Automobile Liability

Admission of liability

GEICO General Insurance Company v. Dixon, 209 So. 3d 77 (Fla. 3d DCA 2017)

This case involved an uninsured motorist who was intoxicated. Both the uninsured motorist carrier and the Co-Defendant driver admitted liability. The court ordered that the Plaintiff could seek punitive damages against the driver. During the compensatory portion of the trial, the trial court allowed the Plaintiff to introduce evidence of the driver's intoxication. The Third District held that this was error because when a Defendant admits liability regarding the cause of the accident, evidence of the Defendant's drinking is irrelevant and prejudicial. The Third District also held that there was insufficient evidence to sustain the claim for future economic damages. In this case, the only evidence that the Plaintiff presented to support his claim for future medical expenses consisted of his testimony that, at the time of the trial, he was taking a prescription drug to detoxify himself from an opiate addiction. The evidence was unclear as to whether the addiction had any relationship to the accident. Further, there was a complete absence of any testimony which would show with reasonable certainty how long the Plaintiff would need to take the drug.

Alcohol

Stewart v. Draleaus, 226 So. 3d 990 (Fla. 4th DCA 2017)

In this motorcycle accident case, there was wildly conflicting testimony of how the accident occurred. One version was that the Defendant driver challenged the motorcyclist to a race. Another was that the Defendant had revved his engine as a warning to the motorcyclist and then he saw one of the cyclists attempt to turn and did so directly into the path of another causing them to collide and hit a curb. There was also independent witness testimony that the motorcyclist and the Defendant were traveling 100 miles per hour and another witness who testified that the vehicles were traveling 55 to 60 miles per hour and that the car was nowhere near the motorcycle when one of the wheels began to wobble and then crash. There was yet another witness, a minor, who was involved in a fender bender shortly after the accident. She testified that she did not see the accident because a truck was traveling in front of her, but she saw the motorcycle speeding and weaving in and out of traffic before the accident occurred. When the truck turned

on to an intersecting street, she saw three people laying on the road and on the sidewalk and she had to swerve to avoid them at which point she hit a car that was pulled over to render aid to the Plaintiffs.

The Plaintiffs moved in limine to keep out a minor witness' prior inconsistent statement where she told the police officers that she saw one of the motorcyclists move into the other motorcyclist's lane and make contact with it arguing that the statement was protected by the accident report privilege. The trial court excluded the testimony of the minor based upon that privilege. The Fourth District pointed out that the immunity provided by the accident report privilege is not extended to witnesses because they have no obligation to provide a statement to law enforcement. The Fourth District found that the trial court erred in excluding in the statement under the theory that the second accident was part and parcel of the first accident. The Fourth District found that conclusion erroneous because neither the minor witness nor the vehicle she struck had collided with the Plaintiffs, their motorcycles or any of the debris from the accident. Additionally, the investigating officer who obtained the minor's statement indicated in his proffered testimony that he was investigating only the motorcycle accident and not the minor's accident. In fact, the minor's accident was memorialized in a separate report authored by a different officer.

The trial court also excluded evidence of the Plaintiff's pre-accident alcohol consumption. Recognizing the inflammatory effects of a party's use of alcohol in the context of a car accident, the jury is still supposed to hear the totality of fault of each side and the specific acts of negligence of each party even when liability is admitted. In this case, one Plaintiff admitted that he had two drinks between 7:30 p.m. and 10:30 p.m. which meant he could have been drinking up to 48 minutes before the accident which happened at 11:18 p.m. A responding officer also smelled alcohol on one of the motorcyclists and one of the defense experts testified that even small quantities of alcohol can impair a motorcycle operator's perception of events.

