

Florida Appellate Court Bars Third Party Practice for Joint Tortfeasor Claims

By Dale A. Scott

The Second District Court of Appeal recently overturned nearly thirty years of standard jurisprudence and held, under § 768.31, the “Uniform Contribution Among Tortfeasors Act,” a defendant may not file a third party claim against an alleged non-party joint tortfeasor. *T & S Enterprises Handicap Accessibility, Inc. v. Wink Ind. Maint. & Repair, Inc., et al.*, 11 So.3d 411, (Fla. 2nd DCA 2009). Apparently, a defendant is left now, pursuant to *Fabre v. Marin* and § 768.81, *Fla. Stat.* (“Comparative Fault”) to simply have a jury apportion fault amongst not only the party defendant, but also the alleged non-party joint tortfeasor.

T & S involved the Second District Court of Appeal’s review of a trial court order dismissing a third party claim for contribution against Wink Industrial Maintenance & Repair, Inc. In the underlying action, Brian and Jennifer Clark filed a complaint against *T & S* alleging Brian Clark was injured while performing repair work at *T & S*’ premises, as a result of *T & S*’ negligence. Clark was a Wink employee, and *T & S* hired Wink to perform the repairs. Wink was not named a party defendant by the Clarks, even though it did not have worker’s compensation insurance covering Clark. *T & S* filed a third party complaint against Wink for contribution, alleging Wink was negligent

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FEDERAL COURT WEIGHS IN ON ISSUE OF PLACING MEDICARE ON SETTLEMENT DRAFT

By Christopher R. Fay

In *Tomlinson vs. Landers*, 2009 WL 1117399 (M.D.Fla.), the United States District Court, Middle District Florida, Jacksonville Division, weighed in on the issue of including Medicare on a settlement draft. In dicta the Court interpreted Medicare Secondary Payer (MSP) Act as not requiring inclusion of Medicare as a payee on a settlement check.

James Tomlinson was involved in an automobile accident with William Landers in February of 2007. Landers was insured by Millers Classified Insurance Company (MCIC). Prior to suit, Tomlinson’s attorney demanded the policy limits on two occasions. In the second demand, Plaintiff’s counsel advised MCIC that it would be in bad faith if it did not pay its policy limits. MCIC accepted the demand

and forwarded its draft to the Plaintiff. However, it included Medicare as a payee on the draft. Plaintiff’s counsel returned the check and MCIC’s Release, claiming that no prior discussion or agreement had been reached to include Medicare on the draft as a payee and that certain language in the Release was inappropriate and should be removed. Plaintiff’s counsel also ad-

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in failing to train Clark, failing to properly supervise him, failing to provide adequate equipment and failing to provide a proper and safe work environment.

Following a hearing on Wink's motion to dismiss, the trial court dismissed T & S' third party complaint. It held the legislature abolished joint and several liability for joint tortfeasors via its 2006 amendments to § 768.81, *Fla. Stat.*, which mandates that a court enter judgment against a party on a basis of that party's percentage of fault, and not on the basis of joint and several liability. The trial court also found, under the Uniform Contribution Among Tortfeasors Act, the right of contribution exists only in favor of a tortfeasor *who has paid* more than its pro rata share of common liability. § 768.31(2)(b), *Fla. Stat.* The trial court found T & S' third party complaint failed to allege such payment, and thus failed to state a cause of action for contribution.

The Second District Court of Appeal affirmed the trial court's order dismissing T & S' third party complaint. In reaching its ruling, the appellate court focused heavily upon the "who has paid" language found in § 768.31(2)(b), *Fla. Stat.* The court acknowledged that in spite of such statutory language, for over thirty years, Florida district courts of appeal have held a defendant could file a third party claim against an alleged non-party tortfeasor as part of the same case brought by the plaintiff, even though the liability of that third party plaintiff had not yet been established (i.e., the defendant is not one "who has paid"). See, e.g., *Gorts v. Lytal, Reiter, et al.*, 769 So.2d 484, 487 (Fla. 4th DCA 2000), *N.H. Ins. Co., v. Petrik*, 343 So.2d 48, 48-50 (Fla. 1st DCA 1977). The rationale, the T & S court explained, was Rule of Civil Procedure 1.180(a) provides for a third party action against a person not a party to the main action who "is or may be" liable to a named defendant, for all or a part of the plaintiff's claim. The prior opinions reasoned § 768.31, *Fla. Stat.*, did not provide the only procedural vehicle available to a defendant seeking contribution. Also, since the Act was, at least in part, procedural, it was subject to the rule-making authority of the Supreme Court, and thus Rule 1.180 permitted the third party action as part of the original plaintiff's case.

