

10-1-1971

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### Recommended Citation

Jeffrey A. Deutch, *The Post-Shingleton And Beta Eta Confusion Clarified -- Somewhat*, 26 U. Miami L. Rev. 255 (1971)

Available at: <https://repository.law.miami.edu/umlr/vol26/iss1/9>

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# CASES NOTED

## THE POST-SHINGLETON AND BETA ETA CONFUSION CLARIFIED—SOMEWHAT

A husband and wife sued the owner-operator of a vehicle for personal injuries suffered in a collision. Plaintiffs joined the insurer of the owner-operator as a party defendant. Defendant-insurer moved for severance, but the motion was denied by the trial judge. At trial, evidence of the existence and amount of insurance coverage was admitted, and the jury returned a verdict for the plaintiffs. On appeal, the District Court of Appeal, Fourth District, held that denial of the motion to sever was within the sound discretion of the trial judge and that the admission into evidence of the insurance coverage was harmless error.<sup>1</sup> On certiorari to the Supreme Court of Florida, the court discharged the writ which had earlier been granted on the basis of an alleged conflict with the decisions in *Beta Eta House Corp. v. Gregory*<sup>2</sup> and *Shingleton v. Bussey*.<sup>3</sup> Though holding that such conflict did not exist and that certiorari had been "improvidently" granted, the court decided to "clarify" the questions which arose as a result of its decisions in *Beta Eta* and *Shingleton*. The Supreme Court held: Severance of the insurer should be granted only when there is "a justiciable issue relating to insurance, such as a question of coverage . . ." If no such issues exist, "there is no valid reason for a severance, and it should NOT be granted." *Stecher v. Pomeroy*, 253 So.2d 421, 423 (Fla. 1971).

The decision in *Shingleton* reversed Florida's position on the question of joinder of insurance companies in actions against their insureds.<sup>4</sup> The underpinning of the *Shingleton* decision was public policy.<sup>5</sup> Quite simply, the court sought to eliminate the multiplicity of actions which necessarily resulted from the non-joinder of an insurer in a tort action. To effectuate this goal, the court relied on three propositions: (1) the injured plaintiff was a third party beneficiary under the contract of insurance; (2) the insurer was a real party in interest in the action;<sup>6</sup> and

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1. *Stecher v. Pomeroy*, 244 So.2d 488 (Fla. 4th Dist. 1971) [hereinafter cited as *Stecher*].

2. 237 So.2d 163 (Fla. 1970) [hereinafter cited as *Beta Eta*].

3. 223 So.2d 713 (Fla. 1969) [hereinafter cited as *Shingleton*].

4. See Note, 24 U. MIAMI L. REV. 845 (1970). Prior to *Shingleton*, Florida refused to allow the insurer to be joined as a party-defendant.

5. "We conclude a direct cause of action now inures to a third party beneficiary against an insurer in motor vehicle liability insurance coverage cases as a product of the prevailing public policy of Florida." *Shingleton v. Bussey*, 223 So.2d 713, 715 (Fla. 1969).

6. The method by which the court reached this conclusion was quite striking. In *In Re Rules Governing Conduct of Attorneys in Florida*, 220 So.2d 6 (Fla. 1969), the court refused to adopt a rule which would have effectively barred the house counsel of insurance companies from representing their defendants-insureds in personal injury actions. The insurance companies argued vehemently that "[i]t is the insurance company's interest, as

(3) the insurer should be joined under Florida's procedural rules governing joinder of parties.<sup>7</sup>

In the ensuing months following the court's pronouncement in *Shingleton*, all four of the District Courts of Appeal of Florida affirmed the right of a plaintiff to join the defendant's insurer as a party defendant.<sup>8</sup> However, in *Beta Eta*, the question of a plaintiff's right to join the insurer was seemingly obfuscated by the use of the word "may":

The trial court *may* on motion of either party order separate trials pursuant to Rule 1.270(b), Florida Rules of Civil Procedure, in those cases where the liability insurance carrier is joined as a defendant in a tort action against its insured.<sup>9</sup>

On its face, this language was not in complete accord with the holding in *Shingleton* regarding the joinder of the insurer as a party defendant. It appeared under the language of *Beta Eta* that the question of joinder or separation was within the discretion of the trial judge. Yet, such a result seemed to be opposed to the main thrust of *Shingleton* which advocated an "all the cards on the table" approach, accomplished by joining the insurer in the action.<sup>10</sup>

To add to the confusion following *Beta Eta*, there were the earlier unresolved questions involving pre-trial discovery of insurance coverage and limits, and the ongoing controversy regarding the prejudicial impact to the insurer resulting from the mention of insurance coverage to a jury. When the difficulties posed by joinder of the insured as a party defendant were added to these two problems, a severe situation developed. Prior to *Shingleton*, Florida prohibited pre-trial discovery of insurance limits and coverage.<sup>11</sup> However, *Beta Eta* apparently altered this position. Though admittedly dicta, the court there noted that "[t]he purpose of *Shingleton v. Bussey* . . . was to require the parties to "lay their cards on the table" in discovery proceedings, settlement negotiations, and pre-trial hearings."<sup>12</sup> This language was subsequently construed to mean that the existence and amount of insurance coverage were subject to discovery.<sup>13</sup>

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an entity, that the lawyer represents, whether house counsel or fee counsel." *Id.* at 8. Thus, since the insurance carriers themselves contended that they were a real party in interest, it was relatively easy for the court in *Shingleton* to adopt such a premise as law.