Because the evidence conclusively established that at least some of the Plaintiffs were drinking prior to the accident, the Fourth District ruled that the issue as to whether alcohol consumption was a contributing factor should have been admitted and made a question of fact for the jury. The Fourth District also ruled that the Defendant would be permitted to pursue his defense under Florida Statute 768.36 when the case was retried. This statute prohibits the Plaintiff from recovering damages for his or her own injuries when the Plaintiff was under the influence of alcohol or drugs to the extent that normal faculties were impaired or

the blood alcohol level was .08% or higher and the Plaintiff was more than 50% responsible for his or her own harm.

Lastly, the Plaintiff successfully excluded evidence that one of the Plaintiffs had not taken a required examination and therefore only possessed a temporary motorcycle license that did not allow him to carry passengers. The Judge ruled a violation in this case was irrelevant because failure to take the requisite test and obtain the permit and license did not suggest negligence in the subject accident. The Fourth District stated that the vast majority of jurisdictions hold that a violation of a driver's license law is not evidence of negligence in the absence of some casual connection between the violation and the injury; however, in some situations the violation of a restriction may be relevant to show a driver's inexperience and incompetence.

Bad faith

GEICO General Insurance Company v. Harvey, 208 So. 3d 810 (Fla. 4th DCA 2017)

On August 8, 2006, GEICO's insured got into a car accident with the decedent. The insured's vehicle was registered in both his name and his business's name. The insured, Harvey, reported the claim to GEICO which had a $100,000 liability policy in effect. Three days later, GEICO advised its insured in writing that the claim by the decedent's Estate could exceed the insured's policy limits and that Harvey had the right to hire his own attorney. Harvey subsequently retained his own attorney to protect his uninsured excess exposure.

On August 14, 2006, an employee of the attorney retained by the decedent's Estate contacted GEICO and advised of their representation. According to the employee, she asked the adjuster to arrange for a statement from Harvey regarding his personal and business assets and whether he was acting within the course and scope of his business at the time of the accident, as well as to determine whether there was any other potential insurance coverage for the claim.

The employee claimed that the adjuster refused to make the insured available for a statement; however, the adjuster stated that she would never have refused such a request. At no time did the Estate's attorney provide a deadline for obtaining this statement nor was the adjuster told that the insured's statement was a prerequisite to settling the insured's claim. On August 17, which was 9 days after the accident, GEICO sent the Estate a Release along with check for the $100,000

policy limits even though the Estate had never demanded the policy limits. On August 23, the insured met with his personal counsel and brought documentation to the meeting showing that the insured's business was the only asset available to the Estate and that it only had $85,000 in its accounts.

The following day, the Estate's attorney sent a letter to the adjuster in response to the check and Release and indicated that she had declined the Estate's request to make the insured available for a statement and renewed its request for the insured's financial information. The adjuster received this letter on August 31, faxed it to the insured and verbally discussed its contents with him that same day. According to the insured, this was the first time he learned that the Estate wanted a statement. The adjuster's supervisor also instructed her to contact the Estate's attorney to find out what kind of statement was wanted and the attorney responded that he wanted to determine what other assets or coverage the insured had available to him. The Estate's attorney then sent a letter to the adjuster documenting the conversation and the adjuster then immediately forwarded that letter to the insured advising him of the Estate's request. The adjuster also sent the insured a sample Affidavit that had blanks in it in which the insured could input his available assets and coverage in order to provide the information to the Estate. Notably, in renewing its request for a statement from the insured, the Estate never provided any deadline or other time frame within which the statement was to be provided.

The very next day, the insured contacted the adjuster and advised her that his attorney was not available until September 5 and asked that adjuster to let the Estate's attorney know that the insured was working on preparing the financial statement. Although the adjuster's supervisor instructed her to relay the insured's message to the Estate, the adjuster did not do so. Despite the insured's attorney return on September 5 and despite the insured knowing that the Estate wanted a statement, neither the insured nor his attorney took any further action to provide the Estate with a statement.

On September 13, the Estate filed a wrongful death lawsuit against the insured and returned GEICO's $100,000 check. The Estate then received a $8.47 million dollar judgment against the insured. After the judgment was entered against him, the insured brought a bad faith claim against GEICO. The trial court denied GEICO's Motion for Directed Verdict and the jury subsequently entered a verdict in favor of the insured.

