RECENT DEVELOPMENTS IN AUTOMOBILE LAW

Gary M. Pappas and Rebecca S. Herbig

This survey article reviews a sampling of numerous 2005–06 state and federal judicial decisions affecting topics related to automobile law, including apportioning liability, automobile insurance, damages, evidentiary issues, procedural and discovery rulings, uninsured and underinsured motorist coverage issues, national automobile class actions, and automotive expert witnesses.

I. APPORTIONING LIABILITY

Under long-standing Virginia precedent, injury or sets of injuries from a single accident are indivisible.[1] Nevertheless, the Fairfax County (Virginia)

1. *See* Cauthorn v. British Leyland, U.K., Ltd., 355 S.E.2d 306, 308–09 (Va. 1987) (injury for which settlement had been consummated was indivisible, and unconditional release of

Gary M. Pappas is a trial attorney and shareholder in the Miami office of Carlton Fields, P.A., concentrating on the defense of manufacturers in products liability litigation. He also is a vice chair of the TIPS Automobile Law Committee. Rebecca S. Herbig is an associate in the Richmond, Virginia, office of Bowman and Brooke LLP. *The authors thank Angela T. Puentes, an associate at Carlton Fields, for her valuable assistance in preparing the case summaries, and Sandra Giannone Ezell, managing partner for the Richmond office of Bowman and Brooke LLP, for her assistance and support.*

Circuit Court's *Benitez v. Ford Motor Co.*[2] opinion implicitly endorses the opposite view. In *Benitez*, the plaintiff agreed to a settlement with the at-fault driver before giving Ford or the selling dealership any notice of her potential deployment-of-air-bag claims.[3] The release allocated only $10,000 of the $280,000 total settlement to an eye injury, the cause of which she alleged was a defectively designed air bag.[4] Ford brought a motion to dismiss, arguing that the settlement was made in bad faith, that it did not meet Virginia's statutory good faith requirements, and that it was therefore subject to the common law rule that "a release of one is a release of all."[5] In the alternative, Ford and the selling dealership argued that they were entitled to a setoff of any verdict for the full $280,000 recovery.

The trial court denied the motions, holding that the release and its apportionment were permissible under the Uniform Contribution Among Tortfeasors Act ("UCATA") and were therefore not in bad faith.[6] Significantly, the ruling appears to allow for apportionment of fault for certain injuries among joint tortfeasors, despite the fact that apportionment was not allowed at common law and that even the UCATA, a statute in derogation of common law, did not specifically provide for it. Also, the holding implicitly contradicts long-standing Virginia precedent holding that a single injury or set of injuries from one accident is indivisible.[7] Overall, unfortunately, the opinion encourages Virginia plaintiffs to attempt a double recovery by apportioning injuries between tortfeasors and circumventing UCATA's setoff provision.

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one allegedly liable for injury barred recovery against others who were also allegedly liable, regardless of theory upon which liability was predicated).

2. No. CL-2004-222545, 2005 WL 3476694 (Va. Cir. Ct. Nov. 23, 2005). Ms. Herbig's firm represented the defendant in this case.

3. *Id.* at *1. Benitez was a passenger in a car that collided with another, at-fault vehicle at about twenty-five to thirty-five miles per hour. The right front passenger air bag deployed. In her Motion for Judgment against Ford and the selling dealership, Benitez alleged injuries to her knee, back, neck, etc., as well as eye injuries and sought $21 million in compensatory damages, plus punitive damages against Ford. *Id.*

4. *Id.*

5. *Id.* at *4 (citing Va. Code Ann. § 8.01-35.1 (2000)).

6. *Id.* Section 8.01-35.1 of the Virginia Code provides, in relevant part:

> A. When a release or a covenant not to sue is given in good faith to one of two or more persons liable in tort for the same injury, or the same property damage or the same wrongful death:
>
> 1. It shall not discharge any of the other tort-feasors from liability for the injury, property damage or wrongful death unless its terms so provide; but any amount recovered against the other tort-feasors or any one of them shall be reduced by any amount stipulated by the covenant or the release, or in the amount of the consideration paid for it, whichever is the greater. . . . 2. It shall discharge the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.

Va. Code Ann. § 8.01-35.1 (2000).

7. *See, e.g.*, Cauthorn v. British Leyland, U.K., Ltd., 355 S.E.2d 306, 308 (Va. 1987).

II. AUTOMOBILE INSURANCE

In *Patrons Oxford Insurance Co. v. Harris*,[8] an unlicensed, intoxicated driver fled from a hostile crowd, seriously injuring a pedestrian in the process. The vehicle owner's insurer provided the driver with a defense but reserved rights and commenced a declaratory judgment action based on the following reasonable belief exclusion: "We do not provide Liability Coverage for any 'insured' . . . [u]sing a vehicle without a reasonable belief that the 'insured' is entitled to do so."[9] The injured pedestrian and driver settled the personal injury claim with notice to—but not permission from—the insurer, and the pedestrian agreed he would not seek to collect from the driver but instead would attempt to collect from the insurer under Maine's reach and apply statute.[10]

The Maine Supreme Court ruled against the insurer, binding it to the settlement and holding the exclusion inapplicable because the driver reasonably believed he was entitled to operate the vehicle to escape the emergency situation and threat of bodily harm.[11] It held the insurer gave up control of the insured's defense by choosing to defend him under a reservation of rights, and the insured was free to enter into a reasonable, noncollusive, nonfraudulent settlement without consent of the insurer.[12] However, the insurer is not bound by any factual stipulations in the settlement and is free to litigate coverage, reasonableness, and collusion in a declaratory judgment proceeding.[13]

In *State Farm Mutual Automobile Insurance Co. v. Nichols*,[14] the Florida Supreme Court confronted the application of the attorney fee-shifting provisions of Florida's offer of judgment statute and procedural rule to a claim for personal injury protection ("PIP") benefits. The insurer had agreed to pay its insured's initial medical bills resulting from a car accident as part of her PIP benefits. When it later requested the insured submit to an independent medical examination to determine further treatment, the insured failed to get the exam. Relying on a Florida statute, the insurer refused to pay any further PIP benefits.[15] While the insured's PIP suit was pending, the insurer served an offer of judgment requiring the insured "to execute a General Release in favor of State Farm," expressly limiting "all claims, cause of action, etc. that [had] accrued through the date of acceptance" of the proposal.[16] The insured

