ROLFES HENRY

Professionals in Action. Partners in Service.

"Great difficulties may be surmounted by patience and perseverance."

-- Abigail Adams

Dear Business Partners and Friends:

While our annual Law Summary message generally revolves around the legal services Rolfes Henry provides, the manner in which we provide those services, and the commitments we make to you as your counsel, such an offering would seem this year to be relatively trite when considering the events of the past twelve months. As a Firm, we have now experienced some of five different decades, and the events of 2020 will be far more pronounced in our individual and collective memories than most years that have come before.

In the past year, some of you may have lost friends or loved ones, whether due to the ubiquitous coronavirus or other reasons, and we sympathize with you for your loss. Many of you have suffered serious personal or professional difficulties, whether due to medical issues, employment challenges and "lockdowns," or other unexpected upheavals in your lives. And everyone has experienced some degree of tumult during the past year as a result of cultural and political strife, whether you wanted to or not. We have all shared the burden of this difficult year.

However, Scripture tells us that while we may weep for a night, joy cometh in the morning. Our night has been long and arduous, and by all accounts it will continue for some time. But there is joy to be seen all around us – in the births that have come, the marriages that have been made, the promotions that have been earned, and in the lives well-lived. As we all move together through these challenging times, take a moment to see that joy – to embrace the better angels of our world and in ourselves. We all deserve that.

Thank you for being our business partners and friends during 2020. We look forward to continuing to serve you in the coming year.

Very truly yours,

Brian P. Henry
Firm President

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I. STATUTES OF LIMITATIONS TABLE – STATE BY STATE COMPARISON

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

II. THE STATE OF OHIO

A. FREQUENTLY CITED OHIO STATUTES

1. General Considerations in Insurance Claims Management

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

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

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

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

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

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

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

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

R.C. § 4505.11
Salvage Titles

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

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

R.C. § 4509.51
Automobile Minimum Liability Limits

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

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

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

2. Clarification of Facts and Legal Duties

R.C. § 2317.48
Action for Discovery

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

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

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

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

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

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

3. Uninsured Motorist Coverage

R.C. § 3937.18
UM/UIM Coverage

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

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

(C) UIM coverage is not excess coverage.

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

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

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

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

(H) An insured has a three-year statute of limitations to assert 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

Wilson v. Durrani, 2020-Ohio-6827
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-6827.pdf

Plaintiff May Not Use Saving Statute to Refile a Medical Claim After the Statute of Limitations has Expired if Statute of Repose Has Expired.

The issue before the Ohio Supreme Court was whether a plaintiff may take advantage of Ohio's saving statute to refile a medical claim after the applicable one-year statute of limitations has expired if the four-year statute of repose for medical claims has also expired.

The issue required consideration of the interplay between three distinct types of statutes: (1) statutes of limitations, (2) statutes of repose, and (3) saving statutes. Statutes of limitations and statutes of repose share a common goal of limiting the time during which a putative wrongdoer must be prepared to defend a claim, but they operate differently and have distinct applications.

A statute of limitations establishes a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered). A statute of limitations operates on the remedy, not on the existence of the cause of action itself.

A statute of repose, on the other hand, bars any suit that is brought after a specified time since the defendant acted even if this period ends before the plaintiff has suffered a resulting injury.

In contrast to statutes of limitations and statutes of repose, both of which limit the time in which a plaintiff may file an action, saving statutes extend that time. Saving statutes are remedial and are intended to provide a litigant an adjudication on the merits. Generally, a saving statute will provide that where an action timely begun fails in some manner described in the statute, other than on the merits, another action may be brought within a stated period from such failure. It acts as an exception to the general bar of the statute of limitations.

In the subject case, the Supreme Court found R.C. 2305.113(C) is a true statute of repose that, except as expressly stated in R.C. 2305.113(C) and (D), clearly and unambiguously precludes the commencement of a medical claim more than four years after the occurrence of the alleged act or omission that forms the basis of the claim. Expiration of the statute of repose precludes the commencement, pursuant to the saving statute, of a claim that has previously failed otherwise than on the merits in a prior action. Had the General Assembly intended the saving statute to provide an extension of the medical statute of repose, it would have expressly said so in R.C. 2305.113(C), as it did in the R.C. 2305.10(C), the statute of repose that governs product-liability claims.

Because the injured patients commenced their actions in Hamilton County more than four years after the alleged conduct that formed the basis of their claims, the statute of repose barred appellees' refiled actions.

Nationwide Mut. Fire Ins. Co. v. Pusser, 2020-Ohio-2778
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-2778.pdf

Automobile Insurer's Reliance on Insured's Application Warranty Regarding Household Members/Operators Results in Policy Voidance Ab Initio. Premium returned after judicial voidance.

An insured's sister was driving a car covered under an automobile insurance policy when it struck a pedestrian. During the insurance application process the insured had misstated to the insurer that she was the only member of her household.

The Supreme Court focused its analysis on the seminal case for voidance/recission in Ohio, *Allstate v. Boggs*, 27 Ohio St. 2d 216. *Boggs* essentially creates a two-part test where (1) a statement must be a "warranty," as opposed to a "representation," to void the policy *ab initio*, and (2) the insurer must have included a statement in the policy to the effect that the statements in the application are warranties or the insurer had incorporated by reference the application into the policy.

The Supreme Court then determined the automobile-insurance policy should indeed be voided. One step of the *Boggs* test was satisfied by the following policy provision: "The application for this policy is incorporated herein and made a part of this policy. When we refer to the policy, we mean this document, the application, the Declarations page, and the endorsements." The second step of the *Boggs* test was satisfied with the policy stating answers provided to questions in the application constitute warranties, which if incorrect, could void the policy from the beginning. The Supreme Court further said that information provided regarding "other operators in the household" constituted a warranty.

The Supreme Court explained the Court of Appeals was incorrect to focus on the nonmandatory nature of the word "could." This did not change the fact that the policy plainly stated that a misstatement in the insured's warranty, which plainly occurred, rendered the policy subject to being voided *ab initio*, as if the policy never existed.

The Supreme Court also explained that once an insurance policy has been judicially declared void, the insurer can then return any premium that the insured had paid on the policy.

Buddenberg v. Weisdack, 2020-Ohio-3832
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-3832.pdf

No Criminal Conviction Required to Pursue Civil Recovery for Criminal Act Per R.C. 2307.60.

R.C. 2307.60 is a statute that generally provides for civil recovery for those injured by a criminal act. A plaintiff sued in federal court pursuing a claim for civil liability pursuant to R.C. 2307.60 for alleged violations of three criminal statutes: R.C. 2921.05 (retaliation), R.C. 2921.03 (intimidation), and R.C. 2921.45 (interfering with civil rights). The defendants moved to dismiss those claims arguing the civil liability statute did not apply because none of the defendants were convicted of the underlying criminal offenses.

Upon receipt of a certified question from a federal court, the Ohio Supreme Court held that R.C. 2307.60 does not require an underlying criminal conviction because the plain language of the statute does not require such proof. The Ohio Supreme Court noted the word "conviction" is noticeably absent and reading a conviction requirement into R.C. 2307.60(A)(1) would render R.C. 2307.60(A)(2) superfluous. The Ohio Supreme Court was also not persuaded that the term "commission of the offense" as used in the statute necessarily means that a formal declaration of criminal guilt has occurred.

Lubrizol Advanced Materials, Inc. v. Nat'l Union Fire Ins. Co., 2020-Ohio-1579
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-1579.pdf

No Full and Complete Indemnity, Under One Policy for Damage Occurring Over Multiple Policy Periods, When Policy Contains "Those Sums" Language.

Lubrizol manufactured and sold an allegedly defective resin to a second company between 2001 and 2008. The second company used the resin to make pipes that later failed and resulted in numerous claims. The second company settled the claims, but it sued Lubrizol alleging negligence, breach of contract, and breach of warranty on the basis that Lubrizol knew or should have known the resin it sold was not fit or suitable for its intended purpose of being used in pipes. The second company then sought complete indemnification from Lubrizol. The second company and Lubrizol thereafter settled their claims.

Subsequently, Lubrizol sued an insurance company that had insured it during a limited period of portion of the seven total years it had sold the resin. Lubrizol argued that under Ohio law, all of its triggered insurance policies should be treated as establishing joint and several liability, such that Lubrizol could recover under the policy of its choice.

Upon a certified question from a federal court, the Ohio Supreme Court was asked to determine when an insured is permitted to seek full and complete indemnity, under a single policy providing coverage for "those sums" that the insured becomes legally obligated to pay because of property damage that takes place during the policy period, when the property damage occurred over multiple policy periods.

The Ohio Supreme Court answered the question in the negative. It found there was no reason to allocate liability across multiple insurers and policy periods if the injury or damage for which liability coverage is sought occurred at a discernible time. In that circumstance, the insurer who provided coverage for that time period should be liable, to the extent of its coverage, for the claim.

The Ohio Supreme Court cautioned against using its ruling as a blanket rule applicable to all policies with "those sums" language as the terms of the contract and circumstances surrounding the liability still control.

Stiner v. Amazon.com, Inc., 2020-Ohio-4632
http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-4632.pdf

Amazon and Level of Control Over Product Required to Establish Supplier Liability.

Amazon was sued under the Ohio Products Liability Act after a teenager died from his ingestion of caffeine powder purchased through Amazon's website. The Ohio Supreme Court found an

e-commerce company, on whose website the product was purchased from a third-party seller, was not a "supplier" as defined in R.C. 2307.71(A)(15)(a). The Ohio Supreme Court considered the definition of "supplier" in R.C. 2307.71(A)(15)(a)(i) together with the list of entities that were not suppliers found in R.C. 2307.71(A)(15)(b). It found a person who "otherwise participates in the placing of a product in the stream of commerce" must exert some control over the product as a prerequisite to establishing supplier liability. Amazon did not have the requisite level of control over the caffeine powder.

Lunsford v. Sterilite of Ohio, L.L.C., 2020-Ohio-4193
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-4193.pdf

Drug Tests, "Direct Observation," and No Corresponding Invasion of Privacy Claim.

A private employer had a workplace substance-abuse policy requiring employees to submit urine samples for drug testing under the "direct-observation method." The Ohio Supreme Court determined the employees could not maintain invasion of privacy claims against the employer as they were at will employees and consented to the testing and method. The employees' claim that their consent was involuntary due to their fear of termination lacked merit as the employer had the right to condition employment on consent to drug testing under the "direct-observation method." The employees had the right to refuse to submit to the direct-observation, but the employer likewise had the right to terminate the employees for their failure to submit.

McAdams v. Mercedes-Benz USA, L.L.C., 2020-Ohio-3702
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-3702.pdf

Federal Class Action Opt-Out Procedures Upheld and Informal Opt-Out Through Maintenance of a Pre-Existing Lawsuit Rejected.

The Ohio Supreme Court determined that when a federal court approves a settlement that defines a class action class, and the court excludes only those members of the class who opt out through the specific procedure set forth by the federal court, those who do not properly opt out are subject to the settlement reached in the federal court case and are forever barred from attempting to relitigate claims in state court. The Ohio Supreme Court essentially adopted the majority approach requiring compliance with court-mandated opt-out procedures and rejected the Ohio Tenth District's approach treating maintenance of a preexisting lawsuit as an "informal opt-out."

A.J.R. v. Lute, 2020-Ohio-5168
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-5168.pdf

Response by Teachers/Administrators to Alleged Bully Incidents Not Found to be "Reckless" and Immunity Applied.

A student's parents sued a teacher and various school officials for failing to act following a series of alleged bullying incidents and an injury to the minor student. The Ohio Supreme Court was asked to determine whether a teacher and school officials acted recklessly in response the bullying reports. Had the teacher and school official's conduct been "reckless," immunity would not have applied.

The Ohio Supreme Court found that based on the record, the allegation that another student pushed the student while they were in line, on its own, was insufficient to show that school officials should have been aware that the other student might cause physical harm to the student. The family failed to establish that there was a known risk that the other student might physically attack their child. Because there was no known risk, the school officials could not have been reckless. Summary judgment for the teacher and school officials was therefore appropriate.

Moore v. Mount Carmel Health Sys., 2020-Ohio-4113
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-4113.pdf

Savings Statute Fails to Save Malpractice Complaint Not Served within One Year.

The Ohio Supreme Court determined the Court of Appeals made a mistake in finding that "Savings Statute," R.C. 2305.19, applied to a father's medical malpractice action against an anesthesiologist, his practice, and a hospital. Although the lawsuit was filed one day before expiration of the R.C. 2305.113 (medical malpractice) statute of limitations, it was not commenced under Civ. R. 3(A) because service was not obtained within one year. Also, the lawsuit had not been dismissed or failed otherwise than upon the merits, so the "Savings Statute" did not revive the lawsuit. The father's instructions to the clerk of courts to serve the original complaint that remained on the court's docket after the limitation period had expired could not be treated as a voluntary dismissal and refiling of his complaint.

Crown Servs., Inc. v. Miami Valley Paper Tube Co., 2020-Ohio-4409
http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-4409.pdf

Dismissal Without Prejudice, Based Upon Forum Non Conveniens, Not Final Appealable Order.

In a case won before the Ohio Supreme Court by Rolfes Henry, the Court determined dismissal of a case without prejudice based on *forum non conveniens* is not a final, appealable order because it does not prevent refiling. It therefore does not affect a substantial right, determine the action, or prevent a judgment.

Kisling, Nestico & Redick, L.L.C. v. Progressive Max Ins. Co., 2020-Ohio-82
http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-82.pdf

No Duty for Insurer to Distribute Portion of Settlement Funds to Former Attorney Via Charging Lien.

The Ohio Supreme Court determined an insurer who settles a personal-injury claim with an accident victim does not have a duty to distribute a portion of the settlement proceeds to the victim's former lawyer pursuant to a charging lien.

Phoenix Lighting Group, L.L.C. v. Genlyte Thomas Group, L.L.C., 2020-Ohio-1056
http://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-1056.pdf

Attorney Fees and Lodestar Calculation.

The Ohio Supreme Court found there was a strong presumption that the reasonable hourly rate multiplied by the number of hours worked, the "lodestar," was the proper amount for the attorney-fee award. The Court found enhancements to the lodestar were to be granted rarely and were appropriate when an attorney produced objective and specific evidence that an enhancement of the lodestar was necessary to account for a factor not already subsumed in the lodestar calculation. Because the lodestar reflected a reasonable fee based on the prevailing market rate for the services rendered by the attorneys, the Court of Appeals erred by affirming the trial court's enhancement to the lodestar based on the opposing party's conduct.

Pivonka v. Corcoran, 2020-Ohio-3476
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-3476.pdf

R.C. 5160.37 Acts as Sole Remedy for Medicaid Program Participants to Recover Excessive Reimbursement Payments After 2007.

A class action lawsuit sought a declaratory judgment that former R.C. 5101.58, which relates to Medicaid reimbursements, is unconstitutional and sought to recover all sums paid to the Ohio Department of Medicaid under that statute. The Ohio Supreme Court found that because R.C. 5160.37 provided the sole remedy for Medicaid program participants to recover excessive reimbursement payments made to the Ohio Department of Medicaid on or after September 29, 2007, the trial court lacked subject-matter jurisdiction over the class action for the named and prospective class plaintiffs whose claims for recovery fell within the statute's express language.

