries of the release. The Court looked to the plain, unambiguous language of the release in upholding it as it clearly read physicians and hospitals were released.

Auto Club Grp. Ins. Co. v. Louis, 340446, (Mich. Ct. App. July 2, 2019)
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20190702_C340446_104_340446.OPN.PDF

Insurer not Entitled to Setoff of Sum Paid to Mortgagee in Case Evaluation Award Stemming from Fire Loss

This appeal involved an interpleader action to determine the proper distribution of case evaluation proceeds. The primary issue was whether the case evaluation award in the underlying litigation constituted a complete settlement of all claims for loss arising from a fire, including a mortgage payoff claim, or whether the award was limited to insurance proceeds to which the insured was entitled.

The Court of Appeals held the insured's acceptance of case evaluation proceeds could not have settled the mortgagee's independent right to payment under the insurance policy. The insurer's payment of the existing mortgage balance satisfied its obligation to the mortgagee, while having no effect upon the insured's claim.

The insurer was therefore not entitled to set off any payment it may be obligated to make to the mortgagee against a mutually accepted case evaluation award.

D. SIGNIFICANT CASES PENDING BEFORE THE MICHIGAN SUPREME COURT

Skanska United States Bldg. v. M.A.P. Mech. Contrs., SC: 159510-1 (October 18, 2019)

The parties will address whether: (1) the definition of "occurrence" in *Hawkeye-Security Ins Co v Vector Construction Co*, 185 Mich. App 369; 460 N.W.2d 329 (1990), remains valid under the terms of the commercial general liability policy at issue in the case; and (2) whether the plaintiff has shown a genuine issue of material fact as to the existence of an "occurrence" under those terms.

Turner v. Farmers Ins. Exch., SC: 159660, SC: 159661 (November 27, 2019)

The parties will address whether a self-insured vehicle owner is subject to the priority provision in the former MCL 500.3114(4)(a) as "[t]he insurer of the owner or registrant of the vehicle occupied" if the self-insured entity's vehicle involved in the accident was not subject to the security provisions of the no-fault act because it was registered in another state, did not need to be registered in this state, and was not operated in this state for more than 30 days during the applicable year.

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 on 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.

§ 624.1055, Fla. Stat. (effective 1/1/2020)
Right of Contribution Among Insurers for Defense Costs

This statute provides that a liability insurer who owes a duty to defend an insured and who defends the insured against a claim, suit, or other action has a right of contribution for defense costs against any other liability insurer who owes a duty to defend the insured against the same claim, suit, or other action, provided that contribution may not be sought from any liability insurer for defense costs that are incurred before the liability insurer's receipt of notice of the claim, suit, or other action. (This statute does not apply to motor vehicle liability insurance or medical professional liability insurance).

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

Restoration 1 of Port St. Lucie v. Ark Royal Ins. Co., SC18-1624; SC18-1623 (Fla. 2019)
https://efactssc-public.flcourts.org/casedocuments/2018/1624/2018-1624_disposition_146891_d25.pdf

Supreme Court Defers to Legislature on Assignment of Benefits

The Supreme Court of Florida declined to hear a case involving assignment of benefits law. As the Supreme Court explained subsequent to the Court accepting jurisdiction, the Legislature passed, and the Governor approved, "[a]n act relating to insurance assignment agreements." See Ch. 2019-57, Laws of Fla. Section 1 of the act creates new section 627.7152, Florida Statutes, titled "Assignment agreements," that among other things defines the term "assignment agreement" and sets forth certain requirements for an assignment agreement to be valid and enforceable. Ch. 2019-57, § 1, Laws of Fla. Section 2 of the act creates new section 627.7153, Florida Statutes, titled "Policies restricting assignment of post-loss benefits under a property insurance policy," that among other things permits an insurer to "make available a policy that restricts in whole or in part an insured's right to execute an assignment agreement" if certain conditions are met. Ch. 2019-57, § 2, Laws of Fla. The act has an effective date of July 1, 2019. Id. § 6.