8. 905 A.2d 819 (Me. 2006).
9. *Id.* at 823.
10. *Id.* at 823, n.3 (citing ME. REV. STAT. ANN. tit. 24-A, § 2904 (2005)).
11. *Id.* at 824–25, 827.
12. *Id.* at 828.
13. *Id.*
14. 932 So. 2d 1067 (Fla. 2006) [hereinafter *Nichols II*].
15. *Id.* at 1070 (citing FLA. STAT. ANN. § 627.736(7)(b) (West 1999)).
16. *Id.* at 1071.

rejected the offer, fearing that the general release would extinguish her outstanding uninsured motorist ("UM") claim arising from the same accident.[17]

The trial court found that the insured unreasonably refused to submit to a medical examination and entered judgment in favor of the insurer, including the insurer's attorney fees and costs, based on the rejected offer of judgment.[18] It certified a question of "great public importance," namely, whether the offer of judgment statute applies to PIP suits.[19] The Florida intermediate appellate court answered yes.[20] The Florida Supreme Court agreed but held that the insurer's proposal to settle in this case was invalid because it was "too ambiguous" as it related to potential resolution of the insured's pending UM claim.[21] To recover fees, insurers must either attach the proposed general release or describe it with particularity in the offer of judgment.[22]

In *Discover Property & Casualty Insurance Co. v. Beach Cars of West Palm, Inc.*,[23] a car dealership sold a vehicle in December 2001 that was involved in an accident in 2003. The liability insurer for the dealership brought a declaratory judgment action, asserting it had no duty to defend or indemnify because the policy was only effective for a one-year period ending in 2002.[24] Finding that the policy definitions of *bodily injury* and *accident* did not limit coverage to events occurring during the policy period, the court found for the dealership.[25] The appellate court affirmed, finding an ambiguity because some sections of the policy were limited to events occurring during the policy period while others were not. Construing the contract in favor of the insured and strictly against the insurer, the court observed that "if an insurer wishes to restrict coverage for incidents which occur during the policy period, it is free to expressly say so."[26]

Whether an insurance company can be held liable for bad faith where a plaintiff demands to settle with one insured but will not release all insureds was addressed by a Florida court of appeals in *Contreras v. U.S. Security Insurance Co.*[27] In *Contreras*, a pedestrian was struck and killed by

17. *Id.* at 1071–72.
18. *Id.* at 1071.
19. *Id.*
20. Nichols v. State Farm Mut. Auto Ins. Co., 851 So. 2d 742 (Fla. Dist. Ct. App. 2003).
21. *Id.* at 1080. The court found that a release was a condition or nonmonetary term that had to be stated with "particularity" under Rule 1.442.
22. *Id.* at 1078–79.
23. 929 So. 2d 729 (Fla. Dist. Ct. App. 2006).
24. *Id.* at 730.
25. *Id.* at 732.
26. *Id.* at 733.
27. 927 So. 2d 16 (Fla. Dist. Ct. App. 2006).

a car driven by a permissive user. Presuit, counsel for the decedent's estate sent a demand letter to the car owner's insurance company requesting the $10,000 policy limits. The company tendered the limits along with a release of both the driver and the owner. The plaintiff's counsel responded that the demand was for the owner only, not the driver. The company took the position that it had to act in good faith to all its insureds and could not enter into a release that exonerated one and not the other.[28]

The jury returned a substantial excess verdict against both the owner and the driver, and the driver assigned her bad faith claim against the insurer to the plaintiff.[29] In the subsequent bad faith lawsuit, the trial court entered a directed verdict in favor of the insurer, recognizing that the settlement demand placed the insurer in Hobson's choice, whereby it would be sued for bad faith whether or not it accepted.[30] The court of appeals affirmed, finding that the insurer fulfilled its duty of good faith by trying to secure a release of both insureds for policy limits, and it could have settled on behalf of the owner only once it became clear that the estate was unwilling to settle with the driver and give him a complete release.[31]

In a case involving the insurer's appointment of counsel, *Bell South Telecommunications, Inc. v. Church & Tower of Florida, Inc.*,[32] the insurer denied coverage and declined to defend based on alleged untimely notice of a third party's claim. Some time after the insured sued for breach of contract, the insurer notified the insured that it was no longer denying coverage and agreed to assume the insured's defense. It sought to appoint counsel of its own choosing to represent the insured, but the insured objected.[33] The trial court found for the insurer, but, on certiorari review, a Florida appellate court quashed the order, holding the insurer had forfeited its right to defend. Given the passage of time, the insured would "suffer material harm if forced to relinquish" its chosen counsel and "control of [its] defense."[34]

In a recent Connecticut case, an arbitration award in favor of a passenger did not have to be judicially confirmed before the driver's umbrella policy insurer could bring a claim for equitable subrogation.[35] In *American States*

28. *Id.* at 18–19.
29. *Id.* at 19 (noting the judgment was affirmed in *Dessanti v. Contreras*, 695 So. 2d 845 (Fla. Dist. Ct. App. 1997)).
30. *Id.* at 20.
31. *Id.* at 21–22. The concurring opinion cites to the majority of jurisdictions that have rejected the trial court's Hobson's choice reasoning in this type of situation. *Id.* at 22–23.
32. 930 So. 2d 668 (Fla. Dist. Ct. App. 2006).
33. *Id.* at 670.
34. *Id.* at 671–72.
35. Am. States Ins. Co. v. Allstate Ins. Co., 891 A.2d 75 (Conn. App. Ct. 2006).

Insurance Co. v. Allstate Insurance Co., a mother and daughter were named insureds on an automobile insurance policy bought and issued in Florida. The mother was injured in Connecticut while a passenger of her daughter, who received the policy statements and bills at her Connecticut address. When the mother sued her daughter for personal injuries, the automobile insurer denied coverage, refusing to defend or indemnify the daughter because the policy excluded bodily injury to the named insured or any relative in the household.[36] The daughter was also insured by a personal umbrella liability insurer, which provided a defense in the action. The action proceeded to arbitration, where an award for damages was granted to the mother. The umbrella insurer paid the award, which was neither confirmed nor vacated by a judicial authority.[37]

The umbrella insurer then brought suit against the automobile liability insurer for a declaratory judgment that the automobile liability insurer had a duty to defend and indemnify the daughter. The trial court, applying Connecticut law, granted summary judgment and later damages to the umbrella insurer, but the appellate court reversed.[38] It held that the umbrella insurer did have standing to bring the equitable subrogation action and was not acting as a volunteer when defending and settling the underlying claim.[39] Further, the arbitration award did not need to be confirmed by a judicial authority to support the insurer's equitable subrogation claim.[40] Finally, Florida law governed the validity of the exclusion of the liability coverage for injuries sustained by the named insured and precluded the umbrella insurer's indemnity, and, under Florida law, the automobile insurer had properly excluded coverage for named insureds and resident relatives.[41]

