

July 15, 2008

Re: **CASE LAW ALERT**

Dear Ladies and Gentlemen:

The Florida District Courts of Appeal have recently issued several opinions that are worthy of your consideration. The Third District Court of Appeal, in *The Itnor Corp. v. Markel Int'l Insurance Co.* held that although language of a coverage exclusion contains a word that is not defined within the policy, the lack of a contractual definition does not create an ambiguity. The “undefined” term should be given its plain and ordinary meaning. This case is important to our clients as it emphasizes that a contractual provision is not necessarily ambiguous simply because it contains a term that is not defined within the contract itself.

In *Grainger v. Wald*, the First District Court of Appeal held that a trial court erred when it granted a directed verdict of the permanency of the Plaintiff's injuries. The trial court instructed the jury it was free to weigh, accept, or reject the opinions of any expert witness. However, there was no reference to permanence on the verdict form or in the jury instructions. Consequently, there was no avenue through which the jury could reject the permanency of the injuries. Permanency is a jury question, and even if uncontroverted testimony is presented on this issue, a jury is still free to accept or reject it. Further case law updates are summarized below.

UPDATES

- I. ***Itnor Corporation v. Markell International Insurance Co.*, 33 Fla. L. Weekly D1372 (Fla. 3d DCA 2008).**

Coverage excluded under Independent Contractor Exclusion as well as Cross-Liability Exclusion; Exclusions are not ambiguous

FACTS AND PROCEDURAL HISTORY

While working at Itnor's trailer park, Shirley Murphy ("Murphy") was injured in a propane gas explosion. Itnor had a commercial liability policy with Markell. The policy excluded: (a) Bodily injury "arising out of operations performed for you by independent contractors" ("independent contract exclusion"); and (b) Bodily injury "arising out of action initiated or caused to be brought about by any insured covered by the policy against any other insured covered by this policy ("cross-liability exclusion").

On summary judgment, the trial court determined that Murphy was barred from coverage under the policy's Independent Contractor and Cross-Liability Exclusions. Itnor and Murphy contend that neither the Independent Contractor nor the Cross-liability Exclusions are applicable for two reasons: (1) The Independent Contractor Exclusion is ambiguous and should be interpreted against Markell; and (2) the Cross-liability Exclusion does not apply because Murphy is not an insured manager. Markell, on the other hand, asserts that both exclusions are unambiguous and applicable.

APPELLATE COURT DECISION

Courts must construe insurance contracts in accordance with their plain meaning. *Taurus Holdings, Inc., v. U.S. Fid. and Guar. Co.*, 913 So. 2d 528 (Fla. 2005). Where policy language is susceptible to more than one reasonable interpretation, it is considered ambiguous and will be liberally construed in favor of the insured. *Id.*

As to the Independent Contractor Exclusion, Florida's Third District Court of Appeal concluded that this provision plainly and unambiguously excludes coverage. Although the section's caption refers only to employees of independent contractors, the remaining language clearly includes the independent contractors themselves. Notably, in this case, Itnor and Murphy admitted in their Motions for Summary Judgment that Murphy was an independent contractor. Further, the 3rd

DCA held that the trial court properly found that Murphy's injury arose out of "operations" performed in the course and scope of her employment.

Turning next to the Cross-liability Exclusion, under this type of exclusion, claims brought by one insured against another insured covered by the same policy are barred. See *Underwriters at Lloyds London v. St. Denters, Inc.*, 395 F. Supp. 2d 1142 (N.D. Fla. 2005). Moreover, a commercial liability policy is designed to protect the insured from claims by the public, not from individuals working for the insured. See *Fla. Ins. Guar. Ass'n. v. Revoredo*, 698 So. 2d 890 (Fla. 3d DCA 1997). In this case, Itnor is named insured. The policy provides that "any person...acting as your real estate manager" is also an insured. Murphy acted as the real estate manager of Itnor's trailer park. Therefore, the Cross-liability Exclusion barred coverage for Murphy's lawsuit against Itnor. For these reasons, the Final Summary Judgment entered below is affirmed.

***II. Makar v. Downi, Mansour, et al.*, 33 Fla. L. Weekly D1563 (Fla. 5th DCA 2008).**

Active tortfeasor's voluntary settlement of claim does not, standing alone, extinguish a plaintiff's potential claim against passive tortfeasors who are vicariously liable for the active tortfeasor's wrongdoing

FACTS AND PROCEDURAL HISTORY

Wasfi Makar ("Makar") appeals a Final Judgment enforcing a settlement agreement between himself, Kamil S. Gowni ("Gowni") and George Mansour ("Mansour"). Makar contends that the trial court erred in ruling, as a matter of law, that his settlement with the two individual defendants also inured to the benefit of the corporate defendants named in his original suit.

