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Insurance: Florida's Nonjoinder Statute Declared Constitutional

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INSURANCE: FLORIDA'S NONJOINDER STATUTE DECLARED CONSTITUTIONAL

VanBibber v. Hartford Accident & Indemnity Insurance Co., 439 So. 2d 880 (Fla. 1983)

Appellant brought suit against a supermarket and its insurance carrier seeking damages for the supermarket's alleged negligence.[1] The trial court found Florida's nonjoinder statute[2] constitutional and, because the plaintiff failed to satisfy the statutory condition precedent for joinder,[3] dismissed the insurer from the suit.[4] The First District Court of Appeal certified the issue to the Florida Supreme Court[5] which affirmed the trial court[6] and HELD, the nonjoinder statute is a substantive enactment and therefore does not unconstitutionally invade the supreme court's exclusive rulemaking authority.[7]

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1. 439 So. 2d 880 (Fla. 1983). Appellant, Ara Williams VanBibber, sought damages from appellees, Hartford Accident and Indemnity Insurance Co. & Publix Supermarkets, alleging that her injury was caused by the supermarket's negligence. *Id.*

2. The statute referred to by the trial court is the 1982 revision. FLA. STAT. § 627.7262 (Supp. 1982), current version at FLA. STAT. § 627.7262 (1983).

3. FLA. STAT. § 627.7262 (1983) reads as follows:

> Nonjoinders of insurers.—
>
> (1) It shall be a condition precedent to the accrual or maintenance of a cause of action against a liability insurer by a person not an insured under the terms of the liability insurance contract that such person shall first obtain a judgment against a person who is an insured under the terms of such policy for a cause of action which is covered by such policy.
>
> (2) No person who is not an insured under the terms of a liability insurance policy shall have any interest in such policy, either as a third-party beneficiary or otherwise, prior to first obtaining a judgment against a person who is an insured under the terms of such policy for a cause of action which is covered by such policy.
>
> (3) Insurers are affirmatively granted the substantive right to insert in liability insurance policies contractual provisions that preclude persons who are not designated as insureds in such policies from bringing suit against such insurers prior to first obtaining a judgment against one who is an insured under such policy for a cause of action which is covered by such policy. The contractual provisions authorized in this subsection shall be fully enforceable.

4. 439 So. 2d at 881 & n.1.

5. *Id.* at 881. The district court deemed the case "as passing on a question of great public importance or as having a great effect on the administration of justice throughout the state." *Id.* The Florida Supreme Court accepted jurisdiction pursuant to FLA. CONST. art. V, § 3(b)(5). *Id.*

6. 439 So. 2d at 883. The Court, however, reversed the trial court's holding as the statute applies to the instant case because the statute was solely prospective in operation and therefore did not apply to a cause of action occurring prior to its effective date, Oct. 1, 1982. *Id.*

7. *Id.* at 882-83. The rule making authority of the Supreme Court is found in article V, section 2(a) of the Florida Constitution. FLA. CONST. art. V, § 2(a) provides:

Absent legislative action, public policy may be judicially established.[8] Prior to the passage of the original nonjoinder statute,[9] the Florida Supreme Court was the sole policymaker concerning joinder or nonjoinder of motor vehicle liability insurers.[10] In *Artille v. Davidson,* the plaintiff sustained injuries in an automobile accident caused by the insured.[11] Arguing he was a third party beneficiary of the contract between the insured and the insurer, the plaintiff sought to join the parties in suit.[12] The supreme court rejected the plaintiff's third party beneficiary contention and ruled that because the appellant was not in privity with the insurer, the insurer was not liable in tort to the plaintiff.[13] The court therefore held the plaintiff had no cause of action against the insurer.[14]

The Supreme Court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. These rules may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

8. Baker v. United States, 27 F.2d 863, 875 (1st Cir. 1928), *cert. denied,* 278 U.S. 656 (1929).

9. FLA. STAT. § 627.7262 (1976):

Nonjoinder of insurers.—

(1) No motor vehicle liability insurer shall be joined as a party defendant in an action to determine the insured's liability. However, each insurer which does or may provide liability insurance coverage to pay all or a portion of any judgment which might be entered in the action shall file a statement, under oath, of a corporate officer setting forth the following information with regard to each known policy of insurance:

(a) The name of the insurer. (b) The name of each insured. (c) The limits of liability coverage. (d) A statement of any policy or coverage defense which said insurer reasonably believes is available to said insurer filing the statement at the time of filing said statement.

(2) The statement required by subsection (1) shall be amended immediately upon discovery of facts calling for an amendment to said statement.

