Florida Law Review

Volume 24 | Issue 4 Article 15

June 1972

Civil Procedure: Joinder of Liability Insurers--A Welcome Clarification of Shingleton, and Beta Eta

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Although the court did not emphasize congressional intent, the decision is sound because the defendant's rules were designed specifically to circumvent the NEPA's requirements.[73] If federal agencies were permitted to trod unshackled over federal environmental legislation, the moral if not the legal underpinning of legislation aimed at privately caused environmental damage would disappear. [74]

RICHARD NIELSEN

CIVIL PROCEDURE: JOINDER OF LIABILITY INSURERS – A WELCOME CLARIFICATION OF *SHINGLETON* AND *BETA ETA*

Stecher v. Pomeroy, 253 So. 2d 421 (Fla. 1971)

Plaintiffs sued the owner-operator of a vehicle and the owners' insurer for injuries sustained in a collision. Although the policy limits of $100,000/$300,000 were mentioned to the jury the trial court refused to give requested instructions to disregard this information, and a verdict was returned for $19,000. The judgment was affirmed by the Fourth District Court of Appeal of Florida, which determined that admission of the existence and extent of insurance coverage was harmless error when the insured admitted negligence and when the nature and extent of the plaintiff's injuries sustained the amount of the verdict.[1] The appellants alleged conflict between *Beta Eta House Corp. v. Gregory*[2] and *Shingleton v. Bussey*[3] concerning the propriety of refusing requested instructions to disregard mention of insurance limits, and whether such error, if any, was harmless. On certiorari[4] the

73. 449 F.2d at 1116-19.

74. Recently there has been a move to legislatively override the instant decision. An amendment to the Federal Water Pollution Control Act would permit a licensing agency to rely on the water quality standards of other federal agencies and thus would not be required to examine any problem of water quality. NATIONAL WILDLIFE FEDERATION, CONSERVATION REPORT, 63-65 (March 3, 1972).

1. Stecher v. Pomeroy, 244 So. 2d 488 (4th D.C.A. Fla. 1971). The contention on appeal was that the defendants were deprived of a fair trial by the trial court: (1) informing the jury that the liability insurer was a party defendant; (2) permitting plaintiffs to publish to the jury answers to the interrogatories disclosing the existence and extent of liability insurance coverage; and (3) refusing to instruct the jury to ignore the existence of insurance coverage.

2. 237 So. 2d 163 (Fla. 1970).

3. 223 So. 2d 713 (Fla. 1969).

4. According to the court, the conflict asserted was not primarily founded upon the basic holdings in *Beta Eta* and *Shingleton* regarding the propriety of granting severance. Concluding that the question of severance continues to trouble the trial courts, however, the instant court attempted to clarify this question, apparently through dicta. 253 So. 2d 421 (Fla. 1971).

Supreme Court of Florida dismissed the appeal[5] and HELD, policy liability limits should not be mentioned to the jury, and if such mention is made the jury should be instructed to disregard it. Finding no adverse effect upon the jury's verdict, however, the court held the mention of liability limits to be harmless error.

Prior to *Shingleton v. Bussey*[6] a liability insurer could not be joined in an action against the insured tortfeasor.[7] Reference to the existence of insurance coverage was excluded from trial because juries might be more prone to find negligence or to augment damages if they felt that an affluent institution would bear the loss.[8] *Shingleton,* however, established that a plaintiff, as a third-party beneficiary to an automobile liability policy, had a direct cause of action against the insurer and could join the insurer as party-defendant.[9]

Confusion subsequently arose concerning the extent that *Shingleton* overruled former cases[10] prohibiting the disclosure of the existence and extent of insurance at trial.[11] While the *Shingleton* court did not totally discredit the argument that disclosure might prejudice the insurer, it concluded in dictum that modern juries are more mature. Accordingly, "a candid admission at trial"[12] of both the existence and extent of insurance coverage would diminish the insurer's over-all policy judgment payments more than the non-disclosure approach, which "may often mislead juries to think insurance coverage is greater than it is."[13] Moreover, the court suggested that joinder would facilitate resolution of all interrelated issues and preserve the parties' interests in expeditious litigation of their claims.[14] Thus, while the main thrust of *Shingleton* was to establish procedural joinder of liability insurers, the court clearly contemplated the disclosure of insurance at trial.

Although the language in *Shingleton* suggests that both the existence of coverage and the liability limits should be disclosed at trial, it was not so interpreted in *Beta Eta House Corp. v. Gregory.*[15] In *Beta Eta* the court

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5. The court concluded that the alleged conflict necessary for certiorari jurisdiction, FLA. CONST. art. V, §4(2), was not present. 253 So. 2d at 422.

