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INSURANCE: UNINSURED MOTORIST COVERAGE: BUSINESS AUTO INSURANCE POLICY MAY HAVE ONE SET OF UNINSURED MOTORIST LIMITS FOR EXECUTIVES AND THEIR FAMILIES AND ANOTHER SET OF LIMITS FOR ALL OTHER INSUREDS

Germany v. Darby, ___ So. 3d ___, 40 Fla. L. Weekly D436 (Fla. 1st DCA February 16, 2015)

The plaintiff's employer purchased a business auto policy with uninsured motorist limits of $500,000 for executives and their family members and $30,000 for all other insureds, including the plaintiff. The plaintiff challenged the propriety of the different limits after he sustained bodily injury as a result of the negligence of an uninsured motorist during the course and scope of the plaintiff's employment. "The trial court construed [Section 627.727(1), Florida Statutes] to allow for different coverage limits among insureds," and the appellate court affirmed. The statute requires a policy with bodily injury liability coverage to include uninsured motorist coverage unless the insured makes a written rejection of uninsured motorist coverage or selects lower limits. "By its terms, the statute expressly permits the election of '*lower limits*' by a named insured on behalf of all insureds. It does not specify that there must be a single 'limit' applicable to all insureds. Because in this case, the employer selected lower coverage limits for all insureds and did so in writing using [an Office of Insurance Regulation approved form], it satisfied the statute's requirements." "[The employer's] election of lower limits for some insureds [did not] violate the purpose of the UM statute "'to provide for the broad protection of the citizens of this State against uninsured motorists.'" The employer could have rejected uninsured motorist coverage entirely. Instead, it chose "to provide UM coverage with meaningful, albeit different, coverage limits for all insureds. Its decision [broadly to] provide coverage comports with the State's coverage goals; and, in fact [did] so much more that if it had chosen (lawfully under the statute) to provide no UM coverage at all. Thus, nothing on the face of § 627.727, or as a policy matter, [forbade the employer's] UM coverage elections."

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INSURANCE: AUTO INSURANCE: RESCISSION: MATERIAL MISREPRESENTATION: ALTHOUGH POLICY WAS SUBJECT TO RESCISSION FOR MATERIAL MISREPRESENTATION, TRIAL COURT ERRED BY FAILING TO CONSIDER WHETHER INSURER WAIVED ITS RIGHT TO RESCIND OR CONFESSED JUDGMENT BY MAKING PIP PAYMENTS TO HEALTH CARE PROVIDERS AFTER INSURED FILED SUIT FOR BREACH OF CONTRACT:

EVIDENCE OF PAYMENT OF PIP BENEFITS WAS NOT BARRED BY SECTION 90.409, FLORIDA STATUTES, BECAUSE IT WAS NOT OFFERED TO PROVE LIABILITY FOR THE INJURY OR ACCIDENT

Echo v. MGA Insurance Company, Inc., ___ So. 3d ___, 40 Fla. L. Weekly D442 (Fla. 1st DCA February 16, 2015)

