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1. Supreme Court Decisions

a) Insurance Coverage Decisions

Am. S. Home Ins. Co. v. Lentini, 286 So. 3d 157
https://www.floridasupremecourt.org/content/download/545396/opinion/sc18-320.pdf

Collector Vehicle Policies and Attempts to Limit Underinsured Coverage.

The issue the Florida Supreme Court sought to address is whether an insurance company that issues a reduced premium collector vehicle policy may limit uninsured motorist coverage under that specialty policy to accidents involving the occupancy or use of the collector vehicle. The Supreme Court determined the requirements of § 627.727, Florida Statutes (2015), prohibit the limitations placed on uninsured motorist coverage in the collector vehicle policy at issue. As identified by the Fifth Appellate District in *Lentini*, nothing in § 627.727, Fla. Stat., excludes collector or antique vehicle insurance policies from its application as, to the contrary, § 627.727 explicitly states that no motor vehicle liability insurance policy shall be delivered or issued for delivery in Florida unless uninsured motor vehicle coverage is provided. The Florida Supreme Court, therefore, held that because the limitations to uninsured motorist coverage in the collector vehicle policy did not comply with the statutory mandates under § 627.727, the Court approved the Fifth District's decision in *Lentini* and disapproved of the Second District's decision in *Martin*.

b) Other Significant Decisions

R.R. v. New Life Cmty. Church of CMA, No. SC18-962
https://www.floridasupremecourt.org/content/download/672459/opinion/sc18-962.pdf

Accrual of and Limitations Period for Claims of Minor's Sexual Abuse Governed by Statute, Not Common Law.

The subject case addressed child sexual abuse but was ultimately about the separation of powers and the proper role of courts in applying statutes of limitations. The Florida Legislature adopted a comprehensive statutory framework to govern limitations periods, including provisions that address when those periods begin to run (accrual) and when they are suspended from running (tolling). The Florida Supreme Court was tasked with determining whether courts can go beyond the statutory framework and adopt a special, judge-made rule to govern the accrual of tort claims where the plaintiff is a minor.

The Supreme Court held the accrual of the minors' negligence and respondeat superior claims against a church and others was governed by § 95.031, Fla. Stat. (2019), not the common law, as the statutory framework left no room for supplemental common law accrual rules. The Supreme Court also found the adoption of a tolling provision reinforced the conclusion that a minor's cause of action could accrue even though the minor did not have a legal representative. It followed that the minors' claims were not subject to delayed accrual under case law because even that case law was still valid, the negligence and respondeat superior claims were not intentional torts and did not involve childhood sexual abuse accompanied by traumatic amnesia.

Lieupo v. Simon's Trucking, Inc., 286 So. 3d 143
https://www.floridasupremecourt.org/content/download/545397/opinion/sc18-657.pdf

Water Quality Assurance Act Allows for Recovery for Personal Injury.

The Florida Supreme Court, in answering a certified question, held that the private cause of action provision contained in the 1983 Water Quality Assurance Act, § 376.313(3), Fla. Stat., permitted recovery for personal injury. This was based on the plain meaning of all damages in § 376.313(3), Fla. Stat. including personal injury damages.

Plantation Open MRI, LLC v. Infinity Indemnity Ins. Co., Nos. 4D19-1398, 4D19-2260, 4D19-2261, 4D19-2264, 4D19-2265, 4D19-2277, 4D19-2278, 4D19-2282, 4D19-2283, 4D19-2284, 4D19-2285, 4D19-2286, 4D19-2333, 4D19-2382, 4D19-2385 and 4D19-2611.
https://www.4dca.org/content/download/671361/opinion/191398_DC05_09232020_101230_i.pdf

Insurer Obligation Limited to 80% of Statutory Fee Schedule for PIP Benefits.

Medical providers contended an insurer's personal injury protection ("PIP") policy created an ambiguity requiring the insurer to pay full reimbursement for the cost of medical services. The trial found that the subject policy limited the insurer's obligation to 80% of the statutory fee schedule for PIP benefits outlined in § 627.736(5)(a)1., Florida Statutes (2018). The Florida Supreme Court was then asked to determine whether a PIP insurance policy requires the insurer to pay more than 80% of the statutory fee schedule, if it includes provision for the total limit of benefits the insurer is obligated to pay based on the difference between the deductible and the total amount of all expense incurred, subject to the $10,000 limit of benefits. The Supreme Court determined this was not true and ruled in favor of the insurance company.

2. Appellate Court Decisions

a) Insurance Coverage Decisions

People's Trust Ins. Co. v. Portuondo, 3D20-266
https://www.3dca.flcourts.org/content/download/676034/opinion/200266_DC13_10072020_104849_i.pdf

Motion to Compel Appraisal Still Proper and Preferred Procedure Despite Prior Extension of Coverage.

