

Trial Law TIPS

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TIP #83

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No Need to Prove Permanent Injury in Uninsured Motorist Cases Involving Phantom Vehicle or Any Case Where Tortfeasor Not Shown to Have PIP Coverage

Let's see a show of hands out there. How many believe that the plaintiff in an uninsured motorist's case *always* must sustain a permanent injury (or otherwise exceed the No-Fault threshold) to recover non-economic damages? Most of you have raised your hands, but I see a few of you with no hands up; is that because you know the answer, or because you did not understand the question? All kidding aside, I will bet that most trial lawyers believe there is no exception to the permanent injury requirement. Some of you, on the other hand, may be aware of the exception where the uninsured tortfeasor lacks PIP coverage on himself or herself. Based on that exception, here is an argument that you *never* have to

sustain or demonstrate a permanent injury where the tortfeasor was driving a “phantom vehicle.” This argument also may entitle you to a directed verdict on the threshold defense even where the tortfeasor is identified.

Those of us handling smaller auto cases in which the no-fault threshold is an issue all need to start taking the position that, under Florida law, the Plaintiff need not ever sustain a “permanent injury” (or other injury exceeding the threshold) in order to recover non-economic damages where the tortfeasor who caused the collision was operating a phantom vehicle and whose identity is unknown. We also need to start moving for a directed verdict on the threshold issue in every UM case (even those in which the tortfeasor comes to trial and testifies) where the defense fails to prove that the at-fault driver had PIP insurance. That is because the burden of proving the applicability of the threshold defense is on the UM carrier, not the plaintiff.

To begin with, in the ordinary car crash case against a negligent motorist, it is the law in Florida that the tortfeasor’s failure to have PIP insurance obviates the need for the plaintiff to sustain a permanent injury in order to recover damages for pain and suffering and other non-economic damages. That is because the threshold defense is available only to “[e]very owner, registrant, operator, or occupant of a motor vehicle with respect to which *security has been provided* as required by ss. 627.730-627.7405” § 627.737(1), Fla. Stat. (Emphasis added). In other words, if the defendant has no PIP, the plaintiff need not sustain a threshold injury.

Most of us never get to the point in a regular auto case of dealing with the consequences of the tortfeasor having no PIP insurance because, if the tortfeasor had no PIP, he or she would also not have any BI coverage. However, the same rule applies in UM cases: unless the tortfeasor had PIP, the plaintiff need not sustain a threshold injury to recover for pain and suffering. In *Dauksis v. State Farm Mut. Auto. Ins. Co.*, 623 So. 2d 425 (Fla. 1993), the Supreme Court of Florida held

that—where the plaintiff pursuing a UM claim against his insurer had been injured by a tortfeasor who did not have PIP insurance, which was “the required security necessary to claim tort exemption under section 627.737(2), Florida Statutes (1987), it was unnecessary for him to meet the permanency threshold of that sub-section.” *Id.* at 455.

The question then becomes whether the Plaintiff has the burden to prove that the uninsured driver did not have PIP, or whether the UM carrier has the burden to prove that the uninsured driver *did* have PIP. First we need to demonstrate to the court that the Defendant undertook the burden of proof because the UM carrier pled the No-Fault threshold as an affirmative defense in its answer to the complaint. “The defendant has the burden of proving an affirmative defense.” *Custer Med. Ctr v. United Auto. Ins. Co.*, 62 So. 3d 1086, 1094 (Fla. 2010).

The burden of proof issue was addressed by the Fourth District in *Kahle v. Prewitt*, 673 So. 2d 121 (Fla. 4th DCA 1996). That was a case arising out of a motor vehicle collision in which the defendants “asserted a no-fault threshold defense pursuant to section 627.737, Florida Statutes. “At the conclusion of the case, the trial court observed that no evidence had been presented on the issue on whether appellants had the required security to qualify for the exemption provided by section 627.737(1), and said it would not give the threshold instructions to the jury.” *Id.* at 121. The Defendant sought leave of court to reopen their case to present evidence that the tortfeasor had PIP insurance, but the trial court denied that motion.

In reversing the judgment for the Plaintiff and holding that the Defendant should have been allowed to present evidence of the tortfeasor’s PIP coverage in order to shift the burden to the Plaintiff to prove a permanent injury, the court clearly noted that it was the Defendant’s burden to demonstrate the existence of the tortfeasor’s PIP insurance:

It was an abuse of discretion for the trial court not to provide Appellants the opportunity to satisfy the trial court that they had met the statutory requirements, notwithstanding Appellants' failure to eliminate the non-issue of coverage earlier in the trial court's mind. The parties stipulated prior to trial that one of the issues was "no-fault threshold." ***This defense does not become material until it is shown that the tortfeasor had the required security.***

Id. at 122(emphasis added). Thus, the Defendant cannot rely upon the permanent injury no fault threshold unless and until "it is shown that the tortfeasor had the required security." That showing must be made by the defense.

Note that *Kahle* was not a UM case, but that distinction should not alter the fact that, even in a UM case, the insurance company must prove that the tortfeasor had the required PIP insurance in order to benefit from the No-Fault threshold. That is because the UM carrier "stands in the shoes" of the tortfeasor:

When an insured seeks to recover uninsured motorist benefits from its insurance carrier, the insured's UM carrier stands in the shoes of the uninsured motorist. *See State Farm Mut. Auto. Ins. Co. v. Revuelta*, 901 So. 2d 377, 380 (Fla. 3d DCA 2005) (explaining that uninsured motorist carrier "stand[s] in the shoes of the uninsured motorist"); *Mayo v. Capital Assurance Co.*, 845 So. 2d 275, 276 (Fla. 3d DCA 2003) (explaining that uninsured motorist carrier stood in the shoes of the driver of a "phantom" vehicle).

Diaz-Hernandez v. State Farm Fire & Cas. Co., 19 So. 3d 996, 999 (Fla. 3d 2009).

The Defendants in a phantom vehicle case never will be about to demonstrate that the phantom vehicle operator had the security required to provide immunity from liability from non-economic damages in the absence of permanent injury under Florida law. Similarly, in other UM cases the defense may overlook the need to prove that the uninsured driver had PIP. Therefore, your client will be entitled to recover the full amount of non-economic damages without having to satisfy any threshold requirement.

You may not get a directed verdict on the issue the first time you move for one. However, if at first you don't succeed
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Keep Tryin!

Roy