In a de novo review, the Georgia Court of Appeals held, as a matter of first impression, that a policy's liability section defining *an insured* as "any person using your covered auto" was ambiguous and should be strictly construed against the insurer. In *Padgett v. Georgia Farm Bureau Mutual Insurance Co.*,[42] an automobile owner's insurer brought a declaratory judgment action to determine its responsibility to defend claims for negligent entrustment made against the passenger of a vehicle involved in a collision. The driver and passenger were in a car owned and insured by the driver's employer, and both the driver and passenger were on the

36. *Id.* at 82.
37. *Id.* at 77–78.
38. *Id.* at 78.
39. *Id.* at 79.
40. *Id.* at 80.
41. *Id.* (recognizing the principal location of the insured risk was in Florida, not Connecticut).
42. 625 S.E.2d 76 (Ga. Ct. App. 2005).

job at the time of the accident. The trial court found the passenger was not an insured and granted the insurer's motion for summary judgment.[43] The Georgia Court of Appeals reasoned that the word *use* was not defined in the policy and was susceptible to both an active interpretation, such as operating the vehicle, and a passive interpretation, such as employing a vehicle for transportation.[44]

The household exclusion of liability coverage for injury to a resident relative of a permissive user was held invalid by the South Dakota Supreme Court in *MGA Insurance Co., Inc. v. Goodsell*.[45] In *Goodsell*, an automobile insurer sought a declaratory judgment that its household exclusion provided no liability coverage for injuries to a resident relative of a permissive user of the vehicle. The policy's definition of *insured* included persons who had permission from the named insured to use the vehicle, and the exclusion denied coverage to any member of the family of any other insured person residing in the same household as that insured.[46] A South Dakota statute, however, only permitted insurers to exclude coverage of relatives residing with the named insured.[47] The trial court held the exclusion void and in violation of public policy, and the supreme court affirmed. The claimant was clearly not a resident of the named insured's household; rather, he was a resident of the household of a permissive user, so the statute did not apply.[48]

III. DAMAGES

In *Cruz v. Ford Motor Co.*,[49] a Tennessee federal court ruled that Michigan substantive law applied to the question of whether a cause of action for punitive damages could be brought. In *Cruz*, the plaintiffs, residents of Memphis, Tennessee, were passengers injured in a single vehicle rollover accident that occurred in Nuevo Leon, Mexico.[50] The plaintiffs sought punitive damages against Ford with respect to claims of strict liability and negligence.[51] Ford moved for summary judgment on the issue of punitive damages, arguing that Michigan law applied.[52]

43. *Id.* at 77.
44. *Id.* at 78 (noting that the great majority of other jurisdictions have held that a passenger indeed uses a vehicle that he is occupying) (citing Aetna Life Ins. Co. v. Bulaong, 588 A.2d 138, 144–45 (Conn. 1991)).
45. 707 N.W.2d 483 (S.D. 2005).
46. *Id.* at 484–85.
47. *Id.* at 487–88.
48. *Id.* at 488.
49. 435 F. Supp. 2d 701 (W.D. Tenn. 2006).
50. *Id.* at 702.
51. *Id.* at 703.
52. *Id.* (noting that Michigan law does not permit the award of punitive damages).

Tennessee follows the *Restatement (Second) of Torts* conflict of law provision applying the most significant relationship test.[53] Ford's argument rested upon the assertion that virtually all of the alleged misconduct occurred in Michigan.[54] In analyzing the purpose of both Michigan's and Tennessee's punitive damages laws, as well as reviewing all factors that are a part of the most significant relationship test, the court found that Michigan, as the site of the alleged misconduct, had the most significant relationship to the litigation.[55]

The U.S. Court of Appeals for the Sixth Circuit considered whether a $3 billion award against Chrysler for a design defect was excessive in *Clark v. Chrysler Corp.*[56] The compensatory damages verdict for wrongful death resulting from ejection from the vehicle was $471,258.26.[57] Citing *State Farm Mutual Automobile Insurance Co. v. Campbell*,[58] the court ruled that the punitive damages award was constitutionally excessive and that a punitive damages award for approximately twice the amount of the compensatory damages award would comport with due process.[59] Although the finding that punitive damages should be awarded was supported, the plaintiff failed to prove that any of the alternative designs would have actually prevented the death or that Chrysler's conduct was so reprehensible to permit such an enormous award.[60]

IV. EVIDENTIARY ISSUES

In *Edwards v. Ford Motor Co.*,[61] the court refused to apply the doctrine of res ipsa loquitur where "[p]laintiff failed to offer direct evidence or plausible theories in contradiction of defendant's largely uncontradicted explanation," stating the doctrine was "not a sword which blindly carves out a recovery."[62] The plaintiff's allegations arose from the unexpected deployment of an air bag when he closed the driver's door of a vehicle.[63] The court held the plaintiff could not recover for "simply experiencing a strange accident" and was required to present evidence that a defect in fact existed in the air bag.[64]

53. *Id.* (citing Hataway v. McKinley, 830 S.W.2d 53, 59 (Tenn. 1992) (providing that the law of the accident site would properly apply unless another state has a more significant relationship to the litigation)).
54. *Id.* at 704.
55. *Id.* at 704–06.
56. 436 F.3d 594 (6th Cir. 2006).
57. *Id.* at 597.
58. 538 U.S. 408 (2003).
59. *Clark*, 436 F.3d at 600.
60. *Id.* at 603–05.
61. 934 So. 2d 221 (La. Ct. App. 2006).
62. *Id.* at 224.
63. *Id.* at 222.
64. *Id.* at 223–24.