This case addressed an insurance coverage dispute following Hurricane Irma and whether an insurance company could compel an appraisal after previously extending partial coverage. The Florida Court of Appeals determined the trial court erred by denying the insurance company's motion to compel appraisal. The insurer did not waive its right to appraisal by choosing to extend only partial coverage to the claimed losses or by abating the appraisal process after the insured served it with a breach of contract lawsuit.

Gonzalez v. People's Trust Ins. Co., No. 3D19-646
https://www.3dca.flcourts.org/content/download/682684/opinion/190646_DC13_10212020_103934_i.pdf

Concession of Coverage and Invocation of Preferred Contractor Endorsement Does Not Necessarily Waive Insured's Proof of Loss Requirement and Other Post-Loss Cooperation Requirements.

Following Hurricane Irma, homeowners submitted a property damage claim to their insurer. The insurer sought to invoke a Preferred Contractor Endorsement, whereby the insurer's chosen contractor would restore the property to its pre-loss condition. The insurer conceded coverage, but also requested the insured submit a Sworn Statement in Proof of Loss.

The Florida Court of Appeals first noted there was no dispute that the insureds' property incurred damage from Hurricane Irma, and there is no dispute that the insurer had conceded coverage for those as-yet unspecified losses under the homeowner's policy. However, the Court of Appeals explained policy indicates that the insureds must continue to comply with their post-loss obligations even after the insurer invokes its right to repair their property. There was no waiver of the proof of loss requirement based upon this conduct. The Court of Appeals then requested the trial court determine whether the insureds' sworn proof of loss failures constituted a breach of the policy justifying forfeiture of coverage, even after coverage had been conceded by the insurer.

Sec. First Ins. Co. v. Czelusniak, No. 3D19-589
https://www.3dca.flcourts.org/content/download/635370/opinion/190589_DC13_05132020_104016_i.pdf

Anti-Concurrent Cause Provision Upheld on Water/Mold Claim.

This case concerns water that entered the insured's home causing mold growth and damage to the interior. The policy included an anti-concurrent cause provision. The Florida Court of Appeals determined trial court erred in granting the insured's motion for directed verdict on the basis of the concurrent cause doctrine because the policy included an anti-concurrent cause provision. This provided that when a covered cause and non-covered cause combined to cause a loss, all losses directly and indirectly caused by those events were excluded from coverage. The anti-concurrent cause provision at issue here, coupled with the undisputed evidence that the loss was caused by a combination of both excluded and covered perils, foreclosed the analysis of whether the jury could legally or factually separate the damage caused by water coming through the door, which was not an expressly excluded cause, from water coming through the walls and windows, which were expressly excluded causes.

Hernandez v. Citizens Prop. Ins. Corp., No. 3D19-156
https://www.3dca.flcourts.org/content/download/635935/opinion/190156_DC05_05202020_104121_i.pdf

No Coverage for Earth Movement Unless Direct Loss by Explosion; Indirect, Off-site Explosion Insufficient.

The insured alleged his home sustained cracks to the walls and flooring as a result of vibrations caused by off-site blasting explosions. The Florida Court of Appeals determined no coverage was due and owing. There was no coverage for damage caused by earth movement unless a direct loss

by explosion occurred. However, the damages at issue resulted from an indirect, off-site explosion. The policy's terms and conditions unambiguously precluded coverage for earth sinking, rising, or shifting, and settling, cracking, or expansion of the foundation, whether caused by natural or man-made activities.

Frederick v. Citizens Prop. Ins. Corp., No. 3D18-1209
https://www.3dca.flcourts.org/content/download/693725/opinion/181209_DC13_12092020_101009_i.pdf

Insured's Contractor's Opinion Provides Evidence to Overcome Summary Judgment on Water Loss Claim.

After a thunderstorm in November 2015, the insured's home sustained damage from rainwater that came in through the roof. Following a coverage denial, the insured sued her insurance company. The insurance company moved for summary judgment, with the support of an engineering report and affidavit indicating the roof leaks were caused by wear and tear of the roof, as well as testimony from the insured's own contractor. The insured opposed summary judgment relying on an affidavit, inspection report, and deposition of its contractor, who ultimately concluded that the roof leaks resulted from micro-fissures in the roof caused by strong wind gusts and wind-driven rain during the original thunderstorm. The trial court determined that the evidence relied upon by the insured was insufficient to withstand summary judgment as to whether a covered peril caused an opening in the building's roof and entered final judgment in favor of the insurer. However, the Florida Court of Appeals disagreed and found the insured met her burden of showing at minimum a factual issue that should be addressed by the jury as to causation.