6. 223 So. 2d 713 (Fla. 1969).

7. Artille v. Davidson, 126 Fla. 219, 170 So. 707 (1936).

8. *See, e.g.,* Carls Markets, Inc. v. Meyer, 69 So. 2d 789, 793 (Fla. 1953).

9. 223 So. 2d 713, 715 (Fla. 1969). Although this decision involved automobile liability contracts, subsequent cases have extended joinder to other forms of liability insurance. *See, e.g.,* Pyles v. Bridges, 239 So. 2d 278 (2d D.C.A. Fla. 1970) (medical malpractice insurance); Beta Eta House Corp. v. Gregory, 237 So. 2d 163 (Fla. 1970) (premises liability insurance); Ray v. Pfeiffer, 237 So. 2d 562 (2d D.C.A. Fla. 1970) (homeowner liability insurance).

10. *See, e.g.,* Carls Markets, Inc. v. Meyer, 69 So. 2d 789 (Fla. 1953).

11. *See* Comment, *Judicial Creation of Direct Action Against Automobile Liabiblity Insurers,* 22 U. FLA. L. REV. 145, 148 (1969). For a general discussion of the questions created by the judicial provision for direct action *see* Williams, Shingleton v. Bussey *Doctrine: To Join or Not To Join — This Is the Question,* 37 INS. COUNSEL J. 418 (1970).

12. Shingleton v. Bussey, 223 So. 2d 713, 718 (Fla. 1969).

13. *Id.*

14. *Id.* at 719-20.

15. 237 So. 2d 163 (Fla. 1970).

concluded that the purpose of *Shingleton* was to require disclosure in discovery proceedings, settlement negotiations, and pretrial hearings.[16] Without any supporting discussion the *Beta Eta* court stated that the existence and amount of insurance coverage have no bearing on the issues of liability and damages, and such evidence should not be considered by the jury.[17] Thus, *Beta Eta* indicates that prior case law prohibiting disclosure at trial was not overruled by *Shingleton.*

The *Beta Eta* and *Shingleton* decisions, in addition to differing as to the propriety of disclosure, apparently conflicted on the issue of severance. Although *Beta Eta* reaffirmed joinder of liability insurers, the court held that the trial judge "may," in his discretion, order a separate trial on the issue of coverage[18] pursuant to Florida Rule of Civil Procedure 1.270 (b).[19] In *Shingleton,* however, the court had stated that if joinder resulted in unduly complicated issues between the insured and the insurer, the trial judge could sever such issues for a separate adjudication.[20] The implication was that absent such complicating issues there would be no basis for severance.

While the *Beta Eta* decision relegated severance to the discretion of the trial court, the majority provided no guidelines for the exercise of this discretion.[21] Possible confusion as to the meaning of *Beta Eta* is readily apparent, since Florida Rule of Civil Procedure 1.270 (b) permits severance of parties "in furtherance of convenience or to avoid prejudice."[22] On the basis of the statement in *Beta Eta* that the jury should not consider the existence of insurance, a trial judge might feel that joinder of an insurer would necessarily prejudice the jury. Therefore, a plausible interpretation of *Beta Eta* is that it created an absolute right to severance in liability insurers.

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16. *Id.* at 165.

17. *Id.*

18. Beta Eta House Corp. v. Gregory, 237 So. 2d 163, 165 (Fla. 1970). In so holding, the court modified the lower court's formulation in Beta Eta House Corp. v. Gregory, 230 So. 2d 495, 500 (1st D.C.A. Fla. 1970), that the trial judge "should," on the motion of either party, order severance in order to exclude any reference to insurance from the trial. In Utica Mut. Ins. Co. v. Clonts, 248 So. 2d 511, 512 (2d D.C.A. Fla. 1971), the court interpreted this modification to mean that the supreme court intended to restore to the trial court whatever measure of discretion the lower appellate court had purported to remove. *But see* Beta Eta House Corp. v. Gregory, 237 So. 2d 163, 166, 167 (Fla. 1970) (Boyd, J., concurring in part and dissenting in part). Justice Boyd concluded that the majority had affirmed the effect of the lower court's formulation requiring automatic severance absent extraordinary circumstances, and thereby reversed the remedial aspects of Shingleton v. Bussey, 223 So. 2d 713 (Fla. 1969).

19. FLA. R. CIV. P. 1.270 (b) provides in part: "The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim . . . or of any separate issue . . . ."

20. 223 So. 2d 713, 720 (Fla. 1969).

