INSURANCE DECISIONS

From Around the State

by Gregory Yaffa

There was certainly no shortage of homeowners' property damage and sinkhole cases since the last article. If these cases are pertinent to your practice or if you simply enjoy reading sinkhole opinions, please see *Case v. Tower Hill*, 41 FLW D1118 (Fla. 2d DCA 5-11-16); *Certified Priority Restoration v. State Farm*, 41 FLW D1133 (Fla. 4th DCA 5-11-16); *Diaz v. Florida Peninsula Ins. Co.*, 41 FLW D1289 (Fla. 4th DCA 6-1-16); *Start to Finish Restoration v. Homeowners Choice Prop. & Cas. Ins. Co.*, 41 FLW D1385 (Fla. 2d DCA 6-10-16); *Citizens v. Perez.*, 41 FLW D1388 (Fla. 2d DCA 6-10-16); *Allen v. State Farm*, 41 FLW D1389 (Fla. 2d DCA 6-10-16); *Citizens v. Retz.*, 41 FLW D1436 (Fla. 2d DCA 6-17-16); and *Citizens v. Nunez.*, 41 FLW D1479 (Fla. 2d DCA 6-24-16).

In UM subrogation action, it was error for trial court to enter Final Judgment against vicariously liable party without first conducting an evidentiary hearing as to damages and when there had not yet been a liability determination relating to the active tortfeasor. *Kotlyar v. Metropolitan Cas. Ins. Co.*, 41 FLW D1182 (Fla. 4th DCA 2016).

Following Met. Casualty's settlement of its insured's property damage and UM claim, the carrier brought a subrogation claim against the active third party tortfeasor and her vicariously liable husband. In the subrogation claim, Met. Casualty pled entitlement to the $50,000 UM benefits that it paid its insured, as well as the $4,789.85 that it paid out in property damage. The damages were pled as an exact amount during the subrogation action but were unliquidated.

In response to the subrogation complaint, the active tortfeasor filed a *pro se* answer denying liability, while her vicariously liable husband defaulted. The trial court denied the husband's motion to vacate the default and considered the damages liquidated, in that the specific amount of $54,789.85 was pled. As such, without conducting an evidentiary hearing, the trial court entered a final default judgment against the husband in the amount of $54,789.85.

In the appeal, the husband argued that the trial court erred in (1) determining the nature of the damages and entering the FJ without conducting an evidentiary hearing, and (2) denying the motion to vacate the default judgment (equating to a finding of liability against him) while there had not yet been a determination of liability against his wife (the active tortfeasor who did file an answer).

The Fourth District Court of Appeal reversed the trial court and remanded the action, holding that it was fundamental error to award damages against the husband without conducting an evidentiary hearing ("the setting of unliquidated damages without the required notice and without proof is regarded as fundamental error." *Talbot v. Rosenbaum*, 142 So.3d 965 (Fla. 4th DCA 2014)). The Court held that by citing a specific amount of damages, Met. Casualty did not convert unliquidated damages to liquidated damages. Recognizing that this holding conflicts with *Dunkley Stucco v. Progressive American Ins.* Co., 752 So.2d 723 (Fla. 5th DCA 2000), the Court certified the question.

In addition, the Court held that the trial court erred by entering a judgment against the defendant without an adjudication of liability against the defendant's wife who was operating the vehicle at the time of the accident. Specifically, the Court stated, "allowing a default judgment to stand against Kotlyar, without an adjudication as to the liability of his wife, could lead to an absurd and unjust result if Metropolitan is able to obtain damages against Kotlyar based solely on his ownership of the vehicle, prior to an adjudication that his wife negligently operated that vehicle.

Error to apply a multiplier where there was no showing that the insureds would have had difficulty finding competent counsel to represent them. *Florida Peninsula Insurance Co. v. Wagner*, 41 FLW D1279 (Fla. 2nd DCA 6-1-16):

Florida Peninsula's insureds made a claim against the carrier when a refrigerator water line broke and caused some flooding inside their home. Once the house was in a condition to have the extent of the damage ascertained, a dispute arose concerning the insurance company's invocation of an "option to repair" provision in the policy, the scope of remedial work that would be required to repair the damage from the leak, and the selection and hiring of a contractor to effectuate those repairs.

After the insureds' neighbor (attorney friend trying to help them out) was unable to get the claim resolved, the insureds hired competent counsel on a contingency fee basis, who was able to obtain a favorable jury award in the amount $71,123.79.

Following the favorable result, counsel moved for fees pursuant to §627.428, Florida Statutes. The parties stipulated to the reasonable number of hours and hourly rate, but disagreed as to entitlement to a contingency risk multiplier. Despite the insureds not testifying at the fee hearing, the trial court applied a 2.0 multiplier to the loadstar amount (reasonable hourly rate multiplied by a reasonable number of hours for the work performed). Based on the opinion, it appeared that the trial court awarded the multiplier simply because the insureds' counsel litigated the matter through trial.

The Second District Court of Appeal reversed, holding that counsel did not establish entitlement to a contingency risk multiplier pursuant to *Standard Guar. Ins. Co. v. Quanstrom*, 555 So.2d 828 (Fla. 1990):

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> A court must consider three factors before it may award a fee multiplier in a contract dispute:
>
> (1) Whether the relevant market requires a contingency fee multiplier to obtain competent counsel; (2) whether the attorney was able to mitigate the risk of nonpayment in any way; and (3) whether any of the factors set forth in [*Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985)] are applicable, especially, the amount involved [in the litigation], the results obtained, and the type of fee arrangement between the attorney and his [or her] client.