V. PROCEDURAL AND DISCOVERY RULINGS

Whether customer complaints regarding sudden vehicle acceleration were admissible as evidence was addressed by a North Dakota federal court in *Olson v. Ford Motor Co.*[65] Specifically, the court considered the questions of whether the testimony of four other persons should be admitted as evidence of (1) other crimes, wrongs, or acts; (2) brake ineffectiveness, relative dangerousness of the condition, negligence, and defective condition; and (3) manufacturer's notice of the alleged defect.[66] The manufacturer argued no evidence of prior acts should be admitted absent a showing of substantial similarity. The court held that testimony concerning other incidents of sudden vehicle acceleration was not admissible as similar incident evidence; and, in any event, the probative value of the testimony concerning other incidents of sudden vehicle acceleration was substantially outweighed by danger of unfair prejudice.[67]

VI. UNINSURED AND UNDERINSURED MOTORIST COVERAGE ISSUES

In *Coffey v. Moore & Metropolitan Property & Casualty Insurance Co.*,[68] the Alabama Supreme Court held that, as a matter of first impression, a person's status under the Alabama guest statute is determined at the inception of the journey.[69] The primary issue presented was whether the owner/bailee of a vehicle may become a guest under Alabama's guest statute during a road trip in which the owner/bailee and a friend share the driving responsibilities of a rental vehicle.[70]

In *Coffey*, the bailee of a rental car was a passenger of her friend and sleeping in the backseat when an accident occurred.[71] She sued her friend for her injuries, and she also sued her insurer to recover uninsured/underinsured motorist ("UM/UIM") benefits under an automobile liability insurance policy.[72] The trial court entered summary judgment in favor of the friend/driver and insurer under Alabama's guest statute, finding that the bailee's claims were barred because the bailee became a guest either when she allowed her friend to drive or when she fell asleep.[73] The

65. 410 F. Supp. 2d 855 (D.N.D. 2006). Ms. Herbig's firm represented the defendant in this case.
66. *Id.* at 866–68.
67. *Id.*
68. No. 1031268, 2006 WL 1966989 (Ala. July 14, 2006).
69. *Id.* at *2–3 (citing ALA. CODE § 32-1-2 (1975)).
70. *Id.* at *1. The court noted that for purposes of the facts of this case, a person who has rented a vehicle (a bailee) and the owner of a vehicle are the same. *Id.* at *4, n.1.
71. *Id.*
72. *Id.*
73. *Id.*

appellate court reversed, holding that a person's status under the guest statute is determined at the inception of the journey.[74] The opinion sheds light on the purpose of the guest statute, enacted in 1935, and examines the legislature's intention in adopting the act.[75] The court interpreted the intended beneficiary of the statute as the host, not the guest, because only a host can offer a ride to a guest.[76] In this case, the friend/driver was the guest, and the bailee's simple act of changing drivers or falling asleep did not alter her classification.

When Scott Shira, single with no dependents, was killed in the course of his employment by an uninsured motorist's vehicle in Minnesota, his workers' compensation death benefit was paid to the Wisconsin special compensation fund pursuant to statute.[77] *In Teschendorf v. State Farm Insurance Co.*,[78] Shira's parents brought a wrongful death action against the automobile insurer to collect UM benefits without reduction for the workers' compensation death benefit paid to the fund. The court held as a matter of first impression that such a payment to the fund does not entitle the insurer to a reduction in coverage limits.[79] The court concluded that the applicable statute[80] "does not allow an insurer to reduce uninsured motorist policy limits by workers' compensation payments that are not made to or on the behalf of the insured, the insured's heirs, or the insured's estate."[81]

It reasoned that allowing policy limits to be reduced by payments made to the fund would be absurd,[82] and it analyzed statutory interpretation principles, legislative history, and public policy in support of its holding that payment of the workers' compensation death benefit to the fund did not entitle the insurer to a reduction in coverage limits.[83]

74. *Id.* at *3.

75. The court explained that the legislature, in adopting the act, found itself in a situation where the increasing use of automobiles was yielding a rise in cases where generous drivers, having offered rides to guests, later found themselves named as defendants in lawsuits stemming from "close questions of negligence." *Id.* at *2 (citing Blair v. Greene, 22 So. 2d 834, 837 (Ala. 1945)).

76. *Id.*

77. Teschendorf v. State Farm Ins. Co., 717 N.W.2d 258 (Wis. 2006); *see also* Wis. Stat. § 102.49(5)(b) (2002).

78. 717 N.W.2d 258 (Wisc. 2006).

79. *Id.* at 261.

80. Wisc. Stat. § 32.32(5)(i)2 (2002). This statute states, in pertinent part, "A policy may provide that the limits under the policy for uninsured or underinsured motorist coverage for bodily injury or death resulting from any one accident shall be reduced [by] amounts paid or payable under any workers' compensation law." Id.

81. *Teschendorf*, 717 N.W.2d at 261.

82. *Id.* at 267. The court admitted that to understand the "absurdity that flows" from that interpretation requires looking at the background of the Wisconsin Workers' Compensation Act.

83. *Id.* at 261.

In *USAA Casualty Insurance Co. v. Shelton*,[84] "evidence of an insurer's payment of PIP benefits was held not relevant and therefore not admissible to prove the propriety of claimed medical damages"[85] in an action for underinsured motorist benefits. The insureds brought an action against their automobile insurer for UM benefits.[86] The jury returned a verdict in favor of the insureds, and the trial court entered a judgment in the amount of the policy limits.[87] On appeal, the insurer argued the trial was tainted by the court's ruling allowing the insureds to introduce evidence of the insurer's standards for payment of PIP benefits.[88]

This court recognized that "no majority opinion in Florida had previously addressed the issue of whether evidence of a carrier's payment of PIP benefits was admissible as evidence that the medical damages sought were reasonable, necessary, or connected with the accident."[89] The court acknowledged other cases that discussed the differences between PIP and UIM benefits, each an independent type of coverage in an automobile insurance policy.[90] However, the actions taken by either party with regard to either type of coverage do not bind that party with respect to other coverage under an automobile policy.[91] As a result, a carrier's payment of PIP benefits is not relevant, or admissible, to prove that a claimant's claims for UM benefits are "reasonable, necessary, and connected to the accident."[92] The court concluded, however, that the error was harmless in this case.[93]

In *Craley v. State Farm Fire & Casualty Co.*,[94] the insurer for the spouse of Jayneann Craley, a decedent driver, sought a declaratory judgment that it did not owe UM coverage to the decedent because her car was not insured under her spouse's policy, and her spouse had expressly waived stacked benefits. Craley was driving her own car when she was killed and her son and mother-in-law were injured by an uninsured drunk driver.[95] Craley's husband, Randall, and her in-laws brought an action to recover uninsured motorist benefits from State Farm pursuant to a policy for which the decedent was named as the insured.[96] Because the plaintiffs' claims exceeded