State ex rel. Omni Manor, Inc. v. Indus. Comm'n of Ohio, 2020-Ohio-4422
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-4422.pdf

Workers Compensation and Procedures for Determining Reasonable and Necessary Treatment.

In April 2016, while working as a housekeeper, the worker injured her right shoulder helping a coworker lift a couch. Her workers' compensation claim was initially allowed for a right-shoulder sprain. She moved to add a right-shoulder rotator-cuff tear as an allowed condition. The employer opposed the request, asserting that the torn rotator-cuff was the result of a degenerative condition and predated the work injury. Throughout the workers compensation claim, the worker's claims for covered injuries/medical needs intensified resulting in a request for medical-service reimbursement for a reverse total-shoulder arthroplasty.

The employer claimed (1) the court of appeals erred when it failed to require the injured worker to prove to the Commission that the reverse total-shoulder arthroplasty was "independently required" before the Commission allowed the condition of a right-shoulder rotator-cuff tear and (2) the court of appeals erred when it found that a doctor's "equivocal" report constituted some evidence in support of the Commission's determination to authorize treatment.

The Ohio Supreme Court found the Industrial Commission properly authorizes medical services if (1) the services are reasonably related to an allowed condition, (2) the services are reasonably necessary for treatment of an allowed condition, and (3) the cost of the services is medically reasonable.

In the subject case the injured worker was required to show the requested medical services were reasonably related to and reasonably necessary for treatment of an allowed condition. Because the doctor believed that a primary repair of the employee's torn rotator cuff would not be successful and that a reverse total-shoulder arthroplasty would be the best option to treat it, the reverse total-shoulder arthroplasty was covered and should have been reimbursed.

State ex rel. Manor Care, Inc. v. Bureau of Workers' Comp., 2020-Ohio-5373
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-5373.pdf

No Compensation to Employer for Overpaid Permanent-Total-Disability Payments.

A self-insured employer made lump-sum payments under protest to two injured workers, in order to correct its long-term underpayment of their permanent-total-disability compensation. The self-insured employer then asked the Bureau of Workers' Compensation for reimbursement from the Disabled Workers' Relief Fund, arguing that its underpayment of permanent-total-disability compensation should be offset by the Bureau's corresponding overpayment of relief-fund benefits to the same employees, for which the company had reimbursed the Bureau as part of its annual assessments. The Bureau denied the request.

The Ohio Supreme Court found the employer cited no authority imposing on the Bureau of Workers' Compensation a clear legal duty to deem overpaid relief-fund benefits permanent-total-disability compensation. The employer also cited no authority permitting the Bureau to treat relief-fund-benefit payments as permanent-total-disability compensation, let alone imposing a clear legal duty to do so. The Bureau, therefore, did not abuse its discretion by rejecting the employer's proposed accounting adjustment and instead requiring the employer to correct its permanent-total-disability-compensation underpayment by making lump-sum payments to the employees.

2. Appellate Court Decisions

a) Insurance Coverage Decisions

Acuity v. Masters Pharm., Inc., 2020-Ohio-3440
https://www.supremecourt.ohio.gov/rod/docs/pdf/1/2020/2020-Ohio-3440.pdf

Duty to Defend Opioid Litigation.

This case addressed an insurance company's duty to defend and indemnify an insured pharmaceutical distributor in lawsuits brought by governmental entities for costs incurred in combating the opioid epidemic.

The insurance policies at issue contained the following provision:

> [Insurer] will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies. [Insurer] will have the right and duty to defend the insured against any suit seeking those damages. However, [Insurer] will have no duty to defend [Insured] against any suit seeking damages for bodily injury or property damage to which this insurance does not apply.

The insurer argued it had no duty to defend or indemnify. The Court of Appeals determined the trial court erred by granting summary judgment for the insurer because, since the policies potentially covered some of the claims and damages in the underlying suits, the insurer had a duty to defend against the underlying suits. There was arguably a causal connection between the alleged conduct of the insured, a pharmaceutical wholesale distributor, and the bodily injury suffered by individuals who became addicted to opioids, overdosed, or died, and the damages suffered by the governmental entities. Furthermore, although the insured may have been aware there was a risk that, if it filled suspicious orders, diversion of its products could contribute to the opioid epidemic, thus causing damages to the governmental entities, that mere knowledge of the risk was not enough to bar coverage under the loss-in-progress policy provision.

Al Neyer, L.L.C. v. Westfield Ins. Co., 2020-Ohio-5417
https://www.supremecourt.ohio.gov/rod/docs/pdf/1/2020/2020-Ohio-5417.pdf

Demolition Without a Formal Contract Not Accidental and Not an Occurrence Under CGL Policy.

The Court of Appeals determined the trial court erred in declaring that the insured, a construction company, was entitled to coverage for defense and indemnification of the underlying lawsuit. This was because the CGL policy at issue included coverage for property damage caused by an "occurrence." However, the insured's unauthorized demolition of a restaurant did not constitute an "occurrence." The insured proceeding with a demolition without a formal contract in place was not accidental and was entirely within the project manager's control.

Stamper v. Polley, 2020-Ohio-3709
https://www.supremecourt.ohio.gov/rod/docs/pdf/4/2020/2020-Ohio-3709.pdf

Land Contracts and Division of Fire Insurance Proceeds.

A property being sold via a land contract was involved in a fire. The Court of Appeals had to address (1) whether a vendor who maintains insurance on property subject to a land contract has any obligation to the vendee when an insurable loss occurs; and (2) the meaning of the contract language "as their interests appear."

The Court of Appeals explained that when A has insurance on property which he contracts to sell to B, but before the title is transferred a loss occurs, A may collect from his insurance company. However, A holds the insurance proceeds in trust for B subject to A's claim for unpaid compensation. A vendor who maintains insurance on property subject to a land installment contract has an obligation to the vendee when an insurable loss occurs, and the vendor may be entitled to the insurance proceeds to the extent of the unpaid purchase price, while the vendee may be entitled to the excess amount.

Here, the land contract stated that sellers would provide insurance on the property. Although the loss that resulted from the fire fell on sellers, the insurance proceeds that sellers received were for the benefit of the legal and equitable estates.

The Court of Appeals also found that per the doctrine of equitable conversion, the meaning of the phrase "as their interests appear" refers to the amount of the unpaid purchase price as it relates to a vendor. The vendee's interest, then, is the equitable interest in all of the benefits that pertain to

the property and may include the amount of insurance proceeds in excess of the unpaid purchase price.

LTF 55 Prob. Ltd. v. Charter Oak Fire Ins. Co., 2020-Ohio-4294
https://www.supremecourt.ohio.gov/rod/docs/pdf/8/2020/2020-Ohio-4294.pdf

Five-Month Delay in Reporting Fire was Factual Issue Inappropriate for Summary Judgment as to Prompt Notice Requirement.

In a coverage dispute stemming from a fire loss, the Court of Appeals determined there was a factual issue as to whether the insured breached the policy's prompt notice condition. The reasonableness of the additional insureds' five-month delay in providing notice required a factual determination not appropriate for summary judgment. There were also factual issues as to whether the insurer had represented it would handle the claim, when the insurance agent was notified, and whether the ability to access some of the claimed damages truly prejudiced the insurance company and should have resulted in a complete denial of the claim.

Turner v. Univ. of Cincinnati, 2020-Ohio-248
https://www.supremecourt.ohio.gov/rod/docs/pdf/10/2020/2020-Ohio-248.pdf

Student Injured During Club Sports Travel for University Not Covered Under University Auto Policy.

A student sued the university for damages he sustained in a car crash. The student played on the university's club ultimate frisbee team. He and his teammates had driven from Cincinnati to Columbus and for a frisbee tournament. On their return travel, the car crashed, seriously injuring all occupants. The involved car was driven by another student and owned by that student's family. The injured student testified he was not aware at the time of the collision, but learned afterwards, that university policy required clubs to procure rental vehicles through the university for trips in excess of 50 miles. He was aware that anyone driving such a rental vehicle was, by policy, required to be over 21 years of age. The student testified that student officers of the club were the persons who made rental arrangements for the teams, that such officers went to university meetings about club sports rules from time to time, but that such persons had not informed him of any requirements regarding the use of rental vehicles as opposed to personal vehicles for out-of-town club-related travel.

The university had a Joint Self-Insurance Pool Automobile Liability Coverage Agreement. Covered persons under the policy included: "Any permitted user. Any person or organization to whom you've given permission to use a covered auto you own, rent, lease, hire or borrow is a protected person."

The university argued the injured student had not made a claim against its institutional automobile liability coverage and, even if he had, it would not succeed as he was not a covered person in a covered automobile.

The Court of Appeals found no agency relationship could be implied to create derivative liability through respondeat superior between the student and the university, in connection with the car accident involving the student and classmates. This was because the 18-year-old student drove his family's vehicle to transport members of the university's ultimate frisbee club with no evidence of any actions taken to even notify the university that its team members were traveling.

Par v. Geico Gen. Ins. Co., 2020-Ohio-5247
https://www.supremecourt.ohio.gov/rod/docs/pdf/1/2020/2020-Ohio-5247.pdf

Shooting Did Not Arise Out of Use of Vehicle, Interpretation of Kentucky Law.

In a case where the plaintiff attempted to recover for decedent's injuries and death incurred while driving, but caused by a shooting from an unknown assailant, the trial court correctly granted summary judgment in the defendant-insurer's favor because, under Kentucky law, the shooting did not arise out of the use of a vehicle.

Villaos v. Nationwide Mut. Fire Ins. Co., 2020-Ohio-5123
https://www.supremecourt.ohio.gov/rod/docs/pdf/12/2020/2020-Ohio-5123.pdf

Dog Liability Exclusion Upheld.

Following a dog attack, the homeowners confessed judgment and assigned to the injured party any claims that might exist against their homeowner's insurance policy. However, the Court of Appeals ruled in favor of the insurer and pursuant to a dog liability exclusion that had been added to the homeowners' policy. The Court of Appeals noted an affidavit was providing showing the insurer mailed the homeowner separate and clearly worded notices alerting them to the new exclusion.

Buehrer v. Meyers, 2020-Ohio-3207
https://www.supremecourt.ohio.gov/rod/docs/pdf/6/2020/2020-Ohio-3207.pdf

Childcare Business Exclusion Upheld.

A wrongful death action was instituted after the plaintiffs' son died in the paid care of the defendant-insureds. The defendant's homeowner's insurer sought a declaration that it did not owe coverage given the exclusions for a childcare "business" under the policy. The Court of Appeals agreed and determined the loss was not covered. The homeowners' activity in the home did not meet the four exceptions to avoid being a "business" under the insurance policy. The incident occurred in the homeowner's home, and the differing opinions between the homeowner and the mother as to whether or not the homeowner operated a childcare business out of her home did not create material issues of fact where the underlying facts about the homeowner's childcare activities were undisputed.

Watkins v. Allstate Vehicle & Property Ins. Co., 2020-Ohio-3397
https://www.supremecourt.ohio.gov/rod/docs/pdf/6/2020/2020-Ohio-3397.pdf

Following Fire Loss, Court Considers Denials as to Dwelling and Personal Property Separately.

Following a fire, the insurer denied coverage as to both the dwelling and personal property claims based on fraud. The Court of Appeals determined the dismissal of the bad faith claim was improper as the insurer disputed the value of personal property claim, but purportedly never claimed that insured acted fraudulently in connection with fire. The Court of Appeals found the policy for the dwelling was separate. The Court of Appeals also considered testimony that corroborated the personal property ownership. Finally, the insurer's adjuster stated that she had no reason to believe that insured submitted a false claim.

Krothe v. Westfield Ins., 2020-Ohio-172
https://www.supremecourt.ohio.gov/rod/docs/pdf/5/2020/2020-Ohio-172.pdf

UIM Denial Upheld Where Insureds Failed to Provide Notice of Settlement.

The Court of Appeals found summary judgment was properly granted for an insurer on an underinsured motorist (UIM) claim because the insureds failed to place the insurer on notice of their tentative settlement with the motorist and failed to afford the insurer 30 days to advance payment of the tentative settlement amount in order to preserve the insurer's right of subrogation. Furthermore, even though the insurer did not respond to the insureds' letter or otherwise contact them, that was not an unforeseen circumstance that rendered it impossible for them to send written a notice to the insurer of the tentative settlement as required by the policy. There was also a presumption the insurer was prejudiced by the failure to provide notice that the insured failed to rebut.

b) Employment Decisions

Oliphant v. AWP, Inc., 2020-Ohio-229
https://www.supremecourt.ohio.gov/rod/docs/pdf/12/2020/2020-Ohio-229.pdf

No Liability for Independent Contractor Providing Traffic Control to Work Zone.

The case stems from an accident that occurred within a utility work zone. Duke Energy had contracted with AWP to provide temporary traffic control services for a project. Workers at the site were seriously injured and/or died when they were struck by an intoxicated driver who had entered the project area and struck the area in which they were huddling.

The Court of Appeals determined AWP, the independent contractor providing traffic control, was entitled to judgment as a matter of law on negligence and loss of consortium claims the injured workers and family had asserted against it because the contractor did not owe a duty of care to the employee. As the contractor's employees did not direct the employee to meet at the side of a utility truck or otherwise give or deny permission for a huddle, it could not be said to have actively participated in the critical acts that led to the employee's injuries. The company's foreman determined when and where the meeting would take place. The Court of Appeals found a duty of care does not arise out of the "Guidance" section of § 6E.07 of the Ohio Manual on Uniform Traffic Control Devices (OMUTCD) because "guidance" statements set forth in the OMUTCD were not mandatory but rather recommended practice.

Cruz v. Western, 2020-Ohio-5086
https://www.supremecourt.ohio.gov/rod/docs/pdf/8/2020/2020-Ohio-5086.pdf

No Removal of Safety Guard Under Facts of Employer Intentional Tort Case.

An employee filed an employer intentional tort action alleging that her workplace injuries, sustained when she reached around machine's profile gate to lubricate machine, were the result of the employer's deliberate removal of an equipment safety guard. The Court of Appeals found summary judgment for the employer was not an error since the profile gate to keep errant chips

from flying into the operator did not qualify as a safety guard for purposes of R.C. 2745.01 and the manual lubrication process did not constitute deliberate removal of a safety guard.

c) Premises Liability Decisions

Jirousek v. Sladek, 2020-Ohio-5382
https://www.supremecourt.ohio.gov/rod/docs/pdf/11/2020/2020-Ohio-5382.pdf

Dram Shop Act Sole Remedy Against Liquor Permit Holders and No Liability Because Injuries Sustained Off Premises and Caused By Own Intoxication.

In a plaintiff's negligence action against a bar for serious injuries he sustained when he struck by a vehicle after heavily drinking alcohol he purchased elsewhere while sitting at the bar's patio, trial court did not err in granting bar's motion to dismiss. The Dram Shop Act provides the exclusive remedy against liquor permit holders for negligent acts of intoxicated patrons, and plaintiff has no claim under the Act because his injuries were sustained off the premises and caused by his own intoxication per R.C. 4301.22(B).

d) Other Significant Decisions

Perrin v. Cincinnati Ins. Co., 2020-Ohio-1405
https://www.supremecourt.ohio.gov/rod/docs/pdf/2/2020/2020-Ohio-1405.pdf

Information Sharing Between Medpay and Liability Adjuster Not Improper.