In Makar's first appearance before the appellate court, as to the settlement agreement between Makar and the individual defendants, the court found that the agreement was unambiguous as to whether Gowni and Mansour were jointly or severally liable for their designated portions of the overall settlement amount. Upon remand, Gowni filed a motion for entry of final judgment in favor of himself and the four corporate defendants. Named in Makar's original suit. The corporate defendants were all sued on the theory that they were vicariously liable for

misrepresentations made by the individual defendants, which induced Makar to invest money with the defendants.

Makar argued that Gowni was entitled to a final judgment based on his settlement of the original claims, but argued that the settlement agreement could not be construed to release the corporate defendants as well. Gowni countered that the settlement agreement only made him individually liable for his half of the overall debt.

Pursuant to the settlement agreement, Makar agreed to take less than his stated claim from Gowni and Mansour in exchange for their agreement to pay him \$15,000 immediately, and then to tender individual, secured promissory notes, each for half of the remaining balance of the agreed settlement amount.

APPELLATE COURT DECISION

The Fifth District Court of Appeal held that the settlement agreement in no way addressed the effect of the settlement on the corporate defendants. The court further held that an active tortfeasor's voluntary settlement of a claim does not, standing alone, extinguish a plaintiff's potential claim against passive tortfeasor's who are vicariously liable for the active tortfeasor's wrongdoing. *See JFK Medical Center v. Price*, 647 So.2d 833 (Fla. 1994). Rather, under Florida law, "the claim against the primary obligor and the person vicariously responsible for his conduct [are regarded] as separate claims when one of them has been settled." *Id.* Therefore, the fact that Makar entered into a binding settlement agreement with Gowni and Mansour does not preclude him from pursuing his claim against the corporate defendants, unless the parties actually intended and agreed to release them as a part of the prior settlement.

III. Grainger v. Wald, 83 Fla. L. Weekly D1005 (Fla. 1st DCA 2008)

Torts; Automobile accidents; Trial Court erred as a matter of law by directing verdict on issue of permanency of plaintiff's injuries

FACTS AND PROCEDURAL HISTORY

The plaintiff, Mr. Wald, appealed from a Final Judgment awarding over \$1,000,000 in damages for injuries sustained in an automobile accident for which the defendant admitted fault. Mr. Wald argued that the trial court committed error when it granted a directed verdict as to the permanency of the injuries, thereby removing that question from the jury. The First District Court of Appeal of Florida agreed and reversed.

Mr. Wald alleged he suffered injuries to his neck, back, right arm, foot, and thigh in the automobile collision. However, he sought damages only for his neck and back injuries. Since the defendant admitted fault, the only issues for the jury were causation, permanency of the injuries, and damages.

At trial, one doctor testified that Wald had permanent neck, low back and right thigh injuries in connection with the collision. Another doctor opined the neck and low back injuries were not permanent, and neither was connected to the collision. However, the second doctor also testified that Mr. Wald had permanent right thigh numbness and, giving Mr. Wald “the benefit of the doubt,” the condition was related to the collision. Based on this testimony, Mr. Wald moved for a directed verdict on the permanency of his injuries, arguing there was no evidence that he did not suffer a permanent injury from the collision.

The trial court granted the Motion for Directed Verdict on permanency, but only as to the right thigh condition, a condition for which the plaintiff did not seek damages. The trial court instructed defense counsel that he was free to argue to the jury that none of the other injuries were permanent. Additionally, the trial court instructed the jury it was free to weigh, accept, or reject the opinions of any expert witness. However, there was no reference to permanence in the verdict form or in the jury instructions. Consequently, there was no avenue through which the jury could reject the permanency of any of the injuries.

APPELLATE COURT DECISION

Permanency is a jury question. See *Frank v. Wyatt*, 869 So. 2d 263 (Fla. 1st DCA 2004). A jury is free to waive the credibility of expert witnesses as it does any other witnesses, and reject even uncontradicted testimony. Likewise, a jury is entitled to weigh the credibility of a medical expert and a lay witness, reject the expert witness testimony and base its verdict solely on conflicting lay testimony, or

reject the plaintiff's claim entirely. See *Republic Services of Fla. v. Poucher*, 851 So.2d 866 (Fla. 1st DCA 2004).