After the plaintiff sustained injuries in a motor vehicle accident, her insurer rescinded her auto policy because her application misrepresented that she owned the accident vehicle. The plaintiff filed an action for breach of contract in which she claimed an entitlement to PIP and collision coverages and a legal defense in the event of a liability claim. The insurer asserted the affirmative defense of revocation and cancellation, under Section 627.409, Florida Statutes, based upon the insured's material misrepresentation. Despite this defense, the insured paid over $10,000 to the plaintiff's health care providers approximately one year after her lawsuit was filed. After the insurer's payment, the plaintiff amended her complaint to drop her claim for PIP coverage, and she moved for summary judgment based upon the doctrines of waiver and confession of judgment. The trial court refused to consider the issues of waiver and confession of judgment, based on lack of standing, because the plaintiff assigned her PIP coverage to her health care providers. In addition, the trial court refused to consider the issue of confession of judgment based upon Section 90.409, Florida Statutes, which prohibits evidence of the payment of medical expenses "to prove liability for the injury or accident." With the removal of these obstacles, the trial court entered judgment for the insurer based upon the plaintiff's material misrepresentation in her application for insurance. The appellate court affirmed the trial court's finding of material misrepresentation but reversed and remanded for a determination whether the insurer waived its right to revoke the policy or confessed judgment. The appellate court rejected the insurer's argument that it could not resurrect the policy because it was void ab initio. Section 627.409(1), Florida Statutes, "gives an insurer the right to rescind an insurance contract if the statutory criteria are met." Thus, the statute makes the contract voidable, rather than void, and "the case law establishes the principle that an insurer can forfeit its right of rescission." Although the plaintiff may not have had standing to sue for PIP benefits based upon her assignment of this coverage to the health care providers, she did have standing to assert that the insurer's payment of PIP benefits was inconsistent with its defense that the policy was void ab initio, and the trial court erred by refusing to consider the issues of waiver and confession of judgment based on lack of standing. The trial court also erred by concluding that Section 90.409, Florida Statutes, barred evidence of the payment of PIP benefits. The statute applies to evidence of payment of medical expenses "to prove liability for the injury or accident." "Here, however, [the plaintiff] sought to admit [the insurer's] PIP payout ledger, not as evidence of liability for an injury or accident, but as evidence that [the insurer] waived its affirmative defense of misrepresentation and resultant rescission. To put it another way, [the plaintiff] sought to use the evidence to prove that a contract existed despite [the insurer's] claim to the contrary." The word "liability" in the statute refers to "responsibility for causing injury or accident, not for an insurer's obligations to its insured pursuant to an insurance contract."

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TORTS: DEFAMATION: NEGLIGENT SUPERVISION: NEGLIGENT RETENTION: ABSOLUTE PRIVILEGE: ACTION FOR DEFAMATION BASED UPON ONE LAWYER'S DISPARAGING STATEMENTS ABOUT OPPOSING COUNSEL DURING DEPOSITION OF NONPARTY WITNESS WERE ABSOLUTELY PRIVILEGED: NEGLIGENCE CLAIMS ALSO BARRED BY ABSOLUTE PRIVILEGE; CIVIL PROCEDURE: SANCTIONS: ATTORNEY'S FEES: SECTION 57.105,

FLORIDA STATUTES: TRIAL COURT ERRED BY AWARDING ATTORNEY'S FEES AGAINST PLAINTIFFS, ALTHOUGH THEIR ACTION WAS BARRED BY ABSOLUTE PRIVILEGE, BECAUSE PLAINTIFFS ADVANCED A GOOD FAITH ARGUMENT FOR THE ESTABLISHMENT OF NEW LAW WITH A REASONABLE EXPECTATION OF SUCCESS

McCullough v. Kubiak, ___ So. 3d ___, 40 Fla. L. Weekly D457
(Fla. 4th DCA February 18, 2015)

A lawyer and her law firm sued opposing counsel and her law firm for defamation, negligent supervision, and negligent retention, based upon disparaging statements made during the deposition of a nonparty witness. The offending statements allegedly involved "the plaintiffs' litigation practices in similar cases" and were made "to scar[e] the insurance company into settlement." The trial court dismissed the action with prejudice, and the appellate court affirmed because the "alleged statement were made during the course of a judicial proceeding and allegedly bore some relation to settlement negotiations in that proceeding." The appellate court distinguished *DelMonico v. Traynor,* 116 So. 3d 1205 (Fla. 2013), which recognized a narrow exception to the privilege for statements "made by an attorney during ex-parte, out-of-court questioning of a potential, nonparty witness while investigating matters connected to a pending lawsuit." The absolute privilege also barred the plaintiffs' claims for negligent supervision and retention. Nevertheless, sanctions against the plaintiffs under Section 57.105, Florida Statutes, were reversed because *DelMonico* demonstrated that the plaintiffs' presented "a good faith argument for the establishment of new law, with a reasonable expectation of success." When *DelMonico* was filed it "also was 'not supported by the application of then-existing law,'" but the plaintiffs "ultimately established new law [by persuading the Florida Supreme Court to recognize] a 'narrow scenario' to which the absolute privileged did not apply. [The court in the present case] view[ed] the plaintiffs' action here as merely another case in which allegedly defamed parties sought to establish a 'narrow scenario' to which the absolute privilege did not apply."