Following a car accident, an insured sought both Medpay benefits and third-party liability against another driver. During a subsequent bad faith lawsuit, the insured claimed the insurer's medical payments adjuster acted improperly by sharing information, which the adjuster had received for purposes the Medpay claim, with the company's liability adjuster to help the insurer defend the concurrent liability claim. The insured alleged the insurer violated R.C. Chapter 3904 and OAC Chapter 3901 and breached its fiduciary duty to her.

The Court of Appeals ruled for the insurer and found neither R.C. Chapter 3904, which concerned insurance information practices, nor Ohio Admin. Code Chapter 3901, which comprises a variety of insurance-related regulations, prohibited sharing of medical payment records between the insurance company and its liability adjuster.

Koscielak v. United Ohio Ins. Co., 2020-Ohio-3224
https://www.supremecourt.ohio.gov/rod/docs/pdf/3/2020/2020-Ohio-3224.pdf

Failure to Appear for Examination Under Oath and Produce Documents Precludes Insured's Claim.

The Court of Appeals found the trial court correctly determined that an insurer was entitled to summary judgment in a coverage dispute because the insured repeatedly failed to comply with the insurer's demands for her to appear for an examination under oath and for her to provide documentation regarding personal property losses. Furthermore, the insured admitted to willfully ignoring the insurer's ongoing investigation despite the numerous and stern letters she received from the insurer's attorneys.

e) Significant Cases Pending Before Supreme Court

Motorists Mut. Ins. Co. v. Ironics, Inc., 2020-Ohio-137
https://www.supremecourt.ohio.gov/rod/docs/pdf/6/2020/2020-Ohio-137.pdf

On May 12, 2020, the Ohio Supreme Court agreed to hear an insurance coverage case to decide whether the incorporation of a defective ingredient into a product, allegedly making the end product defective, constitutes damage to other property resulting from an occurrence, so as to implicate insurance coverage.

The Court of Appeals case, cited above, determined the insured was not entitled to coverage under a CGL policy for claims asserted by the underlying plaintiff, arising out of the damage caused by the insured's nonconforming ingredient because the ultimate products into which the ingredient was incorporated were not "other property" for purposes of the application of the economic-loss rule. However, the Court of Appeals determined the insured was entitled to coverage under the umbrella policy because the physical injury to the underlying plaintiff's ultimate product, by the insured's transfer of a nonconforming ingredient, constituted unintended and unexpected "property damage" as that term was defined in the umbrella policy, and, thus, the transfer met the definition of an "occurrence" under the umbrella policy.

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

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

Diana Metzger, et al. v. Auto-Owners Insurance Company, et al., 2018-SC-0070-DG
http://opinions.kycourts.net/sc/2018-SC-000070-DG.pdf

No UIM Coverage Under LLC Policy When Member Driving Personal Vehicle for LLC Business.

Members of a Limited Liability Company ("LLC") obtained a commercial automobile policy, which included underinsured motorist ("UIM") coverage for the LLC's vehicles. A member of the LLC drove her personally-insured vehicle on a trip to conduct business on behalf of the LLC. The member's vehicle was involved in the accident and the at fault driver only had $25,000 in liability coverage, thus triggering a potential UIM claim to the LLC's insurer.

The LLC's insurer denied coverage. The Kentucky Supreme Court determined summary judgment in favor of the LLC's insurer was proper as the LLC was the named insured, not the member herself, and the member was not driving a scheduled vehicle at the time of the accident. The fact the member was carrying out business on behalf of the LLC was inconsequential, as the policy neither required an individual to be conducting the business of the LLC at the time of his or her injury, nor guaranteed coverage if he or she was conducting the business of the LLC.

Darryl Isaacs, et al. v. Sentinel Insurance Company Limited D/B/A The Hartford, 2018-SC-0078-DG
http://opinions.kycourts.net/sc/2018-SC-000078-DG.pdf

No UIM Coverage for Individual Under Policy for his Professional Services Company.

The plaintiff was struck by an automobile while bicycling. The plaintiff settled with both the driver who struck him and with his personal underinsured motorist (UIM) coverage. The plaintiff's law firm, which was a professional services company (PSC), had a commercial automobile policy with the insurer, which included UIM coverage. A UIM claim was filed against this insurer.

The subject insurance policy in this case included a section entitled "B. Who Is An Insured." That section provides:

> *If the Named Insured is designated in the Declarations as:*
>
> *1. An individual, then the following are "insureds":*
>
> *The Named Insured and any "family members."*
>
> *a. Anyone else "occupying" a covered "auto" or a temporary substitute for a covered "auto."*

[…]

b. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured."

2. A partnership, limited liability company, corporation or any other form of organization, then the following are "insureds":

a. Anyone "occupying" a covered "auto" or a temporary substitute for a covered "auto."

The policy listed the PSC law firm, and not the individual plaintiff, as the named insured.

The Kentucky Supreme Court agreed with the lower courts that no coverage was due and owing under the PSC's insurance policy. It found the plaintiff did not qualify as an insured under the terms of the policy under the facts of the case. Specifically, the Supreme Court held a PSC is not synonymous with its sole shareholder. The Court also held that the policy language at issue was unambiguous and it would "not disturb the parties' contractual rights in the absence of an ambiguity."

Angela Jackson and Lamont Marshall v. Estate of Gary Day and USAA General Indemnity Company, 2018-SC-000297-DG
http://opinions.kycourts.net/sc/2018-SC-000297-DG.pdf

Dismissal Upheld on Statute of Limitations, Despite Delay in Discovery of Tortfeasor Death.

Plaintiffs were injured in a two-vehicle accident with the tortfeasor in February 2014. Before the statute of limitations period expired, pursuant to KRS 304.39-230(6), the plaintiffs filed a complaint against this tortfeasor. There were multiple unsuccessful attempts to effectuate service. Subsequently, a sheriff's return filed in the record on May 18, 2016, indicated that the tortfeasor was deceased. However, it was not until receipt of a special bailiff report, in August 2016, and after expiration of the limitations period, that all parties discovered the tortfeasor's death.

On December 19, 2016, plaintiffs then filed a third amended complaint, which named the tortfeasor's estate in place of the tortfeasor individually. The estate then filed a motion for summary judgment arguing that the claims were time barred by the statute of limitations. Conversely, the plaintiffs argued that the third amended complaint could relate back to the original complaint pursuant to CR 15.03.

The Kentucky Supreme Court found the claims were properly dismissed. The claims were filed outside the statute of limitations period, Ky. Rev. Stat. Ann. § 304.39-230(6), and the requirements of Ky. R. Civ. P. 15.03, which relates to "relation back" of claims and defenses, were not met. The insured died almost a full year before the plaintiffs filed their initial complaint, and the tortfeasor's estate did not exist until after the statute of limitations expired. The estate could not have known about the proceedings against it during the applicable limitations period, a requirement of Rule 15.03, because it was not until after the statute of limitations expired that the plaintiff's petitioned for the appointment of a public administrator.

Dennis Thomas, as Administrator of the Estate of Glenda Thomas, Deceased, et al. v. University Medical Center, Inc. d/b/a University of Louisville Hospital, et al., 2018-SC-000454-DG
http://opinions.kycourts.net/sc/2018-SC-000454.pdf

Post-Incident Reports and Admissibility/Inadmissibility as Subsequent Remedial Measures.

A patient underwent surgery performed by a sixth-year neurosurgical resident, under the supervision of an attending surgeon. After the surgery, the patient suffered a brain injury from lack of blood flow and later died.

The administrator of the deceased's estate filed a medical negligence suit against the hospital, the resident, the attending physician, and a private neurosurgery practice. During discovery, the existence of a "Root Cause Analysis and Action Plan" ("RCA") was discovered. The admissibility of this report, as a potential subsequent remedial measure, became an issue.

The Kentucky Supreme Court held that the trial court erred in excluding the RCA under KRE 407, which addresses subsequent remedial measures. However, the Supreme Court found that error was harmless. As a matter of first impression, the Supreme Court held that whether a post-incident investigatory report like the RCA is admissible turns on whether the report recommends a remedial change and whether that change was actually implemented. Generally, KRE 407 will not prevent the admission of a report when its suggested remedial measures are not taken, as the information would not have made the underlying incident any less likely to occur. The Supreme Court did acknowledge that in rare situations it may be possible to characterize similar reports as "measures" which, if conducted before the incident would reduce the likelihood of the occurrence. If an investigatory report includes a recommendation for a remedial measure, and that measure is taken, the report is so inextricably intertwined with the subsequent remedial measure that it must be excluded under KRE 407.

Jassica Sneed v. University of Louisville Hospital, et al., 2019-SC-000048-DG
http://opinions.kycourts.net/sc/2019-SC-000048-DG.pdf

Supreme Court Declines to Allow Medical Malpractice Action to Proceed Under Expanded Arguments as to Continuous Treatment Doctrine and Alleged Fraudulent Concealment of Medical Records.

The plaintiff delivered her baby at the hospital and during delivery she suffered a fourth-degree laceration. Two weeks later she was diagnosed with a rectovaginal fistula. She later sued the hospital and various doctors and nurses. The trial court ruled in favor of the medical practitioner defendants on the basis of a statute of limitations argument. The plaintiff argued this was improper and the statute of limitations was tolled based upon (1) the continuous treatment doctrine and (2) the alleged fraudulent concealment of her medical records, which delayed her discovery of the doctors who delivered her baby. A third argument was presented regarding alleged confusion created by the hospital as to whether the treating doctors were employees or independent contractors.

The Kentucky Supreme Court made several rulings. First, the Supreme Court declined to expand the continuous treatment doctrine to situations where a patient continues to receive care at the same hospital, but not by the same doctor. Second, the Supreme Court declined to apply equitable tolling principles under a fraudulent concealment argument because the plaintiff was aware of her cause

of action prior to the running of the statute of limitations. Third and finally, the Supreme Court determined there was not an issue of material fact as to whether the doctors were agents of the hospital because the hospital took reasonable steps to notify patients that they would be treated by independent contractor doctors and not employee doctors.

Seiller Waterman, LLC, et al.; Pamela M. Greenwell; Gordon C. Rose; and Paul J. Hershberg v. RLB Properties, Ltd., 2018-SC-000558-DG
http://opinions.kycourts.net/sc/2018-SC-000538-DG.pdf

Wrongful Use of Civil Proceedings Claim Prohibited Against Attorney by Non-Client.

A law firm, acting on behalf of its client, sued a third-party. That third-party later sued the law firm under a variety of theories, including wrongful use of civil proceedings, abuse of civil process, civil conspiracy, slander of title, violations of 434.155 by allegedly filing an illegal lien, negligence, and negligent supervision.

The Kentucky Supreme Court determined that neither the desire to earn attorney fees nor the filing of a claim seeking damages on behalf of a client constitutes an improper purpose sufficient to sustain a wrongful use of civil proceedings/process claim. Furthermore, a professional negligence claim may not be brought against an attorney by a party who is neither the attorney's client nor an intended third-party beneficiary of the attorney's legal work. Finally, KRS 413.245, which contains a one-year statute of limitations applicable to the rendering of professional services and legal work, remains applicable to claims against attorneys, even when malice is alleged.

LP Louisville East, LLC D/B/A Signature Healthcare of East Louisville, et al. v. Kenneth R. Patton, 2019-SC-000016-DG
http://opinions.kycourts.net/sc/2019-SC-0016-DG.PDF

Arbitration Agreement Executed by Agent/Power of Attorney Found Valid and Enforceable.

A father granted his son a power of attorney, which included agency authorization for the son to act on behalf of the father as to the father's "maintenance" and "health." The son thereafter admitted the father to a long-term care facility. The admittance included signing an arbitration agreement with the facility. The father later fell and died. Wrongful death claims were presented on behalf of the estate and the son individually.

The Kentucky Supreme Court found the arbitration agreement was valid and enforceable based on the son's authority to sign a necessary, non-optional arbitration agreement in order to obtain the father's admittance into the long-term care facility. The Supreme Court also found that because son signed the arbitration agreement in his individual capacity, in addition to signing as his father's authorized representative, the arbitration agreement was valid and enforceable as to the son's individual wrongful death action.

2. Appellate Court Decisions

a) Insurance Coverage Decisions

Marshall v. Kentucky Farm Bureau Mutual Insurance Company, NO. 2019-CA-001059-MR
http://opinions.kycourts.net/coa/2019-CA-001059.pdf

"Service" as Used in the Phrase "Used to Service an Insured's Residence" is Not Ambiguous.

After her husband was killed in an ATV accident, the plaintiff filed a wrongful death action seeking damages against the driver of the ATV. The driver was insured under a homeowner's insurance policy that covered his residence. The insurance policy excluded coverage for the use of "motorized land conveyances," which included ATVs. One of the exceptions to the exclusion from coverage was for a vehicle or conveyance not subject to motor vehicle registration, which was "used to service an insured's residence."

Both the trial court and Court of Appeals determined the subject homeowner's policy did not provide coverage in relation to the ATV. They determined the word "service" in the exception to the exclusion was not ambiguous and the ATV was never used to serve the residence.

The driver of the ATV and the homeowner-insured testified that he never used ATV, either before or after the accident, to perform yard work or other tasks for his residence. Rather, he testified that he used the ATV to give rides to children around the neighborhood, to hunt, and in connection with his landscaping business on one occasion. Therefore, summary judgment in favor of the insurance company was appropriate.

Kentucky Farm Bureau Mutual Insurance Company v. Brewer, NO. 2018-CA-000736-MR
http://opinions.kycourts.net/coa/2018-CA-000736.pdf

Mere Passage of Time Between Reservation of Rights Letter and Declaratory Judgment Action Does Not Result in Waiver of Coverage Defense.

The insured was a developer and excavator of residential property. The insured sold certain property and in April of 2015 the buyer of that property claimed excavation work performed by the insured led to a landslide. The insured notified his insurer of the claims asserted by the buyer. The insured had two policies with his insurance company, a farm owner policy, and a commercial general liability policy. The insurance company then sent the insured a reservation of rights letter informing the insured that it was reserving its rights to deny coverage because of the late notice of the loss, and the claims, including allegations of fraud, might be excluded under the policy. The insurance company advised that it was reserving rights to additional defenses, should they become known during the investigation of the claim. The letter also informed the insured that the insurance company had employed counsel to represent him in defending any lawsuit. Finally, the letter stated: "If you disagree with our proceeding as outlined above, you may contact this office within 14 days of this letter." These events related to the reservation of rights occurred in April of 2015.

In July of 2017, the insurance company intervened in the pending lawsuit and in March of 2018 it filed a declaratory judgment action asserting there was no coverage for the claims against the insured and that it therefore had no duty to defend or indemnify the insured.

The Kentucky Court of Appeals held that the lower court erroneously concluded that the mere passage of time between the reservation of rights and the filing of a declaratory judgment action was sufficient to preclude the insurance company from asserting a no-coverage defense. However, the lower court had not addressed whether the insurer had misrepresented to the insured that it was no longer defending under a reservation of rights or whether the insured had been prejudiced by the insurance company's failure to earlier assert a no-coverage defense. Therefore, the case was remanded to the lower court for further deliberations.

