CASE LAW SUMMARY
2010

Automobile Liability

Dangerous Instrumentality

Salsbury v. Kapka, 41 So. 3d 1103 (Fla. 4th DCA 2010)

The issue presented in this appeal is whether an all-terrain vehicle (ATV) is a dangerous instrumentality. Citing the Supreme Court's decision in *Meister v. Fischer*, 462 So. 2d 1071 (Fla. 1984), the Fourth District noted that in order to determine that the ATV constituted a dangerous instrumentality, the trial court had to find that the ATV fit the statutory definition of a "motor vehicle"; had to find that they were extensively regulated by statute; and there had to be record evidence regarding the causes and consequences of ATV accidents.

The Fourth District noted that the first two factors involve legal questions which the court could competently determine; however, the third factor (record evidence regarding the causes and consequences of ATV accidents) required the trial court to take evidence and resolve the issue of dangerousness. As such, judgment of the trial court was reversed with directions to hold an evidentiary hearing on this issue.

IME

Gaskins v. Canty, 29 So. 3d 432 (Fla. 2d DCA 2010)

The trial court ordered that the plaintiff attend a vocational rehabilitation examination. The order provided that the examination could be recorded by using an unattended videotape or audiotape machine, but it prohibited the presence of any third person such as a videographer or the plaintiff's attorney.

After the defendant sought the examination, the plaintiff responded that she would appear for the examination accompanied by her counsel or a videographer. The defendant filed a motion to compel the examination with limitations and attached an affidavit from the examining expert who asserted that the examination involved time testing that could not be interrupted by the changing of videotapes; the presence of a videographer could negatively affect the examination; and

numerous psychological articles show that observation might affect the examination.

The Second District quashed the trial court's order and granted certiorari. In doing so, they noted that while this was originally a request for a rehabilitation examination, the request was amended to be for a life plan examination because the plaintiff had dropped her claim for future loss of earning capacity. The examining expert was not present at the hearing and did not provide any evidence concerning the specifics of a life plan examination or why the presence of third person would disrupt the examination. Further, there was no evidence presented that no other examiner would conduct the examination with a third person present.

Medical Bills

Columbia Hospital v. Hasson, 33 So. 3d 148 (Fla. 4th DCA 2010)

The plaintiff suffered bodily injuries in an accident and underwent a procedure at Columbia Hospital. The hospital billed her over $19,000 for the surgery. The defendant sought discovery from the hospital concerning the particular procedure, including the amount the hospital charged patients with and without insurance; those with letters of protection; and differences in billing for litigation patients versus non-litigation patients.

The hospital moved for a protective order asserting that the information was protected trade secret. The defendants conceded that the information was protected; however, they nonetheless argued that the information was relevant on the issue of damages. The Fourth District found that the defendant had sufficiently explained why they needed the information; however, they granted certiorari in part and found that the trial court should have stayed discovery until the parties had an opportunity to negotiate a confidentiality agreement to protect the hospital's trade secrets.

PIP

United Automobile Insurance v. Hollywood Injury Rehab Center, 27 So. 3d 743 (Fla. 4th DCA 2010)

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.

Florida Medical & Injury Center v. Progressive Express Insurance Co., 29 So. 3d 329 (Fla. 5th DCA 2010)

The Fifth District held that submission of an incomplete disclosure and acknowledgment form is not the equivalent of no written notice of a claim and the failure to correctly complete and deliver this initial form does not preclude further claims. Further, they held that the completion of the form is not a condition precedent to payment of all medical bills and, lastly, that submission of a flawless form is not a condition precedent to the right of a provider to access the courts to recover a claim unpaid by the insurer.

USAA Casualty Insurance Company v. Pembroke Pines MRI, 31 So. 3d 234 (Fla. 4th DCA 2010)

The Fourth District held that an independent, diagnostic corporate supplier of MRI services does not have to include the professional license number of either the interpreting radiologist or its medical director in block 31 of its CMS 1500 Claim Form in order to properly furnish notice of the amount of covered loss for medical bills under Florida Statute 627.736 (5)(d).

Menendez v. Progressive Express Insurance Company, 35 So. 3d 873 (Fla. 2010)

Progressive failed to timely pay PIP benefits after its insured was involved in a motor vehicle accident in June, 2001. The trial court entered a judgment in favor of Menendez; however, the Third District reversed finding that the Plaintiff failed to comply with the statutory presuit provisions provided under Florida Statute 627.736(10). These were enacted after the accident. The Supreme Court quashed the decision of the Third District finding that, because the amendment constituted a substantive change to the statute, it could not be applied retroactively to insurance policies issued before the effective date of the amendment.