The T & S court argued, however, the above noted line of cases were decided before the current version

of § 768.81, *Fla. Stat.*, was enacted in 2006. The section now provides that in negligence cases such as T & S, the trial court shall enter judgment against each party liable on the basis of such party's percentage of fault "and not on the basis of the doctrine of joint and several liability." See § 768.81(3), *Fla. Stat.* In order to allocate any fault to a nonparty, a defendant must affirmatively plead this fault and prove it at trial "by a preponderance of the evidence." See § 768.81(3)(a) and (b); *Fabre v. Marin* 623 So.2d 1182 (Fla. 1993).

The T & S court noted, in the case at issue, similar procedures were available to T & S, except Wink would not be a named party. That is, T & S has the opportunity to plead that Wink is partially or completely at fault for plaintiff's injuries, and the evidence presented a trial would presumably be the same whether such fault was argued by T & S in the *Clark v. T & S* case under § 768.81(3), *Fla. Stat.*, or whether asserted via a subsequent action by T & S against Wink under § 768.31, *Fla. Stat.* Also, the court reasoned, it was unlikely T & S would be required to pay more than its pro rata share of any common liability under either scenario. The T & S court concluded by noting while the cases cited in its opinion "may not have been overruled by the enactment of the current version of § 768.81, they appear to have been rendered *obsolete*, at least in cases like this one." *Id.* at 413.

T & S appears to have quietly effectuated a significant change in litigation practice in Florida. As it acknowledges, for some thirty years, a defendant to a negligence action, who believes a non-party may bear some fault for the alleged damages, had the option of either (1) identifying the fault of such non-party, and having the jury apportion fault to that non-party, thus diminishing the liability of the defendant, versus (2) filing a third party complaint against the non-party, thus bringing that party into the lawsuit. The decision of whether to simply assert the fault of the third party, versus bringing the third party into the lawsuit, involved strategic and cost related considerations. However, following T & S, it would appear the option of bringing the third party into the lawsuit has been eliminated.

We believe this opinion is questionable, as is its applicability. First, as the court acknowledges its opinion cuts against thirty years of jurisprudence from

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vised that his client would agree to hold MCIC harmless for any Medicare claims if MCIC would reissue the check without Medicare listed as a payee and remove the offending language in the Release. MCIC moved to enforce settlement.

The Court refused to enforce settlement finding that there was no meeting of the minds on these two issues. Thus, no settlement agreement had been reached between the parties that could be enforced. Please bear in mind that this opinion primarily deals with enforcement of settlement agreements between parties rather than a full blown interpretation of MSP law and regulation. The Court reviewed 42 CFR 411.24(i) because MCIC claimed that it was required to include Medicare as a payee on the settlement draft under this Act. In its opinion, the Court stated that MCIC misconstrued the Medicare Secondary Payer Act and found that there was no requirement that the Defendant list Medicare as a payee on the settlement check. While that practice would be in the best interest of an insurer, it is not required by Federal law. Since it was not required by law, when the insurer

added Medicare as a payee, it created a new condition or term to the settlement. This new settlement term was not agreed upon by the parties. As a result, there was no meeting of the minds and no settlement agreement had been reached. Thus, the Court could not enforce a settlement agreement that had never been reached.

