TABLE OF CONTENTS

A. SIGNIFICANT FLORIDA COURT DECISIONS

1. Supreme Court Decisions

a) Insurance Coverage Decisions

Harvey v. GEICO General Insurance Co., No. SC17-85, 43 Fla. L. Weekly S 375 (Fla. 2018*)*
https://www.floridasupremecourt.org/content/download/425459/4585448/file/sc17-85.pdf

Actions by the Insured That Contributed to an Excess Judgment Will not Allow an Insurer to Escape Liability for Bad Faith

Plaintiff was involved in a car accident that resulted in the death of the other driver. The defendant insurer quickly determined the plaintiff was at fault and contacted the estate of the deceased. The estate requested financial and asset information of the plaintiff. The defendant originally rejected the request, but after continued efforts by the estate, the defendant informed the plaintiff of the request for information. The plaintiff told the defendant that he would contact his attorney and asked that the defendant inform the estate of existing circumstances that would delay his response. However, the defendant failed to relay the message and shortly thereafter the estate filed a wrongful death suit against the plaintiff. The estate was awarded damages far in excess of the policy coverage. The plaintiff subsequently filed a bad faith claim against the defendant and won. The Fourth District reversed because the plaintiff's actions or inactions were partly responsible for the excess judgment. However, the Supreme Court of Florida rejected this view stating that an insured's actions will not let an insurer off the hook when evidence clearly established the insurer acted in bad faith.

b) Other Significant Decisions

Schoeff v. R.J. Reynolds Tobacco Co., 232 So. 3d 294 (Fla. 2017)
https://www.floridasupremecourt.org/content/download/323284/2900370/file/sc15-2233.pdf

Comparative Fault Statute Likely Will not Reduce Compensatory Damages Resulting From Both Negligence and Intentional Torts

The Supreme Court of Florida explained the comparative fault statute is statutorily prohibited from applying to intentional torts. The court determined the damages in this case could not be allocated among the intentional tort and simple negligence claims without violating the rule against double damages. Therefore, any reduction in damages would necessarily reduce the damages resulting from the intentional tort and violate the statutory prohibition. Thus, when a party is found to have committed negligence and intentional torts, and those damages cannot be allocated between the two, the comparative fault statute cannot be applied to reduce damages.

Nat'l Deaf Acad., LLC v. Townes, 242 So. 3d 303 (Fla. 2018)
http://www.floridasupremecourt.org/decisions/2018/sc16-1587_CORRECTED.pdf

A Claim is of Ordinary Negligence Unless it is Directly Related to Medical Care or Services That Require the Use of Professional Judgment or Skill

The Fifth District and the Supreme Court of Florida determined this claim was not one of medical malpractice but one of ordinary negligence. The Supreme Court of Florida explained the determinative inquiry is whether the claim required proving a breach of the prevailing professional standard of care, through the use of a medical expert. In doing so, the Supreme Court of Florida explicitly disagreed with the First District's opinion in *Shands*. Because the restraining method at issue was employed by non-medical personnel, for the protection of residents and employees, and did not require medical skill or judgment when deciding to utilize the method, it would not require the use of medical testimony to prove negligence. Therefore, the injury was not directly related to medical care and the case was one of ordinary negligence.

Odom v. R.J. Reynolds Tobacco Co., 254 So. 3d 268 (Fla. 2018)
https://www.floridasupremecourt.org/content/download/413899/4509417/file/sc17-563.pdf

No Cap on Noneconomic Damages of Adult Children in Wrongful Death Suits

The plaintiff, the daughter of a deceased smoker, sued the defendant, a tobacco company, for wrongful death. The plaintiff was awarded a multimillion-dollar jury verdict. The Fourth District overturned the award on the basis that a relationship between an adult child living independent of their parent cannot justify a multimillion noneconomic damages award. The Supreme Court of Florida reversed because the only statutory requirement for an adult child to receive noneconomic damages is that there is no surviving spouse. The court explained, there is no statutory cap or a requirement the adult child be financially dependent, and an award should only be held excessive when it evinces or carries an implication of passion, prejudice, corruption, improper influences, or the like. Therefore, the court determined there is not a noneconomic damage cap for adult children in wrongful death suits.

