2015
CASE LAW SUMMARY

Automobile Liability

Defendant Not Subject To CFR Regulations Where It Was Not Owner Or Driver

Peninsula Logistics, Inc. v. Erb, 159 So. 3d 301 (Fla. 5th DCA 2015)

This case arose from a collision involving the Erb's vehicle and a semi-truck owned by O&L Transport and operated by Smith. At the time of the collision, Smith was transporting cargo for Peninsula in a trailer owned by an entity not a party to the appeal. The Erbs conceded that Smith was an independent contractor and not a Peninsula employee.

Nonetheless, they argued that Peninsula was liable for his negligence based upon Florida Statute §316.302(1)(b) which provides that all owners or drivers of commercial motor vehicles that are engaged in intrastate commerce are subject to the rules and regulations contained in [various parts] of the Code of Federal Regulations (CFR). The trial court directed a verdict for Plaintiffs on the issue of Peninsula's vicarious liability for Smith's negligence and the Fifth District reversed finding that because it was neither the owner nor the driver of the vehicle, it was not subject to the CFR.

Equitable Subrogation

Allstate Insurance Company v. Theodotou, 171 So. 3d 163 (Fla. 5th DCA 2015)

Hintz was riding his scooter when he sustained catastrophic head injuries as a result of an accident with Emily Boozer. Boozer was driving her father's car at the time of the accident which was insured by Allstate. Following the accident, Hintz was treated by several healthcare providers where, according to his Complaint, his injuries were severely exacerbated by medical negligence. Thereafter, Stalley, as guardian of Hintz, sued the Boozers for damages resulting from that accident. Stalley successfully argued that the doctrine espoused in *Stuart v. Hertz Corp.* precluded the Boozers from presenting evidence that medical negligence was a contributing cause of his injuries. The Boozers were ultimately

held liable for all damages and a judgment was entered in excess of $11,000,000. Allstate then paid Stalley its policy limits of $1,100,000 with the remainder of the judgment remaining unpaid.

After the personal injury verdict was rendered, but before final judgment was entered, Stalley filed a separate medical malpractice lawsuit against the various healthcare providers and sought recovery for the very same injuries involved in the initial lawsuit against the Boozers. He also filed a bad faith action against Allstate which remains pending. After Allstate and Boozer were granted leave to intervene in Stalley's medical malpractice lawsuit, they each filed Complaints in that case claiming that they were entitled to equitable subrogation from the medical providers. The medical providers moved to dismiss the Complaints arguing that the Appellants were barred from seeking equitable subrogation because they had not paid the entirety of Hintz's damages.

The trial court granted the Motions to Dismiss and dismissed the Complaints with prejudice. The Fifth District reversed and stated that the right to equitable subrogation arises when payment has been made or judgment has been entered, so long as the judgment represents the victim's entire damages. They also certified this question to the Florida Supreme Court: "is a party that has had judgment entered against it entitled to seek equitable subrogation from a subsequent tortfeasor when the judgment has not been fully satisfied?"

IME's

Grabel v. Sterrett, 163 So. 3d 704 (Fla. 4th DCA 2015)

Plaintiff filed an uninsured motorist claim and, thereafter, sought to depose the doctor who performed the Compulsory Medical Examination for the insurance company. The subpoena requested the doctor to bring various items to his deposition. The doctor objected to certain items and State Farm also moved for protective order asserting the same objections. The Court overruled the objections to three specific requests which included: (1) copies of all billing invoices submitted by the doctor to defense counsel, defense counsel's firm and the Defendant's insurer (State Farm) for a total of 6 years; (2) a document and/or statement that includes the total amount of money paid by or on behalf of the Defendants and/or their attorneys and/or the defense law firm including any predecessor and/or successor law firm and any of the attorneys presently or

formerly employed at the law firm and the Defendants' insurer to the doctor for expert work over the 6 years; and, (3) all documents evidencing the amount or percentage of work performed by the doctor on behalf of any Defendant and/or defense law firm and/or insurance carrier for 6 years including time records, invoices, 1099's and other income reporting documents.

The trial court overruled the objections but limited the request to 3 years. The trial court did not address the doctor and the insurer's objection that the discovery exceeded that allowed by Florida Rule of Civil Procedure 1.280(b)(5)(A)(iii) and did not find "unusual or compelling circumstances" but merely compelled the discovery. The Fourth District granted certiorari finding that the trial court departed from the essential requirements of the law by allowing discovery of financial information that exceeded the scope of discovery permitted under the Florida Rule of Civil Procedure without finding unusual or compelling circumstances.