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TORTS: WRONGFUL DEATH: PRODUCT LIABILITY: TOBACCO: ENGLE PROGENY CASE; APPEALS: PRESERVATION: WAIVER: INVITED ERROR: PLAINTIFF WAIVED ARGUMENT THAT FINDING OF ENGLE CLASS MEMBERSHIP PRECLUDED FINDING THAT DEATH WAS NOT CAUSALLY RELATED TO DEFENDANT'S WRONGFUL ACTS BECAUSE PLAINTIFF'S COUNSEL ADVOCATED OR AGREED TO INSTRUCTIONS AND VERDICT FORM THAT SUBMITTED ISSUE OF CAUSATION TO THE JURY

Baker v. R.J. Reynolds Tobacco Company, ___ So. 3d ___, 40 Fla. L. Weekly D476
(Fla. 4th DCA February 18, 2015)

The jury found that the decedent was a member of the *Engle* class but that the defendant's wrongful acts were not the cause of his death. The plaintiff moved for a new trial based upon the premise that the verdict was internally inconsistent because the finding of *Engle* class membership established causation. The trial court denied the motion and entered judgment for the defendant, and the appellate court affirmed. The plaintiff submitted an instruction that asked the jury to determine "whether [the decedent] was addicted to cigarettes containing nicotine[,] and if so, whether his addiction was a legal cause of his lung cancer and death." In addition, the "Plaintiff agreed to jury instructions requiring the jury to find 'for the defendant' if they made a specific finding that 'the negligence of the defendant' or 'the defective and unreasonably dangerous cigarettes placed on the market by the defendant' were not 'a legal cause of [the decedent's] lung cancer and death.'" Furthermore, the plaintiffs' proposed verdict form submitted the issue of causation to the jury to determine. *Philip Morris USA, Inc. v. Douglas,* 110 So. 3d 419 (Fla. 2013), which was decided after the trial of the present case, held that "legal causation for the strict liability claim in *Engle* progeny cases is 'established by proving that addiction to the *Engle* defendants' cigarettes containing nicotine was a legal cause of the injuries alleged." The plaintiff was not entitled to rely upon *Douglas* because she either advocated or agreed to the jury instructions and verdict form that submitted the issue of causation for determination by the jury. The court held that "[t]he jury [could not] be faulted for doing exactly what it was instructed to do" and that the "Plaintiff waived any argument that the alleged inconsistency [was] grounds for a new trial."

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TORTS: MEDICAL MALPRACTICE: JURY INSTRUCTIONS: RETAINED FOREIGN BODY INSTRUCTION WAS UNNECESSARY AND WAS NOT SUPPORTED BY THE FACTS BECAUSE THE PLAINTIFF WAS CONSCIOUS AND HIS WIFE WAS IN THE ROOM WHEN A NURSE FAILED TO REMOVE THE ENTIRE DRAINAGE TUBE FROM HIS SURGICAL INCISION; APPEALS: PRESERVATION: WAIVER: COURT DECLINES TO CONSIDER WHETHER INSTRUCTION WOULD HAVE BEEN APPROPRIATE WITH RESPECT TO ONE OF THE PLAINTIFF'S TWO CLAIMS BECAUSE THE PARTIES FAILED TO COMPLY WITH THE TRIAL COURT'S REQUEST TO SUBMIT PROPOSED INSTRUCTIONS DIFFERENTIATING BETWEEN THE CLAIMS

Dockswell v. Bethesda Memorial Hospital, Inc., ___ So. 3d ___, 40 Fla. L. Weekly D480 (Fla. 4th DCA February 18, 2015)