Restoration Constr., LLC v. SafePoint Ins. Co., No. 4D19-3790
https://www.4dca.org/content/download/693747/opinion/193790_DC13_12092020_101240_i.pdf

Considerations in Prompt Notice Arguments Following Water Losses.

The insureds had an insurance policy on their property from the insurer which covered water and mold damage, provided that the insureds complied with "all applicable provisions of" the policy. One of those provisions stated that after a claimed loss, the insureds were required to "give prompt notice to the insurer or its agent."

After the insureds discovered a water leak under their kitchen sink on January 30, they contacted a repair company to remedy the leak. They also retained Restoration the same day to perform water extraction, mold remediation, and repair services. Both Restoration and the repair company began repairs the same day they were contacted. In exchange for the services that Restoration performed, it received an assignment of the benefits under the insureds' insurance policy with the insurer. However, the insureds did not notify the insurer of the leak until five days later, on February 4.

When the insurer learned of the leak, it assigned a claim number to the loss but did not send a representative to inspect the property until February 9 – five days after it received notice. Another twelve days passed before the insurer sent its retained professional inspectors to visit the property and prepare a report. In that report, the inspectors noted that they reviewed an invoice from the repair company indicating that the repair company had replaced "a leaking hot water supply line servicing the kitchen sink." The report stated that this replacement and the removal of other items

within the kitchen area prior to its visit "severely hampered their investigation and impeded their ability to determine specific causes and origins of damage reported by the insureds and separate damages attributable to historical water discharges, leakages, and seepages from damages which may have been caused by a recent water leakage event." Thus, the inspectors opined that they were "unable to confirm" the cause of the water discharge in the sink or delineate the extent of damage that was attributable to that water discharge.

The Florida Court of Appeals determined the trial court erred in granting summary judgment to the insurer based on a five-day delay by the insureds in reporting the claim because there were genuine issues of material fact as to whether the insureds provided "prompt" notice of the loss. The Court of Appeals declined to create a bright line rule for what constitutes delay because resolution of insurance claim cases involve different scenarios. The trial court erred in finding that the notification was not prompt as a matter of law because the circumstances of the case created a question of fact for the jury, including the fact that the insurer waited another five days before sending an adjuster to the premises and then waited almost two additional weeks before engaging a third-party inspector to help assess the claim.

b) UM/UIM Decision

Milling v. Travelers Home & Marine Ins. Co., 2D18-4724
https://www.2dca.org/content/download/688195/opinion/184724_DC08_11132020_074524_i.pdf

Attorney's Fees Available in Bad Faith Suit and Recovery of Uninsured (UM) Benefits.

The insured sought attorney's fees as compensatory damages resulting from the insurance company's bad faith failure to settle pursuant to § 624.155. The Court of Appeals found the trial court erroneously ruled § 627.727(8) precludes, categorically, the recovery of the uninsured motorist (UM) attorney's fees. The Court of Appeals determined litigation of the existence and amount of the insured's damages was a part of the prosecution of the bad faith lawsuit and therefore attorney's fees incurred for such litigation should be awardable as prevailing-party fees in the bad faith case.

c) Other Significant Decisions

Avatar Prop. & Cas. Ins. Co. v. Simmons, 5D20-304
https://www.5dca.org/content/download/637556/opinion/200304_DC02_06122020_090731_i.pdf

No Blanket Claims File Privilege in Discovery.

In a breach of contract action against an insurance company, the insured requested: (1) any and all videos or photographs related to the insured's claim; and (2) the insurance company's complete underwriting file. The insurer objected, arguing that the requested documents, specifically the photographs, were part of the claim file and therefore work product. The trial court ordered the insurer to produce the photographs in response to the first request and reports and photographs in response to the second request. The Florida Court of Appeals determined that while a "claim file" is protected under the work product doctrine, not every document the claim file is work product. It focused on the "anticipated in litigation" requirement of the work product doctrine. Even if the

photographs at issue were placed in the claim file with other non-discoverable, claim-related documents, the photographs could be discoverable if the only objection is that they are part of an insurer's claim file.

State Farm Fla. Ins. Co. v. Hill, No. 3D20-1191
https://www.3dca.flcourts.org/content/download/691165/opinion/201191_DC03_11252020_105646_i.pdf

Subpoena for Claims Handling Policies, Practices, Procedures, Manuals, Guidelines Quashed.