Because the Supreme Court concluded the new legislation addressed on a going-forward basis the assignment of benefits issue, it discharged its jurisdiction and declined to hear the case.

b) Other Significant Decisions

In Re: Amendments to the Florida Evidence Code, No. SC19-107 (Fla. 2019)
https://www.floridasupremecourt.org/content/download/525509/5838164/file/sc19-107.pdf

Daubert Expert Witness Standard Adopted

The Florida Supreme Court adopted the *Daubert* standard for determining the admissibility of expert testimony. The Court remarked the *Daubert* amendments remedy deficiencies of the *Frye* standard. Whereas the *Frye* standard only applied to expert testimony based on new or novel scientific techniques and general acceptance, *Daubert* provides that "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." The *Daubert* amendments will create consistency between the state and federal courts with respect to the admissibility of expert testimony and will promote fairness and predictability in the legal system, as well as help lessen forum shopping.

2. Appellate Court Decisions

a) Insurance Coverage Decisions

Auto Club Ins. Co. v. Estate of Lewis, No. 5D18-3439 (Fla. Dist. Ct. App. 2019)
https://www.5dca.org/content/download/545051/6141601/file/183439_1260_12132019_09060732_i.pdf

Loss of Consortium Claim Limited to Single Per Person Policy Limit

The Court of Appeals determined the parents' loss of consortium claims were subject to a single $100,000 per person limit. The policy defined "bodily injury" as "bodily harm, sickness or disease, including death therefrom." Given the decedent insured was the only person who sustained "bodily injury" in the accident, as defined by the policy, the bodily injury coverage limit of $100,000 per person was all that was available to the estate. The insurance policy was not ambiguous on the definition or scope of "bodily injury." The trial court erred in determining that the definition of "Bodily Injury" as expressly set forth in the policy was somehow "expanded" by the policy's Limits of Liability provision.

Alvarez v. State Farm Fla. Ins. Co., No. 3D17-2261 (Fla. Dist. Ct. App. 2019)
https://www.3dca.flcourts.org/content/download/525700/5840473/file/3D17-2261.pdf

Misrepresentation Voids Policy, Regardless of Inconsistent Information on Jury Verdict

The Court of Appeals determined that a jury's verdict finding material misrepresentation voided homeowners' coverage for the claimed loss, and correctly rendered judgment in favor of the insurer with no entitlement to damages.

Musselwhite v. Fla. Farm Gen. Ins. Co., No. 1D18-780 (Fla. Dist. Ct. App. 2019)
https://www.1dca.org/content/download/525952/5843557/file/180780_1284_05282019_10255719_i.pdf

Policy's Business Limitations Found to Not Cover Off-Premises Injury

The Court of Appeals determined the trial court properly entered summary judgment for an insurer where the victim's off-premises injury, suffered while drilling a water well for a residential customer of the insured, was not covered under insurance policies where a "d/b/a" designation limited liability to a feed store business operated under the fictitious name. Furthermore, the insurance policies did not provide coverage for claims arising out of the insureds' drilling operations, as they only covered claims arising out of their business premises, which was described by the declaration's page as a "feed store." The Court of Appeals noted that because well drilling was not necessary or incidental to the business of selling animal feed, the trial court properly concluded that the victim's off-premises injury was not covered by the applicable policies.

State Farm Fla. Ins. Co. v. Sheppard, No. 1D18-2388 (Fla. Dist. Ct. App. 2019)
https://www.1dca.org/content/download/524182/5823377/file/182388_1287_04292019_09285059_i.pdf

Appraisal Appropriate When Portion of Total Loss is Covered

Following a water loss claim, the Court of Appeals determined because the insurer acknowledged that some portion of the total loss is covered, the trial court should have granted the motion to compel an appraisal.

Advanced Sys., Inc. v. Gotham Ins. Co., No. 3D18-1744 (Fla. Dist. App. Ct. 2019)
https://www.3dca.flcourts.org/content/download/525805/5841781/file/3D18-1744.pdf

Error to Refer to Material Safety Data Sheet for Determination of Policy's Pollution Exclusion

The Court of Appeals determined a trial court erred by relying on extrinsic evidence, a material safety data sheet, to conclude that the policy's total pollution exclusion operated as a bar to coverage and any duty to defend because released foam constituted a "pollutant" within the meaning of the exclusion.