The day after surgery, a nurse failed to remove the entire drainage tube from the plaintiff's incision. The error was discovered four months later and was corrected by a second surgery. The plaintiff contended that the nurse was negligent because of (1) the technique she used to remove the tube (too fast and forceful), and (2) failing to inspect the tube to confirm that it was removed completely. The jury returned a verdict for the hospital, but the plaintiff appealed based upon the trial court's failure to give the retained foreign body instruction to the jury. *Fla. Std. Jury Instr. (Civ.)* 402.4c provides a rebuttable presumption of negligence based upon the presence of a foreign object in the patient's body. The instruction implements Section 766.103(3), Florida Statutes, which provides that discovery of a surgical

object in a patient's body is prima facie evidence of negligence. In this case, the court held that the instruction was neither necessary nor supported by the facts because the plaintiff was conscious and his wife was present in his hospital room when the nurse removed the drainage tube. As a result, the plaintiff was capable of furnishing direct proof of negligence, and the instruction would have interfered with the ability of the jury to weigh the conflicting testimony of the parties' expert witnesses. Furthermore, the instruction was irrelevant to the negligent inspection claim because a second surgery would have been necessary even if the failure to remove the entire tube had been discovered immediately. The court refused to consider whether the instruction would have been appropriate as to the negligent technique claim because the parties failed to comply with the trial court's request to "submit proposed instructions differentiating the claims." As a result, this issue was not preserved for appellate review.

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INSURANCE: UNINSURED MOTORIST COVERAGE: WHEN DAUGHTER WAS SUBSTITUTED FOR HER FATHER AS THE SOLE NAMED INSURED UNDER AUTO POLICY, INSURER WAS REQUIRED TO OBTAIN A WAIVER OF MATCHING LIMITS OF BODILY INJURY AND UNINSURED MOTORIST COVERAGES FROM DAUGHTER

Chase v. Horace Mann Insurance Company, ___ So. 3d ___, 40 Fla. L. Weekly S97 (Fla. February 19, 2015)

In 2001, the father obtained an auto insurance policy with bodily injury limits of $100,000/$300,000 and uninsured motorist limits of $25,000/$50,000. His daughter was listed as a driver, but she was not an insured, and she did not have the right to select coverage amounts. In 2004, the daughter was substituted for her father as the sole named insured under the policy, and a new policy was issued to the father as the sole named insured. In 2005, the daughter moved out of her father's house, and the father was removed as a listed driver from her policy. In 2007, the daughter returned to her father's house, and her father was added as a listed driver on her policy. One month later, the father and daughter were involved in a motor vehicle accident that killed the father and injured the daughter. The trial court ruled that daughter was not bound by her father's selection of lower limits of uninsured motorist coverage, but the First District Court of Appeal reversed, creating express and direct conflict with a decision of the Second District Court of Appeal. The Florida Supreme Court quashed the decision of the First District and approved the decision of the Second District. The supreme court held that a new policy was created when the daughter was substituted for her father as the sole named insured "because it was the first time that the only named insured on the policy had the opportunity to make statutorily required waivers," and the "[insurance company] did not obtain a valid waiver of UM coverage under [the daughter's] policy." The father's prior waiver under the same policy number were not binding upon the daughter either "as the sole named insured on her policy or as the personal representative of her father's estate under her policy." Justices Labarga, Pariente, and Perry concurred in Justice Quince's majority opinion. Justice Lewis concurred in the result. Justice Canady concurred in Justice Polston's dissenting opinion.

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CIVIL PROCEDURE: NOTICE: DUE PROCESS: JUDGMENT REVERSED AS TO PARTY WHO DID NOT RECEIVE SUFFICIENT SERVICE OF MOTION FOR ENTRY OF JUDGMENT AND NOTICE OF HEARING ON MOTION

Sarasota Estate & Jewelry Buyers, Inc v. Kane, ___ So. 3d ___, 40 Fla. L. Weekly D486 (Fla. 2d DCA February 20, 2015)

One group of appellants did not receive legally sufficient notice of the appellee's motion for entry of final judgment and the notice of hearing on the motion. The other appellant did receive legally sufficient notice. The appellate court reversed the judgment as to the appellants who did not receive legally sufficient notice because they were denied due process of law.