(3) If the statement or any amendment thereto indicates that a policy or coverage defense has been or will be asserted, then the insurer may be joined as a party.

(4) After the rendition of a verdict, or final judgment by the court if the case is tried without a jury, the insurer may be joined as a party and judgment may be entered by the court based upon the statement or statements herein required.

(5) The rules of discovery shall be available to discover the existence and policy provisions of liability insurance coverage.

10. *See* Artille v. Davidson, 126 Fla. 219, 220, 170 So. 707, 708 (1936).

11. *Id.* at 220, 170 So. at 708.

12. *Id.*

13. *Id.*

14. *See id.* The court held that, where there has been no breach of contract creating in the insured a present right to maintain an action on the policy, such right cannot accrue to another by reason of having a claim against the insured. *Id.*

Thirty-three years later, *Artille* was overruled in the seminal case of *Shingleton v. Bussey.*[15] In *Shingleton,* the plaintiff brought suit against the insured and insurer for injuries sustained in an automobile accident. The Florida Supreme Court overruled *Artille* and reversed the trial court's dismissal of the insurer as a party defendant. Thus, Florida became the first state to adopt direct action by judicial fiat.[16]

The court based its decision on the previously discarded third party beneficiary rationale and held that an injured member of the public does benefit from the contract between the insured and the insurer.[17] Moreover, the right to join the insurer vested when the injured party became entitled to sue the insured.[18] The decision thus permitted inclusion of liability insurers as party defendants in suits stemming from the insured's negligent acts.[19] While noting that nonjoinder precluded possible prejudice by preventing jury knowledge of insurance coverage, the *Shingleton* court felt juries had matured since *Artille.* Indeed, knowledge of coverage[20] could benefit insurers by allowing the jury to adjust any damage award according to the policy's limits.[21] The court further determined that the parties could not contract for nonjoinder[22] unless the legislature affirmatively au-

15. 223 So. 2d 713 (Fla. 1969).

16. *Id.* at 715, 718. The court modified the nonjoinder rule as a matter of public policy. Public policy is a device available to the judicial process to incorporate "changing realities" and the "related rules of fair play" into our legal system. *Id.* at 715. *See* Lee & Polk, *Insurance,* 31 U. MIAMI L. REV. 1061, 1065 (1977).

17. 223 So. 2d at 716. Support for this judicial determination was assumed from the intent of the parties. The court noted that parties to a liability policy contract contemplate injury to a third party. *Id.* Therefore, by operation of law, an injured party becomes a third party beneficiary and is entitled to maintain a cause of action directly against the insurer of the tortfeasor. *Id.*

18. *Id.* Although the liability of the insured for judgment is a condition precedent to the liability of the insurer for judgment, the court found that this condition would not initially affect the insurer's liability to be sued. *Id.* at 716-17.

19. *See* Lee & Polk, *supra* note 16, at 1065.

20. 223 So. 2d at 718. The court felt that this approach would be more beneficial than the "ostrich head in the sand" approach which often misled juries into thinking that insurance coverage was greater than it actually was. *Id.* In addition, the court reasoned that the initial joinder of insurance companies was desirable because this procedure placed "all the cards on the table," including possible defenses to the claim. *Id.* at 720. Also, initial joinder would eliminate the need for additional or collateral proceedings to enforce the judgment since the insurer would be a party to the original suit. *See id.* Thus, initial joinder might reduce the multiplicity of suits. *Id.* at 718.

21. 223 So. 2d at 718. The court felt that complete disclosure of the insurer's interest in the outcome of the case would diminish their total policy judgment payments. Failure to disclose often misled juries into thinking insurance coverage was greater than it was. *Id.*

22. *Id.* at 717-19. The court, citing FLA. CONST. art. I, § 4, found that nonjoinder clauses in liability policies infringed upon the plaintiff's right to a speedy trial. *Id.* at 717. The plaintiff's recovery was delayed because the clauses effectively postponed liability by prohibiting direct action against the insurer. *Id.*

thorized insurers to include nonjoinder clauses in the policies.[23]

In 1976 the legislature enacted original section 627.7262, modifying the *Shingleton* joinder rule.[24] In *Markert v. Johnston,* however, the Florida Supreme Court declared the statute an unconstitutional infringement of its rulemaking authority.[25] The court found section 627.7262 a procedural rule because it merely designated the precise moment when a motor vehicle insurer became a real party in interest.[26] Because timing of joinder is a procedural matter within the exclusive province of the court's rulemaking power, the court held the statute invalid.[27] The court failed, however, to indicate whether *Shingleton,* in establishing the insurer's status as a real party in interest, created a substantive or procedural right to joinder.[28]

The instant case addressed the constitutionality of the most recent version of section 627.7262.[29] Finding this nonjoinder statute

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23. *Id.* at 718. This legislative action would apparently prevent the joinder of the insurer pursuant to FLA. R. CIV. P. 1.210(a). *Id.* Under FLA. R. CIV. P. 1.210(a), joinder may occur as follows:

> (a) Parties Generally. Every action may be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another or a party expressly authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest may be joined on the same side as plaintiffs or defendants, and when any one refuses to join, he may for such reason be made a defendant.

