2016
CASE LAW SUMMARY

Insurance Coverage

Appraisal

State Farm Florida Insurance Company v. Lime Bay Condominium, Inc., 187 So. 3d 932 (Fla. 4th DCA 2016)

The Condominium Association sustained roof damage following a hurricane and filed a claim with State Farm. Lime Bay obtained a proposal to replace all of its roofs; however, it never provided State Farm with any evidence that the roofs needed to be replaced. After several inspections, State Farm determined that the roofs needed to be repaired and not replaced and made a payment to the Condominium Association after adjustment for the policy deductible.

Approximately five months later, Lime Bay filed a Civil Remedy Notice alerting State Farm that it intended to file suit. State Farm responded with a demand for an appraisal pursuant to the insurance agreement. Lime Bay responded that it would not participate until State Farm provided proof of compliance with a mediation notification requirements of Florida Statue §627.7015(2). Lime Bay then filed a breach of contract action against State Farm without first participating in the appraisal process.

After the filing of the Complaint, State Farm moved to abate the case pending the completion of an appraisal. The appraiser issued a significant award and, after applying deductibles, State Farm made an additional payment to Lime Bay. Lime Bay then filed a Motion to Confirm the Appraisal Award and a Motion for Final Judgment and Attorney's Fees arguing that the payment of the appraisal award constituted a confession of judgment. State Farm argued that Lime Bay was not entitled to a confirmation of the appraisal award because the claim had been fully resolved through the parties' contractual appraisal process and State Farm paid the appraisal. The trial court denied State Farm's motion.

The Fourth District reversed noting that voluntary payment of an appraisal award after suit was filed did not amount to a confession of judgment as a matter of law where there was a disputed issue as to whether the insured was forced to litigate in order to get the insurance company to pay the claim or whether the insured breached the contact by failing to participate in the appraisal process and

whether the insurance company timely provided notice of mediation as required by statute. They also held that the documents requested by the insurance company including copies of communication between Lime Bay and its public adjuster/contractor were relevant to the issue of whether Lime Bay continued to dispute the insurer's estimate and was forced to file suit to resolve the claim.

Attorney's Fees

Allen v. State Farm Florida Insurance Company, 41 FLWD 1902 (Fla. 2d DCA 8/17/16)

An insured prevailing in an action against the insurance company may be awarded attorney's fees under Florida Statute 627.428 for services in the Appellate Court, regardless of whether the proceeding is a direct appeal or a Petition for Writ of Certiorari. As such, the insured's amended Motion for Attorney's Fees incurred in the certiorari proceedings was granted; however, it was conditioned upon their ultimately prevailing in the trial court.

Companion Property and Casualty Insurance Company v. Category 5 Management Group, LLC, 189 So. 3d 905 (Fla. 1st DCA 2016)

Category 5, a company located in Pensacola, purchased a commercial general liability policy from Companion. During the time period that the policy was in effect, Companion was hired to supervise subcontractors and their crews performing clean up operations following Hurricane Katrina. One of these subcontractors was a trucking company which performed certain transportation-related services at the project site. An employee of this trucking company, while driving a pickup truck owned by a sub-subcontractor, ran a stop-light in Alabama and stuck a car occupied by the Stewart family thereby severely injuring three family members. The Stewart family filed a personal injury lawsuit in Alabama against several Defendants, including Category 5.

Companion denied Category 5's request for defense and indemnity citing the auto exclusion of the policy as the sole basis for denial. Category 5 retained counsel to defend it against the allegations and to seek insurance coverage from Companion. Eventually, a consent judgment was entered against Category 5 and in favor of the Stewart family in the Alabama lawsuit and the Stewart family agreed not to record or execute the judgment against Category 5 in exchange for its promise to continue to prosecute its coverage action against Companion and to pay the Stewarts any insurance proceeds collected from Companion.