21. For a discussion of the resulting confusion relating to the exercise of judicial discretion on a motion for severance *see* Kratz v. Newsom, 251 So. 2d 539 (2d D.C.A. Fla. 1971).

22. FLA. R. CIV. P. 1.270 (b).

The apparent conflict between *Beta Eta* and *Shingleton,* regarding disclosure at trial and severance, has produced much confusion in the lower courts. In *Utica Mutual Insurance Co. v. Clonts*[23] the court held that the denial of the insurer's motion for severance was an abuse of discretion. Although agreeing that the mention of insurance at trial was no longer prejudicial as a matter of law, the court emphasized that disclosure nevertheless involved a risk of prejudice. Stressing the difficulty of determining whether the injection of liability insurance would be prejudicial in a particular trial, the court concluded that a ruling on severance should be guided by the relevance of insurance to the triable issues remaining in the case.[24] Relying on *Beta Eta,* the court decided that insurance was irrelevant in *Utica,* since it was determined at pretrial conference that the sole triable issues were negligence and damages.[25] Therefore, since disclosure of insurance coverage at trial always involves risk of prejudice, it was an abuse of discretion, when insurance was irrelevant, to deny a motion for severance.[26]

In *Hartford Accident & Indemnity Co. v. Myers*[27] the same court affirmed the denial of insurer's motion for severance, noting that the insurer did not have an absolute right to severance. Although no specific guidelines were suggested, the court emphasized that the trial judge had discretion to determine whether under all the circumstances of the particular case the motion for severance should be granted.[28]

Conflict on the issue of severance led to a split decision in *Kratz v. Newsom,*[29] in which the court upheld the denial of the insurer's motion for severance. Two members of the court, believing in the continued strength of former cases holding that knowledge of insurance might prejudice a jury, would have granted severance.[30] The two judges who voted to affirm felt that *Shingleton* provided no absolute right to severance, since the insurer was a proper party.[31] Moreover, they emphasized that there was no showing that the trial court abused its discretion in denying severance.[32]

Although the instant decision concluded that the mention of policy limits might be harmless under certain circumstances,[33] the court specifically

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23. 248 So. 2d 511 (2d D.C.A. Fla. 1971).

24. *Id.* at 513.

25. *Id.*

26. *Id.* at 514.

27. 247 So. 2d 83 (2d D.C.A. Fla. 1971). A strong dissent was filed stating that under *Shingleton* and *Beta Eta,* absent extraordinary circumstances, the motion to sever should be allowed. *Id.* at 85.

28. *Id.* at 84.

29. 251 So. 2d 539 (2d D.C.A. Fla. 1971).

30. *Id.*

31. *Id.* at 539-40.

32. *Id.* Judge Robert Mann, who wrote the court's opinion, voted to affirm because there was no showing of abuse of discretion. However, he stated that in future cases the motion for severance should be granted unless some reason for the insurer's presence at trial is shown by the plaintiff. *Id.* at 539.

33. 253 So. 2d at 422. The court said the mention of policy limits appears to be harmless where the limits are $100,000/$300,000; where there was disc injury with serious and

rejected the notion that disclosure of policy limits should be made to the jury.[34] According to the court, one of the objectives of *Beta Eta* and *Shingleton* was to provide a disclosure of policy limits "between the parties" to facilitate negotiations and encourage settlements.[35] Although contrary to the plain language of *Shingleton,* the court stated it never intended that policy limits should go to the jury.[36] Since the verdict must rest solely on the evidence, the court reasoned that the amount of the policy is immaterial. Moreover, allowing disclosure of the extent of the defendant's insurance would equally entitle a defendant to mention it when the coverage is minimal.

Although liability limits should not be disclosed at trial, the instant court noted that in *Beta Eta* and *Shingleton* it was felt that revealing the existence of an insurer as a real party in interest justifiably reflected financial responsibility.[37] Knowledge of the existence of insurance offsets any possible arguments characterizing the defendant as indigent when there is an actual financial ability to respond.[38] The court did not rely on the language in *Shingleton,* which suggested that modern juries are more mature.[39] Rather, the instant court emphasized that the insurance companies are real parties in interest as they have a financial stake in the determination of the case and usually bear the burden of defense costs.[40] Indeed, it was the insurance companies that had earlier urged they should be recognized as real parties in interest.[41] The court concluded that insurers, as real parties in interest, should be disclosed and present when the case is tried.[42] Thus, the instant decision effects a compromise between *Beta Eta* and *Shingleton* by allowing the jury to consider the existence, but not the extent, of insurance coverage.