Joyce v. Federated Nat'l Ins. Co., 228 So. 3d 1122 (Fla. 2017)
https://www.floridasupremecourt.org/content/download/323359/2901059/file/sc16-103.pdf

Contingency Fee Multipliers Apply in Insurance Cases

The Florida Supreme Court rejected the view that contingency fees are only to be applied in rare and exceptional circumstances. In this insurance coverage dispute the Florida Supreme Court upheld the trial court's two step application of a contingency fee multiplier. First, the trial court determined the "lodestar amount." Then, utilizing the *Quanstrom* factors, the trial court applied a contingency fee multiplier of 2.0.

DeLisle v. Crane Co., SC16-2182 (October 15, 2018)
https://www.floridasupremecourt.org/content/download/413865/4508984/file/sc16-2182.pdf

Florida is a Frye State for Admissibility of Expert Testimony

The Florida Supreme Court held that Florida utilizes the Frye standard and not the Daubert standard. In doing so, the court overturned an appellate court and refused to adopt the amended Section 90.702 of the Florida Code that attempted to endorse the Daubert standard. The court also

stated that judges are not obligated to assess whether the methodology utilized by expert witnesses is reliable because that determination is to be left to the relevant scientific community.

Newton v. Caterpillar Fin. Servs. Corp., 253 So. 3d 1054 (Fla. 2018)
https://www.floridasupremecourt.org/content/download/413901/4509441/file/sc17-67.pdf

Dangerous Instrumentality Interpretation

The Florida Supreme Court further interpreted the dangerous instrumentality doctrine, which generally imposes vicarious liability upon the owner of a motor vehicle who voluntarily entrusts that motor vehicle to an individual whose negligent operation causes damage to another. The subject case dealt with an 8,000-pound loader used to clear private lots near public streets. Newton was an independent contractor. He was injured assisting the operator of the loader, who was not an independent contractor. Newton alleged Caterpillar was liable for the injuries he sustained from the operator's negligent operation of the loader, because the loader was a dangerous instrumentality. The Court first found, as a matter of law, that loaders are dangerous instrumentalities. Second, the Court found Newton's status as an independent contractor did not preclude him from protection under the dangerous instrumentality doctrine. The Court found its prior interpretation of the dangerous instrumentality doctrine did not treat construction workers different from the general public when injured in a public place. The Court found that while Newton may not have been a member of the unsuspecting public, the subject incident occurred on a public street. Finally, Newton employment status did not disqualify his accident from coverage under the dangerous instrumentality doctrine.

2. Appellate Court Decisions

a) Insurance Coverage Decisions

Citizens Prop. Ins. Corp. v. Salkey, 43 Fla. L. Weekly D 2560 (Fla. Dist. Ct. App. 2018)
https://edca.2dca.org/DCADocs/2014/3002/143002_39_11162018_08265395_i.pdf

Re-affirmation of Concurrent-Cause Doctrine and Burden of Proof

The Second District reversed a judgment rendered for the insureds on their breach of contract claim against the insurer because the jury instructions were confusing and may have misled the jury, causing it to conclude that the insureds had proved that their property was damaged by a sinkhole, a burden they did not have, and made it impossible for appellant to meet its burden of proving that no loss was sinkhole related. In so ruling, the court affirmed that the context of property insurance, the concurrent-cause doctrine, not the efficient-proximate-cause doctrine, is the appropriate theory of recovery to apply when two or more perils converge to cause a loss and at least one of the perils is excluded from an insurance policy. Regarding burdens of proof, the court found the insured submitting a claim under an all-risks policy has the initial burden of proving that the insured property suffered a loss while the policy was in effect. The burden then shifts to the insurer to prove that the cause of the loss was excluded from coverage under the policy's terms and conditions.

b) UM/UIM Decision

Amica Mut. Ins. Co. v. Willis, 235 So. 3d 1041 (Fla. Dist. Ct. App. 2018)
https://edca.2dca.org/DCADocs/2016/2319/162319_65_01172018_08311004_i.pdf