Grabel v. Roura, 174 So. 3d 606 (Fla. 4th DCA 2015)

The trial court found that there were inconsistencies between Interrogatory answers provided by defense counsel and deposition responses provided by Dr. Grabel, the defense expert witness concerning the percentage of income the doctor derived from working as an expert witness and the number of times he had testified for Plaintiffs and Defendants in personal injury litigation. The Fourth District granted certiorari and found that the disputed discovery exceeded the provisions of Florida Rule of Civil Procedure 1.280 which limits discovery to an approximation of the expert's involvement as an expert witness.

The court noted that the trial court allowed the Plaintiff to issue subpoenas to 20 non-party insurance carriers not shown to have any involvement in the litigation. The subpoenas required production of financial records including tax records showing the total amount of fees paid to the doctor for expert litigation services since 2009. The court pointed out that the rule expressly provides that "the expert shall not be required to disclose his or her earnings as an expert witness."

Bodzin v. Leviter, 174 So. 3d 608 (Fla. 4th DCA 2015)

A non-resident Defendant, who had not sought affirmative relief, was ordered by the trial court to appear for an independent medical examination in Florida in order to determine his capacity to testify after his counsel alleged that he was incapacitated by Alzheimer's. The court noted that the Defendant had given multiple depositions in the case without having raised incapacity to testify at those depositions and that the Plaintiff had already received the Defendant's medical records and retained an expert to review the records and form an opinion as to the Defendant's capacity. As such, they granted certiorari and quashed the trial court's order.

Joinder Of Insurance Company Improper

GEICO General Insurance Company v. Lepine,173 So. 3d 1142 (Fla. 2d DCA 2015)

Plaintiff who was injured in a car accident sued the driver of the other car who was insured through GEICO. She also sued GEICO claiming that it agreed to pay its policy limits and then refused to do so. As a result, she sued GEICO alleging a breach of contract claim. GEICO moved to dismiss citing the non-joinder statute and the trial court denied it. The Second District granted certiorari and found that the trial court departed from the essential requirements of the law by refusing to dismiss the count against GEICO adding that the Plaintiff could not join GEICO as a party Defendant until she obtained either a judgment against the insured or a settlement with the insured.

Limitation On Damages For Owner Of Car

De Los Santos v. Brink, 167 So. 3d 519 (Fla. 5th DCA 2015)

Following a catastrophic accident, a judgment of almost $13,000,000 was entered against De Los Santos (owner of the car) and Ruiz-Pereles (driver of the vehicle). De Los Santos argued that the judgment against him should not have exceeded $600,000 plus applicable costs and interest pursuant to Florida Statute §324.021. The Fifth District noted that it was undisputed that Santos' liability was solely vicarious and that Ruiz-Pereles had insurance limits of less than $500,000 combined for property damage and bodily injury liability. As a result, the statute

was applicable and Santos' liability was limited to $600,000 plus applicable costs and interest.

No Settlement Due To Added Terms

Pena v. Fox, 40 FLWD 2573 (Fla. 2d DCA 11/13/15)

Following a motor vehicle accident, Plaintiff's counsel requested policy limits from the Defendant's insurer advising that the Plaintiff would execute a release only as to the insured adding that "any attempt to provide a release which contains a hold harmless or indemnity agreement, which releases anyone other than your insured, or which releases any claim other than my client's claim, will act as a rejection of this good faith offer."

Following its receipt of this, the Defendant's insurance company issued a release which specifically released the insured, his heirs, executors and assigns and subsequently shifted its reference to "releasee(s)" without defining the term. The trial court found that there was a settlement, however, the District Court reversed finding that the additional terms including "releasee(s)" without defining the term improperly added parties beyond those that the Plaintiff proposed to release and materially deviated from the limitation clearly expressed in Plaintiff's offer. As such, there was no meeting of the minds and no settlement.

Order Of Coverage

Allstate Insurance Company v. United Services Automobile Association, 174 So. 3d 622 (Fla. 4th DCA 2015)

The underlying accident occurred in 2007 when a permissive driver of a car owned by another was involved in an accident. The car's owner had a State Farm Insurance policy that provided $100,000 in coverage and an Allstate umbrella policy that provided $1,000,000 in coverage. It also required the owner to maintain underlying limits of $250,000 per person. USAA provided uninsured motorist coverage to the injured party.

State Farm tendered its $100,000 policy limits to the injured party and obtained a partial release in favor of the car owner. The injured party then sought to recover additional monies from the Allstate's umbrella policy, however, Allstate denied coverage. As a result, the Plaintiff filed a Complaint against her UM

carrier; USAA. This caused USAA to file a third-party complaint against Allstate, the Plaintiff and the permissive driver. The Complaint sought a declaration that Allstate's umbrella policy applied before USAA's UM policy.

