2009
CASE LAW SUMMARY

Automobile Liability

Equitable Subrogation

State Farm v. Johnson, 18 So.3d 1099 (Fla. 2d DCA 2009)

Defendant and State Farm's insured were involved in a motor vehicle accident in June, 2000. In January, 2003, State Farm paid its insured over $40,000 in UM benefits. In October, 2005, State Farm sued the defendant tortfeasor seeking reimbursement for the monies it had paid to its insured. The defendant tortfeasor moved for summary judgment arguing that State Farm's claim was for contractual subrogation as opposed to equitable subrogation and therefore its claim was barred by the statute of limitations. The trial court granted the motion.

The Second District reversed finding that this was a cause of action for equitable subrogation because State Farm made a payment to protect its own interest; State Farm did not act as a volunteer; State Farm was not primarily liable for the debt; State Farm paid off the entire debt; and subrogation would not work any injustice to the rights of a third party. As such, because State Farm filed its claim within four years of paying the claim, the trial court's summary judgment was reversed.

Graves Amendment

Karling v. Budget Rent A Car System, Inc., 2 So. 3d 356 (Fla. 5th DCA 2009)

Following the issuance of the Court's opinion in this case, the appellant, Christopher Karling, moved for certification of a question of great public importance. The Court granted the motion and certified the following question to the Florida Supreme Court: Does the Graves Amendment 49 U.S.C. §30106, preempt section 324.021(9)(b)(2), Florida Statutes (2007). This is the same question recently certified by the Second District in *West v. Enterprise Leasing Company*, 997 So. 2d 1196 (Fla. 2d DCA 2008), and by the Fourth District in *Vargas v. Enterprise Leasing Company*, 993 So. 2d 614 (Fla.4th DCA 2008). On June 3, 2009, the Florida Supreme Court accepted jurisdiction on the *Vargas* matter. Oral arguments are scheduled for March 1, 2010.

Insurance – Leased Vehicles

Rosado v. Daimler Chrysler Financial Services, 1 So. 3d 1200 (Fla. 2d DCA 2009)

Plaintiff sought damages for injuries sustained when he was struck by a vehicle obtained from Daimler Chrysler under a long-term lease. The plaintiff claimed that Daimler Chrysler was liable because it failed to insure that the vehicle was covered by insurance limits pursuant to Fla. Stat. §324.021(9)(b)(1). The trial court entered summary judgment in favor of Daimler Chrysler finding that this statute was preempted by the Graves Amendment.

The Second District held that the Graves Amendment preempted this statute, but certified this question to the Florida Supreme Court. They further stated that "we recognize, as the dissent argues, that the uniqueness of Florida's Dangerous Instrumentality Doctrine makes the application of the Graves Amendment more questionable in Florida."

Permanency

Fell v. Carlin, 6 So. 3d 119 (Fla. 2d DCA 2009)

Fell appealed a final judgment entered against him in a personal injury action and contended that the trial court should have directed a verdict in his favor on the issues as to whether he sustained a permanent injury caused by the subject motor vehicle accident. It was noted that every physician who testified at trial, including the physician who testified for the defense, opined that Fell had sustained a permanent injury. The Second District held that the appellant's argument overlooked the fact that a jury may reject even uncontroverted expert medical testimony provided they have a reasonable basis to do so, such as when there is conflicting lay testimony. In the present case, the medical opinions regarding Fell's injuries were based upon his subjective complaints of pain, and accordingly, the validity of those opinions depended on Fell's candor reporting his complaints. Under these circumstances, if the jury has a reasonable basis to conclude that Fell was not candid with his doctors, they also had a basis to reject their opinions regarding whether he had sustained a permanent injury. The court concluded that the trial court correctly denied Fell's motion for a directed verdict and allowed the issue to go to the jury.

PIP

Trumbull Insurance Company v. Wolentarski, 2 So.3d 1050 (Fla. 3d DCA 2009)

Plaintiff sued the School Board for injuries sustained when a school bus struck his vehicle and also sued his insurer for uninsured motorist coverage. No mention was made in the complaint of an entitlement to or a denial of PIP benefits. Six months after the action commenced, the plaintiff sought leave to amend his complaint to add a claim against his insurance company for payment of PIP benefits and also sought attorney's fees. Thereafter, most of the discovery was directed to the School Board's defenses.

Subsequent thereto, the case was settled against the School Board and also as to the insurance company on the uninsured motorist claim. Two months later, they resolved the remaining PIP claim. The trial court's award of almost $60,000 in attorney's fees was reversed by the Third District. First, they found that the late filed amendment to add a PIP claim did not allow for relation back of attorney's fees going back to the beginning of the action. Second, plaintiff's counsel did not keep contemporaneous time records. His testimony was found to be little more than "rank speculation" which would not support a fee award. In fact, his proof was described as being "no more than a guesstimate" and therefore was legally insufficient.