84. 932 So. 2d 605 (Fla. Dist. Ct. App. 2006).
85. *Id.* at 607.
86. *Id.* at 606.
87. *Id.*
88. *Id.*
89. *Id.* at 606–07.
90. *Id.* at 607.
91. *Id.*
92. *Id.*
93. *Id.* at 608.
94. 895 A.2d 530 (Pa. 2006).
95. *Id.* at 533.
96. *Id.*

the limits of the decedent's policy, they sought uninsured motorist benefits from Randall's automobile insurance policy.[97] The insurer filed a declaratory judgment action seeking a determination that the claims were excluded pursuant to Randall's waiver of stacking and the household vehicle exclusion included in the policy.[98]

The trial court held that the stacking waiver and household vehicle exclusion clauses were invalid under Pennsylvania law as applied to interpolicy stacking.[99] The appellate court reversed, entering judgment in favor of the insurer, holding that both interpolicy and intrapolicy stacking are permissible based upon the household vehicle exclusion clause.[100] The Pennsylvania Supreme Court affirmed, holding that interpolicy stacking of UM coverage, which entails the stacking of limits available on two or more separate policies, may be waived by consumers,[101] abrogating *State Farm Mutual Automobile Insurance Co. v. Rizzo*,[102] *Nationwide Mutual Insurance Co. v. Harris*,[103] and *In re Insurance Stacking Litigation*.[104] The court did not address, however, the enforceability of the household vehicle exclusion.

In a Washington case, *Sherry v. Financial Indemnity Co.*, an insurer was held not entitled to an offset for PIP payments to the insured until the insured had been fully compensated for his total damages.[105] In *Sherry*, an insured pedestrian injured by an uninsured motorist applied for confirmation of an arbitration award of his uninsured motorist ("UM") claim against his automobile insurer.[106] The arbitrator had determined the total amount of the insured's medical and general damages and that the insured was seventy percent at fault for the accident.[107] However, the arbitrator claimed that he did not have jurisdiction to decide how much of the insured's PIP benefits should be offset against the award.[108] The trial court confirmed the arbitrator's net award and found that the insurer was entitled to an offset for its full PIP payments to the insured, less attorney fees.[109] The Washington Court of Appeals reversed, holding that the insurer was not entitled to an offset until the insured had been fully compensated, and

97. *Id.* Only Randall Craley's claim on behalf of the estate and the decedent's mother-in-law's claim pursuant to Randall's policy remain at issue before the court. *Id.* at n.5.
98. *Id.* at 533.
99. *Id.* at 534–35.
100. *Id.* at 536.
101. *Id.* at 542.
102. 835 A.2d 359 (Pa. Super. Ct. 2003).
103. 826 A.2d 880 (Pa. Super. Ct. 2003).
104. 754 A.2d 702 (Pa. Super. Ct. 2000).
105. 131 P.3d 922 (Wash. Ct. App. 2006).
106. *Id.* at 924.
107. *Id.*
108. *Id.*
109. *Id.* at 360.

the proportionate share of fault did not apply to PIP payments because they are payable regardless of fault.[110]

A mother and her son sought UM coverage in *State Farm Mutual Automobile Insurance Co. v. Reis*[111] for their pain and suffering due to witnessing their husband's/father's death in an Alabama car accident caused by an underinsured driver.[112] The insurer did not dispute that the claimed "damages were independently recoverable [under Alabama's tort law] as part of their own bodily injuries arising from the accident;"[113] however, the carrier contended that the coverage available for these claims was exhausted when it paid the estate the policy limits for bodily injury for "Each Person."[114] The policy provided, in pertinent part:

> Under "Each Person" is the amount of coverage for all damages due to **bodily injury** to one **person.** "**Bodily injury** to one **person**" includes all injury and damages to others resulting from this **bodily injury.** Under "Each Accident" is the total amount of coverage, subject to the amount shown under "Each Person", for all damages due to **bodily injury** to two or more **persons** in the same accident.[115]

The insurer argued that when one insured seeks damages for bodily injuries suffered from an automobile accident and a second insured seeks damages for bodily injuries suffered in the same accident but resulting from the injuries to the first insured, the total amount payable under the policy to the two insureds is the amount of coverage specified for each person.[116] The court analyzed similar cases from numerous other states that evaluated identical policy language, noting that, in the present case, the insurer did not challenge the trial court's determination that the insureds' claims were independent and nonderivative.[117] Similarly, the insurer did not challenge the trial court's determination that the insureds' damages were recoverable as part of their own bodily injuries arising out of the accident.[118] Thus, the Florida court held that the policy was ambiguous such that the greater coverage limit for each accident applied.[119]

The New Mexico Court of Appeals recently held that where a passenger is injured by a third-party tortfeasor who is entirely at fault and the

110. *Id.* at 365, 371. The court noted that when discussing the insured's recovery of PIP benefits "regardless of the insured's fault," it is not addressing excludable acts of the insured, such as intentional acts like racing or speed contests. *Id.* at 371, n.3.
111. 926 So. 2d 415 (Fla. Dist. Ct. App. 2006).
112. *Id.* at 416.
113. *Id.* at 418.
114. *Id.*
115. *Id.* at 417.
116. *Id.*
117. *Id.* at 419.
118. *Id.* at 421.
119. *Id.*

damages exceed the amount of available UIM coverage from both the primary Class I insurer and the secondary Class I insurer, the primary insurer is required to pay first and is entitled to the statutory liability offset.[120] In *State Farm Mutual Automobile Insurance Co. v. Jones*, Mary Beth Jones, a passenger of Kathy Williams, was injured when the vehicle collided with a car driven by Ethel Dorand.[121] Dorand was solely responsible for the accident.[122] All three individuals involved in the accident were insured.[123] Jones settled her liability claim with Dorand's insurer for the policy limits of $100,000[124] and proceeded to make claims against State Farm and Twin City for policy limits of the UIM benefits.[125] The parties did not dispute that the passenger's damages exceeded the amount of UIM coverage available from the sum of the tortfeasor's insurance, the driver's primary Class II insurance, and the passenger's own secondary Class I insurance (i.e., Jones's damages exceeded the aggregate UIM coverage of $600,000).[126] Nonetheless, the driver's insurer sought a declaratory judgment that it owed no UIM coverage for Jones's injuries because she recovered liability coverage limits from a third-party tortfeasor and because she had her own policy with UIM coverage.[127] The driver's insurer contended that it was entitled to a contractual offset and that the passenger's insurer was entitled to the statutory offset.[128] The trial court entered summary judgment for the driver's insurer, finding that its coverage was completely offset by the tortfeasor's coverage, thus effectively reducing the liability of the driver's insurer to zero.[129]