UM/UIM Coverage Must be Reciprocal to Liability Coverage

An insurance policy did not include golf carts within its definition of motor vehicles. However, the policy provided liability coverage for damages caused by the insured's use of a golf cart while simultaneously excluding UM/UIM coverage for damages sustained from another's use of a golf cart. The insured was hit by a golf cart and the insurance carrier denied UM/UIM benefits. The issue was whether an insurance company can provide liability coverage in excess of the statutorily required minimum but exclude reciprocal UM/UIM coverage, thereby maintaining the minimum statutory UM/UIM coverage. The appellate court determined Florida Statute 627.727(1) required any insurance policy providing liability coverage also provide a reciprocal amount of UM/UIM coverage.

c) Other Significant Decisions

Demase v. State Farm Fla. Ins. Co., 239 So. 3d 218, 219 (Fla. Dist. Ct. App. 2018)
http://www.5dca.org/Opinions/Opin2018/032618/5D16-2390.op.pdf

Bad Faith Claims do not Require an Underlying Civil Action

The trial court dismissed the claim because there was no underlying civil action that determined the insurer's liability and the extent of the insureds' damages, as required under § 624.155(1)(b). The appellate court reversed finding the payment of the claim after the 60-day cure period, provided in 624.155(3), constituted a determination of the insurer's liability for coverage and the extent of the insureds' damages. Therefore, an underlying action is not the only way to fulfill these two prerequisites under § 624.155(1)(b) and a bad faith claim can proceed after such a payment made outside the 60-day cure window.

Peoples Trust Ins. Co. v. Tracey, 43 Fla. L. Weekly 1684 (Fla. Dist. Ct. App. 2018)
https://www.4dca.org/content/download/384871/3298530/file/173945_1709_07252018_10053161_i.pdf

Insurers Can Compel Appraisal if They do not Wholly Deny a Claim

The defendant admitted coverage but, finding some of the damage was the result of causes not covered, limited the amount of the loss. The plaintiff obtained two estimates far in excess of the defendant's estimates and the defendant requested appraisal to resolve the discrepancies. The plaintiff filed a breach of contract claim and the defendant moved to compel appraisal but was denied. Because the defendant did not wholly deny the plaintiff's claim, they were able to compel appraisal of the disputes portion of the claim in an attempt to resolve the issue.

Markovits v. State Farm Mut. Auto. Ins. Co., 235 So. 3d 1018 (Fla. Dist. Ct. App. 2018)
https://edca.1dca.org/DCADocs/2017/1623/171623_1287_01032018_02540466_i.pdf

Service of a Complaint on the CFO of Florida Constitutes Service on the Insurance Company for Timing of Settlement Offers

The plaintiff served their complaint on the Chief Financial Officer of Florida (CFO) and three days later served the defendant. Then, 90 days after serving the CFO, but only 87 days after serving the defendant, the plaintiff served the defendant a settlement offer, which the defendant rejected. The plaintiff received a judgment more than 25 percent greater than the proposed settlement and moved for attorney's fees. The trial court denied the motion because the settlement proposal was served less than 90 days after the defendant was served the complaint. The First District reversed finding service on the CFO constituted service on the defendant under Fl. R. Civ. Pro. 1.442(b).

Jones v. Federated Nat'l Ins. Co., 235 So. 3d 936 (Fla. Dist. Ct. App. 2018)
https://www.4dca.org/content/download/188505/1672993/file/162579_1709_01172018_08481782_i.pdf

Insurers Bear the Burden When Insured Produces Evidence of a Covered Concurrent Cause

If the insured produces evidence of a covered concurrent cause for their claim, the insurer bears the burden of proof to establish that the insured's purported concurrent cause was either (a) not a concurrent cause, or was a *de minimis* cause, or (b) excluded from coverage by the insurance policy. If the insurer fails to satisfy this burden of proof, the insured is entitled to judgment in their favor.