The instant court also approved *Beta Eta's* adaptation of rule 1.270 (b), providing that a trial judge "may" grant severance. Absent a justiciable issue relating to insurance, however, the court found no valid reason for severance.[43] Thus, the court rejected the notions that an insurer has an absolute

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prolonged disability, traction and hospitalization; where the injuries were permanent; and where the verdict returned was only for $19,000.

34. *Id.*

35. *Id.* at 423.

36. *Id.*

37. *Id.*

38. *Id.*

39. *See* text accompanying notes 10-12 *supra.*

40. 253 So. 2d at 423.

41. *See In re* Rules Governing Conduct of Attorneys in Florida, 220 So. 2d 6 (Fla. 1969).

42. 253 So. 2d at 423.

43. *Id.* at 424. The court said there are some instances involving a question of coverage when severance would be quite proper. However, absent a justiciable issue relating to insurance, questions such as coverage, applicability of the insurance policy, interpretation of the policy, or other such valid disputes on insurance coverage would not justify severance. *See also* Godshall v. Unigard Ins. Co., 255 So. 2d 650 (Fla. 1971).

right to severance [44] or that it must be affirmatively shown by the plaintiffs that the matter of insurance is relevant to his cause of action.[45] Emphasizing the insurer's status as real party in interest, the court interpreted *Shingleton* as providing for severance of issues between the insured and the insurer, not for severance of the trial on negligence liability.[46]

The instant decision clearly established that the jury should be aware of the existence of insurance coverage, and thus reconciled the law with the realities of modern life. Since most states today have some form of mandatory automobile insurance, juries are generally aware of the probability that defendants have insurance coverage.[47] Skillful attorneys have developed many ways to indirectly inform juries of the existence of insurance.[48] Therefore, the policy of nondisclosure may often fail to accomplish its purpose. Additionally, the instant decision advanced an affirmative reason for permitting disclosure by recognizing that nondisclosure may prejudice the plaintiff.[49]

In deciding that severance should not be granted unless there is some valid dispute on the matter of insurance coverage, the instant case provides a standard to guide the trial judge's discretion. The new standard, however, is not without ambiguity. No rationale was offered for the standard adopted, yet the court approved the *Beta Eta* adaptation of rule 1.270 (b) providing that a trial judge may grant severance "in furtherance of convenience or to avoid prejudice."[50] Thus, the court may mean that a dispute involving insurance coverage might prejudice the jury or that it might be convenient to sever such a dispute for a separate trial. If the court meant that severance of issues relating to insurance would be more convenient, then the reasoning in *Shingleton* that the trial judge could sever unduly complicated issues may still be applicable. However, if the court meant that litigation on the issue of insurance coverage might result in prejudice, it at least impliedly recognized that this degree of jury exposure to the fact of insurance could be prejudicial to the insurer. Indeed, in both Louisiana and Wisconsin, where the existence of insurance is admissible, decisions indicate that undue emphasis on such evidence may be prejudicial to the defendant.[51]

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44. *See* text accompanying notes 23-26 *supra*.

45. *See* Kratz v. Newsom, 251 So. 2d 539 (2d D.C.A. Fla. 1971).

46. 253 So. 2d at 424. The court found the insurance carrier, as real party in interest, is in "a position of continuing interest which includes the trial of the cause which the third party has asserted against its insured."

47. Bussey v. Shingleton, 211 So. 2d 593, 596 (1st D.C.A. Fla. 1968).

48. *Id.*

49. *See* text accompanying note 38 *supra*. When the existence of insurance is not known to the jury and the defendant is characterized as poor, juries may be prone to return inadequate verdicts. *See* Note, *Direct Action Against the Liability Insurer: A Legislative Approach for Florida*, 23 U. FLA. L. REV. 304, 309 (1971).

50. FLA. R. CIV. P. 1.270 (b).

51. *See* New Amsterdam Cas. Co. v. Harrington, 274 F.2d 323, 326 (5th Cir. 1960) (dictum); Roeske v. Schmitt, 266 Wis. 557, 571-73, 64 N.W.2d 394, 401-03 (1954) (dictum).

This factor may be significant, since the extent to which a plaintiff might dwell on the existence of insurance is an unresolved question. If the standard were based upon possible prejudice, this evidences an intent to insulate the insurer at trial from possible prejudice flowing from actual litigation over insurance coverage. More explicitly, the court stated "the presence of financial responsibility . . . should be left apparent [without other express mention, of course]."[52] A plausible implication is that "other express mention" may still be grounds for a mistrial. Nevertheless, the intent of the instant case is to effect a reasonable compromise between the interests of the injured plaintiff and the insurer by allowing disclosure while minimizing the risk of prejudice to the insurer.

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52. 253 So. 2d at 424.