Bryant v. GeoVera Specialty Ins. Co., No. 4D18-189 (Fla. Dist. App. Ct. 2019)
https://www.4dca.org/content/download/524708/5829310/file/180189_1709_05082019_08531943_i.pdf

Change of Coverage Position in Litigation Shows Potential Bad Faith

A surplus lines property insurer partially denied coverage for the insured's pipe leak by denying coverage above a $1,000 leakage sub-limit and a $5,000 mold sublimit. The insured's then filed suit. The insurer's subsequent payment of an appraisal award of $37,563 demonstrated that it had abandoned its position, which constituted a confession of judgment for purposes of § 626.9373, Fla. Stat. (2014). The Court of Appeals found that because the insurer's denial of liability above the sub-limits was based upon grounds other than failure to furnish a notice or proof of loss, the denial operated as a waiver of a formal proof of loss. There were also factual issues regarding the insurer's exercise of good faith given the position regarding the initial $1,000 leakage sublimit.

Lake Worth Surgical Ctr., Inc. v. Gates, No. 4D18-2774 (Fla. Dist. App. Ct. 2019)
https://www.4dca.org/content/download/430163/4670939/file/182774_1702_02272019_09143274_i.pdf

Confidentiality Protections for Medical Services Rendered

The Court of Appeals declined to impose confidentiality restrictions on information regarding the amounts paid for services rendered to a patient, a car accident victim, on two different dates, including the approximate percentage of the surgical center's practice of treating patients who were involved in a pre-suit claim or personal injury litigation over a three-year period. The surgical center did not present any evidence to support a finding that the percentage of practice information was a trade secret. However, the trial court erred in failing to grant a surgical center's request for confidentiality protection for information regarding two examples of contracted reimbursement rates provided by private health insurance carriers for the surgery received by the patient.

Universal Prop. & Cas. Ins. Co. v. Loftus, No. 4D18-2192 (Fla. Dist. Ct. App. 2019)
https://www.4dca.org/content/download/534506/5936639/file/182192_1257_08072019_08585596_i.pdf

Condominium Act does not Provide Private Cause of Action Against Another Unit Owner

The Court of Appeals determined summary judgment was properly awarded to a landlord because the trial court correctly concluded that § 718.111(11)(j), Fla. Stat. (2014), of Florida's "Condominium Act," did not provide a condominium unit owner with a private right of action against another unit owner for the tortious conduct of the latter's tenants.

Homeowners Choice Prop. & Cas. Ins. Co. v. Mahady, No. 4D19-142 (Fla. Dist. Ct. App. 2019)
https://www.4dca.org/content/download/535380/5945777/file/190142_1704_08212019_09080652_i.pdf

Breach of Contract Discovery

An insured's discovery requests for claim file materials were improper. As issues of the insurer's liability for coverage and the amount of the policy owners' damages had not been finally determined, the discovery order from the trial court was a departure from the essential requirements of the law which would result in irreparable harm. Until the obligation to provide coverage and damages had been determined, a party was not entitled to discovery related to the claims file or to the insurer's business policies or practices regarding handling of claims.

Kennedy v. First Protective Ins. Co., No. 3D18-1993 (Fla. Dist. App. Ct. 2019)
https://www.3dca.flcourts.org/content/download/469846/5155012/file/3D18-1993.pdf

Notice of Right to Mediate Requirement

The Court of Appeals determined once a dispute is in existence the insurer may not demand an appraisal under the policy and pursuant to § 627.7015, until it has provided the insured with notice of the right to mediate. An insurer who does so waives its right to appraisal.

b) UM/UIM Decision

Progressive Am. Ins. Co. v. Pawelczyk, Case No. 2D18-1651 (Fla. Dist. Ct. App. 2019)
https://www.2dca.org/content/download/525035/5832791/file/181651_39_05152019_08245916_i.pdf

Rental Vehicle not "Covered Auto" for UM Purposes

The Court of Appeals addressed whether it was proper to grant summary judgment to the passenger in her action against the driver's UM carrier to recover for injury sustained while the driver was operating a rental vehicle. The Court of Appeals determined the rental vehicle was not a "covered auto" as defined in the UM section of the policy where it was not either an additional or a replacement auto. Therefore, the passenger was not an "insured person" covered by the driver's policy. Furthermore, the driver was not a beneficial owner of the rental vehicle because beneficial ownership requires something more than a mere right of possession and the driver did not have any ownership interest in the rental vehicle.