There was conflicting testimony as to the permanency of plaintiff's neck and back injuries, and the testimony as to the permanency of plaintiff's thigh injury was ambivalent. By granting a directed verdict as to the permanency of plaintiff's thigh injury, the trial court took from the jury's consideration the issue of the permanency of plaintiff's neck and back injuries as well. Furthermore, these were the only conditions for which plaintiff sought damages. Because the issue of permanency is a jury question, the trial court erred as a matter of law by directing a verdict on that issue.

IV. Miami-Dade County v. Deerwood Homeowner's Association,
33 Fla. L. Weekly D996 (Fla. 3rd DCA 2008)

Torts; County was unable to plead facts to show that an association or maintenance company voluntarily undertook to maintain the tree roots or repair the public sidewalks

Miami-Dade County appealed a final Circuit Court Order dismissing with prejudice the County's Second Amended Crossclaim against Deerwood Homeowner's Association (hereinafter "Deerwood") and Techlawn, Inc. (hereinafter "Techlawn"), the Association's landscaper. The issue presented is whether a land owner, Deerwood, and its maintenance company, Techlawn, may be liable to the County for injuries allegedly caused by tree roots growing under the surface of the County sidewalk.

FACTS AND PROCEDURAL HISTORY

The Perdomo's filed claims against the County, Deerwood, and Techlawn after Mrs. Perdomo tripped and fell on a County sidewalk. The Perdomo's alleged that roots from a tree near the sidewalk in the Deerwood subdivision created a vertical separation in the concrete that caused Mrs. Perdomo's fall.

The Perdomo's alleged: (1) The County controlled the sidewalk and failed to maintain it; (2) Deerwood planted the tree and failed to maintain the tree's root system; and (3) Techlawn, as Deerwood's lawn maintenance company, also failed to maintain the tree's roots. The trial court eventually found that the County's

allegations failed to state a cause of action, and that Deerwood and Techlawn did not owe a legal duty to the County. The trial court entered a final order of dismissal with prejudice in favor of Deerwood and Techlawn.

APPELLATE COURT DECISION

The County argued that Deerwood and Techlawn undertook maintenance of the tree, and that both the Perdomo's and the County relied on this maintenance. Once such an obligation is voluntarily undertaken, the County argued, it must be performed with reasonable care. The County cites this "voluntary undertaking" doctrine as an exception to the Florida's Supreme Court's holding in *Sullivan v. Silver Palm Properties, Inc.*, 558 So.2d 409 (Fla. 1990), which held that private landowners are not liable for injuries caused by subterranean roots growing under public rights of way.

However, the County was unable to plead operative facts regarding the alleged undertaking. "Gratuitously" planting a tree next to a sidewalk and "maintaining the tree for nine years" does not take Deerwood's or Techlawn's conduct out of the simple, clear rule elaborated in *Sullivan*. Legal conclusions unsupported by ultimate facts are not enough to state a cause of action. See *Risheld v. Eastern Airlines, Inc.*, 466 So.2d 1136 (Fla. 3rd DCA 1985). Since there are no specific facts pled to show that Deerwood or Techlawn undertook to maintain the tree's roots or to repair the public sidewalk, the "voluntary undertaking" argument fails.

The County also argued that it gives private owners, developers, and homeowner's associations an information packet on their obligations when they obtain a permit to plant a tree. The Second Amended Complaint states that "Deerwood would have received this packet if it properly sought a permit to plant a tree." For reasons it does not explain, however, the County concedes that it has no records that Deerwood or Techlawn obtained any permit for the tree in question, or thereby consented to maintain the roots or repair the sidewalk near the tree. As a result, the County was unable to plead such facts.

Similarly, no relevant duty is invoked by the County's allegation that Deerwood is responsible under Chapter 19 of the Miami-Dade County code for maintaining the tree and the area in which it is planted. That ordinance does not impose upon Deerwood or Techlawn the obligation to trim the tree roots below the

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County sidewalk or to repair the sidewalk, nor does it create a private cause of action against the abutting landowner for a breach of any such duty.

In this case, however, the County apparently could not, and therefore did not, allege that Deerwood or Techlawn ever trimmed a tree root near the sidewalk, repaired the sidewalk, or agreed with the County to perform any such task. After first allowing the County two attempts to amend, the trial court correctly dismissed the County's claims with prejudice.

Very truly yours,

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