One year after *Shingleton,* in Beta Eta House Corp. v. Gregory, 237 So. 2d 163 (Fla. 1970), the court extended initial joinder from automobile liability insurers to liability insurers in all tort claims. *Id.* at 165.

24. FLA. STAT. § 627.7262 (1976). *See supra* note 9. In cases arising out of accidents occurring on or after Oct. 1, 1976, the liability carrier could not be joined as a party to the action until after the trial unless it intended to assert a policy or coverage defense. However, final judgment could include an award against the insurance company even though it was not previously a defendant. *See* Lee & Polk, *supra* note 16, at 1065.

25. 367 So. 2d 1003, 1006 (Fla. 1978).

26. *Id.* at 1005.

27. *Id.* at 1006.

28. *Id.* at 1005. The court avoided ruling on this issue by holding that the insurer was a real party in interest. The court stated that § 627.7262 was consistent with *Shingleton* in that the statute also recognized insurers as the real parties in interest. *Id.* The court refused to adopt the substance of the statute as a rule of procedure, as advocated in the concurring opinion. *Id.* at 1006. *See also* Carter v. Sparkman, 335 So. 2d 802, 806 (Fla. 1976) (court adopted reference to joinder as a rule of procedure for medical malpractice trials), *cert. denied,* 429 U.S. 1041 (1977).

29. *See supra* note 3. *See also supra* note 9. Both houses introduced similar bills which restated the joinder policy. FLA. STAT. 1239 (Reg. Sess. 1979, introduced by Comm. on Commerce & Sen. Barron, MacKay, McLain & Hair); FLA. H.R. 1471 (Reg. Sess. 1979, introduced by

substantive rather than procedural, the court held the statute constitutional.[30] The present statute, unlike the prior version, requires a third-party interest to vest by judgment as a condition precedent to joinder.[31] Additionally, "the present statute specifically authorizes a contractual provision prohibiting direct third-party suits."[32] Because of these differences, the court found the legislature went beyond merely controlling the timing of joinder and enacted a substantive statute.[33] The majority realized that although public policy can be judicially determined, such a determination must yield to "valid, contrary legislative pronouncement."[34] Thus, the court found the policy announced in *Shingleton* of allowing simultaneous joinder of the insurer no longer prevailed.[35]

Rep. Gallagher). Although *Markert* frustrated the legislative intent of nonjoinder, the legislature could reassert its constitutional prerogative because the full court never ruled that denial of joinder is outside the purview of the legislature. 367 So. 2d at 1004. In fact, the court in *Shingleton* had specifically stated that the legislature may provide for nonjoinder. 223 So. 2d at 718-19.

Although neither bill was enacted, the senate bill was endorsed by a full committee. FLA. S. 1239 was referred to the Senate Committee on Commerce, which adopted a Committee Substitute (FLA. CS) for FLA. S. 1239 in lieu of the original bill. FLA. CS for FLA. S. 1239 was favorably referred to the Senate Committee on Rules and Calendar, where it remained until the end of the session. FLORIDA LEGISLATURE, HISTORY OF LEGISLATION, SENATE BILL ACTIONS REPORT at 315 (Reg. Sess. 1979). The Committee Substitute for the senate bill provided the language and policy for the new nonjoinder statute. *See supra* note 3.

30. 439 So. 2d at 883. The court upheld FLA. STAT. § 627.7262 (1983) on the grounds that it was a substantive enactment by the legislature. *Id.* However, the court held that the statute had no application to a cause of action predicated on events which occurred prior to the effective date of the statute, Oct. 1, 1982. *Id.* Therefore, *Shingleton* and *Markert* controlled the suit. *Id.*

The court stated that this successor statute would fail on the grounds enunciated in *Markert* if it was found procedural and not substantive. 439 So. 2d at 882. The third-party beneficiary concept was altered to provide that an injured party had no beneficial interest in a liability policy until that party had first obtained a judgment against an insured. *Id.*