Thomas v. Perkins, NO. 2017-CA-001875-MR
http://opinions.kycourts.net/coa/2017-CA-001875.pdf

Childcare Exclusion Upheld and Not Void Against Public Policy.

Plaintiffs filed a lawsuit for negligence and gross negligence when their child was injured while in the care of defendants. Plaintiffs sought indemnification under the defendants' homeowners' insurance policy. However, the Kentucky Court of Appeals determined the defendants provided childcare services and that the policy's childcare exclusion applied. The Court of Appeals rejected the plaintiffs' arguments that (1) the defendants' negligence was excepted from the exclusion for childcare services and (2) that the childcare services exclusion was void as against public policy. The Court of Appeals took particular note of the fact the defendant husband testified he would hold the children or let them sit on his lap. He also explained he did not, as plaintiffs contended, provide only occasional childcare not subject to the policy exclusion, nor was he a remote and disinterested third-party.

b) UM/UIM Decisions

Davis v. Progressive Direct Insurance Company, NO. 2019-CA-000850-MR
http://opinions.kycourts.net/coa/2019-CA-000850.pdf

Horse-Drawn Buggy Not a "Motor Vehicle" Under Either the MVRA or Insurance Policy.

While riding her motorcycle, the insured collided with a horse-drawn buggy. She subsequently submitted an uninsured (UM) motorist claim to her insurer. The insured appealed the following two coverage issues. First, she argued the lower court erroneously concluded that a horse-drawn buggy did not qualify as a "motor vehicle" under the Motor Vehicle Reparations Act (MVRA), KRS 304.39-010. Second, she argued the lower court erroneously concluded that the horse-drawn buggy did not qualify as a "motor vehicle" as defined by the language of her insurance policy.

The Kentucky Court of Appeals ruled in favor of the insurance company. First, the Court determined MVRA defines a "motor vehicle" as one which is "propelled by other than muscular power." KRS 304.39-020(7). Second, a horse-drawn buggy does not qualify as a motor vehicle for purposes of uninsured motorist coverage. This was consistent with the prior case of *Rosenbaum v. Safeco Ins. Co. of America*, 432 S.W.2d 45 (Ky. 1968). The Court found there was no indication the insurance company intended to cover events of that type or that the insured had any such belief when she purchased the policy.

Stone v. Ky. Farm Bureau Mut. Ins. Co., NO. 2019-CA-1739-MR
https://appellatepublic.kycourts.net/api/api/v1/publicaccessdocuments/2d8f3b3337d3e19683bd338fa4b9d963bbc65a8e02e6163d53e144ba2a5b33cc/download

Loss of Consortium Not Recognized for Adult Child.

The plaintiffs were the mother and a minor son of a woman who was killed in a car accident. They submitted a claim for consortium damages under the underinsured motorist ("UIM") portion of an automobile insurance policy. The Kentucky Court of Appeals determined the claims were excluded under the terms of the subject policy. The mother's claims were dismissed because Kentucky does not recognize a claim for loss of consortium for an adult child. The son's loss of consortium claim was excluded from coverage because the claim was derivative of the excluded primary wrongful death claim.

c) Employment Decisions

Dixie Fuel Company, LLC v. Wynn, NO. 2018-CA-000984-MR
http://opinions.kycourts.net/coa/2018-CA-000984.pdf

Up-the-Ladder Immunity Granted, No Need to Show Work Performed Regular or Recurrent Part of Contractor's Work.

The employer sought immunity from a personal injury claim filed by a worker pursuant to the exclusive remedy provision set out in KRS 342.690 of Kentucky's Workers' Compensation Act. The Kentucky Court of Appeals determined the employer was entitled to the exclusive remedy set forth in KRS 342.690(1), as it contracted with the contractor to mine the coal on its property and therefore was entitled to up-the-ladder immunity for the injuries the employee sustained while he was working in the course and scope of his employment for the contractor. The owner did not need to establish that the work performed by the employee was a regular or recurrent part of the contractor's work.

Holder v. Paragon Homes, Inc., NO. 2019-CA-000908-MR
http://opinions.kycourts.net/coa/2019-CA-000908.pdf

No Duty Owed to Independent Contractor Under Kentucky OSHA Statute Under Facts of Case.

The Kentucky Court of Appeals found a construction company did not owe an independent contractor's employee any duty under the Kentucky Occupational Safety and Health Act where the independent contractor had contracted with the homeowners and had not reached out to the company to coordinate a time for the employee to perform the work. Therefore, there was no pseudo employer-employee relationship as contemplated by the case law interpreting KRS 338.031(1), which is the OSHA statute addressing the obligations of employers and employees. The Court of Appeals also found the company did not owe the employee any duty to maintain the premises in a reasonably safe manner where a large step from the garage into the house was apparent to the employee because he had been to the house when a ramp was in place, he should have known this was a safety measure, and when he arrived on site the day of his fall and saw that the ramp was gone, he should have reasonably known it was a safety hazard.

d) Governmental Immunity Decisions

Wallace v. Martin, NO. 2018-CA-001260-MR
http://opinions.kycourts.net/coa/2018-CA-001260.pdf

No Qualified Immunity in Case of Defamation Per Se.

While the plaintiff was fired from his employment as a school bus driver following a disciplinary incident with a child, he was subsequently acquitted of a fourth-degree assault charge stemming from the same incident. He thereafter sued a police officer and the school superintendent for malicious prosecution, abuse of process, and defamation. The trial court granted the officer's motion for summary judgment on the basis of qualified immunity, but the Kentucky Court of Appeals reversed. The Court of Appeals explained qualified immunity is not a blanket shield for all tort claims, but only generally protects negligent acts. Following precedent *Martin v. O'Daniel,* 507 S.W.3d 1, the Court of Appeals reasoned that one who acts with malice is not entitled to immunity, for if one has no malice, one needs no immunity, since proof of malice is a necessary element to prevail on a claim of malicious prosecution. In an issue of first impression, the Court of Appeals then determined the same reasoning of *Martin* equally applies to claims of defamation *per se*.

e) Other Significant Decisions

Nichols v. Zurich American Insurance Company, NO. 2019-CA-000071-MR
http://opinions.kycourts.net/coa/2019-CA-000071.pdf

Refusal to Allow Discovery as to All Post-Litigation Conduct was Permissible and Summary Judgment in Favor of Insured in Bad Faith Case Upheld.

Following a grant of summary judgment to an insurance company in a bad faith lawsuit, the insured appealed and argued he was denied access to certain discovery and evidence. The trial court had not permitted discovery of all post-litigation conduct and communications, but, rather, only allowed discovery of evidence related to settlement that was not otherwise privileged. The Court of Appeals found this was permissible and not an abuse of discretion by the trial court. Furthermore, the Court of Appeals found that since nothing in the underwriting file could have negated the reasonable basis for the insurance company's denial of the underinsured (UIM) motorist claim, the trial court did not err in finding the production of the underwriting file irrelevant to the bad-faith claim.

Poore v. 21st Century Parks, Inc., NO. 2019-CA-000855-MR
http://opinions.kycourts.net/coa/2019-CA-000855.pdf

Kentucky Recreational Use Statute and Fee Use of Landowner Park.

The Kentucky Court of Appeals sought to determine whether the surviving spouse and the estate of the decedent were entitled to compensatory and punitive damages from a landowner that owned and operated a park, as well as its employees, for their alleged negligence in connection with the decedent's death during a kayaking trip when the decedent accessed a state-controlled waterway from one of the landowner's parks. The Court of Appeals determined the landowner and its employees were entitled to summary judgment based on Kentucky's Recreational Use Statute,

KRS 411.190, because the decedent's free use of the landowner's park and the landowner's involvement in the case fell within the scope and purpose of the statute.

Wal-Mart Real Estate Bus. Trust v. Hopkins County Coal, NO. 2019-CA-1369-MR
https://appellatepublic.kycourts.net/api/api/v1/publicaccessdocuments/0b2edd28fbd4b0234a6c0b7fbcf21c7753c7cf0684d70f4d38e48e566cbd3c9f/download

Discerning Between General Occurrence Rule and Discovery Rule in Mine Subsidence / Property Damage Case.

The Kentucky Court of Appeals was tasked with determining whether the "general occurrence rule" or the "discovery rule" applied to a property damage claim stemming from mine subsidence.

The "general occurrence rule" provides that a cause of action accrues, and the period of limitation begins to run, where negligence and damages have both occurred. The discovery limitation period begins to run when the cause of action was discovered or, in the exercise of reasonable diligence, should have been discovered. This rule is a codification of the common law "discovery rule," and often functions as a savings clause or second bite at the apple for tolling purposes. The "discovery rule" is available only in cases where the fact of injury or offending instrumentality is not immediately evident or discoverable with the exercise of reasonable diligence, such as in cases of medical malpractice or latent injuries or illnesses."

In a mine subsidence and property damage case, the Court of Appeals found the "general occurrence rule" applicable and in turn found the plaintiff's property damage and negligence claim was barred by the statute of limitations. In rejecting the plaintiff's effort to apply the "discovery rule" the Court of Appeals noted the following: (1) plaintiff was aware of potential subsidence as early as 1992 or two years before it began construction on its store location, (2) a 1994 engineering consultant report stated the possibility of subsidence could not be precluded, (3) the subject store was completed in 1995 and nine months later cracking began to appear in the drywall and tile floor, which got worse over time, (4) the plaintiff did not conduct a geotechnical investigation on the property until 2002, (5) experts determined the last subsidence event occurred in 2009, and (6) in 2010, more than five years prior to the filing of the complaint, a project was opened to investigate "possible subsidence remediation."

McAlpin v. American General Life Insurance Company, NO. 2019-CA-000053-MR
http://opinions.kycourts.net/coa/2019-CA-000053.pdf

No Breach of Duty by Insurance Agent in Offering Life Insurance but Not Accidental Death Insurance.

The plaintiff sued an insurer and insurance agent based upon the argument the insurance agent breached a professional obligation owed to him when the agent offered to sell him life insurance but did not offer to sell him accidental death insurance.

The Court of Appeals ruled in favor of the insurance company and agent. The Court of Appeals found there was no affirmative false statement alleged in support of the plaintiff's negligent misrepresentation claim. Furthermore, the plaintiff's negligence claims did not show a breach of duty, as he said he wanted a $1,000,000 life insurance policy, an accidental death policy in that amount was unavailable, and the insurance agent's duty was to present possible solutions to the

needs of the customer, which the customer stated were life insurance for his son, which the agent in fact offered.

Frankfort Plant Board Municipal Projects Corporation v. BellSouth Telecommunications, LLC, NO. 2019-CA-000193-MRANDNO. 2019-CA-000239-MR
http://opinions.kycourts.net/coa/2019-CA-000193.pdf

Violation of Dig Law Found to be Negligence Per Se.

The Kentucky Court of Appeals analyzed and upheld the validity of an easement and then held that a failure to comply with the Dig Law, KRS 367.4911, which then led to the damages to the surrounding facilities, constituted negligence *per se*, for purposes KRS 446.070. The Court of Appeals specifically determined the defendant was a utility operator and thus a member of the class KRS 367.4901 was designed to protect. It also found the utility had a valid easement for its underground facilities. Because of the failure to obtain a location marking of underground facilities, the entity performing construction was negligent *per se*.

Porter v. Allen, NO. 2019-CA-0115-MR
https://appellatepublic.kycourts.net/api/api/v1/publicaccessdocuments/e02ef72bfe9b3dffcc247b1baecb13cc2d9cedf95bf715fd64e70960f2d3dc8e/download

Exclusion of Impairment Rating from Evidence.

A three-car accident resulted in relatively minor damage. However, the plaintiff claimed to have injuries to her head, neck, left shoulder, and lower back. The defendant tortfeasor stipulated to fault for causing the accident but contested damages. The defendant moved to exclude physician testimony as to an American Medical Association (AMA) permanent impairment rating. The defendant argued that because plaintiff previously testified she returned to full-time employment and was not making a claim for impairment or destruction of earning capacity, the impairment rating would mislead the jury. The Kentucky Court of Appeals determined the trial court properly excluded the impairment rating evidence as it would confuse the jury and be unfairly prejudicial.

Hensley v. Traxx Management Company, NO. 2018-CA-000928-MRANDNO, 2018-CA-001213-MR
http://opinions.kycourts.net/coa/2018-CA-000928.pdf

No Liability for Store When Attendant Pursues and Kills Thief Following Robbery.

The decedent perpetrated a robbery and threated the gas station attendant's family upon departure. The gas station employee pursued, shot, and killed the decedent following the robbery. The Court of Appeals determined the store was not vicariously liable for its employee's actions. There was no evidence to indicate that the gas station failed to use ordinary care in hiring or retaining the employee, nor that hiring or retaining the employee created an unreasonable risk of harm to the decedent.

Bramlett v. Ryan, NO. 2019-CA-000122-MR
http://opinions.kycourts.net/coa/2019-CA-000122.pdf

Children Age 7-8 Old Enough to Appreciate Hazards of Pools, No Duty to Warn.

Plaintiff's seven-year-old son drowned in defendant's swimming pool during a swim party. The evidence indicated that at least four adults were providing supervision around the pool at the time of the child's death. The Court of Appeals ruled summary judgment for the host/property owner was proper. The Court of Appeals first determined the child was a licensee as opposed to an invitee. The duty of care owed, therefore, was a general duty of care. The Court of Appeals determined that children aged seven or eight are considered old enough to appreciate the possible hazards of use of "confined waters or swimming pools. Therefore, there is no duty to warn children as young as seven concerning the hazards of bodies of water, such as private swimming pools, as in this case.

The Court of Appeals also determined there was also no evidence that the pool created an unreasonable risk triggering a duty to warn the child. Therefore, the defendant hosts could not be held liable for the child's death under a general duty to licensees as they had no obligation to warn him of the hazards of swimming in a private swimming pool.

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

TWO YEARS

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

C. SIGNIFICANT INDIANA COURT DECISIONS

1. Supreme Court Decisions

a) Other Significant Decisions

Glover v. Allstate Prop. & Cas. Ins. Co., 153 N.E.3d 1114
https://public.courts.in.gov/Decisions/api/Document/Opinion?Id=2raZ1kRfVtT8JSNfgQjfqW4NIuWXN5LSTV47GpRmzlQ5Se2XRUbkWPkdxA6JuPBB0

Anti-Stacking Provisions Interpreted in Context of Underinsured Motorists Coverage.

A death occurred as a result of a car accident. The Indiana Supreme Court then addressed the policy's anti-stacking provisions in the context of underinsured motorist (UIM) coverage. The Supreme Court determined because the policy's anti-stacking provision barred aggregating policy limits for UIM coverage, but did not bar multiple UIM recoveries, under Ind. Code § 27-7-5-5(a), the anti-stacking provision did not prevent the decedent's estate from obtaining UIM recoveries of up to $50,000, as the estate's total UIM payments of $50,000 from the driver's and the decedent's policies were less than the estate's aggregate UIM maximum of $100,000 under her parents' policy. However, because the estate was paid $75,000 by or on behalf of someone "legally responsible for the accident," that money had to be offset against the policy's $100,000 UIM limit, thus reducing the limit to $25,000.