The appellate court affirmed, addressing the issue of how the statutory offset for liability payments received from a third-party tortfeasor is applied when an injured passenger stacks Class II primary coverage and Class I secondary UIM coverage, and the amount of damages exceeds the available aggregate coverage.[130] It held that the driver's primary insurance should be the first to receive the benefit of the statutory offset

120. State Farm Mut. Auto. Ins. Co. v. Jones, 135 P.3d 1277 (N.M. Ct. App. 2006).
121. *Id.* at 1278.
122. *Id.*
123. *Id.* Dorand had automobile liability insurance limits of $100,000; Williams had UM coverage through State Farm with policy limits of $100,000; Jones, the passenger, had UM coverage with policy limits of $500,000 through Twin City Fire Insurance Co. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 1278. A Class II insured is an insured by virtue of presence in an insured vehicle. *Id.* at 1280 (citing Konnick v. Farmers Ins. Co., 703 P.2d 889, 892 (N.M. 1985)). A Class I insured is the named insured on the policy, the spouse, and those relatives who reside in the household. *Id*. at 1280.
127. *Id.* at 1279.
128. *Id.*
139. *Id.*
130. *Id.*

up to the limits of its coverage under the facts of this case.[131] The insurer closest to the risk, i.e., the insurer of the insured vehicle involved in the accident, is primary and bears the greatest risk.[132] The driver's insurer, however, was not entitled to the contractual offset because it would violate public policy.[133] In this case, the injured insured collected liability payments from a third-party tortfeasor, not the driver's Class II coverage.[134] The injured insured was not attempting to collect both liability and UIM coverage from a Class II insurer.[135] Therefore, allowing the driver's insurer to claim a contractual offset while also allowing the passenger's insurer a statutory offset would result in the injured passenger receiving less than the total UIM coverage purchased for her benefit.[136]

In *Rush v. Jostock*,[137] the Minnesota Court of Appeals addressed the issue of whether a rear-ended motorist was entitled to offset a reduction in damages award by the collateral source amounts paid for personal injury protection coverage.[138] Minnesota's collateral source statute provides that when damages include an award to compensate the plaintiff for losses, the court shall offset any reduction in the award by the amounts paid by the plaintiff for the two-year period immediately before the accrual of the action to secure the right to the collateral source.[139] The parties did not dispute the propriety of including sums received from automobile or liability insurance providing health or income disability benefits as collateral source benefits to be deducted from a damages award; thus, the court's inquiry turned instead on whether the offset requirement in subdivision 3(a) of the statute included insurance premiums for liability, collision, and comprehensive or if it would be limited only to premiums paid to provide health or income disability benefits.[140] The court looked to legislative history, Minnesota case law, and finally case law of other jurisdictions to conclude that the collateral source statute excluded an offset for premiums paid to secure liability, collision, and/or comprehensive coverage.[141] It reasoned that allowing an offset for such premiums would thwart the purpose of the statute and allow the plaintiff a

131. *Id.* at 1282.
132. *Id.*
133. *Id.* at 1283.
134. *Id.* at 1284 (distinguishing Mountain States Mut. Cas. Co. v. Martinez, 848 P.2d 527 (N.M. 1993); Samora v. State Farm Mut. Auto. Ins. Co., 892 P.2d 600 (N.M. 1995)).
135. *Id.* at 1284.
136. *Id.* at 1284–85.
137. 710 N.W.2d 570 (Minn. Ct. App. 2006).
138. *Id.* at 579–83.
139. Minn. Stat. § 548.36, subdivs. 2(2), 3 (2002).
140. *Rush*, 710 N.W.2d at 579.
141. *Id.* at 581.

windfall.[142] Thus, the offset must be limited to the premiums attributable to the plaintiff's PIP coverage.[143]

In early 2006, a Florida appellate court addressed the issue of when a driver is occupying a vehicle so as to be entitled to UM benefits. In *Auto-Owners Insurance Co. v. Above All Roofing, LLC*,[144] the plaintiff was involved in a collision while driving his employer's van.[145] He exited the vehicle, went across the street to exchange information with the other driver, and was struck by another car.[146] He sought UM benefits under his employer's policy for this incident.[147] The insurer denied the claim, concluding that the employee was a pedestrian when injured and was not occupying or getting into or out of the vehicle.[148] The employee claimed that he was injured while operating the vehicle because he was injured while fulfilling his statutory obligations as a result of a car accident.[149]

The Florida appellate court reversed the trial court and held for the insurer, reasoning that because the employee was not a first-named insured, he was subject to the provision affording him UM coverage only "while occupying or getting into or out of a covered vehicle."[150] Only first-named insureds were entitled to UM coverage for injuries suffered as a pedestrian.[151] Concluding that the plaintiff was not covered as a pedestrian, nor was he physically occupying or getting into or out of the car when he was injured, the court found there was no UM coverage under the policy.[152]

In *Pantelis v. Erie Insurance Exchange*,[153] a Pennsylvania court addressed "whether an insurer's acknowledgement of 'reasonable proof' that first party benefits are due precludes the insurer from later disputing whether

142. *Id.*
143. *Id.*
144. 924 So. 2d 842 (Fla. Dist. Ct. App. 2006).
145. *Id.* at 843.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*; *see also* Fla. Stat. Ann. § 316.027 (West 2002) (stating, in pertinent part, that the driver of a vehicle involved in a crash resulting in injuries of any person must stop the vehicle immediately as close to the accident as possible and remain at the scene until he has fulfilled the requirements of Fla. Stat. Ann. § 316.062 (West 2002)); Fla. Stat. Ann. § 316.062 (West 2002) (stating, in pertinent part, that the driver of any vehicle involved in an accident resulting in injury has a duty to give information, e.g., name, address, registration number of the vehicle, license, etc., to the driver of the other vehicle and to the police officer at the scene of the accident).
150. *Auto-Owners*, 924 So. 2d at 843–44. The UM provision stated that the insurer would "pay damages to any person legally entitled to recover from the owner or operator of an uninsured automobile because of bodily injury sustained while occupying or getting into or out of an automobile that is covered by [the liability coverage] of the policy." *Id.* at 844.
151. *Id.*
152. *Id.*
153. 890 A.2d 1063 (Pa. 2006).

the insured is 'legally entitled to recover' third party benefits pursuant to state statute."[154] In *Pantelis*, the insured received first-party medical benefits from her insurer for two separate automobile accidents that occurred several months apart.[155] After the second accident, the insured filed an additional claim for UM benefits under the same policy.[156] The insurer denied coverage, and the case went to arbitration.[157] The arbitrators allowed the insurer to pursue a causation defense despite prior payment of first-party benefits from the second accident, and they refused to allow the insured to introduce evidence of the insurer's payment of first-party benefits to counter its causation defense.[158]