Landers v. State Farm Fla. Ins. Co., 234 So. 3d 856 (Fla. Dist. Ct. App. 2018)
http://www.5dca.org/Opinions/Opin2018/011518/5D15-4032.op.mot%20reh.pdf

A CRN can be Filed Before the Completion of the Appraisal Process

The Fifth District found that Florida Statute 624.155(3)(d) does not require a final determination of coverage and damages before a CRN can be filed. The court explained that the purpose of a CRN is to facilitate and encourage good-faith efforts to timely settle claims before litigation. Therefore, a CRN filed during the appraisal process was valid and could be utilized for a subsequent bad faith claim.

Eckols v. 21st Century Centennial Ins. Co., 2018 Fla. App. LEXIS 17502
https://edca.5dca.org/DCADocs/2017/2904/172904_1260_12072018_08324407_i.pdf

"Owned Vehicle" Exclusion Found Ambiguous

The Fifth District found the following "owned vehicle" exclusion was ambiguous as to whether it applied to the motorcycle Eckols was riding when he was struck by an uninsured/underinsured motorist. *"A. We do not provide Uninsured Motorist Coverage for bodily injury sustained: 1. By an insured while occupying any motor vehicle owned by that insured which is not insured for this coverage under this policy. This includes a trailer of any type used with that vehicle."*

B. SIGNIFICANT CASES PENDING BEFORE THE FLORIDA SUPREME COURT

Progressive Select Ins. Co. v. Fla. Hosp. Med. Ctr., 236 So. 3d 1183, 1188 (Fla. Dist. Ct. App. 2018)
http://www.5dca.org/Opinions/Opin2017/111317/5D16-2333.op.pdf

How to Calculate Deductibles for PIP Benefits

The defendant insured an individual who was injured in a car accident. The insured's medical bills exceeded the deductible and his benefits under the policy were assigned to the plaintiff hospital. The hospital sent the defendant a calculation of treatment costs and defendants remitted payment that was less than the proffered amounts. The difference was a result of applying Florida Statute 627.739(2) before or after applying 627.736(5). The trial court and the Fifth District determined Florida Statutes required the deductible be applied to the total charges before applying section 627.736(5).

Restoration 1 of Port St. Lucie v. Ark Royal Ins. Co., No. 4D17-1113 (Fla. Dist. Ct. App. 2018)
https://www.4dca.org/content/download/402124/3447933/file/171113_1257_09052018_09123304_i.pdf

Insurance Policies Can Require the Consent of Mortgagees Before an Assignment of Post-Loss Benefits

Insureds had a policy on their house that included an anti-assignment provision disallowing the assignment of benefits without consent from all insureds and all mortgagees. The insureds' house sustained water damage. One insured hired the plaintiff to repair and fix the damage and agreed to assign to the plaintiff any benefits the insureds had under their policy. However, the insured did not obtain consent from either the other insured or the mortgagee before entering this agreement. The trial court dismissed the action because of the anti-assignment provision and lack of consent. The Fourth District affirmed. The Fourth District recognized the Fifth District has read Florida precedent broadly to create a blanket ban on any restriction regarding assignment of benefits under an insurance policy. However, the Fourth District read Florida precedent to ban only the requirement of insurer's consent because an insurer has no interest in who they must pay. However, other insureds and mortgagees have vested interests in who performs the repairs. Therefore, the Fourth District held policy provisions requiring consent from insureds and mortgagees regarding the assignment of benefits are enforceable. The Fourth District has certified a direct conflict with the Fifth District to the Florida Supreme Court, which has accepted discretionary review.

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

State Departments of Insurance
Contact Information

Ohio Department of Insurance
50 W. Town Street
Third Floor – Suite 300
Columbus, Ohio 43215
(800) 686-1526
https://www.insurance.ohio.gov

Kentucky Department of Insurance
215 West Main Street
Frankfort, Kentucky 40601
(800) 595-6053
http://insurance.ky.gov

Indiana Department of Insurance
311 West Washington Street
Suite 103
Indianapolis, Indiana 46204
(317) 232-2385
http://www.in.gov/idoi/

Michigan Department of Insurance
611 W Ottawa Street
3rd Floor
Lansing, Michigan 48933
(877) 999-6442
http://www.michigan.gov/difs/

Florida Office of Insurance Regulation
200 East Gaines Street
Tallahassee, Florida 32399
(850) 413-3140
https://www.floir.com/