Deutsch v. Geico Gen. Ins. Co., No. 4D18-2714 (Fla. Dist. Ct. App. 2019)
https://www.4dca.org/content/download/540114/6096294/file/182714_1257_10302019_09124184_i.pdf

Gym Operating from Truck Considered a "Building" and not a "Vehicle" for UM Purposes

The Court of Appeals determined an insured was not entitled to UM/UIM benefits after sustaining injuries in a mobile gym that operated out of the back of a truck because the owner's use of the truck as a gym was within the policy's exclusion for a "vehicle located for use as a premises" and was not an uninsured auto under the policy. The Court of Appeals noted that when used as a gym, the stationary truck was "located for use as a building."

Owners Ins. Co. v. Allstate Fire & Cas. Ins. Co., No. 2D18-2309 (Fla. Dist. Ct. App. 2019)
https://www.2dca.org/content/download/539935/6094318/file/182309_39_10252019_09051716_i.pdf

UM Insurer Allowed to Exclude Resident Relative Without Complying with Certain Requirements

The Court of Appeals determined an insurer could exclude a resident relative who owns an automobile from UM coverage without complying with the informed-acceptance and reduced-premium requirements of section 627.727(9), Florida Statutes (2013), if the policy does not provide liability coverage to that resident relative.

c) Other Significant Decisions

MacGregor v. Daytona Int'l Speedway, LLC, No. 5D17-2989 (Fla. Dist. Ct. App. 2018)
https://www.5dca.org/content/download/521887/5797104/file/172989_1260_12212018_08455717_i.pdf

Gross Negligence Claims not Barred via Speedway Release

The plaintiff was injured when she was run over by a tow truck that was backing up at the Daytona International Speedway. In order to enter the non-spectator restricted area of the speedway during the race, pursuant to section 549.09(2), Florida Statutes (2013), the plaintiff had been asked to and did sign a release and waiver of liability and assumption of risk agreement.

The Court of Appeals first ruled that although the language of the release states that it "extends to all acts of negligence," in the context of closed-course motorsport facilities, the Legislature has explicitly excluded gross negligence from the definition of negligence for injuries occurring in the non-spectator areas of the facility. § 549.09(1)(e), Fla. Stat. (2013). The explicit exclusion of gross negligence from the definition of negligence prevented the release from barring the gross negligence claim.

Zurich Am. Ins. Co. v. Puccini, LLC, No. 3D17-0690 (Fla. Dist. App. Ct. 2019)
https://www.3dca.flcourts.org/content/download/467997/5132326/file/3D17-0690.pdf

Tenants' Policy Bears Risk of Loss Following Fire

Following a fire, a dispute arose between the landlord's insurer and tenant's insurer as to which policy should bear the risk of loss for the tenant's negligence. The Court of Appeals held the tenant's policy, under the facts of this case, should bear the risk of the loss. The following factors were considered by the Court: the lease affirmatively placed the burden on the tenant to procure and maintain insurance for its own benefit and to name the landlord as an additional insured; the parties did not intend to shift the risk of loss for damage caused by the tenant's negligence to the insurer; the clear intent of the parties was that the tenant or the tenant's insurer would bear the risk of loss due to damage resulting from the tenant's negligence.