Gables Insurance Recovery, Inc. v. Seminole Cas. Ins. Co., 10 So. 3d 1106 (Fla. 3d DCA 2009)

Gables Insurance Recovery, Inc., sought second tier certiorari review of a final summary judgment in Seminole's favor. Following a motor vehicle accident of February 2006 the insured, Maria Ovalle, received medical care from Atlantic Medical Specialty. An executed assignment of benefits in Atlantic's favor was provided. Thereafter, Seminole paid Atlantic benefits for those medical services provided to Ovalle. However, when Seminole stopped reimbursing Atlantic for Ovalle's care, Atlantic executed an assignment of benefits in favor of Gables Insurance Recovery, Inc., a billing agency.

Following suit, Seminole moved for summary judgment claiming that the PIP benefits are not payable to third parties who do not perform medical services, such as Gables Insurance Recovery. The decision on review was quashed and, the matter remanded, because the court determined that if the assignment to Gables

was valid, despite being a billing agency, Gables would be standing in the shoes of Atlantic and have the same rights and status as the assignor.
United Auto Ins. Co. v. A 1st Choice Healthcare Systems, 21 So. 3d 124 (Fla. 3d DCA 2009)

In this second tier certiorari case, United sought the court's jurisdiction to quash a per curiam affirmance of a county court final judgment, finding that the insured had a proper right of action under the Personal Injury Protection provisions of Florida Motor Vehicle No-Fault Law §627.736, against an insurer who failed to provide its insured an itemized specification of each item that the insured had reduced, omitted or declined to pay, demonstrated by the parties in this case as an "Explanation of Benefits" (EOB), within (30) days after the insurer is furnished written notice of the fact of a covered loss.

The Court held that under the plain language of the statute, a response is required from the insurer only when an insurer either pays a portion of a claim or rejects a claim. Then, at the time of the partial payment or rejection, the insurer shall provide an itemized specification of each item that the insurer had reduced, omitted or declined to pay. The Court added that it is clear that there is neither a requirement, nor a deadline for personal injury protection insurers to respond to a request for payment. In fact, subsection 4(b) does not preclude an insurer from challenging the submitted claim after the (30) day time period, or limit the ability of the insured to obtain and submit proof after the (30) day time period, that the treatment was not reasonable, necessary or related. On the other hand, if the payments are not made within this timeframe, the insured may be entitled by law to an award of interest on the overdue payment and potentially an award of attorney's fees.

Central Magnetic Imaging v. State Farm Fire, 22 So.3d 782 (Fla. 4th DCA 2009)

An insurer is not required to obtain an independent medical examination before denying a PIP claim. Rather, a valid report denying a PIP claim may be based upon a physician's review of treatment records of the insured.

Shaw v. State Farm Fire and Cas. Co., 34 FLW D2189 (Fla. 5th DCA 10/23/09)

Following a motor vehicle accident, the injured driver received medical care from the appellant, David Shaw, D.C. He executed two assignment forms assigning his no fault benefits and his causes of action to recover those benefits to the appellants. When the appellant presented a claim to State Farm for the services

rendered to the injured party, State Farm requested that the appellant appear for an EUO (examination under oath) pursuant to a clause found in the insurance policy.

Apparently State Farm was requesting the EUO to investigate suspected fraudulent claims made by the appellants. The appellants refused to attend the EUO and State farm refused payment. In their Answer to the complaint, State Farm claimed appellants failed to comply with the conditions precedent to make a claim for policy benefits. The trial court held that the EUO provision is a condition precedent and that the assignee must comply in order to make a claim and file suit. The trial court accordingly granted summary judgment in favor of the insurer.

In affirming the trial court's decision, the *Shaw* court noted that courts have consistently held an EUO provision in insurance policies is a valid condition and must be complied with in order to maintain an action to recover policy benefits. State Farm's policy, in regards to who must give an EUO, states, "Any person or organization making a claim or seeking payment." They contrasted this with other cases where the policy states, "A person who suffers a bodily injury and makes a claim under this policy." As the rights of the injured party were transferred in whole to the appellant, the appellant was likewise required to submit to an EUO prior to having benefits paid.

United Automobile Ins. Co. v. Professional Medical Group, Inc., 34 FLW D2500A (Fla. 3d DCA 12/2/09)

United petitions for a second tier certiorari review of a circuit court appellate division's per curiam affirmance of a final summary judgment entered in favor of the respondent. On November 6, 2006, PMG filed their complaint seeking unpaid benefits. As affirmative defenses, United claimed that payment was not required because PMG did not provide United with proper written notice of a covered loss where the initial set of bills did not include a disclosure and acknowledgement form (D&A form), as described in Section 627.736(5)(e), Florida Statutes, and that box 31 of the CMS 1500 claim form did not contain the physician's license number as required by Section 627.736(5)(d), Florida Statutes.