Thereafter, Category 5 filed a Complaint seeking a declaratory judgment arguing that the insurance policy issued by Companion provided coverage to Category 5 for this loss. The trial court ultimately granted Companion's Motion for Summary Judgment and dismissed the Complaint with prejudice; however, the First District then reversed finding that Companion breached its duty to defend.

On remand, the trial court granted Category 5's Motion for Summary Judgment on the issue of coverage; however, it granted Companion's Motion for Partial Summary Judgment on the issue of attorney's fees. The First District reversed the partial summary judgment on attorney's fees and ruled that the trial court erred in limiting recovery of attorney's fees under the contingency fee agreement between the insured and its attorney to those fees incurred in litigating the coverage action against the insurance company, thereby allowing no recovery for attorney's fees incurred in defending the insured in the underlying personal injury action for which the insured had sought coverage and a defense. The First District also ruled that the insurance company had no standing to advance a construction of a fee agreement to which it was neither a party nor a third-party beneficiary and, accordingly, could not impose an interpretation of the agreement that ran counter to the intent of the parties to the contact to agree that they contemplated recovery of attorney's fees incurred in defending the underlying tort action. In doing so, the District Court stated that the inclusion of these fees was consistent with the subject matter and the object and purpose of the contract between Category 5 and its attorneys.

Paton v. GEICO General Insurance Company, 190 So. 3d 1047 (Fla. 2016)

Following a bad faith verdict, Plaintiff moved for attorney's fees and costs. The Plaintiff sought discovery related to the time records of the Defendant's attorneys including: (1) any and all timekeeping slips and records regarding time spent defending GEICO in the bad faith action; (2) any and all bills, invoices, and/or other correspondence for payment of attorney's fees for defending GEICO in the bad faith action; and, (3) any and all retainer agreements. GEICO objected to the request arguing that the information was privileged and irrelevant. The trial court overruled GEICO's objections to this discovery and the Fourth District granted certiorari and quashed the trial court's order. The Supreme Court quashed the Fourth District's decision and held "that the hours expended by counsel for the Defendant insurance company in a contested claim for attorney's fees filed pursuant to §624.155 and §627.428, Florida Statutes, is relevant to the issue of the

reasonableness of time expended by counsel for the Plaintiff, and discovery of such information, where disputed, falls within the sound discretion of the trial court."

Florida Peninsula Insurance Company v. Wagner, 196 So. 3d 419 (Fla. 2d DCA 2016)

Following a verdict in favor of an insured, the insured sought attorney's fees which the trial court granted. The trial court also ordered a multiplier. The Second District found that the trial court abused its discretion in applying a multiplier to the attorney's fee award where there was no showing that the insureds would have had difficulty finding competent counsel to represent them. Further, the fact that the case went all the way through trial to completion was also not a valid basis for award of a fee multiplier.

Garrison Property and Casualty Insurance v. Rohrbacher, 204 So. 3d 154 (Fla. 5th DCA 2016)

The Fifth District ruled that the county court properly denied the request of the insured for contingent fee multiplier upon finding that the relevant market did not require a multiplier for the insured to obtain competent counsel because many attorneys took his case without a discussion of a multiplier.

Attorney's Fees Improperly Granted

State Farm Mutual Automobile Insurance v. Pro Health Pain Relief Center, 185 So. 3d 712 (Fla. 3d DCA 2016)

The Eleventh Judicial Circuit, sitting in its appellate capacity, unconditionally granted Pro Health's Motion for appellate Attorney's fees. The Third District reversed and ruled that the award of appellate attorney's fees pursuant to Florida Statute 627.428(1) should have been condition upon Pro Health ultimately prevailing in the underlying proceeding. The Third District remanded to the appellate division for entry of an order conditionally awarding the appellate attorney's fees to Respondent upon its prevailing in the underlying proceedings.