Orthopedic Ctr. of S. Fla. v. Sode, No. 4D18-3478 (Fla. Dist. Ct. App. 2019)
https://www.4dca.org/content/download/527060/5855429/file/183478_1704_06122019_09174515_i.pdf

Protections Afforded to Experts Extended to Non-Party Corporate Entity

The Court of Appeals determined a corporate non-party was entitled to quash a records subpoena served on it by the plaintiff in a related personal injury action that sought financial discovery from the non-party as a business entity affiliated with the defendant's expert because the protections afforded to an expert under Fla. R. Civ. P. 1.280(b)(5)(A)(iii) extended to a non-party corporate entity.

Davis v. Karr, No. 5D18-149 (Fla. Dist. Ct. App. 2019)
https://www.5dca.org/content/download/522049/5799078/file/180149_1257_01252019_08393455_i.pdf

Medical Malpractice Pre-Suit Affidavit Must Come from Physician of Same Medical Specialty

The Court of Appeals addressed whether under Florida's Medical Malpractice Act a pre-suit affidavit submitted by a plaintiff from a health care provider who does not specialize in the same field as the defendant meets the statutory pre-suit investigatory requirements for filing a medical negligence suit. The Court of Appeals held that it did not. Applying §§ 766.203 and 766.202(6), Fla. Stat., the patient was required to submit a pre-suit verified written medical opinion from an individual who would qualify as an expert witness under § 766.102, Fla. Stat., corroborating that reasonable grounds existed for her to bring a medical negligence suit against the orthopedic surgeon. Because the doctor was an orthopedic surgeon, the plain language of § 766.102(5), Fla. Stat., required that the medical expert or experts who provided the patient with the corroborating pre-suit verified medical expert opinions be of the same specialty.

State Farm Fla. Ins. Co. v. Sanders, No. 3D19-927 (Fla. Dist. Ct. App. 2019)
https://www.3dca.flcourts.org/content/download/533822/5929139/file/190927_807_07242019_10172482_i.pdf

Public Adjuster on Contingency Fee not Disinterested Appraiser

This appeal addressed whether an insurer was entitled to a writ of certiorari to quash a trial court's order allowing the insureds' agent/public adjuster to act as their disinterested appraiser in the alternative dispute resolution of their claim. The Court of Appeals disallowed the public adjuster from serving in this role. The public adjuster was not disinterested, as he had a financial interest in whether or not the insureds recovered from the insurer and how much they recovered, based on his contingency fee.

Jiménez v. Granada Ins. Co., No. 3D19-118 (Fla. Dist. Ct. App. 2019)
https://www.3dca.flcourts.org/content/download/525873/5842597/file/3D19-0118.pdf

Insured not Entitled to Assert Work Product Protection in Response to Non-Party Subpoenas to Insurers

In *Scottsdale Insurance Co. v. Camara De Comercio Latino-Americana De Los Estados Unidos, Inc.*, the Court had previously recognized that both that an insurer's claims file is the insurer's work product and that the work-product privilege belongs solely to the insurer. In the subject claim, neither of two subpoenaed insurers objected to the non-party subpoenas in the lower court; nor was either insurer a participant in the appeal. The Court of Appeals therefore concluded it lacked jurisdiction because the insured did not have the requisite standing to assert the work product privilege on behalf of the two subpoenaed insurers.

Harper v. GEICO Gen. Ins. Co., No. 2D17-4987 (Fla. Dist. Ct. App. 2019)
https://www.2dca.org/content/download/430389/4673604/file/174987_39_03012019_08294648_i.pdf

Civil Remedy Notice Timeliness

The Court of Appeals determined an insurer was not entitled to summary judgment in response to an insured's bad faith claim because the 60-day cure period for the insurer's bad faith began when a civil remedy notice was electronically filed with the Department of Financial Services, but the insurer mailed the settlement payment to the insured's counsel 65 days after the electronic filing.

Toscano Condo. Ass'n v. DDA Eng'rs, P.A., No. 3D18-1762 (Fla. Dist. Ct. App. 2019)
https://www.3dca.flcourts.org/content/download/526181/5846333/file/3D18-1762.pdf

Limits to Amending Complaints in Construction Defect Litigation

This appeal addressed court-imposed limits on amending pleadings in construction defect litigation. The plaintiff condominium association was precluded from amending its complaint a fourth time. Factors militating against allowing the amendment included the following: (1) the association was on notice of potential claims against an engineering firm, yet waited until after it had already been granted leave to amend on three prior occasions, (2) the association did not assert the subject claims until more than two years after the filing of the original complaint and more than six months after the trial court conducted its case management conference, and (3) the latest

request to amend came after the case was set for trial and the trial court had specifically set a deadline for bringing in new parties.