Humphrey v. Tuck, 151 N.E.3d 1203
https://public.courts.in.gov/Decisions/api/Document/Opinion?Id=WW0LMyS7cScWMn5bHgXl_lwkPKiYwOBBPxyD81kR8xKPncR31vfkbISLdQHRt9AQ

Mitigation of Damages Instruction, Stemming from Not Taking Medication, Properly Given Under Facts of Case.

The Indiana Supreme Court determined that a jury was properly given an instruction as to mitigation of damages when the evidence indicated the plaintiff did not initially take the medicine prescribed for him, the medicine worked when it was taken, that the plaintiff stopped taking the medicine because of side effects, that the plaintiff did not immediately follow up as directed to find an alternative medicine, and that despite claiming vision problems, the plaintiff failed to fill an eyeglasses prescription.

Smith v. Franklin Twp. Cmty. Sch. Corp., 151 N.E.3d 271
https://public.courts.in.gov/Decisions/api/Document/Opinion?Id=tt_KCzpaAFk03Gieg__xw7ocVcwLhfJKdjpuS624qXVBeqPpCcwIvC92U8V3Bgok0

Denial of Request for Reinstatement Upheld Following Dismissal Per Statute of Limitations from Claims Against Public Schools Act.

Nine days before the applicable statute of limitations expired, an injured party filed a lawsuit against a school. The school moved to dismiss the complaint, arguing that the plaintiff failed to provide the pre-suit notice required by a recently enacted law. Under the Claims Against Public Schools Act (CAPSA), a party, before filing a lawsuit against a school, must satisfy certain notice requirements. If a party files suit without providing the required notice, the court must dismiss the

case without prejudice. The plaintiff did not respond to that motion to dismiss. Likewise, when the trial court dismissed the complaint, the plaintiff did not appeal that decision. Rather, months later, the plaintiff challenged the legal basis underlying the dismissal in the last of a series of Trial Rule 41(F), "reinstatement following dismiss" filings that requested reinstatement of the case.

The Indiana Supreme Court found that the plaintiff could not use a Rule 41(F) filing to collaterally attack the merits of the dismissal order. The plaintiff failed to preserve a substantive challenge to that decision. Thus, the court acted within its discretion when it denied the motion for reinstatement.

Clark v. Mattar, 148 N.E.3d 988
https://public.courts.in.gov/Decisions/api/Document/Opinion?Id=_TK1ij6w6PJ-PIme3Aws7aeE752UWHfY6GWtjfTFzv89YfF4HUrrx547cBR4z1hJ0

Basis for Striking Juror for Cause in Medical Malpractice Case.

In a medical malpractice case, the patient's estate was entitled to a new trial because a juror should have been struck for cause based on bias under Ind. Jury R. 17(a)(8). The juror stated he did not want to serve on the jury, that had a favorable impression of doctors, and that he would not be able to assess noneconomic damages.

River Ridge Dev. Auth. v. Outfront Media, LLC, 146 N.E.3d 906
https://public.courts.in.gov/Decisions/api/Document/Opinion?Id=1TbEq1r4_wUh9nY3EVDYJfBPRi1JFFWMmwjrCGboPW8_WybZiEWU31jBRALGWUkg0

Supreme Court Analyzes Exceptions to General Rule that Each Party Pays Own Attorney's Fees; Common-Law Obdurate Behavior Exception Not Abrogated by Statute.

In this attorney's fees and alleged litigation misconduct case the Indiana Supreme Court explained the baseline rule (the "American Rule") whereby each party pays their own attorney fees. The Indiana Supreme Court also explained and analyzed three potential exceptions to this baseline rule, which it found were lacking in the subject case.

First, the Indiana Supreme Court explained both common-law obdurate behavior exception and the statutory General Recovery Rule permit a court, in certain circumstances, to award attorney's fees. However, these can only be awarded to a "prevailing party." In this case, the Plaintiff voluntarily dismissed their case and, therefore, the defendant was not a "prevailing party."

Second, the Indiana Supreme Court addressed questions about the common-law obdurate behavior exception's viability in light of the General Recovery Rule. The plaintiffs had argued that because sanctions for obdurate behavior are now a "part of" the statute, the common-law exception no longer exists "distinct from the statutory framework." Conversely, the defendants had argued that, although the statute codified the common law, it did not abrogate the obdurate behavior exception. The Indiana Supreme Court agreed with the defendants and found the obdurate behavior exception was not abrogated.

Third, the Indiana Supreme Court reaffirmed that trial courts have inherent authority to sanction a party by awarding attorney's fees at any point during litigation. However, such an award was not warranted in the subject case.

Burton v. Benner, 140 N.E.3d 848
https://public.courts.in.gov/Decisions/api/Document/Opinion?Id=yAVb-RavhLSYoOgjHkU6v72KKPKK3xDDYk42Gc5VUaoiyXjL3c67sv61tVbEuyks0

Off-Duty Officer Granted Immunity Following Accident as Conduct Not Clearly Outside the Scope of Employment.

The Indiana Supreme Court first explained that certain negligent acts or omissions on the part of a government employee have the potential to remove the shield of respondeat superior and expose the employee to personal liability. Under the Indiana Tort Claims Act, there are only a handful of well-delineated pathways to accomplish this task. One of those paths is to show that the employee's act or omission was "clearly outside the scope of the employee's employment."

The plaintiff had attempted to sue an Indiana State Trooper in his personal capacity after the two were involved in an accident. At the time of the accident, the Trooper was off duty but was operating his state issued police commission, as allowed under State Police policy.

The Trooper sought summary judgment on whether he could be held personally liable for any damages that flowed from the incident. The trial court awarded summary judgment in favor of the Trooper because though off duty, he was otherwise in substantial compliance with State Police policy in operating his commission and was therefore not clearly outside the scope of his employment. The Court of Appeals reversed, opining that reasonable minds could disagree whether the Trooper was outside the scope of his employment and summary judgment was thus inappropriate. Finally, the Supreme Court held the initial grant of summary judgment for the Trooper was proper. Although there was some evidence that the Trooper was not in strict compliance with State Police policy at the time of the accident, this was not enough to place him "clearly outside" the scope of his employment. His conduct was of the same general nature as authorized by the policy, including maintaining radio contact, conforming to a dress code, and being able to suddenly become available for official duties.

Cavanaugh's Sports Bar & Eatery, Ltd. v. Porterfield, 140 N.E.3d 837
https://public.courts.in.gov/Decisions/api/Document/Opinion?Id=cLb2nFJsUzBFVFuD7NByF7zEseld_AcSF_UE6eqx686fVSjEbt4kmm3raDd7tQoz0

No Duty for Bar to Protect Patron Against Unforeseeable Criminal Attack.

A bar patron sued a bar for negligence after a sudden fight in the bar's parking lot left him injured. The Indiana Supreme Court held that the bar was entitled to summary judgment because it owed the patron no duty to protect him against the unforeseeable criminal attack. It noted the skirmish occurred suddenly and without warning because the patron and his friends socialized with bartender for hours and had no animosity with other customers. The Supreme Court also noted that by pointing to police runs made to the bar during the year before the quarrel, the patron improperly substituted evidence of the bar's past raucousness for contemporaneous knowledge of imminent harm.

Estabrook v. Mazak Corp., 140 N.E.3d830
https://public.courts.in.gov/Decisions/api/Document/Opinion?Id=MzBeJocBLqKH0Qi3gzr9zNRLUcgYX7S8kMOY8U8JghSMH6VLlXftROETGQOK0dAp0

Refusal to Extend Statute of Repose in Products Liability Case Even When Manufacture Conducts Post-Sale Repair, Refurbishment or Reconstruction of Product.

The Indiana Supreme Court explained the Indiana Products Liability Act contains a ten-year statute of repose. The statute requires a plaintiff to bring suit "within ten years after the delivery of the product to the initial user or consumer." The only exception is for an action accruing at least eight years but fewer than ten years after the product's initial delivery. When that happens, a plaintiff can still sue within two years after accrual, even if more than ten years have elapsed since delivery. Because the statute has no other exceptions, the Supreme Court concluded the ten-year limitations period cannot be extended for any other reason, including a manufacturer's post-sale repair, refurbishment, or reconstruction of a product.

2. Appellate Court Decisions

a) Insurance Coverage Decisions

North v. Selective Ins. Co., 155 N.E.3d 662
https://public.courts.in.gov/Decisions/api/Document/Opinion?Id=u67fcPiw7fsj7-Q8QaxnDZQKgjgkf9g6OiyqWKW0mBiIKHfKpR_lBtYQ92TvKqvd0

No UM/UIM Coverage Under Umbrella Policy Under Facts of Case.

At issue was whether an insured's personal umbrella policy included underinsured and uninsured motorist (UM/UIM) coverage. The Court of Appeals determined that although the insured asserted that the statutory requirements for rejection under Ind. Code 27-7-5-2, "Uninsured and underinsured motorist coverages, rejection in writing," were not met in the case, and thus the insured should have been afforded UM/UIM coverage under his personal umbrella policy in effect at the time of his wife's auto accident, the insured did not have UM/UIM coverage under the personal umbrella policy issued to him by the insurer and in effect at the time of the accident. This was because while UM/UIM coverage was available from the insurer with an endorsement, there was no evidence that the insured applied for or purchased it, and there was no endorsement for UM/UIM coverage in the insured's policy.

Progressive Southeastern Ins. Co. v. Chastain, 153 N.E.3d 330
https://public.courts.in.gov/Decisions/api/Document/Opinion?Id=IRY-jHVl1lEdj5YtGoM7oLOowLUJHKjbXy0MVRIL9MBZkLjnLuYHGamESF7Q3Rks0

No UIM Coverage When Scooter Qualifies as "Motor Vehicle" Under Policy.

The Court of Appeals was tasked with analyzing whether a scooter qualified as a "motor vehicle" under the subject policy and the corresponding impact on underinsured motorist (UIM) coverage. The Court of Appeals determined UIM motorist coverage was excluded under the auto insurance policy because the term "motor vehicle" as used in the policy was unambiguous. The evidence revealed that the scooter the insured was driving at the time of the accident was a motor vehicle owned by or available for the insured's regular use. The scooter had a vehicle identification

number, and the insured attached a license plate to the scooter without registering it with the Bureau of Motor Vehicles. Therefore, UIM coverage was excluded under Part III of the Policy which states that "coverage under this Part III will not apply: 1. to bodily injury sustained by any person while using or occupying […] a motor vehicle that is owned by or available for the regular use of you, a relative or a rated resident."

Schmidt v. Allstate Prop. & Cas. Ins. Co., 141 N.E.3d 1251
https://public.courts.in.gov/Decisions/api/Document/Opinion?Id=3TkLSRAEmoRjZaK-tF2vJm4jIfH1LsdvuAJ5O9q8Cg27NEUuFH91WOvorYbnM-0F0

Passengers, Who are Not Named Insureds, Still Owed Duties of Good Faith by Insurer Handling UIM Claims.

A motor vehicle accident occurred, and an injured passenger sought UIM benefits from the driver's insurer. The Court of Appeals addressed the duties the insurer owed to the injured passenger, as opposed to the driver/named insured on the policy. The Court of Appeals determined the insurer owed the passenger a duty of good faith and fair dealing as its insured even though she was not the policyholder. The Court of Appeals noted that because Ind. Code 27-7-5-2, the statute that mandates insurers to provide UM and UIM coverage, does not differentiate between policyholders and additional insureds, there is no principled reason for not requiring insurers to deal in good faith with all insureds.

b) Other Significant Decisions

McGowen v. Montes, 152 N.E.3d 654
https://public.courts.in.gov/Decisions/api/Document/Opinion?Id=GjBVcM1OQ1xur6UMn09dN5ijfuMWdOnTcGIIf6NWtpqg10yHo3JTakado83kMzbA0

Under Good Samaritan Law, Stopping and Asking if Someone Needs Help Qualifies as "Emergency Care."

A party was injured in a motor vehicle accident after a Good Samaritan stopped at the scene of a prior vehicle accident and the Good Samaritan accidentally collided with his vehicle. The Indiana Court of Appeals determined the purported Good Samaritan was rendering emergency care for purposes of the Good Samaritan Law, Ind. Code § 34-30-12-1, when he stopped at the accident scene to ask if the individual was okay and whether he should call 911. The Court of Appeals focused on the fact that because the driver was seeking to arrange medical treatment, stopping, and asking if a person who had been involved in an accident needed help was emergency care, coupled with the fact there was evidence of a sudden event, with a potentially injured person, that qualified as an emergency. The Good Samaritan and his employer were entitled to the protection of the Good Samaritan Law. Furthermore, the driver's conduct did not meet the standard of willful or wanton misconduct as the facts showed that the driver was aware of dangerous road conditions and attempted to drive carefully while rendering aid to the individual.

Parkview Hosp. Inc. v. Am. Family Ins. Co., 151 N.E.3d 1218
https://public.courts.in.gov/Decisions/api/Document/Opinion?Id=sWKeGOITILGPcDs9a92qOiW5A83CZrYdG-LSWGkRU6ql48oDtoYCXCvTXL2gQAKb0

Insurer Violated Hospital Lien Act in Payment of Settlement without Satisfaction of Lien.

A party was injured in an accident in Ohio and transferred to a hospital in Indiana for treatment. The Indiana hospital subsequently filed a hospital lien in Allen County, Indiana pursuant to the Hospital Lien Act. The insured party then filed a lawsuit in Ohio to recover damages from the accident. The Ohio litigation ended with a court order directing the involved insurance company to issue the settlement funds directly to the injured party and injured party's attorney and inherently not to satisfy any involved liens as part of the settlement. The Court of Appeals determined the hospital established that the Ohio court's order regarding the hospital lien was void and that the insurer violated the Hospital Lien Act when it paid settlement funds without satisfying the hospital's lien.

SoderVick v. Parkview Health Sys., 148 N.E.3d 1124
https://public.courts.in.gov/Decisions/api/Document/Opinion?Id=DLf7lr1czlRvfcCBVL640iFBz9LhNFtYVuvgRx4qXIwXlF_2PpjkOH_ELYPwBiKi0

Potential HIPPA Violation for Medical Practitioner Texting Patient Information to Husband.

A patient claimed a hospital was vicariously liable for the HIPPA violations of a medical assistant who accessed her medical records and then shared details with her husband, after she noticed that the patient had "liked" a photo of her husband on Facebook. The Court of Appeals reinstituted the case as it ruled there were genuine factual issues that needed to be resolved as to whether the assistant was acting in the scope of employment at the time of the incident. The evidence showed that the employee's misconduct was of the same general nature as her regular and authorized job duties. The assistant was in the middle of performing authorized job duties, including entering patient information into the electronic chart, when she accessed the patient's record and proceeded to text the patient's information to the employee's husband. This made the misconduct intermingled with her ordinary and authorized job duties.

NCAA v. Ace Am. Ins., 151 N.E.3d 754
https://public.courts.in.gov/Decisions/api/Document/Opinion?Id=ZXZg_KJ1jmdGHJ12PnAEUdE7MOnlsD_FSoU1fMnBXONw1NtnXbtVnDDrSuwoYzjS0

Insurers Prevail Against NCAA in Coverage Case Stemming from Athletes Suing to Enjoin NCAA for Placing Restrictions on Benefits Offered to Athletes.