The Court, while finding that there is no requirement to add Medicare as a payee to a settlement check, did recognize the precarious position of insurers under these circumstances. According to the Medicare Secondary Payer Act, if after settlement the Plaintiff failed to reimburse Medicare to its satisfaction, the insurer may have to pay twice. This case provides an example of what may happen if the question of Medicare reimbursement is not raised and addressed early on in a claim. Medicare should be discussed during settlement negotiations and a method for addressing MSP reimbursement should be made part of the settlement agreement. This case demonstrates the risk of waiting until the settlement draft has been issued before discussing Medicare reimbursement.

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Accrual of Interest in Insurance Coverage Dispute

By **Mary J. Walter**

In *North Pointe Insurance Company v. Tomas*, 34 Fla. L. Weekly D1752a (Fla. 3d DCA August 26, 2009), the Third District awarded substantial prejudgment interest in a claim where an insurer first denied coverage but then submitted to an appraisal of the claim.

In that case, two homeowners, the Tomases, made a claim with their homeowners' insurance carrier, North Pointe, for the replacement of a marble kitchen floor damaged on October 23, 2005. After an investigation of the claim, North Pointe denied coverage for the loss. When the Tomases filed a petition to compel appraisal under the terms of their policy, North Pointe withdrew its previous denial and admitted coverage. The claim went to arbitration, and, North Pointe paid on May 14, 2008. An appraisal award

was entered on June 10, 2008, in the amount of \$115,899.52, including prejudgment interest and attorneys fees from the date of loss. By motion, the court affirmed the award and entered a final judgment in favor of the Tomases.

North Pointe appealed, arguing it was an error for the trial court to affirm an award which included prejudgment interest before the sixty-day period established by the policy had expired. The Third District disagreed, citing precedent as the basis for the substantial interest award.

As a general rule, interest on a loss payable under an insurance policy is recoverable from the date payment is due pursuant to the provisions of that policy. In *Independent Fire Insurance Co. v. Lugassy*, 593 So. 2d 570 (Fla. 3d DCA 1992), the Third District created an exception where

an insurer denies coverage and coverage is later determined either by admission or determination of a court. The court there reasoned, "[o]nce an insurer denies coverage, it is deemed to have waived the policy provision for deferred payment." Should it pay later, the insurer will be responsible for interest from the date of loss, even where the policy provides for payment at a later date.

Applying *Lugassy*, the Third District held that because North Pointe initially denied the Tomases' claim, the trial court was correct in awarding prejudgment interest from the date of loss, rather than the date payment became due under the insurance policy. The final judgment of substantial prejudgment interest was affirmed.

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across Florida. For now, it would appear this case will only be applicable to cases which arise within the Second District Court of Appeal's jurisdiction, which includes the counties of Pasco, Pinellas, Hardy, Highlands, Polk, De Soto, Manatee, Sarasota, Hillsborough, Charlotte, Glades, Collier, Hendry and Lee. Additionally, the parties to the T & S lawsuit may appeal the matter to the Florida Supreme Court, and thus the opinion may be overturned within the next year or so. Additionally, the T & S opinion reaches a conclusion which could require a defendant to fully defend a lawsuit, and pay a judgment

(notwithstanding apportionment of fault on the part of so-called *Fabre* parties under § 768.81, *Fla. Stat.*), including a portion in excess of its share of fault, and *then* file suit against the allegedly negligent non-party to recover the excess portion of the judgment paid. It would be an exceedingly inefficient process for a party to completely defend a lawsuit, and then be required to file a new lawsuit, against the negligent non-party, which would involve all the same issues, witnesses, and lines of inquiry as the first lawsuit. It is a well established precept of statutory interpretation that statutory provisions shall not be read

together in such a manner so as to result in an "absurd" result. Such inefficiency may, in the eyes of the Supreme Court or other districts, be tantamount to an "absurd" reading of § 768.31, *Fla. Stat.*, and § 768.81, *Fla. Stat.*, in conjunction.

In any event, the Second District Court of Appeal was guarded in its opinion, by stating the previous cases from the last thirty years "appear" to have been rendered "obsolete." It will be interesting to see how the import of this opinion is construed by the courts in the next few years.

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