Basner v. Bergdoll, No. 1D19-562 (Fla. Dist. Ct. App. 2019)
https://www.1dca.org/content/download/539698/6091724/file/190562_1287_10232019_10275804_i.pdf

Release Not Effective

The Court of Appeals determined the plaintiff/injured motorist did not agree to a settlement of a tort claim because there was no meeting of the minds or acceptance of insurer's offer to settle where they scratched out the driver's name on the release form and held the check, but did not cash the check. This conduct effectively created a counteroffer, rather than an acceptance.

D. SIGNIFICANT CASES PENDING BEFORE THE FLORIDA SUPREME COURT

Younkin v. Blackwelder, Case No. 5D18-3548 (Fla. Dist. Ct. App. 2019)
https://www.5dca.org/content/download/522706/5807100/file/183548_1254_02222019_09293066_i.pdf

The Supreme Court will determine whether the analysis and decision in *Worley v. Central Florida Young Men's Christian Ass'n*, 228 So. 3d 18 (Fla. 2017), should also apply to preclude a defense law firm that is not a party to the litigation from having to disclose its financial relationship with experts it retains for the purposes of litigation, including those that perform compulsory medical examinations. The Fifth District certified this question to the Supreme Court following appeal of a trial court discovery order where a non-party defense law firm was compelled to disclose the number of times it had retained an expert witness and how much they paid him over the past three years.

Lopez v. Wilsonart, No. 5D18-2907 (Fla. Dist. Ct. App. 2019)
https://www.5dca.org/content/download/531703/5901131/file/182907_1260_07122019_09093903_i.pdf

The Supreme Court will address whether there should there be an exception to the present summary judgment standards that would allow for the entry of final summary judgment in favor of the moving party when the movant's video evidence completely negates or refutes any conflicting evidence presented by the non-moving party in opposition to the summary judgment motion and there is no evidence or suggestion that videotape evidence had been altered or doctored.

Santiago v. Rodriguez, No. 2D18-3114 (Fla. Dist. Ct. App. 2019)
https://www.2dca.org/content/download/539386/6088033/file/183114_65_10182019_08552050_i.pdf

Adult children brought a medical malpractice claiming against a physician whose negligence they argued contributed to their father's death. Section 768.21(8), Fla. Stat. (2017) excludes medical malpractice cases from those in which adult surviving children have a statutory right to recover noneconomic damages for the wrongful death of a parent. The Court of Appeals found the trial court properly dismissed a claim seeking a declaration that § 768.21(8), Fla. Stat., was unconstitutional because the Supreme Court of Florida had previously held that the statute did not

violate the equal protection guarantees of U.S. Const. amend. XIV, § 1 and Art. I, § 2, Fla. Const. However, the Court of Appeals also certified the issue to the Florida Supreme Court for further direction because there was a question as to the underpinnings of the decision where the court had held in other cases that a medical malpractice crisis no longer existed.

State Farm Mut. Auto. Ins. Co. v. MRI Assocs. of Tampa, Inc., No. 2D16-4036 (Fla. Dist. Ct. App. 2018)
https://www.2dca.org/content/download/313294/2803294/file/164036_39_05222018_10270018_i.pdf

The Supreme Court will address whether the 2013 PIP Statute, as amended, permits an insurer to conduct a fact-dependent calculation of reasonable charges under Section 627.736(5)(a) while allowing the insurer to limit its payment in accordance with the schedule of maximum charges under Section 627.736(5)(a)(1).

Arch Ins. Co. v. Kubicki Draper, LLP, No. 4D17-2889 (Fla. Dist. Ct. App. 2019)
https://www.4dca.org/content/download/431174/4682130/file/172889_1711_03202019_09260012_i.pdf

The Supreme Court will address whether an insurer has standing to maintain a malpractice action against counsel hired to represent its insured where the insurer has a duty to defend.