A lawsuit sought to enjoin the NCAA and the other parties from imposing any restrictions on what money or other benefits could be offered to student-athletes. The issue before the Court of Appeals was whether insurers were required to provide coverage for the underlying lawsuit filed against the NCAA. The Court of Appeals found for the insurers as the Related Wrongful Acts Exclusion in the insurance policies barred coverage for the NCAA in the underlying lawsuit against the NCAA.

Cortez v. Ind. Univ. Health, 151 N.E.3d 332
https://public.courts.in.gov/Decisions/api/Document/Opinion?Id=zhIaGWm4YgcasBsFmrRWTUFrzbVA2HyQCi0jFD3X7479uXQboUwqaw_PRBkeZLHP0

Independent Medical Panel Must Review Case Over Altered Medical Records Before Suit May be Brought by Patient.

In the pursuit of a medical malpractice lawsuit, a plaintiff became concerned the medical provider had altered his medical records. The Indiana Court of Appeals determined the plaintiff could not independently pursue a lawsuit over the alleged alterations without first proceeding through a separate medical review panel.

Estabrook v. Mazak Corp., 140 N.E.3d 830
https://public.courts.in.gov/Decisions/api/Document/Opinion?Id=MzBeJocBLqKH0Qi3gzr9zNRLUcgYX7S8kMOY8U8JghSMH6VLlXftROETGQOK0dAp0

Dismissal of Employee as Defendant Does not Automatically Absolve Defendant Employer When Respondent Superior Plead.

A negligence suit was filed against an assisted living facility after a resident was injured when a buffet table fell and knocked her to the ground. The Court of Appeals explained the crux of the dispute between the parties was whether the dismissal of the allegedly negligent assisting living facility employee as a defendant extinguished the facility's liability under the theory of respondeat superior. The Court of Appeals determined that the dismissal of the employee as a defendant did not extinguish the facility's potential liability arising from the employee's conduct. The Court of Appeals noted the facility admitted the employee was acting within the scope of her employment at the time of the incident. Therefore, it was up to the jury, and not the judge, to determine if the conduct imputed to the facility.

Univ. of Notre Dame v. Bahney, 158 N.E.3d 809
https://public.courts.in.gov/Decisions/api/Document/Opinion?Id=Eu-IeJQdiw05JYEQSf7Fijtc7FoNMnPt1hqixPBeChIK7PtSEbkds40LuzNT4qsd0

Failure to Correct/Amend Deposition Testimony Not So Substantially Prejudicial to Overturn Judgement.

A trip and fall at a basketball game resulted in a lawsuit against the university. A university athletics department representative provided a deposition and identified certain exhibits purported depicting the area of the fall. It was later determined this testimony was not accurate and the photographs provided of the area of the fall were from another date and event. However, the university failed to amend the incorrect testimony prior to a trial where it prevailed.

The Court of Appeals first agreed that the university's failure to correct the deposition testimony before trial violated Trial Rule 26(E) and constituted "misconduct" under Rule 60(B)(3), even if it was not an intentional concealment. However, the Court of Appeals rejected overturning the trial result as if a party cannot show that the misconduct substantially prejudiced the party's presentation of the party's case, a court should not set aside an otherwise final judgment.

Renner v. Shepard-Bazant, 159 N.E.3d 1
https://public.courts.in.gov/Decisions/api/Document/Opinion?Id=Uf7urWZGh93ZSYP4QIIrR5ErJMN7LyIZGgjE9qYpdtWXGX6hHHfM_hnnTQumveaL0

Prior Concussions Should Have Been Considered Differently, Trip to Amusement Park Days After Incident Not Failure to Mitigate Damages.

Following a motor vehicle accident, where liability was assumed via a default, a bench trial as to damages was held. The injured party had a number of prior concussions. The injured party sought to have the damages at trial increased from $132,000 to more than $690,000. The Court of Appeals first determined the trial court erred because its treatment of the motorist's prior two concussions as separate incidents, rather than as contributing to her injuries and damages arising from the subject auto accident, was against the logic and effects of evidence and resulted in error in the calculation of damages. Second, the Court of Appeals found the motorist's trip to an amusement park four days after the accident and choice to ride roller coasters was insufficient proof of a failure to mitigate damages because there was an absence of evidence showing she sustained a separate new harm.

3. Federal Court Decision

Spinnenweber v. Laducer, United States Court of Appeals for the Seventh Circuit, No. 20-1534
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2020/D12-18/C:20-1534:J:Kanne:aut:T:fnOp:N:2632883:S:0

Remittitur of $1,000,000 Jury Verdict Upheld, Lack of Expert Testimony Limited Potential Damages to Compensatory Damages from Whiplash and Mild Concussion.

In a run-of-the-mill car accident case, defendants conceded liability, and the parties went to trial over causation and damages. Plaintiff sought compensatory damages for his physical injuries and presented evidence that he suffered whiplash and a possible minor concussion from the crash. He did not seek to recover medical expenses, lost wages, or punitive damages. He also did not seek damages for mental or emotional injuries. Nevertheless, the jury awarded the plaintiff a million-dollar verdict. The district court was shocked by this award and, upon motion from defendants, ordered Plaintiff to either accept a reduced verdict of $250,000 or opt for a new trial. Plaintiff chose a new trial, which resulted in a $0 verdict.

The 7th Circuit Court was asked to determine whether the initial remittitur in response to the million-dollar verdict was appropriate, which it determined it was. The plaintiff's evidence showed that he potentially suffered just whiplash and a mild concussion from the crash because the evidence did not show that the crash could have caused plaintiff's other alleged injuries, such as internal brain trauma and tinnitus. The cause of those injuries involved complicated medical questions that lay testimony alone could not have answered. The district court did not abuse its discretion in finding that the $1 million verdict for plaintiff's injuries was outrageous and then granting defendants' motion for remittitur or a new trial. Whiplash and mild concussion were the only injuries for which the jury could have awarded compensatory damages to plaintiff.

Greene v. Westfield Ins. Co., 963 F.3d 619
http://media.ca7.uscourts.gov/cgi-bin/rssExec.pl?Submit=Display&Path=Y2020/D06-25/C:19-2260:J:Scudder:aut:T:fnOp:N:2536105:S:0

Known Claim and Expected or Intended Injury Exclusions Applied Such that Insurer Not Response for Jury Verdict in Excess of $50 Million.

This appeal followed more than ten years of litigation between a group of neighbors in Elkhart, Indiana, and a nearby wood recycling facility. The neighbors alleged waste disposal practices exposed them to dust and odors in violation of federal environmental law. They also brought state tort law claims for the resulting loss of use and enjoyment of their property, as well as adverse health effects. At certain points the defendants successfully fended off the neighbors' claims. But sometimes they did nothing at all. These litigation choices eventually led to a $50.56 million default judgment.

What began as a case about environmental pollution evolved into a joint garnishment action against an insurer to satisfy some of the $50.56 million judgment. Once judgment was entered, the neighbors shared their litigation interests with the tortfeasor and both wanted the insurer to pay the judgment. This change of position required the parties to adjust some of their previous positions to argue that the insurance policies should apply. The neighbors sought to distance themselves from certain facts they previously pleaded were true to show that the tortfeasor did not know the extent of the pollution at the time the insurance policy went into effect.

The 7th Circuit Court of Appeals found for the insurer when it determined both the known claim and expected or intended injury exclusions applied. Therefore, the insurer was not obligated to cover the neighbors' judgment.

D. SIGNIFICANT CASE PENDING BEFORE THE INDIANA SUPREME COURT

G&G Oil Co. v. Cont'l Western Ins. Co., 145 N.E.3d 842

The Indiana Supreme Court will hear an appeal related to coverage issues stemming from a ransomware attack. The Indiana Court of Appeals ruled a commercial insurance policy did not include coverage for losses suffered as the result of a ransomware attack. This was because (1) the hijacker did not use a computer to fraudulently cause the insured to purchase Bitcoin to pay as ransom, (2) the hijacker did not pervert the truth or engage in deception in order to induce the insured to purchase the Bitcoin, and (3), while the hijacker's actions were illegal, there was no deception involved in the hijacker's demands for ransom in exchange for restoring the insured's access to its computers.

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 cl**aims** 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.

TWO YEARS

Claim Type/Section	**Statute Period**
Assault, Battery, or False Imprisonment M.C.L.A. § 600.5805(2)-(4)	Two years for a person charging assault, battery, or false imprisonment. Five years for a person charging assault or battery against: his or her spouse or former spouse, an individual with whom he or she has a child in common, an individual with whom he or she has had a dating relationship, or a person with whom he or she resides or formerly resided.
Malicious Prosecution M.C.L.A. § 600.5805(5)	Two years from the date of the underlying criminal action being terminated in favor of the accused.

Medical Malpractice M.C.L.A. § 600.5805(6), § 600.5838(a)	Two years for an action charging malpractice, or within six months after the plaintiff discovers, or should have discovered, the existence of the claim, whichever is later. However, except as otherwise provided in section 600.5851(7) or (8) regarding minors, the claim shall not be commenced later than six years after the date of the act or omission that is the basis of the claim.
Fraudulent Concealment of Claim or Identity of Person Liable, Discovery M.C.L.A. § 600.5856	If a person who is or may be liable for any claim fraudulently conceals the existence of the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within two years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim, although the action would otherwise be barred by the period of limitations.

THREE YEARS

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

FOUR YEARS

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

SIX YEARS

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

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.

FIFTEEN YEARS

C. SIGNIFICANT MICHIGAN COURT DECISIONS

1. Supreme Court Decisions

a) No-Fault/PIP Decision

Meemic Ins. Co. v. Fortson, No. 158302
https://courts.michigan.gov/Courts/MichiganSupremeCourt/Clerks/Recent%20Opinions/19-20-Term-Opinions/158302.pdf

Insurer's Fraud Defense Not Upheld Because Grounded on Neither Either No Fault Act Nor Common Law.

The insurer sought to void its policy with the insured and stop paying no-fault benefits to their son. Although the benefits are mandated by statute, the insurer sought to avoid its statutory obligations by enforcing the antifraud provision in the policy. The issue before the Michigan Supreme Court was the extent to which a contractual defense like the one at issue was valid and enforceable when applied to coverage mandated by the No-Fault Act, MCL 500.3101.

The underlying facts showed that at the time of the accident, the insurer had provided no-fault coverage to a minor and his parents. The parents were the named insureds in the policy. But the son was also an "insured person" under the policy's "resident relatives" provision and under MCL 500.3114(1). Following an accident whereby the son was seriously injured, the insurer agreed to pay the parents $11 an hour to provide attendant-care services to the son and requested that the parents send the insurer monthly bills documenting actual hours spent providing care. From October 2009 to October 2014, the parents submitted bills for attendant care, and the insurer paid them. In May 2013, however, the insurance company began a formal investigation. The investigation revealed that between September 2012 and July 2014, the son had been in jail for 233 days and in drug rehabilitation for another 78 days. During this period, the son's parents had continued to bill the insurer for attendant care services allegedly rendered.

The insurer terminated the son's no-fault benefits and filed suit, asserting claims of breach of contract, fraud, common-law statutory conversion, and unjust enrichment. The insurer alleged that the parents had fraudulently represented the attendant-care services they claimed to have provided and sought to void the policy under its contractual antifraud provision, to terminate any future liability for benefits, and to require the parents to reimburse the insurer for the fraudulent attendant-care statements.

The Michigan Supreme Court held that such contractual provisions are valid when based on a defense to mandatory coverage provided in the no-fault act itself or on a common-law defense that has not been abrogated by the act. However, because here the insurer's fraud defense was grounded on neither the no-fault act nor the common law, it was invalid and unenforceable.

2. Appellate Court Decisions

a) Insurance Coverage Decisions

Cardinal Fabricating v. Cincinnati Ins. Co., No. 348339
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20200618_C348339_31_348339.OPN.PDF

Insurer Required to Defend Under CGL Policy; Must Plead Coverage Defenses Specifically as Affirmative Defenses or Waived.

A joint venture of contractors subcontracted with another company to manufacture support beams for a "visual screen" being constructed at the end of a runway owned by the Wayne County Airport Authority. This company purchased and used steel material fabricated by the insured. Defects in the insureds steel material compromised the integrity of the structure. The steel support columns cracked, causing panels to fall off the screen and damaging the structure's concrete base - each element constructed by other subcontractors.

In an underlying lawsuit, the joint venture was held liable to the WCAA. A court ordered the company that purchased the steel to indemnify the joint venture. That company, in turn, sought indemnification from the insured, alleging that any damage, or liability, was the result of defective materials supplied by the insured.

The insured then contacted its insurer, invoking its duty to defend and indemnify under its GCL and umbrella policies. The insurer responded that the alleged property damage was not the result of an "occurrence" as defined by the insurance policies, and therefore it had no duty to defend. The insured ultimately retained counsel and paid for its own defense of the underlying action. The insured then filed the current action, alleging the insurer breached its duties under the terms of the insurance policies. The insurer responded by denying coverage based on the absence of a covered occurrence.

The trial court and Michigan Court of Appeals both determined the insurer had a duty to defend. The terms of the CGL policy state in relevant part: "We will pay those sums that the insured becomes legally obligated to pay as damages because of […] 'property damage' to which this insurance applies. We will have the right and duty to defend the insured against any suit seeking those damages." The CGL policy further states that the policy only applies to property damage "that is caused by an 'occurrence,'" which is defined as "physical injury to tangible property, including all resulting use of that property […] or […] loss of use of tangible property that is not physically injured," and also as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Similar provisions are found under the umbrella policy as well. Reading these provisions together, the insurer had a duty under the policies to defend the insured in suits alleging physical injury to or the loss of use of tangible property caused by an accident.

In its letter denying coverage to the insured, the insurer quoted the impaired property clause as one of several exclusionary clauses contained within the insurance policies. However, the insurer stated that it had no duty to defend the insured because "the allegations do not meet the definition of […] property damage […] or occurrence" under the terms of the insurance policies. When asserting its affirmative defenses in its answer to the insured's complaint, the insurer stated in

general terms that the insured's claims might be excluded under the terms of the insurance policies. However, it did not expressly cite specific policy provisions under which coverage was excluded.

The Court of Appeals explained that general language reserving rights or defenses contained in letters denying coverage does not comply with an insurer's obligation to provide notice to an insured party and constitutes a waiver of more specific defenses. Here, the insurer failed to assert that a particular exclusion clause of the insurance policy applied to this case in its denial of coverage and in its affirmative defenses. The insurer therefore waived reliance on the impaired property exclusion and the trial should not have considered its applicability.

Rozenberg v. Auto Club Group Ins. Co, No. 348773
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20201229_C348773_38_348773.OPN.PDF

No Physical Contact Results in No UM Coverage When Item Fell from Lead Vehicle and Two Vehicles Never Made Physical Contact.

A car was driving behind a truck when an item dislodged or fell from the truck causing an accident where the driver was injured. The issue on appeal was whether the injured driver was entitled to uninsured motorist (UM) benefits when there was no "direct physical contact" between his vehicle and the uninsured motor vehicle, the truck, as required by the language of the applicable insurance policy.