The Fourth District reversed and held that the trial court erred in denying the Motion for Directed Verdict where the evidence taken showed that GEICO unconditionally tendered its policy limits to the Estate nine days after the accident and that the insurance company notified Harvey that the Estate wanted a statement 17 days after their request was received by the claims adjuster and the insured subsequently failed to provide a statement to the Estate despite having an opportunity to do so before suit was filed. They also held that even if GEICO's conduct was deficient, its actions did not cause the excess wrongful death judgment rendered against its insured.

Conversion/Theft

Stokes v. Wynn, 219 So. 3d (Fla. 4th DCA 2017)

The Fourth District upheld the trial court's decision to instruct a jury that the lessee of the vehicle would not be liable where the driver's use of the leased vehicle exceeded any express or implied consent amounting to a species of theft or conversion finding that this instruction was consistent with the Florida Supreme Court's decision in *Hertz Corp. v. Jackson*, 617 So. 2d 1051 (Fla. 1993).

Dangerous instrumentality

Depriest v. Greeson, 213 So. 3d 1022 (Fla. 1st DCA 2017)

The First District held that the decedent's estate was not liable under the dangerous instrumentality doctrine for damages caused by the decedent's daughter while driving the decedent's car after the decedent's death and before the appointment of the decedent's step-son as the Personal Representative. Upon the death of the decedent, his car became an asset of his estate; however, the decedent's step-son as the nominated Personal Representative had no legal duty to prevent the decedent's daughter from driving the decedent's car. As such, because the Plaintiffs could not demonstrate that the decedent's daughter had the implied consent to drive the decedent's car, Summary Judgment was properly entered in favor of the estate on the claim based upon the dangerous instrumentality doctrine.

Ward v. Morlock, 218 So. 3d 981 (Fla. 5th DCA 2017)

In this case, a Florida resident lent his vehicle to a resident of Pennsylvania who was involved in an accident in South Carolina with another Florida resident. The Fifth District held that Florida was the state with the most significant

relationship as to the issue of vicarious liability and thus the dangerous instrumentality doctrine applied.

Evidence of speed

Sajiun v. Hernandez, 226 So. 3d 875 (Fla. 4th DCA 2017)

A motorcyclist was killed after a collision with a truck driver. Following a verdict in favor of the Defendant, the Plaintiff appealed several evidentiary rulings which the Plaintiff contended required reversal either standing alone or when combined with the other rulings. At first, the trial court allowed a man sitting behind a privacy fence who only "heard" the motorcyclist proceeding on the adjacent road to testify that he believed the motorcyclist was speeding. It should be noted that the witness had operated a motorcycle since 1980 and could tell the difference between sounds emitted by the engines of a Japanese motorcycle and a Harley Davidson. The court allowed this testimony because two other defense witnesses, a mother and a daughter who were traveling together, encountered the motorcycle and testified that the noise of the engine drew their attention and that they commented to each other about how fast the motorcycle was going and that he had been cutting off cars.

The case also involved the psychotherapist-patient privilege. The Plaintiff's suit sought damages for pain and suffering and the trial court entered an agreed order allowing a Motion to Compel Production of the records of the psychotherapist who treated one of the children. Subsequently, the Plaintiff listed the records as a trial exhibit. At trial, the Plaintiff withdrew the mental anguish claim and argued for the reinstatement of the psychotherapist-patient privilege; however, the jury instruction included an instruction on pain and suffering. It is questionable as to whether that was wrong because the courts have ruled other non-economic damages besides mental anguish may be pursued without putting the Plaintiff's mental health at issue. Eventually, the Fourth District ruled that pursuant to Florida Statute 90.507, the voluntary disclosure of the records waived the privilege even though they noted that the waiver of the privilege itself was not irrevocable. That said, once the information was disclosed, the privilege ceases to exist.