The Second District found that there was no showing or finding that without the prospect of a multiplier to an otherwise reasonable fee award, the insureds would have had difficulty finding competent counsel to represent them in the insurance coverage dispute (evidence presented by the carrier showed 258 local attorneys listed in Martindale Hubbell holding themselves out as first-party insurance attorneys). There was no evidence that the Tampa Bay legal market could not provide competent counsel for the plaintiffs' case at the prevailing hourly rates.

Where policy language was unambiguous, UM coverage denied when liability coverage was afforded under the same insurance policy. *State Farm v. Smith*, 41 FLW D1338 (Fla. 2nd DCA 6-3-16):

> In 2006, Smith (insured with State Farm) was involved in a crash while operating a non-owned vehicle with the permission and consent of the vehicle owner. The crash resulted in injuries not only to himself, but also to the passenger in the vehicle. The vehicle and the passenger were insured under a different State Farm insurance policy.

Smith's insurance policy extended liability coverage to him for the use of the vehicle insured under that policy, *as well as for any other car that he "used but did not own," including the subject vehicle*.

Following tender of the liability limits to the passenger under Smith's State Farm policy, Smith amended his own complaint to include a UM claim against State Farm under his policy. State Farm moved for Summary Judgment, arguing that the uninsured motorist provisions of the Smith policy did not extend coverage to Smith in this case because the Smith policy defined the term "uninsured motor vehicle" to *exclude* any motor vehicle "insured under the liability coverage of this policy." Because Smith's policy extended liability coverage due to his negligent operation of the non-owned vehicle (tendered liability limits to passenger), State Farm contended that the unambiguous language contained within the policy precluded Smith from making a UM claim under that policy. The trial court disagreed and denied State Farm's Motion for Summary Judgment.

Citing to *Fla. Peninsula Ins. Co. v. Cespedes*, 161 So.3d 581 (Fla. 2d DCA 2014), ("Where the language of an insurance policy is unambiguous, we are required to interpret it in accordance with the plain meaning so as to give effect to the policy as written"), the Second District Court of Appeal reversed. The Court held that the policy definition of "uninsured motor vehicle" unambiguously excluded motor vehicles insured under its liability provisions. Because the non-owned vehicle was insured under the liability provisions of the Smith State Farm policy, the trial court erred by holding that the claimed UM exclusion did not apply.

Insurer entitled to rescission of policy due to insureds' misrepresentation on the application. *Certain Underwriters at Lloyd's London v. Jimenez,* 41 FLW D1431 (Fla. 3rd DCA 6-15-16):

In 2007, Raul and Ada Jimenez took out a homeowners policy with Lloyd's. In the application, the homeowners attested to the fact that they had a central station monitor as a protection device that monitored for smoke, temperature, and burglary. The homeowners were given a discount because of the presence of the central station monitoring.

The policy renewed in 2008 and 2009. For each of these renewals, the homeowners affirmatively represented that there had been no changes in the property or the risk as stated in the 2007 application.

The Lloyd's policy contained a Concealment or Fraud provision, stating that the policy would be void if the applicant intentionally concealed or misrepresented any material fact or circumstances; engaged in fraudulent conduct; or made a false statement pertaining to insurance. The entire policy would be void if an insured has made false statements, regardless of whether the statements are intentional or fraudulent.

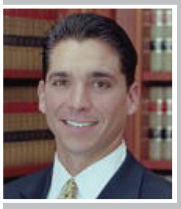
In 2009, there was a kitchen fire at the subject property. When the homeowners made a claim for the property damage incurred, Lloyd's filed a two-count complaint for (1) declaratory relief, claiming that the policy did not provide coverage for the kitchen fire based upon the language of the protection device endorsement provision, and (2) alternatively, seeking rescission of the policy due to material misrepresentations in the application. In denying coverage, Lloyd's returned premiums paid from the inception of the policy.

The trial court found in favor or the homeowners for declaratory relief as to coverage and for breach of contract and held that Lloyd's was not entitled to rescission, despite the fact that the evidence documented that they did not have the central station monitoring system for smoke and temperature in 2007 or any year thereafter.

The Third District Court of Appeal reversed, holding that the misrepresentation in the insurance application was material and was detrimentally relied upon by the Lloyd's, precluding coverage for the kitchen fire and entitling Lloyd's to rescission of the policy.

Section 627.409(1), Florida Statutes, provides that misrepresentations, omissions, concealment of facts, and incorrect statements on an insurance application will not prevent a recovery under the policy unless they are either: (1) fraudulent; (2) material to the risk being assumed; or (3) the insurer in good faith either would not have issued the policy or would have done so only on different terms had the insurer known the true facts. Lloyd's relied on (2) and (3).

The Court emphasized that an insurance company has the right to rely on an applicant's representation in an application for insurance and is under no duty to inquire further unless it has actual or constructive knowledge that such representations are incorrect or untrue. Additionally, under Florida law, an insurer has the right to unilaterally rescind an insurance policy on the basis of misrepresentation in the application for insurance. J



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