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.

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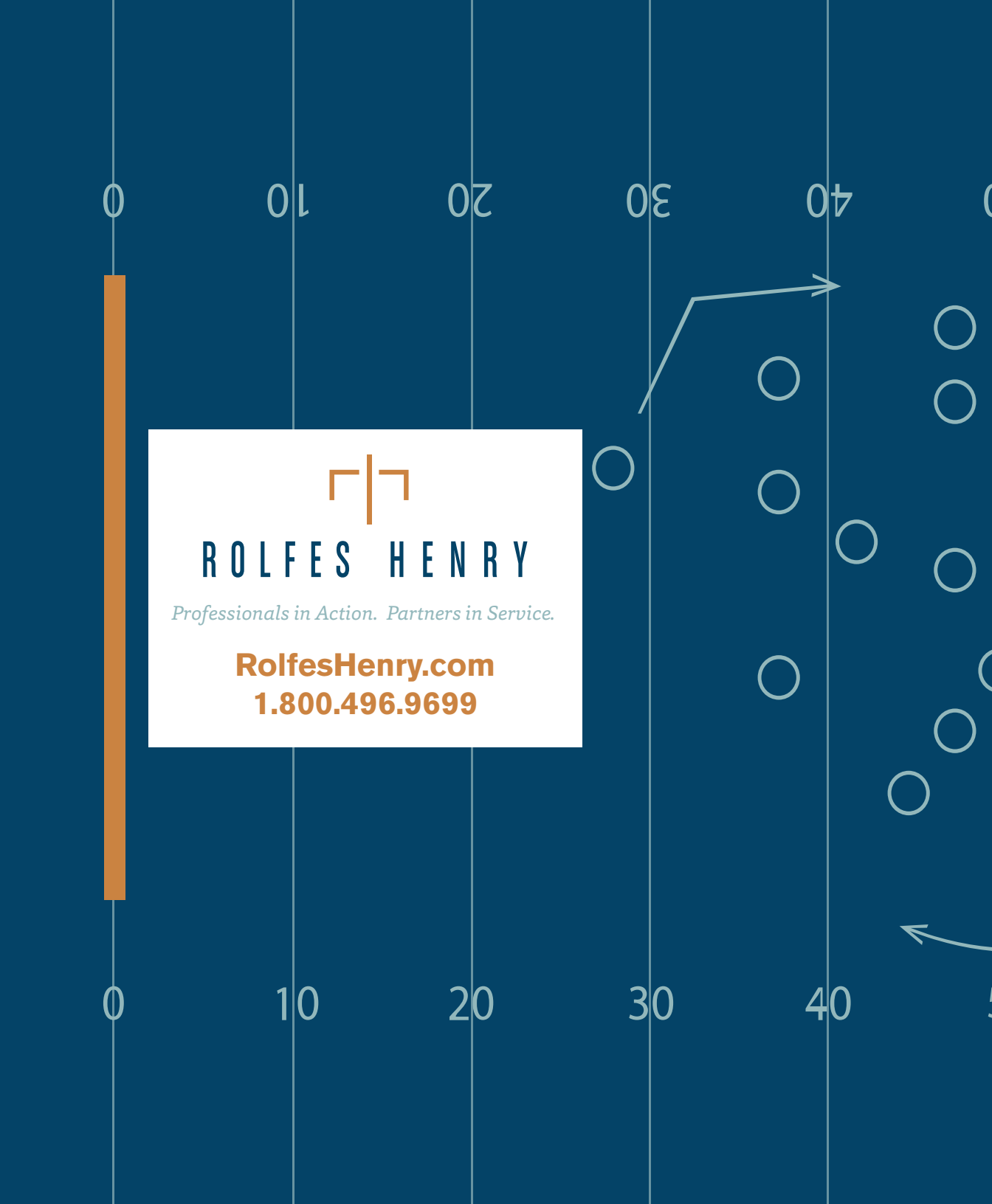

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