31. *Id.* at 882-83. "The statute transfers the accrual of a beneficial interest from the date of occurrence until the time an action brought on a tort has matured to a judgment." *Id.* at 882. The statute clearly states "that no cause of action against an insurance company shall accrue until a judgment against an insured is obtained." *Id.*

32. *Id.* at 883. The statute "authorized insurance companies to insert nonjoinder provisions in their insurance policies." *Id.* at 882. This provision was derived from language in *Shingleton* that said:

> This requirement of the procedural rules raises the presumption that unless the Legislature in the exercise of its police power regulation of insurance, affirmatively gives insurers the substantive right to insert "no joinder" clauses in liability policies there is no basis in law for insurers to assume they have such contractual right as a special privilege not granted other citizens to contract immunity with their insureds from being sued as joint defendants by strangers.

223 So. 2d at 718-19.

33. 439 So. 2d at 882. *See Markert,* 367 So. 2d at 1006.

34. *Id.* at 883.

35. *Id.* "In *Shingleton,* we found that public policy authorized an action against an insur-

Justice Shaw, concurring in part and dissenting in part, cited *Shingleton* and concluded the policy factors considered then remained persuasive.[36] Justice Shaw argued public policy still requires all parties in interest be brought to court immediately to "protect their rights, to facilitate the litigation, and to resolve the dispute."[37] Recognizing other constitutional infirmities Justice Shaw found that the nonjoinder clause contravenes the fundamental constitutional rights of access to the courts and due process.[38] These rights guarantee courts shall afford injured persons legal remedy without denial or delay.[39] Justice Shaw contended that even if section 627.7262 concerned only substantive rights, the legislature still cannot abrogate a right of action, deny due process, nor delay court access in violation of the state constitution.[40] In conclusion, Justice Shaw stated that although a legislative act is deemed good public policy, a court should not defer to the legislature when a constitutional right is violated.[41]

The Florida Supreme Court held the instant statute constitutional because it is a substantive, rather than a procedural, enactment.[42] The court's analysis, however, inadequately articulated the distinctions between the instant "substantive" statute and the "procedural" statute discussed in *Markert*. Although theoretical distinc-

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ance company by a third-party beneficiary prior to judgment. The legislature has now determined otherwise." *Id.*

36. *Id.* at 884 (Shaw, J., concurring in part and dissenting in part). Applying *Shingleton*, Justice Shaw concluded that FLA. STAT. § 627.7262 violates both the due process requirements of FLA. CONST. art. I, § 9 and the right of access to the courts of FLA. CONST. art. I, § 21. *Id.* at 885. Presumably, if the legislature could abolish the right of joinder, then it could also abrogate any other right that had been established by the judiciary and ratified by the electorate in adopting the Constitution.

37. *Id.* at 884. Justice Shaw favorably cited Chief Justice Ervin's majority opinion in *Shingleton*. There Justice Ervin stated that motor vehicle liability insurance was commonplace, statutorily required and primarily for the benefit of injured third parties. Therefore, it was unrealistic to defer accural of the cause of action against the insurer until judgment was obtained against the insured defendant because the liability insurer was the real party in interest. *Id.*

38. *Id.* at 883.

39. *Id.* at 884. Justice Shaw reasoned these rights which are embodied in the federal and state constitutions were inserted precisely because they were good public policies. *Id.* Justice Shaw recognized that the "denial of a direct action against the liability insurer may impermissibly serve to defeat recovery and deprive the plaintiff 'of an open, speedy and realistic opportunity to pursue by due process his right of an adequate remedy at law jointly against the insured and the insurer.' " *Id.* at 885 (quoting Chief Justice Ervin in *Shingleton*, 223 So. 2d at 719).

40. *Id.* at 885.

41. *Id.* at 884-85. In his dissent, Justice Shaw stated that the legislature cannot abrogate a right of action established by *Shingleton*, and ratified by the electorate when it adopted the constitution of 1968. *Id.* at 885. Justice Boyd also wrote an opinion dissenting with the majority's approval of § 627.7262. *Id.* at 886-87 (Boyd, J., dissenting).