Subsequently, USAA moved for summary judgment against Allstate and argued that the umbrella policy provided coverage before the UM policy. Allstate responded that the car owner's failure to carry the required $250,000 limits and underlying coverage created a $150,000 gap in liability coverage and that the gap was uninsured thereby triggering the uninsured motorist policy. Notwithstanding its position throughout the litigation that Allstate's policy applied before USAA's policy, USAA admitted that at the Summary Judgment hearing that its policy provided coverage for the $150,000 gap before Allstate's umbrella policy kicked in. USAA then argued that the priority dispute arose only after USAA breached the $150,000 gap.

Following the hearing, the trial court entered an order granting USAA's Summary Judgment motion and determined that State Farm provided the first $100,000 of coverage; USAA then provided coverage from $100,000.01 to $249,999.99; Allstate then provided coverage from $250,000 to $1,250,000; and then the remainder of the injuries were covered by the uninsured motorist policy. The Fourth District reversed noting that the judgment entered was adverse to USAA's allegations in its declaratory relief action against Allstate, the Plaintiff and the permissive driver. Because USAA received the exact opposite relief that it originally plead for, it was not the prevailing party herein.

PIP

Allstate Fire & Casualty Insurance v. Stand-Up MRI of Tallahassee, PA, 40 FLWD 693 (Fla. 1st DCA 3/18/15)

The PIP policy in question contained language which stated that reimbursements "shall be subject to the limitations in §627.736, including all fee schedules." The Court held that this was sufficient to give notice of the insurance company's election to limit reimbursements by using Medicare fee schedules.

State Farm Mutual Automobile Insurance Company v. Gonzalez, 178 So. 3d 448 (Fla. 3d DCA 2015)

The Third District ruled that the trial court erred in awarding PIP benefits to an insured where the insurance company did not receive notice of the PIP claim because the statement for medical services submitted did not comply with Florida Statues §627.736(5)(d).

State Farm Mutual Auto. Ins. Co. v. Delray Medical Center, Inc., 178 So. 3d 511 (Fla. 4th DCA 2015)

After treating two of State Farm's insureds, the hospital sought PIP payments from State Farm. In response, State Farm sent the hospital two letters requesting documentation and information to assist in determining the reasonableness of the billed charges pursuant to Florida Statute 627.736(6)(b). State Farm questioned the reasonableness of the hospital's charges because the charges were significantly higher than what was allowable under Medicare billing rates. State Farm then made 23 discovery requests and, after the hospital provided only some of the requested documentation, State Farm filed a Petition and Motion for discovery pursuant to Florida Statute 627.736(6)(c) alleging that the hospital charged significantly more than the Medicare reimbursement rate.

In response thereto, Delray Medical Center filed objections and moved for a protective order. State Farm then filed a new production request in which it limited its prior requests. The trial court denied State Farm's petition for failure to show good cause. As a result, State Farm filed an Amended Petition and Motion for discovery in which it alleged that the hospital charged more than other hospitals and that a report from the Agency for Healthcare Administration showed that the hospital's actual reimbursement rate was significantly less than the amount charged. The trial court once again denied the Petition finding that State Farm did not demonstrate good cause and also found the request to be overbroad and extremely far reaching.

State Farm filed an appeal. The Fourth District ruled that under Florida Statute §627.736(6)(b), State Farm was only entitled to discovery of documents regarding the treatment and related billing of the individual injured person. Further, the court found that Florida Statute 627.736(5) was inapplicable and did not apply to discovery requests made under Florida Statute 627.736(6)(b). The court added that "although the documents State Farm sought may have been

'relevant and discoverable in the context of litigation over the issue of reasonableness of charges instituted pursuant to subsection (5)(a), they are clearly not the types of documents specifically delineated by subsection (6)(b).'"

Seatbelt Defense

Jones v. Alayon, 162 So. 3d 360 (Fla. 4th DCA 2015)

The Fourth District affirmed the trial court's denial of a Motion for New Trial filed by the Plaintiff following a trial in which Plaintiff was awarded lesser damages than had been sought. At trial, the court denied a Motion for Directed Verdict on the seatbelt defense because the evidence was undisputed that the seatbelt was not operational. The Fourth District noted that, proof that the seatbelt was available and fully operational is not a pre-requisite to establishing comparative negligence to the Plaintiff and the fact that the available seatbelt may be inoperable is one factor for the jury to consider in determining the issue of comparative negligence.

The Fourth District also held that the trial court did not abuse its discretion in granting a Motion in Limine to prevent admission of the fact that the Defendant, who was an off-duty police officer, fled the scene where the Defendant admitted liability for causing the accident and the trial court determined that the probative value was outweighed by its prejudicial affect. This was so even though the Plaintiff claimed that it caused her emotional distress knowing that a sworn police officer fled the scene of the accident and failed to provide her husband with emergency medical care.