The policy defined an "uninsured motor vehicle," in relevant part, as: "a hit-and-run motor vehicle of which the operator and owner are unknown and which makes direct physical contact with (1) you or a resident relative, or (2) a motor vehicle which an insured person is occupying."

The Michigan Court of Appeals found the policy at issue defines a "motor vehicle," in relevant part, as "a land motor vehicle or trailer, requiring vehicle registration," which implicitly refers to a whole, or at least mostly-whole, machine. The Court of Appeals continued to explain that unmodified, "physical contact" may be direct or indirect. However, "direct physical contact" has been established as requiring two vehicles—as vehicles, rather than in pieces—to touch each other. Thus, the Court of Appeals explained it was constrained to conclude that no "direct physical contact" occurred, as that term has been defined by binding precedent.

Pontiac Sch. Dist. v. Travelers Indem. Co., No.347614
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20200903_C347614_55_347614.OPN.PDF

Two-Year Policy Limitations Period Upheld in Commercial Excess Insurance Policy.

An insurer provided an excess insurance policy to a self-insured property and casualty pool. Coverage issues arose following a water loss. The insurer denied coverage and litigation ensued. The Court of Appeals ruled in favor of the insurer when it invoked the policy's two-suit suit limitations provision. The Court of Appeals rejected an argument that the period of time to file suit was tolled until the insurer had formally denied the claim. The Court of Appeals found that while this argument may apply in the context of fire insurance, it did not apply in the subject claim. It also found that even if the tolling rule did apply to the subject claim, the insurer had written a letter asserting the policy did not cover the loss and cited the reasons why. The letter would have

operated as a denial letter and the subsequent lawsuit would have still been filed beyond the policy's limitations period.

Estate of Wells v. State Farm Fire & Cas. Co., No. 348135
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20200716_C348135_50_348135D.OPN.PDF

Furnishing Minor's Alcohol Leading to Deadly Accident Not "Occurrence" or "Accident" Under Michigan Law.

Following a motor vehicle accident, the decedents estate obtained a policy limits settlement against a no-fault policy and then contained a consent judgment against the tortfeasor. It then turned to the tortfeasor's homeowner's insurer to satisfy portions of the judgment. However, the Court of Appeals determined the underlying event was not an "occurrence" under the subject homeowner's policy. The plaintiff's pleadings regarding social host liability embodied in the consent judgment showed that defendant's insured knowingly furnished alcohol to minors directly creating the risk of alcohol-impaired operation of a motor vehicle that was a proximate cause of plaintiff's damages. Consequently, plaintiff's pleadings show that the automobile crash was the reasonably foreseeable direct result of the insured's intentional act of furnishing alcohol to minors. It was, therefore, not an "occurrence" or an "accident" under Michigan law.

b) No-Fault/PIP Decisions

Settler v. Auto-Owners Ins. Co., No. 350925
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20201222_C350925_56_350925.OPN.PDF

Trial Courts Must Examine Whether Application for Benefit Forms Contain Fraudulent Statements, as Opposed to Attendant Care Forms.

The plaintiff was injured while driving a vehicle rented by his cousin, who allowed him to drive the vehicle while he was out-of-town. The plaintiff was then involved in an accident. He initially said he was not injured, was thereafter taken to a police precinct, and once returned home reported fainting. He was later diagnosed with a traumatic head injury and spent time in a medically induced coma. Plaintiff thereafter sought benefits, including attendant care services, through an insurance policy between the defendant-insurer and a repair shop that rented the vehicle.

The insurer sought to avoid extending coverage arguing the plaintiff committed fraud in the presentation of the claim, especially statements/representations he made on attendant care forms. The Court of Appeals noted the only source of statements that may form the basis of a viable fraud defense would be those made by plaintiff on his application for benefits. Defendant produced an application form, purportedly executed by plaintiff, in which he denied experiencing in the past the same or similar symptoms as those from the auto accident. The application form also stated that the injury occurred while plaintiff was at work, and plaintiff admitted during the course of discovery that this was not true. Plaintiff also testified, however, that he did not recognize the application for benefits and did not recognize his purported signature on the application form.

The Court of Appeals explained the trial court did not address whether the application for benefits contained false statements, concluding only that the attendant-care forms were sufficient for

defendant to deny coverage. Moreover, the trial court did not analyze the case through the framework set forth in *Meemic* and *Haydaw*, both issued after the trial court rendered its decision. The case was therefore remanded for further deliberations.

Mich. Ambulatory Surgical Ctr. v. Farm Bureau Gen. Ins. Co., No. 349706
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20201119_C349706_57_349706D.OPN.PDF

Assignment of Benefit Restrictions in Settlement Agreements.

Defendant's insured was injured in a motor vehicle accident and filed suit against defendant to collect unpaid PIP benefits. Pursuant to a settlement agreement between the insured and the insurer, in exchange for $7,500, the insured released her rights to PIP benefits accrued through the date of the case evaluation. The settlement agreement was a separate contract with a merger clause - not an addendum to the no-fault policy and did it not in any way limit coverage under the policy or prohibit the insured from seeking additional PIP benefits in the future. Rather, the settlement agreement anticipated that the insured would accrue additional claims to PIP benefits in the future. The settlement agreement specifically provided that she would "not assign any of her rights to medical benefits to medical providers in the future without the express written consent of the insurer" with respect to any claim for benefits arising from the motor vehicle accident.

Thereafter, the insured sought and received plaintiff's medical services and thereby created a newly accrued claim for PIP benefits. Contrary to her agreement with the insurer, the insured then assigned to the medical provider her right to reimbursement for the medical provider's billings. The medical provider filed suit against the insurer to recover payment for the assigned, newly accrued PIP benefits. The insurer then filed a motion for summary disposition, arguing that the anti-assignment clause in the settlement agreement invalidated the insureds later assignment to plaintiff.

The medical provider responded that contractual provisions barring the post-loss assignment of an accrued claim to payment of insurance benefits are unenforceable as against public policy under *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182. In turn, the insurer argued that *Shah* only applied to anti-assignment clauses in no-fault insurance policies but not to similar clauses in settlement agreements.

The Court of Appeals determined the trial court erred when it concluded that an anti-assignment provision in a settlement agreement was invalid pursuant to the Michigan Supreme Court's holding in *Shah*. The issues relating to the settlement agreement in this case were factually distinct from the facts presented in *Shah.* Although MCL 500.3143 prohibits the assignment of future benefits, it is silent regarding agreements not to assign benefits. The reasonable implication of the Michigan Legislature's omission regarding agreements not to assign benefits is that parties are free to contract according to their wishes.

Glasker-Davis v. Auvenshine, No. 345238
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20200813_C345238_35_345238.OPN.PDF

Insurer Must Plead Fraud as Affirmative Defense or Waived.

Following an automobile accident, plaintiff alleged a claim for negligence against the driver of the other vehicle and asserted a claim for first-party benefits against the plaintiff's own no-fault insurance provider. Specifically, plaintiff claimed she was entitled to compensation for several months of replacement care services she received daily from her daughter. At her deposition, plaintiff testified that her daughter had performed services daily for a brief period and otherwise only came over two to three times a week. On the basis of that discrepancy, the insurer moved for summary disposition on the ground of fraud. However, the Court of Appeals found the insurer failed to plead fraud as an affirmative defense and it therefore waived asserting fraud as a defense in the litigation. Specifically, a defense premised on an alleged violation of an anti-fraud provision in an insurance policy constitutes an affirmative fraud defense.

c) Premises Liability Decisions

Drob v. SEK 15, Inc., No. 351198
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20201119_C351198_46_351198.OPN.PDF

Bartender, Paid Under-the-Table, was an Independent Contractor and When Injured Could Not Submit a Workers Compensation Claim, but Could Pursue Claim Under Bar's Liability Policy.

The plaintiff worked as a bartender for the bar under-the-table for cash. She injured her ankle while working and subsequently sought to obtain either Worker's Disability Compensation (WDC) benefits or benefits under the bar's liability insurance policy.

The plaintiff was denied WDC benefits given her employment relationship and thereafter filed a premises liability lawsuit wherein she escribed herself as a "business invitee" who was injured while employed by defendant. The plaintiff also alleged the defendant bar violated the Worker's Disability Compensation Act (WDCA), MCL 418.1 et seq., by failing to maintain required WDC insurance for all its employees.

The Michigan Court of Appeals determined plaintiff was not an employee, but rather was an independent contractor who could file a premises liability action against the bar. Although plaintiff served under a contract of hire, she held herself out to the public to perform the same services she performed for the tavern, excluding her from the definition of "employee" and the exclusive remedy provision of the WDCA.

d) Governmental Immunity Decision

Kellapoures v. Suburban Mobility Auth., No. 351790
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20201015_C351790_28_351790.OPN.PDF

Analysis of Governmental Immunity in Context of MCL 691.1405 and Negligent Operation of Motor Vehicle.

The issue concerned whether the circumstances of the incident—where plaintiff alleged that he fell after a bus quickly accelerated from a stop and "jerked" back into traffic while plaintiff had been standing in the bus aisle on an area of floor that was wet and slippery - constituted the "negligent operation" of a motor vehicle for purposes of satisfying the motor-vehicle exception to

governmental immunity. The Michigan Court of Appeals explained that under MCL 691.1405, the governmental entity can be liable "only if plaintiff's injuries resulted from 'the negligent operation' of a motor vehicle" and the governmental entity is protected by governmental immunity if there was no negligent operation of the motor vehicle. The bus in this case was being operated as a motor vehicle because it was being driven as it provided transportation services to the public, specifically driving away from the curb after picking up plaintiff and his wife, when plaintiff allegedly fell as the bus suddenly accelerated while plaintiff was standing on a wet and slippery portion of the bus floor.

e) Other Significant Decisions

Estate of Miller v. Angels' Place, Inc., No. 348940
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20201022_C348940_36_348940.OPN.PDF

Adult Foster Care Facility Not a Medical Provider Under Facts of Case and Could Not be Sued for Medical Malpractice.

Following the decedent's death in an adult foster care facility, an estate attempted to pursue a medical malpractice claim. However, the Michigan Court of Appeals determined an adult foster care facility could not be a licensed health facility or agency, regardless of whether it also had certification as a provider of care for the developmentally disabled. Therefore, the facility and its employee could not be liable for medical malpractice in that capacity. The Court of Appeals focused on the fact the evidence did not show the facility was a hospital, long-term care unit, nursing home, county medical care facility, or other nursing care facility, or distinct part thereof. Because the facility was not licensed under article 17 of the Public Health Code, it was not a licensed health facility or agency under MCL 600.5838a, and the trial court therefore erred in finding that the facility was a health facility or agency.

Estate of Homrich v. Selective Ins. Co. of Am., No. 346583
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20200924_C346583_50_346583.OPN.PDF

Witness Statement Provided to Insurance Company Protected as Work Product.

Following a motor vehicle accident in which a pedestrian was struck and killed, the Michigan Court of Appeals determined a recorded witness statement provided to an insurance company by an insured was protected work-product and not subject to production in discovery. The Court of Appeals focused on the fact that the recorded statement was prepared by a representative of the insurance carrier and MCR 2.302(B)(3)(a) specifically provides that the work-product doctrine applies to materials prepared in anticipation of litigation by a party's insurer. Furthermore, at the time the statement was taken, the prospect of litigation was identifiable because the facts of the situation had already arisen, and a fatal motor vehicle accident generally gives rise to the prospect of litigation. Finally, the recorded statement contained more than objective facts because it also included the questions posed by a representative of the insurance company.

Lost Lake Distillery v. Atain Ins. Co., No. 346552
http://publicdocs.courts.mi.gov/OPINIONS/FINAL/COA/20200917_C346552_61_346552.OPN.PDF

No Duty of Insurance Agency to Warn Policy Nearing Expiration.

An insured utilized an insurance and subagent agency to obtain four policies of varying lengths. At the expiration of each of the first three policies, the agency reached out to the insured to inquire/remind about a renewal. The fourth policy expired without a reminder/inquiry about a renewal and a fire occurred shortly after the fourth policy expired. The agency then placed a new policy and backdated the policy to the expiration date of the third policy. Once the premium was paid on the 4th policy, the fire damage claim was submitted with an incorrect date of loss. The insurer later denied coverage and rescinded the policy on the basis of fraud

The Court of Appeals held for the insurer and agency. It first found the duty to ensure that a particular contract addresses an insured's needs is distinct from a purported duty to warn that a particular policy is about to expire. There is no such duty to warn about the policy's looming expiration, despite these warnings having been voluntarily provided in the past.

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.

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

Am. S. Home Ins. Co. v. Lentini, 286 So. 3d 157
https://www.floridasupremecourt.org/content/download/545396/opinion/sc18-320.pdf

Collector Vehicle Policies and Attempts to Limit Underinsured Coverage.

The issue the Florida Supreme Court sought to address is whether an insurance company that issues a reduced premium collector vehicle policy may limit uninsured motorist coverage under that specialty policy to accidents involving the occupancy or use of the collector vehicle. The Supreme Court determined the requirements of § 627.727, Florida Statutes (2015), prohibit the limitations placed on uninsured motorist coverage in the collector vehicle policy at issue. As identified by the Fifth Appellate District in *Lentini*, nothing in § 627.727, Fla. Stat., excludes collector or antique vehicle insurance policies from its application as, to the contrary, § 627.727 explicitly states that no motor vehicle liability insurance policy shall be delivered or issued for delivery in Florida unless uninsured motor vehicle coverage is provided. The Florida Supreme Court, therefore, held that because the limitations to uninsured motorist coverage in the collector vehicle policy did not comply with the statutory mandates under § 627.727, the Court approved the Fifth District's decision in *Lentini* and disapproved of the Second District's decision in *Martin*.

b) Other Significant Decisions

R.R. v. New Life Cmty. Church of CMA, No. SC18-962
https://www.floridasupremecourt.org/content/download/672459/opinion/sc18-962.pdf

Accrual of and Limitations Period for Claims of Minor's Sexual Abuse Governed by Statute, Not Common Law.

The subject case addressed child sexual abuse but was ultimately about the separation of powers and the proper role of courts in applying statutes of limitations. The Florida Legislature adopted a comprehensive statutory framework to govern limitations periods, including provisions that address when those periods begin to run (accrual) and when they are suspended from running (tolling). The Florida Supreme Court was tasked with determining whether courts can go beyond the statutory framework and adopt a special, judge-made rule to govern the accrual of tort claims where the plaintiff is a minor.

The Supreme Court held the accrual of the minors' negligence and respondeat superior claims against a church and others was governed by § 95.031, Fla. Stat. (2019), not the common law, as the statutory framework left no room for supplemental common law accrual rules. The Supreme Court also found the adoption of a tolling provision reinforced the conclusion that a minor's cause of action could accrue even though the minor did not have a legal representative. It followed that the minors' claims were not subject to delayed accrual under case law because even that case law was still valid, the negligence and respondeat superior claims were not intentional torts and did not involve childhood sexual abuse accompanied by traumatic amnesia.

Lieupo v. Simon's Trucking, Inc., 286 So. 3d 143
https://www.floridasupremecourt.org/content/download/545397/opinion/sc18-657.pdf

Water Quality Assurance Act Allows for Recovery for Personal Injury.