Failure to join insurer

GEICO General Insurance Company v. Nocella, 224 So. 3d 870 (Fla. 2d DCA 2017)

Nocella was involved in an automobile accident with Franklin who was insured by GEICO. Nocella prevailed in a negligence action against Franklin and a final judgment was entered against her. 32 days after entry of the final damage judgment, Nocella moved to join GEICO as a party Defendant pursuant to Florida Statute §627.4136(4). Following a hearing, the trial court granted the motion. GEICO filed certiorari and the Second District granted same finding that irreparable harm had resulted where the Motion to Join was filed more than 15 days after the judgment had become final.

Limitation of liability

Richbell v. Toussaint, 221 So. 3d 764 (Fla. 4th DCA 2017)

Following a verdict in favor of a Plaintiff in a motor vehicle accident, the trial court denied the motion to limit the car owner's total liability under the judgment pursuant to Florida Statute 324.021(9)(b)(3). In this case, the non-owner of the vehicle was driving the vehicle at the time of the accident while the owner was in the passenger's seat. The Fourth District ruled that this fell within the parameters of a loan for purposes of the statute limiting the strict vicarious liability of an owner who "loans" a motor vehicle accident to a permissive user adding that the statute made no distinction as to whether the use of the vehicle must occur with or without the presence of the owner.

Medicaid lien

Willoughby v. Agency for Healthcare Administration, 212 So. 3d 516 (Fla. 2d DCA 2017)

Willoughby suffered serious injuries in a motor vehicle accident. Medicaid paid almost $150,000 for medical expenses incurred. After the accident, he sought uninsured motorist benefits from his carrier and they denied coverage and refused to pay him. Willoughby then sued the insurance company for bad faith and unfair claim settlement practices and eventually they settled; paying the Plaintiff $4,000,000. He also received $20,000 from another insurance company for bodily injury and uninsured motorist benefits under the driver's insurance policy. Willoughby and AHCA stipulated that the full value of his personal injury claim

was at least $10,000,000. They also stipulated that the Plaintiff suffered at least $23,800 in lost wages and the loss of future earning capacity was valued between $800,000 and $2,000,000. They also agreed that his past medical expenses paid by Medicaid were almost $148,000 and that his future medical expenses would exceed $5,000,000. Finally, they stipulated that his past non-economic damages exceeded $1,000,000 and the parties stipulated that, under the settlement with the uninsured motorist carrier, Willoughby recovered less than $148,000 as payment for his past medical expenses.

Willoughby argued that the Administrative Law Judge improperly included the bad faith portion of the $4,000,000 settlement obtained from his uninsured motorist carrier as being available to satisfy the lien. They also argued that AHCA was only entitled to recover the Medicaid lien from that portion of settlement funds allocated to past medical expenses, whereas AHCA argued that they were entitled to make a claim against past and future medical expenses. The Second District ruled that the Administrative Law Judge could properly order recovery from the bad faith damages. At the same time, they found that AHCA was only entitled to recover that portion of the settlement allocated to past medical expenses and then remanded for further calculations of the lien.

Non-Joinder

Choi v. Auto-Owners Insurance Company, 224 So. 3d 882 (Fla. 2d DCA 2017)

Choi was a passenger in a car that was struck by Beutler's vehicle. Choi was seriously injured and Beutler was under insured. Choi filed suit seeking recovery from Beutler for injuries she suffered in the accident under a negligence theory. In Count II, Choi sought uninsured motorist benefits from Auto-Owners for damages she suffered in excess of the amount covered by Beutler's insurance policy. In Count III, Choi sought punitive damages against Beutler based upon a claim that Beutler was intoxicated to the extent her faculties were impaired at the time of the accident. Auto-Owners filed a Motion to Sever the uninsured motorist claim against it from the claims against Beutler in Counts I and III and contended that the non-joinder statute required separate trials of Choi's claims against the tortfeasor and the UM carrier. Following the granting of the motion, Choi sought certiorari review from the Second District. The Second District found that the trial court departed from the essential requirements of law by granting the Motion to Sever because the claims against the UM carrier and the alleged tortfeasor were "inextricably interwoven." Because of the risk of inconsistent outcomes and

material injury that could not be corrected on post-judgment appeal, certiorari was appropriate.