42. *Id.* at 883. The *Markert* holding was used to compare the substantive versus procedural aspects. *Id.* at 882. *See also supra* notes 3 & 9 (provide present and prior versions of joinder statute).

tions are readily available, the practical distinction between substance and procedure is difficult to ascertain.[43] Procedural concepts include the "course, form, manner, means, method, mode, order, process or steps. . ." in which litigation proceeds.[44] Substantive law encompasses those rules and principles which determine primary rights.[45] Utilizing these definitions, the basis of the *Markert* holding, the timing of joinder, seems to fall correctly into the procedural category.[46] In the instant case, the statute's requirement that a third-party interest vest by judgment as a condition precedent to an action against an insurer could be labeled either substantive or procedural.[47]

The vesting requirement does affect the "course" and "order" of litigation.[48] Because the third-party beneficiary must first obtain a judgment against the insured,[49] two trials may result. Therefore, the vesting requirement may be only a less obvious version of the timing aspect and thus procedural. Alternatively, however, the vesting requirement does modify a third-party's right to collect from an insured. Moreover, the legislature can constitutionally prescribe substantive rules,[50] and these rules may modify procedural rights while retaining their substantive characteristics. Consistent with *Shingleton*'s recognition that legislative authorization of nonjoinder contract provisions affects substantive rights,[51] the court held the instant legislative enactment allowing for nonjoinder constitutional.[52]

The majority's analysis of the revised statute also failed to provide an in-depth explanation of the public policy behind the legislature's action. The court merely stated that its public policy decision must yield to a "valid, contrary legislative pronouncement."[53] The majority did not, however, attempt to determine whether the legislature's policy goal, to keep insurance costs down, was in fact valid.[54]

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43. *Markert*, 367 So. 2d at 1004.

44. *In re* Florida Rules of Criminal Procedure, 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J., concurring).

45. *Id.* at 65.

46. *See supra* notes 25-28 and accompanying text.

47. *See supra* note 3.

48. *See In re* Florida Rules of Criminal Procedure, 272 So. 2d at 66.

49. FLA. STAT. § 627.7262(1), (2) (1983).

50. *Markert*, 367 So. 2d at 1004.

51. 223 So. 2d at 718-19.

52. 439 So. 2d at 883.

53. *Id.* The court can determine public policy in the absence of a legislative pronouncement. *Id.*

54. The public policy underlying the statute was not enunciated by the court. FLA. STAT. § 627.7262 (1983). The bill, FLA. CS for FLA. S. 1239 (Reg. Sess. 1979), under which this statute was passed, provides that "it is the intent of the Legislature, through the exercise of its inherent police power, to regulate insurance and to implement this public policy by the substantive law set forth in this section." *Id.* § 1(1).

Such deference to a legislative pronouncement of public policy is proper. The Florida Supreme Court's perception of public policy should not control a legislative enactment which dictates public policy and delineates a substantive right, regardless of whether such right also possesses incidents of procedure.

The instant case presented an opportunity for the Florida Supreme Court to review the amended nonjoinder statute previously declared unconstitutional.[55] Although the decision appears to be correct, the court should define more precisely the difference between substance and procedure. While the current nonjoinder statute has a procedural aspect, it would seem the legislature has remained within its constitutional parameters by establishing public policy and addressing a substantive issue. The legislature, perceiving rising insurance costs as a problem of their constituents, has taken action to control these rising costs. The Florida Supreme Court should not be able to frustrate the legislature's intent merely because it perceives a conflicting public policy.

REUBEN SHARP WILLIAMS IV

The legislature was under pressure to keep insurance costs down, and this may be the best definition of public policy that is available. Lee & Mussetto, *Insurance*, 34 U. MIAMI L. REV. 765, 767 (1979). This line of reasoning is further strengthened by the fact that although the revised statute is placed in Part XI of the insurance code, FLA. STAT. Ch. 627, Part XI Motor Vehicle and Casualty Insurance Contracts, it is not specifically limited to motor vehicle liability insurers. FLA. STAT. § 627.7262 (1976) provided: "(1) No motor vehicle liability insurer. . . ." *Id. See also* FLA. STAT. § 627.7262 (1983) which provides: "(1) It shall be a condition precedent to the accrual or maintenance of a cause of action against a liability insurer. . . ." *Id.*

55. Since the instant case was decided, Florida district courts of appeal have ruled on cases citing *VanBibber* as authority. In each case the appellate court reversed the trial court's dismissal of the liability insurer on the grounds that the cause of action arose before the effective date of § 627.7262, Oct. 1, 1982. *See, e.g.*, Kaminsky v. Travelers Indem. Co., 443 So. 2d 206 (Fla. 3d D.C.A. 1983); Geller v. G. & G. Corp., 442 So. 2d 1034 (Fla. 3d D.C.A. 1983); Harris v. General Accident, Fire & Life Assurance Corp., 442 So. 2d 294 (Fla. 2d D.C.A. 1983); Kneski v. City of Miramar & Am. Druggists' Ins. Co., 441 So. 2d 182 (Fla. 4th D.C.A. 1983); Randel v. General Ins. Co., 439 So. 2d 986 (Fla. 3d D.C.A. 1983).