Lastly, they found that the trial court did not abuse its discretion in admitting hearsay that the decedent's wife spent the parties' money on drugs and alcohol. The testimony came in through a deposition excerpt from an out-of-state sister who testified as to statements made to her by another sister who was subsequently appointed Personal Representative of the estate. As the court noted "admissions need not be based on firsthand knowledge by the party, the rationale being 'that a witness will not make a statement against his interest unless he or she has made an adequate investigation.'"

Even though the statement made to the Personal Representative made by another may have constituted hearsay, it was her repetition of the hearsay

statement that constituted an admission against interest. As the court explained "that it is based upon what someone else may have told Jones' is unimportant, in that she would not make that statement without some investigation or indicia of reliability."

UM – Insured Entitled To Attorney's Fees

Shirtcliffe v. State Farm Mutual Automobile, 160 So. 3d 555 (Fla. 5th DCA 2015)

State Farm originally disputed Shirtcliffe's entitlement to stacking of uninsured motorist benefits. State Farm later agreed that he was entitled to stacking of UM benefits. The court found that its concession on this issue was tantamount to a confession of judgment and, therefore, the insured was entitled to recover statutory attorney's fees.

UM – Named Insured Can Select Lower Limits For All Insureds

Germany v. Darby, 157 So. 3d 521 (Fla. 1st DCA 2015)

Germany was involved in a work-related automobile accident with an uninsured motorist. At the time of the accident, Germany was in a company vehicle. The uninsured motorist policy provided up to $500,000 in uninsured motorist coverage for executives and their families but only $30,000 for all other insureds, including Germany. The trial court found that Germany was only entitled to $30,000 and the First District affirmed finding the Florida Statute §627.727(1) expressly permits the election of lower limits by a named insured on behalf of all insureds and does not specify that there must be a single limit applicable to all insureds.

UM – New Policy Created When Original Insured Removed From Policy

Chase v. Horace Mann Insurance Company, 158 So. 3d 514 (Fla. 2015)

Horace Mann originally issued an insurance policy where the only named insured was Richard Chase. Subsequently, Horace Mann removed Richard Chase as the sole named insured on the policy and made his daughter, Allison, the sole named insured. They also changed the insured vehicle to another vehicle that had been acquired by Allison three days earlier and was titled in only her name. At the same time, Horace Mann issued a new policy with a new policy number to Richard Chase as the sole named insured for a new vehicle that was owned by him.

Subsequent thereto, Allison was involved in a motor vehicle accident and sought uninsured motorist benefits under the policy. Horace Mann denied same. The Supreme Court held that where the sole named insured's name was removed from an auto policy and the insured's daughter was subsequently listed as a named insured on the policy for the first time, a new policy was created. As such, the insurance company was required to advise the daughter of her right to uninsured motorist benefits equal to her liability limits and to obtain a written waiver of those benefits before reducing them. They further found that the father's waiver of uninsured motorist benefits did not apply to the daughter when she became the sole named insured on the policy.

Summary Judgment

Panzera v. O'Neal, 40 FLWD 2661 (Fla. 2d DCA 12/2/15)

Following the death of their son, parents brought an action against Publix and the driver of its truck alleging that the Defendants were negligent in causing the accident which killed their son. The trial court granted summary judgment in favor of the Defendants and the Second District affirmed. They noted that the only evidence showed that the driver was traveling below the speed limit in the right lane and that he applied the brakes when he saw the decedent running into the road and that he then steered the truck to the left to avoid the pedestrian.

In response to the motion, the Plaintiffs relied solely on the deposition testimony of the decedent's parents who surmised that the driver could have avoided the accident had he taken additional evasive maneuvers and that he must not have been able to see their son before the collision occurred based upon their personal review of the scene after the accident. The Second District held that the parents were lay witnesses with no experience in accident reconstruction and, therefore, this was inadmissible testimony.

Until Coverage And Damages Are Determined, Plaintiff Is Not Entitled To Claims File

United Automobile Insurance Company v. Riverside Medical Associates, Inc., 159 So. 3d 285 (Fla. 4th DCA 2015)

United Automobile sought certiorari review after the trial court denied their Motion to Dismiss the Plaintiff's premature Bad Faith Action and overruling their objections to the Plaintiff's premature Bad Faith Discovery Requests. The Fourth District granted the petition as to the discovery objections noting that until the obligation to provide coverage and damages has been determined, a party is not entitled to discovery related to the claims file or to the insurer's business policies or practices regarding the handling of the claims. They denied certiorari as to the denial of the Motion to Dismiss, however, they found that it was without prejudice to United Automobile filing a Motion to Abate the Bad Faith Action.