The insured filed petition to modify or correct the arbitration award, but the trial court refused to set it aside.[159] The Pennsylvania Superior Court affirmed, holding as a matter of first impression that the carrier's payment of first-party benefits under medical payments coverage did not preclude it from later denying UM benefits based on lack of causation.[160] The court, upon reviewing the applicable statutes and case law, rationalized that the insurer's payment of first-party benefits did not, in and of itself, constitute a binding admission of causation.[161] Specifically, payments of UM/UIM claims are subject to a different analysis than payments of first-party benefits.[162] Although case law indicated that the insurer owed a fiduciary duty to the insured in the UM and first-party benefit context, it did not preclude denial of UM benefits even after first-party benefits are paid.[163] The insured still had the right to challenge the denial of benefits by proving something more than the insurer's payment of the first-party benefits.[164]

In *State Farm Mutual Automobile Insurance Co. v. Hartzog*,[165] a Florida court considered an agreement in which a purchaser was to buy a truck by paying the owner in installments.[166] The purchaser took delivery of the truck but did not insure it.[167] The original owner kept the title in his own name and continued to maintain insurance on the truck.[168] After the purchaser was involved in an accident, she sought PIP and UM coverage

154. *Id.* at 1067.
155. *Id.* at 1064.
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 1064–65.
160. *Id.* at 1067–68.
161. *Id.* at 1068.
162. *Id.*
163. *Id.*
164. *Id.*
165. 917 So. 2d 363 (Fla. Dist. Ct. App. 2005).
166. *Id.* at 364.
167. *Id.*
168. *Id.*

under the original owner's policy.[169] The insurer denied coverage, arguing that the claimant was not the owner of the vehicle.[170]

The trial court found for the insurer, holding that the claimant did not have a legal right to exclusive possession of the vehicle because she had not finished paying for it and was not named on the title.[171] The appellate court stated, however, that "the name on the title was not the litmus test for determining who owned a vehicle for insurance purposes."[172] Rather, "beneficial ownership is determined by the overt acts of the buyer and seller at the time of the agreement."[173] Because the claimant took exclusive possession and control of the vehicle upon making the purchase agreement with the prior owner and made installments on the truck before and after the accident, she became the beneficial owner.[174] No matter what the legal title states, exclusive possession and control are the key factors in determining the beneficial ownership of a vehicle.[175]

Ironically, the insurer was held not liable for PIP benefits under the claimant's theory that she was using the truck with the owner's consent because she, in fact, had exclusive possession and control of the vehicle.[176] Additionally, she was not covered as an owner because neither the policy in question nor Florida law provides no-fault benefits to a person who owns a vehicle and chooses not to obtain no-fault benefits.[177] Finally, the claimant could not recover UM benefits because such coverage is "provided for the protection of persons insured under a given policy, and it attaches to the insured person, not the insured vehicle."[178]

In *Robinson v. Gailno*,[179] the Connecticut Supreme Court decided whether the exhaustion requirement in the General Statutes of Connecticut governing insurance required a claimant to obtain full UM limits from her own policy before recovering individually or through the Connecticut Insurance Guaranty Association ("IGA") against a tortfeasor who was uninsured as a result of his insurer's insolvency.[180] The accident victim sued for personal injuries, the alleged tortfeasor's automobile liability insurance

169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* at 365.
173. *Id.* at 364.
174. *Id.* at 365.
175. *Id.*; *see also* Cooney v. Jacksonville Transp. Auth., 530 So. 2d 421, 422 (Fla. Dist. Ct. App. 1988); McCall v. Garland, 371 So. 2d 1080 (Fla. Dist. Ct. App. 1979).
176. *Hartzog*, 917 So. 2d at 365.
177. *Id.*; Fla. Stat. Ann. § 627.736(4)(d)(4)(a) (West 2004).
178. *Hartzog*, 917 So. 2d at 365; *see also* Fla. Stat. Ann. § 627.727(1) (West 2004).
179. 880 A.2d 127 (Conn. 2005).
180. *Id.* at 129 (citing Conn. Gen. Stat. § 38a-845(1) (2003) ("Any person having a claim against an insurer under any provision in an insurance policy . . . shall exhaust first his rights under such policy.")).

company became insolvent, and the IGA took over his defense.[181] The trial court granted the tortfeasor's motion for directed verdict because the plaintiff, having settled with her carrier for less than the policy limits, had failed to exhaust her UM coverage.[182] The Connecticut Supreme Court reviewed the legislative history of the statute, surveyed case law from other jurisdictions across the country, and reversed.[183] It adopted the middle-ground approach, holding that the failure to obtain full UM limits did not preclude recovery from the IGA or the alleged tortfeasor, but recovery from either of those sources would be reduced by the full amount of the UM policy limits.[184]

VII. NATIONAL AUTOMOBILE CLASS ACTIONS

In a national automobile class action suit venued in Florida, the plaintiff purchased an optional supplemental rental liability insurance excess policy from the defendant insurance company when she rented a car in Miami.[185] She was seriously injured in an accident involving the rental car and brought a class action complaint seeking a declaratory judgment that she and the putative class members were entitled to UM coverage. Her complaint was based on a Florida statute that requires an insurer issuing an excess policy to make available, as part of the policy application and at the written request of the insured, limits of uninsured motorist coverage up to the bodily injury liability limits contained in the policy or $1 million, whichever is less.[186] The trial court found in favor of the insurer. The appellate court reversed and entered a mandate to the trial court to hold the insurer liable to the plaintiff for UM coverage.[187]

On remand, the plaintiff filed a motion for class certification, but the trial court denied the motion based on lack of standing. The appellate court, on de novo review, came to the opposite conclusion, reasoning that because she had a pending claim for damages and a pending determination of the insurer's liability, she satisfied the case or controversy requirement.[188] The court did not address the plaintiff's capacity to represent the class, however, explaining that whether a plaintiff is a proper class representative or whether similarity of claims exists among class members is not a standing analysis

181. *Id.* at 129–30.
182. *Id.* at 130.
183. *Id.* at 132–34.
184. *Id.* at 136–37.
185. Ferreiro v. Phila. Indem. Ins. Co., 928 So. 2d 374 (Fla. Dist. Ct. App. 2006).
186. Fla. Stat. § 627.727(2) (1997).
187. *Ferreiro*, 928 So. 2d at 376 (citing Ferreiro v. Phila. Indem. Ins. Co., 816 So. 2d 140 (Fla. Dist. Ct. App. 2002)).
188. *Id.* at 376–77.