PIP

State Farm Mutual Automobile Insurance Company v. Shands Jacksonville Medical Center, Inc., 210 So. 3d 1224 (Fla. 2017)

In this case, the Florida Supreme Court decided the scope of permissible discovery under Florida Statute §627.736(6)(c) (the PIP statute). The court held that the permissible discovery under this provision is limited to the production of documents described in subsection (6)(b). Specifically, this limits production to "a written report of the history, condition, treatment, dates, and cost of such treatment of the injured person and why items identified by insurer were reasonable in amount and medically necessary, together with a sworn statement," as well as production, inspection and copying of "records regarding such history, condition, treatment, dates and cost of treatment." The court noted that subsection (6) provides limited pre-litigation discovery and the specified information about treatment and charges for treatment provided to an injured party and discovery under the Rules of Civil Procedure are not triggered until litigation over reasonableness of those charges has ensued. Lastly, the court held that nothing in subsection (6)(b) or (c) requires a PIP provider to submit any of its representatives to deposition.

Progressive American Insurance Company v. Garrido, 211 So. 3d 1086 (Fla. 3d DCA 2017)

The Third District ruled that the trial court improperly found the PIP statute to be unconstitutional. Specifically, they found that the county court erred in finding that the statute which limits PIP benefits to $2,500 if a provider determines that the injured person did not have an emergency medical condition, and excludes chiropractors from the list of professionals that are authorized to diagnose a patient with an emergency medical condition, is unconstitutional as applied to chiropractors based upon equal protection and due process analysis. The Third District found that the statute bears a rational relationship to the objective of reducing fraud and that when there has been no emergency medical condition diagnosis, available PIP medical benefits are limited to $2,500.

Allstate Insurance Company v. Orthopedic Specialists, 212 So. 3d 973 (Fla. 2017)

In this case, Allstate argued that a "reasonable charge" for medical expenses under the PIP statute is simply payment based upon 80% of 200% of the Medicare charge. The policy endorsement stated that "any amounts payable under this coverage shall be subject to any and all limitations, authorized by §627.736, or any other provisions of the Florida Motor Vehicle No-Fault Law, as enacted, amended or otherwise continued in the law, including but not limited to, all fee schedules" was legally sufficient notice of their election to use the permissive Medicare fee schedules to limit reimbursement for medical expenses. The Florida Supreme Court found that the policy language clearly and unambiguously noted its reliance upon these fee schedules and that the only fee schedule limitations applicable to insure payments contained within the statute were located in Florida Statute §627.736(5)(a)(2). Thus they ruled that Allstate's policy gave proper notice allowing it to pay pursuant to the Medicare fee schedule.

Northwest Center for Integrative Medicine v. State Farm Mutual Automobile Insurance Company, 214 So. 3d 679 (Fla. 4th DCA 2017)

The trial court dismissed a Complaint for declaratory judgement regarding State Farm's calculation of PIP policy medical reimbursements based solely on the Medicare fee schedules where the insurance policy did not provide notice that the insurance company elected to apply the fee schedules pursuant to §627.736(5)(a)(2), Florida Statutes. In doing so, the court believed that the declaration requested had already been determined in *GEICO General Insurance Co. v. Virtual Imaging Services, Inc.,* 141 So. 3rd, 147, 159 (Fla. 2013) which held that notice was required to exercise the option pursuant to the statute in order to use the Medicare fee schedules in calculating reimbursements. The Fourth District reversed finding that the *Virtual Imaging* decision did not resolve the dispute in this case because the insurance policy did not rely on permissive Medicare fee schedules but instead used a fact-based determination of a reasonable fee based upon §627.736(5)(a)(1), Florida Statutes, yet, State Farm exclusively used the Medicare fee schedules to calculate provider fees.