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ARBITRATION: UNDER REVISED FLORIDA ARBITRATION CODE, EFFECTIVE JULY 1, 2013, COURTS DECIDE WHETHER AN ARBITRABLE ISSUE EXISTS: ARBITRATORS DECIDE WHETHER CONDITIONS PRECEDENT TO ARBITRATION HAVE BEEN SATISFIED AND WHETHER ARBITRATION AGREEMENT IS ENFORCEABLE: IF A PARTY TO A LAWSUIT CHALLENGES THE ARBITRABILITY OF A CLAIM, ARBITRATION MAY PROCEED PENDING A DETERMINATION OF ARBITRABILITY BY THE COURT UNLESS THE COURT ORDERS OTHERWISE: DISPUTE OVER MANAGEMENT OF LIMITED LIABILITY COMPANY WAS NOT ARBITRABLE BECAUSE AGREEMENTS TO ARBITRATE WERE LIMITED TO MEMBER DUTIES AND DECISION MAKING IMPASSES

Sherwood v. Slazinski, ___ So. 3d ___, 40 Fla. L. Weekly D487 (Fla. 2d DCA February 20, 2015)

The plaintiff and one of the defendants formed a limited liability company. The plaintiff provided the capital, and the defendants ran the business. When the plaintiff became disenchanted with the management of the business, he sued the defendants for declaratory and injunctive relief, and the defendants moved to compel arbitration. The trial court denied the motion, and the appellate court affirmed based upon the lack of an arbitrable issue because the agreements to arbitrate were limited to "member duties and decision-making impasses." Under the Revised Florida Arbitration Code, effective July 1, 2013, courts decide whether a dispute is arbitrable; arbitrators decide whether the conditions precedent to arbitration have been satisfied and whether an agreement to arbitrate is enforceable. If a party to a lawsuit contends that the dispute is not arbitrable, arbitration may continue until the court decides the issue of arbitrability or orders otherwise."

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JUDGES: DISQUALIFICATION: MOTION BASED UPON JUDGE'S ACTIONS AND COMMENTS OVER COURSE OF CASE WAS UNTIMELY BECAUSE MOTION MUST BE FILED WITHIN TEN DAYS AFTER DISCOVERY OF FACTS SUPPORTING MOTION: MOTION BASED ON ADVERSE RULINGS IS LEGALLY INSUFFICIENT; CIVIL PROCEDURE: COMPUTATION OF TIME: DAY THE TRIGGERING EVENT OCCURS IS EXCLUDED FROM COUNT

Kazran v. Buchanan, ___ So. 3d ___, 40 Fla. L. Weekly D488 (Fla. 2d DCA February 20, 2015)

After the trial court directed a verdict against the petitioner, he filed a motion to disqualify the judge based on the judge's conduct and comments over the course of the case. When the judge denied the motion, the petitioner filed a petition for writ of prohibition, but the appellate court denied the petition. To the extent the motion was based upon conduct or comments made more than ten days before the motion was filed, the motion was untimely. In computing time under *Fla. R. Jud. Admin.* 2.514(a)(1)(A), the day triggering the event is excluded from the count. To the extent that the motion was based on adverse legal rulings, the motion was legally insufficient.

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INSURANCE: HOMEOWNER'S INSURANCE: SINKHOLE: FLORIDA INSURANCE GUARANTY ASSOCIATION (FIGA): SINKHOLE CLAIMS AGAINST FIGA ARE NOT SUBJECT TO APPRAISAL; APPEALS: CERTIFIED QUESTIONS

Florida Insurance Guaranty Association, Inc. v. Frank, ___ So. 3d ___, 40 Fla. L. Weekly D488 (Fla. 2d DCA February 20, 2015)

Sinkhole claims against the Florida Insurance Guaranty Association (FIGA) are not subject to appraisal because Section 631.54(3)(c), Florida Statutes (2011), limits the definition of a covered claim for sinkhole loss to the amounts deemed appropriate by FIGA for testing and the actual cost of repairs. The statute also requires payment for repairs to be made directly to the contractors. The court certified two questions of great public importance to the Florida Supreme Court: (1) Does the 2011 version of the statute defining a covered claim apply to a loss if the policy was issued before the effective date of the statute but the insurer was adjudicated insolvent after the effective date of the statute, and (2) Does the statute limiting payment to the actual cost of repairs preclude appraisal of a sinkhole claim against FIGA?

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