but rather entails the application of the class certification rules requiring numerosity, commonality, typicality, and adequacy of representation after standing has been determined.[189]

In *Allgood v. Meridian Security Insurance Co.*,[190] an automobile insurance policy providing coverage for the lesser of the actual cash value or the amount necessary to repair or replace with property of like kind and quality was held to not obligate the insurer to pay for the diminished value of a car after it was repaired. After the insured's automobile was damaged, the insurer paid to repair it under collision coverage but did not pay for any diminution of value to the vehicle as a result of the damage.[191] The insured brought a class action against the automobile insurer seeking damages and a declaration that diminution in value of the repaired car was compensable. Because the word *loss* was undefined in the policy and other jurisdictions had interpreted it to include diminution, the insured argued that the section of the collision coverage stating "[w]e will pay for direct and accidental loss . . ." included diminution of value.[192] The insurer argued diminution was not covered, citing the following policy provision: "Our limit of liability for loss will be the lesser of the: 1. Actual cash value of the . . . damaged property; or 2. Amount necessary to repair or replace the property with other property of like kind and quality. . . ."[193]

The trial court found the policy unambiguous and dismissed the suit for failure to state a claim. The Indiana appellate court reversed, holding that the phrase *like kind and quality* included restoration of appearance, function, and value.[194] The Indiana Supreme Court, interpreting the contract as a question of law, applied usual principles of policy construction and held that the limit of liability was unambiguous and barred the insured's claim.[195] It reasoned that the phrase *like kind and quality* applied only to replacement, not to repairs, and that the verb *restore* did not appear anywhere in the policy.[196] The court further explained that jurisdictions reaching the opposite conclusion did not establish conclusively that the policy was ambiguous or that they had read the policy correctly.[197]

189. *Id.*
190. 836 N.E.2d 243 (Ind. 2005).
191. *Id.* at 245. The policy did not specifically provide coverage for diminution of value.
192. *Id.* at 246; *see also* State Farm Mut. Auto. Ins. Co. v. Mabry, 556 S.E.2d 114, 120–21 (Ga. 2001); Hyden v. Farmers Ins. Exch., 20 P.3d 1222, 1225 (Colo. Ct. App. 2000); MFA Ins. Co. v. Citizens Nat'l Bank, 545 S.W.2d 70, 71 (Ark. 1976); Venable v. Import Volkswagen, Inc., 519 P.2d 667, 673 (Kan. 1974).
193. *Allgood*, 836 N.E.2d at 246.
194. *Id.* at 245.
195. *Id.* at 247.
196. *Id.* at 248.
197. *Id.*

VIII. AUTOMOTIVE EXPERT WITNESSES

In a review of expert testimony, a Georgia court addressed whether a plaintiff's expert witness, who was proposing to testify that the plaintiff's air bag should have deployed, should be permitted to give expert testimony under *Daubert v. Merrell Dow Pharmaceuticals*.[198] The plaintiff's expert was an automotive mechanic with some training on air bag systems; however, during his deposition, he was unable to answer basic engineering questions regarding the design of the vehicle.[199] Based upon his testimony at both his deposition and the *Daubert* hearing, the court ruled that his testimony should be excluded because his methodology was unclear; the scientific basis for his opinions was not sufficient; he did not know basic air bag design principles; and he specifically testified that he did not have the education, training, or experience to determine the existence of a design defect.[200]

In *Williams v. Michelin North America, Inc.*,[201] a Florida federal court dealt with the reliability and admissibility of expert testimony regarding tire tread separation countermeasures and lack of a printed tire expiration date.[202] Michelin argued that the plaintiff's expert witness did not have adequate background and experience to testify about the tire's design and, in addition, that his opinions were not based upon a reliable foundation.[203] Applying *Daubert*, the court ruled that the effectiveness of the proposed countermeasures was outside the scope of the expert's expertise and, therefore, must be excluded.[204] In addition, the court ruled that the expert's testimony regarding expiration dates lacked scientific support and was beyond his expertise.[205]

The plaintiff in *Ruminer v. General Motors Corp.*[206] offered the expert testimony of Martha Bidez, a biomechanics expert, to opine that he was belted at the time of the accident and that he was injured as the result of a late lockup and spooling of his safety belt.[207] The court determined, however, that although Dr. Bidez's testimony may prove that the safety

198. Cadwell v. Gen. Motors Corp., No. 5:04-CV-72 (WDO), 2005 WL 2811755, at *1 (M.D. Ga. Oct. 27, 2005) (citing Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993) (setting forth factors to be considered in determining whether an expert's testimony is reliable and admissible)).

199. *Id.* at *2.

200. *Id.* at *3.

201. 381 F. Supp. 2d 1351 (M.D. Fla. 2005).

202. *Id.* at 1353, 1357–59.

203. *Id.* at 1356.

204. *Id.* at 1362. This ruling was based upon the fact that the expert's background was in materials science, engineering, and metallurgy, all relevant to the manufacturing process but not the design process. *Id.* at 1361.

205. *Id.* at 1362.

206. No. 4:03-CV-00349 GTE, 2006 WL 287945, at *1 (E.D. Ark. Feb. 6, 2006).

207. *Id.* at *3.

belt system did not restrain the plaintiff and that the plaintiff was injured, she simply could not provide any testimony regarding any specific defect in the safety belt system.[208] Specifically, during her deposition, Dr. Bidez was asked whether there was any "scientific evidence on the seat belt or the seat belt system . . . that [she] could point to, that forms the basis for [any particular defect or cause] having occurred in this accident." Her response was no.[209] Therefore, the court found her testimony was unreliable and thus inadmissible.[210]

208. *Id.* The plaintiff proposed to have Dr. Bidez testify regarding numerous possible causes for the retractor failure. In her deposition, however, Bidez merely stated that she could not "rule out that there are not both design and manufacturing defects." In addition, she testified that she had never disassembled and inspected the retractor itself in an attempt to determine what possible cause there may be for the retractor failure. Instead, she relied simply upon the fact that the retractor failed to lock up as her basis that the safety belt system was defective. *Id.* at *3–4. The court, however, found that the internal documents relied upon by Bidez for her opinion that the system was defective also discussed a number of additional, nondefect-related causes for this failure. *Id.* at *5.

209. *Id.* at *6.

210. *Id.* at *13.