Uninsured Motorist

Zurich American Insurance Company v. Cernogorsky, 211 So. 3d 1119 (Fla. 3d DCA 2017)

Cernogorsky was injured when he was struck by an automobile while walking in front of The Green Company's offices on the way in to the building. The car that struck him was driven by an underinsured motorist. After Mr. Cernogorsky demanded and received payment of the policy limits of the motorist that struck him, he rejected the UM policy limits of his own insurance and sought UM coverage under The Green Company's policy with Zurich, alleging that he was injured as a pedestrian while in the course and scope of his employment with the company. Following a verdict in favor of the Plaintiff, the Third District reversed finding that it was error for the trial court to determine that an employee of The Green Company (the named insured in a business auto policy) was entitled to underinsured motorist benefits for injuries suffered when he was struck by an automobile being driven by an underinsured motorist while he was walking in front of his employer's office on his way in to the building because no covered autos were involved in the accident and the employee was not a named insured under the policy. The court also held that because the policy was an excess liability policy, there was no requirement that the insured execute a written waiver of rejection of UM coverage. Lastly, the court ruled that because the employee was neither a named insured nor a resident family member of an insured, he was, at best a Class II insured who could recover UM benefits only if he was occupying or driving a covered automobile.

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Choi was a passenger in a car that was struck by Beutler's vehicle. Choi was seriously injured and Beutler was under insured. Choi filed suit seeking recovery from Beutler for injuries she suffered in the accident under a negligence theory. In Count II, Choi sought uninsured motorist benefits from Auto-Owners for damages she suffered in excess of the amount covered by Beutler's insurance policy. In Count III, Choi sought punitive damages against Beutler based upon a claim that Beutler was intoxicated to the extent her faculties were impaired at the time of the accident. Auto-Owners filed a Motion to Sever the uninsured motorist claim against it from the claims against Beutler in Counts I and III and contended that the non-joinder statute required separate trials of Choi's claims against the tortfeasor and the UM carrier. Following the granting of the motion, Choi sought certiorari review from the Second District. The Second District found that the trial

court departed from the essential requirements of law by granting the Motion to Sever because the claims against the UM carrier and the alleged tortfeasor were "inextricably interwoven." Because of the risk of inconsistent outcomes and material injury that could not be corrected on post-judgment appeal, certiorari was appropriate.

Wrongful death

Heiston v. Schwartz & Zonis, LLP, 221 So. 3d 1268 (Fla. 2d DCA 2017)

Following the death of a 16-year old in a motor vehicle accident, his parents attempted to be qualified as the Personal Representative of their son's estate. Both parents did not qualify and, as such, the decedent's brother was appointed as the Personal Representative. The law firm of Morgan & Morgan, P.A. represented the brother in his capacity as Personal Representative. Morgan & Morgan filed an action for wrongful death following which the respective carriers tendered their policy limits and death benefit. Schwartz & Zonis, LLP had a contingency fee agreement with the decedent's parents. Although they did not represent the Personal Representative, it actively pursued the wrongful death claim and sent demand letters to the two insurance companies and received the settlement drafts. They also filed a wrongful death action on behalf of the surviving parents and inaccurately described the father as being appointed as the Personal Representative. The trial court eventually awarded the entire fee to the firm that represented the decedent's statutory survivors and nothing to Morgan & Morgan who represented the Personal Representative. The Second District reversed and noted that, by statute, the Personal Representative is the only party with standing to bring a wrongful death action and settle the action. The trial court was ordered to award the full contingent fee to the attorneys for the Personal Representative and then reduce the fee award in a manner commensurate with the value, if any, of the services that Schwartz & Zonis, LLP provided to the statutory survivors.