Bosem v. Commerce and Industry Insurance Co., 35 So. 3d 944 (Fla. 3d DCA 2010)

The Plaintiff, a lawyer, filed a PIP claim for lost wages. He had been fully compensated by his employer for a year's worth of income. Furthermore, the court found that his calculation of weekly earnings was greatly exaggerated. When it was suggested that he had engaged in fraudulent activity, he then began to recharacterize his claim as one of "loss of earning capacity" as opposed to "lost wages." The Third District found that entry of summary judgment was appropriate

because the facts evidencing fraud was so clear from the record. The Plaintiff sought reversal of the dismissal arguing that he had two separate and distinct claims: one for medical expenses and one for lost wages and that fraudulent misrepresentation as to one claim did not vitiate coverage on the other claim. The Third District affirmed the trial court's dismissal citing Florida Statute 627.736(4)(g) which states that "any insurance fraud shall void all coverage arising from the claim related to such fraud under the Personal Injury Protection coverage of the insured person who committed the fraud."

Dickson v. Economy Premier Assur. Co. 36 So. 3d 789 (Fla. 5th DCA 2010)

The Fifth District reversed summary judgment entered in favor of an automobile liability insurer where it claimed that the policy did not cover an injury that took place after the policy had expired. The Fifth District found that the liability section as opposed to other sections of the auto policy, including the PIP coverage, was broad and did not limit coverage to accidents or occurrences that took place only in the policy period. Instead, the general liability covered the insured for "all legal liability resulting from an occurrence in which there is an actual property damage, personal injury or death, anywhere in the world," in defining "occurrence" as an "event, including continuous or repeated exposure to the same conditions, resulting in personal injury or property damage . . . ."

The court agreed with the insured that this general language does not require the injury to occur at the same time the covered occurrence or event causing the injury. Furthermore, there was nothing in the policy's general terms that limited coverage to injuries inflicted during the policy period.

Rather, the insurer relied upon the PIP coverage under a different section of the policy that talked about accidents and not occurrences restricting coverage for those accidents that occurred during the policy period. The court reminded that if the trial court applied the PIP language to the general liability coverage, it would improperly retract coverage granted in one section of the policy where coverage had been extended under an earlier section.

Shaw v. State Farm Fire & Casualty, 37 So. 3d 329 (Fla. 5th DCA 2010)

State Farm issued a policy which contained an examination under oath provision which stated "any person or organization making claim or seeking payment … must, at our option, submit to an examination under oath, provide a statement under oath, or do both, as reasonably often as we require." After the

insured was involved in a motor vehicle accident, he received medical care from a chiropractor and the insured assigned his no fault benefits under the policy to the chiropractor. When the chiropractor sought payment from State Farm under the assignment for services rendered to its insured, they demanded that the chiropractor appear for an examination under oath. The chiropractor refused to do so and State Farm refused payment.

The Fifth District reversed judgment that had been entered in favor of State Farm and held that because the assignment of a contract does not entail the transfer of any duty to the assignee, unless the assignee agrees to assume the duty, the medical provider as assignee of the insured to payment under the insurance contract, has no duty to perform any covenant under the contract because it never agreed to do so. They then certified the following question to the Florida Supreme Court: "WHETHER A HEALTHCARE PROVIDER WHO ACCEPTS AN ASSIGNMENT OF NO-FAULT INSURANCE PROCEEDS AND PAYMENT OF SERVICES PROVIDED TO AN INSURED CAN BE REQUIRED BY A PROVISION IN THE POLICY TO SUBMIT TO AN EXAMINATION UNDER OATH AS A CONDITION TO THE RIGHT OF PAYMENT?"

United Automobile v. Seffar, 37 So. 3d 379 (Fla. 3d DCA 2010)

In opposition to a motion for summary judgment on the issue of PIP benefits, United filed two affidavits from the same physician: the first was based upon an IME and the second was based upon a review of treatment records. The first affidavit stated that the treatment was reasonable and necessary; the second affidavit stated the treatment was not reasonable, necessary or related. The second affidavit did not act as "bald repudiation" of the first affidavit because of a clause contained in the first affidavit which provided that the opinions were subject to change based upon review of further materials.

United Automobile Insurance Co. v. Otero, 39 So. 3d 563 (Fla. 3d DCA 2010)

The insured was injured in a car accident and filed for Personal Injury Protection benefits. He then sought medical treatment from Neurology Associates Group and executed an "Assignment of Benefits" to the physicians. The assignment stated, in part, "I hereby assign to Neurology Associates Group any and all rights and causes of action I may have under any insurance policy or collateral source agreement including but not limited to the above-referenced collateral source provider … I as patient have agreed to remain personally liable

for the amounts billed by the healthcare provider regardless of the amount paid by the insurance company unless ordered otherwise by a court of law."