Error to order production of claims file prior to coverage determination

Doctors Company v. Thomas, 189 So. 3d 196 (Fla. 2d DCA 2016)

The Doctors Company filed a Petition for Writ of Certiorari to review a discovery order that had denied its Motion for Protective Order and compelled production of their claims file and other investigative documents prior to any insurance coverage determination. The Second District granted certiorari finding that the trial court's order departed from the essential requirements of the law and would result in irreparable harm that could not be remedied on appeal.

Insured Entitled to Have Damages Assessed Before Bad Faith Claim

Fridman v. Safeco Insurance Company, 185 So. 3d (Fla. 2016)

Following a motor vehicle accident where the insured suffered several disc herniations, the insurance company failed to tender its $50,000 policy limits until about six months before trial and about three years after the accident. The Plaintiff refused to accept the policy limits. The insurance company then tendered a new check and, without any settlement language, filed a "Confession of Judgment" and a separate "Motion for Entry of Confession of Judgment." The Plaintiff objected and argued that the case should go to trial because the jury's verdict would fix the damages in an ultimate bad faith case.

The trial court denied the Motion to Confess Judgment finding that to do so would ignore the plain legislative intent to Florida Statute 627.727(10) which governs the damages recoverable in a bad faith action. The case then proceeded to trial and the jury awarded damages of $1,000,000. The trial court entered final judgment for $50,000 (the policy limits) and then reserved jurisdiction to determine the Plaintiff's right to amend the Complaint to seek and litigate bad faith damages.

The Fifth District reversed and ruled that when the insurance company confessed judgment in the amount of policy limits, the issues between the parties as framed by the pleadings became moot. The District Court ruled that the trial judge should have entered final judgment and then the Plaintiff would have still had a sufficient basis to pursue a bad faith claim to seek the full amount of damages.

The Supreme Court disagreed with the Fifth District and reinstated the trial court's rulings finding that the issue implicated the heart of UM and first party bad faith litigation. It ruled that an insured is entitled to a determination of liability and a determination to the full extent of his/her damages in the UM case before litigating the first party bad faith claim. It also held that this determination is binding on the subsequent bad faith action provided that the parties have had the opportunity for appellate review of any trial errors that were timely raised. Lastly, they ruled that a final judgment reserving jurisdiction to consider a Motion to Amend to add a bad faith cause of action is a proper approach, as is including the verdict amount in the final judgment.

Material Misrepresentation

Moustafa v. Omega Insurance Company, 201 So. 3d 710 (Fla. 4th DCA 2016)

Homeowners appealed from a final summary judgment entered in favor of the insurance company following the trial court's ruling that Omega's rescission of the insurance policy was proper in light of a material misrepresentation made in the policy application.

The homeowners purchased their home in 2003. Between 2003 and 2007, they made two insurance claims on the home with two different insurance companies. In October, 2007, Moustafa submitted a preliminary application for a homeowner's policy with Omega and later signed a formal application in December, 2007. Although his wife did not sign either application, she was listed as a co-applicant and a named insured on the policy. In filing the application, Moustafa failed to disclose anything about the two prior claims. In reliance upon these representations, Omega issued the homeowner's policy which contained a provision that the company would provide no coverage if it was found that the insureds had intentionally concealed or misrepresented any material fact or circumstance or made false statements relating to the application for insurance.

The court determined that the insured's misrepresentations on the application were material and affected the insurer's decision to issue or renew a policy and found that this was supported by sufficient evidence including the insureds admissions during an examination under oath and the unrebutted testimony of a company official in its underwriting department.

Multiple Perils

Sebo v. American Home Assurance Company, 41 FLWS 582 (Fla. 12/1/16)

The homeowner purchased an All Risk homeowner's policy from American Home Assurance. Shortly after Sebo bought the residence, water began to intrude into the home during rain storms. Major water leaks were reported to his property manager as early as May 31, 2005. She prepared a list of the problems and by June 22, 2005, the property manager advised the homeowner of these leaks in writing. It became clear that the house suffered from major design and construction defects. After an August rainstorm, paint along the windows just fell off the wall. In October, 2005, Hurricane Wilma struck the area and further damaged the residence. The homeowner did not report the water intrusion and other damages to American Home Assurance until December, 2005. American Home Assurance investigated the claim and, in April, 2006, denied coverage for most of the claimed losses. The policy provided $50,000 in coverage for mold and the company tendered that amount to the homeowner but stated that "the balance of the damages to the house, including any window, door and other repairs, is not covered." In May, 2008, he renewed his claim and sent more information about the damages to American Home Assurance but they again denied the claim except for the mold damages. The residence could not be repaired and was eventually demolished.