The insured sued their insurer seeking coverage for water damage. The insured filed a notice of deposition *duces tecum* that: (1) sought to depose an insurer's corporate representative with knowledge of the insurer's "compliance" with section 627.70131(5)(a) of the Florida Statutes, the "Insurer's duty to acknowledge communications regarding claims," and (2) requested production of the insurer's "protocol, policy and guidelines" for complying with section 627.70131(5)(a), the 90-day pay or deny provision. The insurer sought a protective order to prevent production of these documents.

The Court of Appeals quashed the trial court's order denying an insurer's motion for a protective order. The challenged order permitted discovery of documents that were not subject to disclosure. Given the facts of the subject case, the trial court's order requiring discovery of the insurer's protocol, policy, and guidelines for complying with § 627.70131(5)(a), Fla. Stat., constituted a departure from the essential requirements of law causing irreparable harm for which there was no remedy for the insurer on appeal.

The Court of Appeals noted in first-party disputes concerning coverage under a homeowners' insurance policy, the Court of Appeals has consistently granted review and quashed discovery orders that permitted insureds to obtain their insurers' claims handling policies, practices, procedures, manuals, or guidelines.

Universal Prop. & Cas. Ins. Co. v. Deshpande, No. 3D19-1566
https://www.3dca.flcourts.org/content/download/687965/opinion/191566_DC13_11122020_104610_i.pdf

Attorney's Fees in First-Party Property Case Excessive and Unsupported.

The Florida Court of Appeals found a trial court's award of attorney fees and costs to an insured's attorneys in a first-party property case against insurers was excessive and unsupported by the evidence because the parties had engaged in minimal discovery, took only two depositions, filed no substantive motions or expert reports, and the case had settled before trial, and furthermore, the insurer's fee expert identified with specificity which hours should be deducted based on an itemized analysis of the billing entries, and competent, substantial evidence supported reducing the number of hours billed from 469 to 101 hours.

Salinas v. Weden, No. 4D19-3634
https://www.4dca.org/content/download/691190/opinion/193634_DC05_11252020_100540_i.pdf

Homeowners Not Liable for Independent Contractor Tree Trimmer Failing to Observe Electric Lines.

An independent contractor sued a homeowner following injuries he suffered when he was electrocuted while trimming trees on their property. The Court of Appeals began its analysis by explaining a property owner is generally not liable for injuries sustained by an independent contractor or its employees while performing their work. The Court of Appeals went on to explain the independent contractor admitted that he saw the electric lines above the palm trees. While the contractor contended that he did not know that the lines were high voltage lines, this did not constitute a latent danger. All electric lines are dangerous and the existence of unobstructed power lines, clearly visible above an open field is not a latent hazard.

Vitro Am., Inc. v. Ngo, 1D19-3737
https://www.1dca.org/content/download/670761/opinion/193737_DC13_09212020_133313_i.pdf

Jury, Not Judge, Should Have Decided Proximate Cause in Vehicular Collision Case.

This case involved a personal injury action stemming from a vehicular collision. At the close of the defendant's case, the trial court directed a partial verdict in favor of the plaintiff finding that the defendant's negligence was a proximate cause of the collision. The Florida Court of Appeals determined this ruling by the trial court was improper. The issue of proximate cause should have been decided by the jury and not the judge. This was because the testimony of the defendant's expert placed into question whether the plaintiff's inattentiveness was the sole cause of his harm, given the expert's statements that the plaintiff would have been able to see the defendant's truck's flashing lights in time to come to a complete halt and avoid the collision. This testimony alone created a factual issue on legal causation that was sufficient to send the question of proximate cause to the jury.

B. SIGNIFICANT CASES PENDING BEFORE THE FLORIDA SUPREME COURT

Citizens Property Insurance Corp. v. Manor House LLC, SC19-1394

The Supreme Court will decide whether a policyholder alleging breach of its insurance contract, but not bad faith, is entitled to recover damages that fall outside the policy but were caused by the insurer's failure to fulfill its obligations.

C. SIGNIFICANT FEDERAL CASES

Port Consol., Inc. v. Int'l Ins. Co. of Hannover, PLC, 826 Fed. Appx. 822
https://media.ca11.uscourts.gov/opinions/unpub/files/201913544.pdf

The 11th Circuit Court of Appeals granted summary judgment to an insurer. It found each alleged fuel theft was an act separated and distinguishable in "time and space," each alleged act of fuel theft constituted a separate "occurrence" under the commercial property policy. Furthermore, none of the insured's losses exceeded the policy's deductible and the insurance company was not required to pay the insured under the policy for those alleged fuel thefts.

These cases were pending at the time this summary was printed. To confirm whether the Supreme Court has issued a decision in any of these cases, we invite you to visit our website at http://www.rolfeshenry.com.

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