The *PMG* court noted that this statute mandates that statements or bills must be properly completed in their entirety as to material provisions, with all relevant information being provided therein. "Properly completed" is defined, as providing truthful, substantially complete and substantially accurate responses. It was determined that United in fact knew who the physician was who submitted the

bills, despite the license number not having been provided. In regards to the D&A form, facts were presented that showed that although same was not submitted with the initial bills, it nonetheless was ultimately provided to United. The *PMG* court held that PMG cured any defect in submitting the D&A form by providing the form prior to litigation. The writ for certiorari was therefore denied.

Statute of Limitations

Ramirez v. McCravy, 4 So.3d 692 (Fla. 3d DCA 2009)

Plaintiff filed his suit three days after the expiration of the four year statute of limitations in a case involving a motor vehicle accident. Plaintiff argued that Florida Supreme Court administrative orders from hurricanes, which were issued after the accident, tolled the statute of limitations on his claim. The last administrative order was more than six months before the statute of limitations expired. Finding that the weather emergencies which gave rise to the administrative orders had nothing to do with the late filing of this action, the Third District upheld the dismissal of the action for failure to bring it within the statutory time limit. The Supreme Court has now accepted jurisdiction of this matter.

Uninsured Motorist

O'Brien v. State Farm Fire & Cas. Co., 999 So. 2d 1081 (Fla. 1st DCA 2009)

O'Brien appeals a judgment entered in favor of State Farm which held that he had no uninsured or underinsured motorist coverage under his State Farm liability umbrella policy because he had rejected such coverage at the time he applied for the policy. It was noted that the appellant had purchased an umbrella policy from State Farm in 1992, and at that time, signed an application rejecting uninsured/underinsured motorist vehicle coverage. The appellant renewed his policy every year since that time, but contended that he was never offered uninsured motorist coverage for any of the renewals.

The issue before the court was whether an appellate's rejection of the uninsured motorist coverage under an umbrella policy in 1992 continued for each of the renewals. The court pointed out that Florida Statute Section 627.727(1) mandates that a primary policy include UM coverage unless an informed written rejection of such coverage is made by the insured on the proper form. On the other hand, Section 627.727(2) sets forth different requirements for excess policies not providing primary liability insurance. This section states that an insurer who issues

such a policy shall make available as part of the application for such policy, and at the written request of an insured, limits up to the bodily injury liability limits for uninsured motorist benefits. The court determined that the uninsured motorist coverage was available, and at no point in time did the appellant make a written request for this coverage. Accordingly, the lower court's decision was affirmed.

Metropolitan Casualty Insurance v. Tepper, 2 So.3d 209 (Fla. 2009)

Uninsured motorist carrier did not grant its insured permission to accept a settlement offer from the underlying tortfeasor. Rather, the uninsured motorist carrier paid its insured the amount of the underlying tender and preserved its subrogation rights. The trial court dismissed the tortfeasor as a defendant from the action against himself and the uninsured motorist carrier. The trial court further ruled that if the tortfeasor were to be part of the underlying proceedings, it would have to be based upon a third party action brought by the uninsured motorist carrier.

The Supreme Court held that an uninsured motorist carrier is only entitled to seek subrogation upon the final resolution of the uninsured motorist claim. They further held that the statute of limitations for UM subrogation claims does not begin to run until final resolution of the uninsured motorist claim.

Pawtucket Mutual Insurance v. Manganelli, 3 So.3d 421 (Fla. 4th DCA 2009)

Plaintiff filed a claim for uninsured motorist benefits. The policy included an arbitration clause which provided that unless both parties agreed otherwise, arbitration would occur in the county where the insured "lives." The insured requested arbitration in Palm Beach County, but the insurer maintained that the insurer lived in New Hampshire because he listed his primary residence there when the policy was issued. The insured brought an action for declaratory judgment and the trial court determined that Manganelli "lived" in Palm Beach County. The insurance company did not appeal that ruling.

Following arbitration, the insured moved for attorney's fees and costs pursuant to F.S. §627.428 and §627.727(8) arguing that his suit against Pawtucket was only necessary because they effectively denied coverage by refusing to arbitrate in Palm Beach County. The Fourth District upheld the award of attorney's fees even though Pawtucket did not deny coverage pro se, but by maintaining that arbitration had to take place in New Hampshire, it forced its insured to engage in unnecessary litigation.

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