In January, 2007, he filed suit against the sellers of the property, the architect who designed the residence and the construction company that built it. He alleged that the home had been negligently designed and constructed and the sellers had fraudulently failed to disclose the defects in the property. He amended his Complaint in November, 2009 adding the insurance company as a Defendant and seeking a declaration that the policy provided coverage for his damages. After he settled his claims against the majority of all other Defendants, the trial proceeded only on his declaratory action against the insurance company. The jurors found in favor of the homeowner and the court entered judgment against the insurance company. On appeal, the Second District reversed.

The Supreme Court quashed the decision of the Second District and held that where a loss is caused by multiple perils and at least one of the perils is excluded from coverage, the proper theory of recovery is the "concurring cause doctrine." Under the doctrine, coverage may exist where an insured risk constitutes a concurrent cause of the loss even when it is not the prime or efficient cause. As such, Sebo was entitled to coverage for a loss caused by defective construction, even though it was an excluded peril, as well as, for rainwater and

hurricane winds which were covered perils. The Supreme Court also held that the trial court could properly consider settlements received from third parties as a post-judgment offset to the judgment against the insurance company.

No coverage for Plaintiff's employer still covers additional insureds

Taylor v. Admiral Insurance Company, 187 So. 3d 258 (Fla. 3d DCA 2016)

The Plaintiff attended a private event at Villa Vizcaya which was hosted by her employer. While leaving the event, she slipped and fell and sustained injury. Admiral had issued a general liability policy to her employer covering the pertinent time frame. There was a disagreement as to whether Villa Vizcaya was an additional insured under the policy at the time of the incident.

The Plaintiff sued Miami-Dade County and then later sued Villa Vizcaya. When the County requested a defense and indemnity from Admiral Insurance, it declined stating that none of the parties named in the litigation were insureds under the policy. After Admiral Insurance refused to defend Taylor, Villa Vizcaya and the County entered into a *Coblentz* Agreement under which Taylor was paid $25,000 and a $550,000 consent judgment was agreed to. Villa Vizcaya and the County then assigned all of their rights under the policy to Taylor.

The Third District ruled that the trial court properly found that the County and Villa Vizcaya were additional insureds under the policy, but found that it erred in finding the coverage was excluded under the employer's liability provision of the policy. The Third District pointed out that although there would have been no coverage for a claim brought against her employer, there was coverage for claims against the additional insureds under the severability or separation of insureds provision even though she was at the attraction because of her employment with the insured employer.

Settlements from third parties can be used for post-judgment offset

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Uninsured Motorist Coverage Not Applicable

State Farm Mutual Automobile Insurance Company v. Bailey, 203 So. 3d 995 (Fla. 2d DCA 2016)

The Plaintiff, who was acting within the course and scope of his employment, was struck and injured by an uninsured motorist. Specifically, the Plaintiff had been driving a crane truck on behalf of the named insured. At the time of the accident, the Plaintiff was not operating the truck or the crane, but rather, was standing between 10 and 20 feet from the truck observing the operation of the crane by a co-worker. The truck was running in order for the crane to be operated, however, the crane was not moving. While standing 10-20 feet away from the truck, he was struck by an uninsured motorist. The trial court granted summary judgment finding coverage in favor of the Plaintiff; however, the Second District reversed and found that he was not entitled to uninsured motorist coverage under the business named insured endorsement of the policy because he was not occupying the insured vehicle at the time of the loss.