The Florida Supreme Court, in answering a certified question, held that the private cause of action provision contained in the 1983 Water Quality Assurance Act, § 376.313(3), Fla. Stat., permitted recovery for personal injury. This was based on the plain meaning of all damages in § 376.313(3), Fla. Stat. including personal injury damages.

Plantation Open MRI, LLC v. Infinity Indemnity Ins. Co., Nos. 4D19-1398, 4D19-2260, 4D19-2261, 4D19-2264, 4D19-2265, 4D19-2277, 4D19-2278, 4D19-2282, 4D19-2283, 4D19-2284, 4D19-2285, 4D19-2286, 4D19-2333, 4D19-2382, 4D19-2385 and 4D19-2611.
https://www.4dca.org/content/download/671361/opinion/191398_DC05_09232020_101230_i.pdf

Insurer Obligation Limited to 80% of Statutory Fee Schedule for PIP Benefits.

Medical providers contended an insurer's personal injury protection ("PIP") policy created an ambiguity requiring the insurer to pay full reimbursement for the cost of medical services. The trial found that the subject policy limited the insurer's obligation to 80% of the statutory fee schedule for PIP benefits outlined in § 627.736(5)(a)1., Florida Statutes (2018). The Florida Supreme Court was then asked to determine whether a PIP insurance policy requires the insurer to pay more than 80% of the statutory fee schedule, if it includes provision for the total limit of benefits the insurer is obligated to pay based on the difference between the deductible and the total amount of all expense incurred, subject to the $10,000 limit of benefits. The Supreme Court determined this was not true and ruled in favor of the insurance company.

2. Appellate Court Decisions

a) Insurance Coverage Decisions

People's Trust Ins. Co. v. Portuondo, 3D20-266
https://www.3dca.flcourts.org/content/download/676034/opinion/200266_DC13_10072020_104849_i.pdf

Motion to Compel Appraisal Still Proper and Preferred Procedure Despite Prior Extension of Coverage.

This case addressed an insurance coverage dispute following Hurricane Irma and whether an insurance company could compel an appraisal after previously extending partial coverage. The Florida Court of Appeals determined the trial court erred by denying the insurance company's motion to compel appraisal. The insurer did not waive its right to appraisal by choosing to extend only partial coverage to the claimed losses or by abating the appraisal process after the insured served it with a breach of contract lawsuit.

Gonzalez v. People's Trust Ins. Co., No. 3D19-646
https://www.3dca.flcourts.org/content/download/682684/opinion/190646_DC13_10212020_103934_i.pdf

Concession of Coverage and Invocation of Preferred Contractor Endorsement Does Not Necessarily Waive Insured's Proof of Loss Requirement and Other Post-Loss Cooperation Requirements.

Following Hurricane Irma, homeowners submitted a property damage claim to their insurer. The insurer sought to invoke a Preferred Contractor Endorsement, whereby the insurer's chosen contractor would restore the property to its pre-loss condition. The insurer conceded coverage, but also requested the insured submit a Sworn Statement in Proof of Loss.

The Florida Court of Appeals first noted there was no dispute that the insureds' property incurred damage from Hurricane Irma, and there is no dispute that the insurer had conceded coverage for those as-yet unspecified losses under the homeowner's policy. However, the Court of Appeals explained policy indicates that the insureds must continue to comply with their post-loss obligations even after the insurer invokes its right to repair their property. There was no waiver of the proof of loss requirement based upon this conduct. The Court of Appeals then requested the trial court determine whether the insureds' sworn proof of loss failures constituted a breach of the policy justifying forfeiture of coverage, even after coverage had been conceded by the insurer.

Sec. First Ins. Co. v. Czelusniak, No. 3D19-589
https://www.3dca.flcourts.org/content/download/635370/opinion/190589_DC13_05132020_104016_i.pdf

Anti-Concurrent Cause Provision Upheld on Water/Mold Claim.

This case concerns water that entered the insured's home causing mold growth and damage to the interior. The policy included an anti-concurrent cause provision. The Florida Court of Appeals determined trial court erred in granting the insured's motion for directed verdict on the basis of the concurrent cause doctrine because the policy included an anti-concurrent cause provision. This provided that when a covered cause and non-covered cause combined to cause a loss, all losses directly and indirectly caused by those events were excluded from coverage. The anti-concurrent cause provision at issue here, coupled with the undisputed evidence that the loss was caused by a combination of both excluded and covered perils, foreclosed the analysis of whether the jury could legally or factually separate the damage caused by water coming through the door, which was not an expressly excluded cause, from water coming through the walls and windows, which were expressly excluded causes.

Hernandez v. Citizens Prop. Ins. Corp., No. 3D19-156
https://www.3dca.flcourts.org/content/download/635935/opinion/190156_DC05_05202020_104121_i.pdf

No Coverage for Earth Movement Unless Direct Loss by Explosion; Indirect, Off-site Explosion Insufficient.

The insured alleged his home sustained cracks to the walls and flooring as a result of vibrations caused by off-site blasting explosions. The Florida Court of Appeals determined no coverage was due and owing. There was no coverage for damage caused by earth movement unless a direct loss by explosion occurred. However, the damages at issue resulted from an indirect, off-site explosion. The policy's terms and conditions unambiguously precluded coverage for earth sinking, rising, or shifting, and settling, cracking, or expansion of the foundation, whether caused by natural or man-made activities.

Frederick v. Citizens Prop. Ins. Corp., No. 3D18-1209
https://www.3dca.flcourts.org/content/download/693725/opinion/181209_DC13_12092020_101009_i.pdf

Insured's Contractor's Opinion Provides Evidence to Overcome Summary Judgment on Water Loss Claim.

After a thunderstorm in November 2015, the insured's home sustained damage from rainwater that came in through the roof. Following a coverage denial, the insured sued her insurance company. The insurance company moved for summary judgment, with the support of an engineering report and affidavit indicating the roof leaks were caused by wear and tear of the roof, as well as testimony from the insured's own contractor. The insured opposed summary judgment relying on an affidavit, inspection report, and deposition of its contractor, who ultimately concluded that the roof leaks resulted from micro-fissures in the roof caused by strong wind gusts and wind-driven rain during the original thunderstorm. The trial court determined that the evidence relied upon by the insured was insufficient to withstand summary judgment as to whether a covered peril caused an opening in the building's roof and entered final judgment in favor of the insurer. However, the Florida Court of Appeals disagreed and found the insured met her burden of showing at minimum a factual issue that should be addressed by the jury as to causation.

Restoration Constr., LLC v. SafePoint Ins. Co., No. 4D19-3790
https://www.4dca.org/content/download/693747/opinion/193790_DC13_12092020_101240_i.pdf

Considerations in Prompt Notice Arguments Following Water Losses.

The insureds had an insurance policy on their property from the insurer which covered water and mold damage, provided that the insureds complied with "all applicable provisions of" the policy. One of those provisions stated that after a claimed loss, the insureds were required to "give prompt notice to the insurer or its agent."

After the insureds discovered a water leak under their kitchen sink on January 30, they contacted a repair company to remedy the leak. They also retained Restoration the same day to perform water extraction, mold remediation, and repair services. Both Restoration and the repair company began repairs the same day they were contacted. In exchange for the services that Restoration performed, it received an assignment of the benefits under the insureds' insurance policy with the insurer. However, the insureds did not notify the insurer of the leak until five days later, on February 4.

When the insurer learned of the leak, it assigned a claim number to the loss but did not send a representative to inspect the property until February 9 – five days after it received notice. Another twelve days passed before the insurer sent its retained professional inspectors to visit the property

and prepare a report. In that report, the inspectors noted that they reviewed an invoice from the repair company indicating that the repair company had replaced "a leaking hot water supply line servicing the kitchen sink." The report stated that this replacement and the removal of other items within the kitchen area prior to its visit "severely hampered their investigation and impeded their ability to determine specific causes and origins of damage reported by the insureds and separate damages attributable to historical water discharges, leakages, and seepages from damages which may have been caused by a recent water leakage event." Thus, the inspectors opined that they were "unable to confirm" the cause of the water discharge in the sink or delineate the extent of damage that was attributable to that water discharge.

The Florida Court of Appeals determined the trial court erred in granting summary judgment to the insurer based on a five-day delay by the insureds in reporting the claim because there were genuine issues of material fact as to whether the insureds provided "prompt" notice of the loss. The Court of Appeals declined to create a bright line rule for what constitutes delay because resolution of insurance claim cases involve different scenarios. The trial court erred in finding that the notification was not prompt as a matter of law because the circumstances of the case created a question of fact for the jury, including the fact that the insurer waited another five days before sending an adjuster to the premises and then waited almost two additional weeks before engaging a third-party inspector to help assess the claim.

b) UM/UIM Decision

Milling v. Travelers Home & Marine Ins. Co., 2D18-4724
https://www.2dca.org/content/download/688195/opinion/184724_DC08_11132020_074524_i.pdf

Attorney's Fees Available in Bad Faith Suit and Recovery of Uninsured (UM) Benefits.

The insured sought attorney's fees as compensatory damages resulting from the insurance company's bad faith failure to settle pursuant to § 624.155. The Court of Appeals found the trial court erroneously ruled § 627.727(8) precludes, categorically, the recovery of the uninsured motorist (UM) attorney's fees. The Court of Appeals determined litigation of the existence and amount of the insured's damages was a part of the prosecution of the bad faith lawsuit and therefore attorney's fees incurred for such litigation should be awardable as prevailing-party fees in the bad faith case.

c) Other Significant Decisions

Avatar Prop. & Cas. Ins. Co. v. Simmons, 5D20-304
https://www.5dca.org/content/download/637556/opinion/200304_DC02_06122020_090731_i.pdf

No Blanket Claims File Privilege in Discovery.

In a breach of contract action against an insurance company, the insured requested: (1) any and all videos or photographs related to the insured's claim; and (2) the insurance company's complete underwriting file. The insurer objected, arguing that the requested documents, specifically the photographs, were part of the claim file and therefore work product. The trial court ordered the insurer to produce the photographs in response to the first request and reports and photographs in

response to the second request. The Florida Court of Appeals determined that while a "claim file" is protected under the work product doctrine, not every document the claim file is work product. It focused on the "anticipated in litigation" requirement of the work product doctrine. Even if the photographs at issue were placed in the claim file with other non-discoverable, claim-related documents, the photographs could be discoverable if the only objection is that they are part of an insurer's claim file.

State Farm Fla. Ins. Co. v. Hill, No. 3D20-1191
https://www.3dca.flcourts.org/content/download/691165/opinion/201191_DC03_11252020_105646_i.pdf

Subpoena for Claims Handling Policies, Practices, Procedures, Manuals, Guidelines Quashed.

The insured sued their insurer seeking coverage for water damage. The insured filed a notice of deposition *duces tecum* that: (1) sought to depose an insurer's corporate representative with knowledge of the insurer's "compliance" with section 627.70131(5)(a) of the Florida Statutes, the "Insurer's duty to acknowledge communications regarding claims," and (2) requested production of the insurer's "protocol, policy and guidelines" for complying with section 627.70131(5)(a), the 90-day pay or deny provision. The insurer sought a protective order to prevent production of these documents.

The Court of Appeals quashed the trial court's order denying an insurer's motion for a protective order. The challenged order permitted discovery of documents that were not subject to disclosure. Given the facts of the subject case, the trial court's order requiring discovery of the insurer's protocol, policy, and guidelines for complying with § 627.70131(5)(a), Fla. Stat., constituted a departure from the essential requirements of law causing irreparable harm for which there was no remedy for the insurer on appeal.

The Court of Appeals noted in first-party disputes concerning coverage under a homeowners' insurance policy, the Court of Appeals has consistently granted review and quashed discovery orders that permitted insureds to obtain their insurers' claims handling policies, practices, procedures, manuals, or guidelines.

Universal Prop. & Cas. Ins. Co. v. Deshpande, No. 3D19-1566
https://www.3dca.flcourts.org/content/download/687965/opinion/191566_DC13_11122020_104610_i.pdf

Attorney's Fees in First-Party Property Case Excessive and Unsupported.

The Florida Court of Appeals found a trial court's award of attorney fees and costs to an insured's attorneys in a first-party property case against insurers was excessive and unsupported by the evidence because the parties had engaged in minimal discovery, took only two depositions, filed no substantive motions or expert reports, and the case had settled before trial, and furthermore, the insurer's fee expert identified with specificity which hours should be deducted based on an itemized analysis of the billing entries, and competent, substantial evidence supported reducing the number of hours billed from 469 to 101 hours.

Salinas v. Weden, No. 4D19-3634
https://www.4dca.org/content/download/691190/opinion/193634_DC05_11252020_100540_i.pdf

Homeowners Not Liable for Independent Contractor Tree Trimmer Failing to Observe Electric Lines.

An independent contractor sued a homeowner following injuries he suffered when he was electrocuted while trimming trees on their property. The Court of Appeals began its analysis by explaining a property owner is generally not liable for injuries sustained by an independent contractor or its employees while performing their work. The Court of Appeals went on to explain the independent contractor admitted that he saw the electric lines above the palm trees. While the contractor contended that he did not know that the lines were high voltage lines, this did not constitute a latent danger. All electric lines are dangerous and the existence of unobstructed power lines, clearly visible above an open field is not a latent hazard.

Vitro Am., Inc. v. Ngo, 1D19-3737
https://www.1dca.org/content/download/670761/opinion/193737_DC13_09212020_133313_i.pdf

Jury, Not Judge, Should Have Decided Proximate Cause in Vehicular Collision Case.

This case involved a personal injury action stemming from a vehicular collision. At the close of the defendant's case, the trial court directed a partial verdict in favor of the plaintiff finding that the defendant's negligence was a proximate cause of the collision. The Florida Court of Appeals determined this ruling by the trial court was improper. The issue of proximate cause should have been decided by the jury and not the judge. This was because the testimony of the defendant's expert placed into question whether the plaintiff's inattentiveness was the sole cause of his harm, given the expert's statements that the plaintiff would have been able to see the defendant's truck's flashing lights in time to come to a complete halt and avoid the collision. This testimony alone created a factual issue on legal causation that was sufficient to send the question of proximate cause to the jury.

D. SIGNIFICANT CASES PENDING BEFORE THE FLORIDA SUPREME COURT

Citizens Property Insurance Corp. v. Manor House LLC, SC19-1394

The Supreme Court will decide whether a policyholder alleging breach of its insurance contract, but not bad faith, is entitled to recover damages that fall outside the policy but were caused by the insurer's failure to fulfill its obligations.

E. SIGNIFICANT FEDERAL CASES

Port Consol., Inc. v. Int'l Ins. Co. of Hannover, PLC, 826 Fed. Appx. 822
https://media.ca11.uscourts.gov/opinions/unpub/files/201913544.pdf

The 11th Circuit Court of Appeals granted summary judgment to an insurer. It found each alleged fuel theft was an act separated and distinguishable in "time and space," each alleged act of fuel theft constituted a separate "occurrence" under the commercial property policy.

Furthermore, none of the insured's losses exceeded the policy's deductible and the insurance company was not required to pay the insured under the policy for those alleged fuel thefts.

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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