Thereafter, the insured filed suit against the insurance company for non-payment of all medical bills. The Third District found that the insured did not have standing to sue the insurer for benefits because he never obtained a re-assignment of benefits from the physicians. They further held that the fact that the insured remained liable for amounts billed by the medical providers under the terms of the assignment did not make the assignment a qualified assignment.

United Automobile Insurance Company v. Law Offices of Michael Libman, 46 So. 3d 1101 (Fla. 3d DCA 2010)

United Automobile sued Libman, an attorney, on theories of restitution, fraud and insurance fraud seeking recovery of PIP benefits, attorney's fees and costs in previously filed and now closed PIP lawsuits. Prior to this suit being filed, Libman had received monies from United Automobile as part of several PIP lawsuits. Sometime after the resolution of the PIP lawsuits, United Automobile filed a new and separate lawsuit against Libman alleging that its own investigation revealed false billing for tasks performed by a non-lawyer medical billing company, Continental Providers' Services, improper fee-splitting with Continental after payment and false prosecution of several PIP lawsuits without authority from the putative Plaintiffs. The trial court dismissed United Automobile's Complaint with prejudice on grounds that it stemmed from the PIP lawsuits and, as such, should have been previously adjudicated by courts of competent jurisdiction or the claims had been resolved by settlement agreements.

The Third District reversed finding that the claims were not barred by res judicata or collateral estoppel.

GEICO Indemnity Co. v. Physicians Group, LLC, 47 So. 3d 354 (Fla. 2d DCA 2010)

On January 1, 2008 the legislature amended the PIP statute which provides that, for non-emergency, non-hospital services, a PIP insured "may limit reimbursement to 80[%] of … 200[%] of the allowable amount under the participating physician's schedule of Medicare Part B" or if the services are "not reimbursable under Medicare Part B, … 80[%] of the maximum reimbursable allowance under Worker's Compensation."

The Second District held that these amendments to the statute did not apply retroactively to policies that were in effect and which expired before the statute's effective date of January 1, 2008.

United Automobile Insurance Company v. Gaitan, 47 So. 3d 1291 (Fla. 2010)

United Automobile requested Gaitan attend two medical examinations: one with a medical doctor and one with a chiropractor. Gaitan attended only the examination with the medical doctor. Despite several requests, Gaitan refused to appear for the chiropractic examination contending that she had not seen a chiropractor as a part of her claim. United denied benefits and Gaitan filed a lawsuit seeking PIP benefits. Summary judgment was granted due to Gaitan's failure to attend the chiropractic medical examination. It was error to enter a summary judgment on the claim because material issues of disputed facts existed as to whether Gaitan's refusal to attend the chiropractic examination was reasonable or material to her PIP benefits claim where she had never seen a chiropractor and was making any claim for chiropractic benefits.

Sudden and Unexpected Loss of Consciousness

Abreu v. F.E. Development Recycling, Inc., 35 So. 3d 968 (Fla. 5th DCA 2010)

The Defendant lost consciousness while driving when he suffered an aneurysm. This caused the collision which injured the Plaintiff. The Defendant submitted affidavits in support of a Motion for Summary Judgment setting forth that it would have been impossible for the Defendant to have known prior to the accident that he had an aneurysm. The Fifth District reversed the summary judgment finding that there were issues of material fact which included the Defendant's history of aneurysm. Additionally, medical records from the day of the accident indicated that he had a headache for several hours prior to losing consciousness and that the Defendant "tried to drive home but started having blurry vision where he could not see and felt like he was going to pass out." Thus, there were questions regarding whether the loss of consciousness was foreseeable.

The Fifth District also noted that in order to establish the defense of a sudden and unexpected loss of capacity or consciousness, the Defendant must prove: (1) that the Defendant suffered a loss of consciousness or capacity; (2) the loss of consciousness or capacity occurred before the Defendant's purported negligent conduct; (3) the loss of consciousness was sudden; and (4) the loss of consciousness or capacity was neither foreseen nor foreseeable.

Uninsured Motorist

Saris v. State Farm, 49 So. 3d 815 (Fla. 4th DCA 2010)

Plaintiff appealed a final judgment in favor of State Farm. The trial court found that the insured was not entitled to uninsured motorist coverage because the insured failed to comply with the policy provision requiring the insured to sue the owner or driver of the uninsured motorist vehicle. The Fourth District found that this policy provision was void against public policy and the uninsured motorist statute. Even though the insured did not raise the public policy argument in the trial court, the Fourth District found that this was fundamental error and reversed.