



KIRWAN & SPELLACY, P.A.

ATTORNEYS AT LAW

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Kirwan & Spellacy, with offices in Miami, Fort Lauderdale, and Jupiter, Florida, is a full-service insurance defense litigation law firm providing liability, personal injury protection (PIP), subrogation, special investigation unit and fraud unit support to insurance carriers and public adjustment clients throughout South Florida. The attorneys at Kirwan & Spellacy are professionals dedicated to providing excellence in every aspect of our service and commitment to our clients in each of these areas, and would welcome the opportunity to consult with you regarding your legal needs. For further information, please contact Shawn Spellacy at spellacy@kirwanspellacy.com or call 954.463.3008.

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New Dimensions in Discovery/Texting and Smart Phone Discovery

With every advance in day-to-day communications technology and the changes in the way that people communicate, it is important to modify discovery to follow these trends.

Seemingly, texting has overtaken actually speaking on telephones, and with the advent of smart phones and touch screen telephones with keyboards, the unfortunate result has been an increase in traffic accidents and injuries due to DWT (driving while texting).

We at Kirwan & Spellacy have modified our automobile negligence interrogatories and requests for production to include a request for records regarding Plaintiff's telephone numbers so that we can attempt to obtain records relating to texting and other usage on the date of the accident.

A 2003 study at the University of Utah found that talking on cell phones while driving causes the same impairments as driving

while intoxicated.

Additionally, the Insurance Institute for Highway Safety (IIHS) has determined that people using a cell phone while driving were four times more likely to get into an accident than those not talking on cell phones.

It takes very little imagination to figure out that texting, which requires the driver to look at the telephone and keyboard, is even more distracting and more dangerous than talking on cell phones.

A 2007 study by the American Automobile Association (AAA) found that 46% of teenagers have admitted to texting while driving.

It is important in all automobile negligence cases to obtain information as soon as possible regarding which telephones, mobile telephone accounts, or other access was available to the Plaintiff at the time of the accident.



Update on Event Data Recorders (EDR's)

Another consideration in automobile negligence cases is discovery regarding EDR's. As many of us are already aware, most American-made cars now have these EDR's which either continuously record data until a crash stops them or are activated by crash-like events, such as sudden changes in velocity.

Either way, the EDR's are able to record a variety of different things, including whether seatbelts were buckled at the time of the impact, the steering angle, the speed at the time of the impact, whether the brakes were applied prior to the impact and, in some cases, whether a significant change in direction, including an evasive maneuver or over-correction in steering, occurred just prior to the accident.

Several considerations need to be made with regard to EDR's, including the possibility a carrier taking possession of a car could be liable for maintaining the EDR where there is a totaled out vehicle. Once the vehicle is destroyed, if the EDR has not

been removed or down-loaded, spoliation of evidence could be brought by insureds or by other claimants.

The data contained within the EDR's can normally only be down-loaded using a Vetronix CDR tool and by using Vetronix proprietary software.

The use of EDR data in civil and crimi-

nal court cases is rapidly growing and some consideration should be given to obtaining this information from whatever vehicles may contain this system.

For further information on particular vehicles or questions regarding the use of this material, please feel free to contact Kirwan & Spellacy.



Agreement by Letter Upheld

The Third District Court of Appeals, in *Mercury Insurance Company of Florida vs. Miguel A. Fonseca*, found that the trial court erred in finding that correspondence between the Plaintiff's counsel and Defendant's insurer was insufficient to form a settlement. 3 So. 3d 415 (Fla. 3d DCA, 2009).

The Plaintiff, seeking to get out of an agreement to settle the matter for Defendant's \$10,000 bodily injury policy limits, alleged that because the insurer responded to the ac-

ceptance with a release to be signed by the Plaintiff, that somehow transformed the acceptance into a counter-offer, thus negating the contract between the two parties.

The single issue in this case is whether the correspondence between the Plaintiff and Mercury was sufficient to form a settlement and the court indicated that it did.

It was noted that substantial modification to a release may, under certain circumstances, evidence that a contract was not formed, but the

tendering of a document releasing an insurance company from a liability claim arising from the same incident for which the full policy limits were tendered is the kind of usual settlement document implicit in any settlement agreement and, thus, would not serve to negate any agreement based upon the prior correspondence.

Court Cannot Require Disclosure of Claim File Where Bad Faith is Not at Issue

The 2nd District Court of Appeals has noted that the trial court's order requiring Seminole Casualty Insurance Company to turn over its claim file in a declaratory judgment and coverage action was inappropriate where there was no bad faith

claim being made and where disclosure of said claim file materials would have resulted in irreparable harm that could not be adequately addressed on appeal.

Seminole filed a petition for certiorari during the pendency of case in the trial

court asking for a review of the Order requiring the normally privileged material to be turned over.

The Court noted that, in this instance, there was a basis for review due to the fact that the harm that could result from the disclosure of said information pursuant to the trial court's order could not be adequately addressed in an appeal.

Of course, some things contained within a claim file may be discoverable, but many things are not and unless materials are reasonably expected or intended to be used at trial, they are not subject to discovery. *Seminole Casualty Insurance Company vs. Mastrominas*, 34 Fla. L. Weekly, D559 (Fla., 2nd DCA, March 13, 2009).



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Kirwan & Spellacy is certified by the State of Florida Department of Financial Services as a provider of continuing education for adjusters in the State of Florida. Recent course offerings include seminars on Proposals for Settlement ("PFS") and *Florida Statutes, Sec. 57.105, Sanctions*.

If we can be of assistance to you in offering these or any other courses, please contact Shawn Spellacy at (954) 463-3008 or at spellacy@kirwanspellacy.com.

Racing: Liability for Both Vehicles?

It's clear under Florida law that a driver who engages in racing on a public street or highway is not only guilty of a statutory violation, but will also be negligent per se for injuries to passengers within the vehicle or persons struck by the racing vehicle.

What is not as clear is whether the driver of a car involved in a race but not involved in the direct collision or accident in which a claimant was injured, can also be held liable for the injuries.

There is a little known case, *Skroh vs. Newby*, 237 So. 2d 548 (Fla., 1st DCA, 1970), in which two deputy sheriffs were racing along a highway in Santa Rosa County, Florida when one of the deputy's vehicles struck the rear of a motorcycle, causing the Plaintiff/Decedent's death.

There was little question, of course, that liability and perhaps even enhanced liability would apply to the driver of the vehicle which struck the motorcycle; but after the

trial court entered a directed verdict in favor of the Defendant whose vehicle did not strike the motorcycle, the First District Court of Appeals reversed that ruling and found that it was a question of fact to determine whether or not the deputy was racing and, if so, he would be liable for death of the Plaintiff/Decedent.

In cases involving suspected racing, it is extremely important to gather as much information as possible as quickly as possible after the accident, including witness statements and any investigating personnel.

While participants in automobile racing have been known to deny that they were racing following an accident, early obtaining of statements and the other investigation recommended above will enable a more accurate assessment of what actually happened and thus, what coverage may or may not exist.



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