7. FLA. R. CIV. P. 1.210(a).

8. *Duran v. McPherson*, 223 So.2d 639 (Fla. 4th Dist. 1970); *Sherman v. Holzapfel*, 231 So.2d 550 (Fla. 2d Dist. 1970); *Liberty Mutual Ins. Co. v. Roberts*, 231 So.2d 235 (Fla. 3d Dist. 1970); *Kilcrease v. Kilcrease*, 223 So.2d 755 (Fla. 1st Dist. 1969).

9. *Beta Eta House Corp. v. Gregory*, 237 So.2d 163, 165 (Fla. 1970) (emphasis added by court). In addition, the court held that even though *Shingleton* dealt only with automobile liability insurance, the principles were applicable to other forms of liability insurance as well.

10. *Shingleton v. Bussey*, 223 So.2d 713, 720 (Fla. 1969). See *Kratz v. Newsom*, 251 So.2d 539 (Fla. 2d Dist. 1971), for a discussion of the confusion arising from the combination of *Shingleton* and *Beta Eta* in regard to the joinder question.

11. See, e.g., *Brooks v. Owens*, 97 So.2d 693 (Fla. 1957).

12. *Beta Eta House Corp. v. Gregory*, 237 So.2d 163, 165 (Fla. 1970).

13. *Vilord v. Jenkins*, 240 So.2d 68 (Fla. 2d Dist. 1970); *Montano v. Wigfield*, 239 So.2d 609 (Fla. 3d Dist. 1970).

Even though the question of the existence of insurance was made discoverable before trial, there was still the problem of possible prejudice to the insurer by the mere mention of insurance at trial. Traditionally, the Florida courts viewed the mention of insurance at trial as error, subject to the curative effects of a proper instruction to the jury.<sup>14</sup> Again, on this question, the *Shingleton* case appeared to suggest a departure from precedent. The court hypothesized that "a candid admission at trial of the existence of insurance coverage and the policy limits of same . . ." might be better for the insurers' interest than an "ostrich head in the sand approach" which might mislead juries.<sup>15</sup> Previously, the court was not ready to take such a large step away from precedent. In *Beta Eta*, it was expressly pointed out that, "[t]he existence or amount of insurance coverage has no bearing on the issues of liability and damages and such evidence should not be considered by the jury."<sup>16</sup>

Thus, the scene was set, and a somewhat typical pattern resulted. The insurer would be joined as a party defendant. On the basis of *Beta Eta* and the non-obligatory "may," the insurer would move for severance. If the motion were granted, the underlying rationale of *Shingleton* was undercut, and the insurer could defend its insured without being named a party defendant. If the motion for severance were denied, the insurer would proceed to trial as a defendant. Upon losing at trial, the insurer could appeal and assign as error either the refusal to sever, or the possible prejudice arising from the mention of insurance at trial (assuming the insurance limits were mentioned).<sup>17</sup> From the standpoint of the plaintiff, such appeals would appear to be dilatory tactics, indirectly sanctioned by a somewhat confused state of law.<sup>18</sup>

In the instant case the Supreme Court of Florida has apparently ended this confusion since it dealt with all three of these problem areas. First, it resolved any possible misunderstandings still remaining as far as the discovery of insurance limits and coverage was concerned.

One of the objectives of *Beta* and *Bussey* was to provide a disclosure of policy limits *between the parties* which had not

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14. See, e.g., *Carls Markets v. Meyer*, 69 So.2d 789 (Fla. 1953) and cases cited therein.

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

16. *Beta Eta House Corp. v. Gregory*, 237 So.2d 163, 165 (Fla. 1970). Such language represented a brief restatement of the existing case law.

17. On the question of discretionary severance, see *Kratz v. Newsom*, 251 So.2d 539 (Fla. 2d Dist. 1971); *Utica Mutual Ins. Co. v. Clonts*, 248 So.2d 511 (Fla. 2d Dist. 1971); *Hartford Accident and Indem. Co. v. Myers*, 247 So.2d 83 (Fla. 2d Dist. 1971). These opinions clearly demonstrate the difficulty faced by the courts in construing the word "may" in *Beta Eta*. The opinions are particularly dramatic since they trace a running dispute in the District Court of Appeal, Second District.

As to the problem of prejudicial or harmless error arising from mention of insurance limits and coverage to a jury, see *Futch v. Josey*, 247 So.2d 491 (Fla. 2d Dist. 1971) and *Stecher v. Pomeroy*, 244 So.2d 488 (Fla. 4th Dist. 1971), *cert. discharged*, 253 So.2d 421 (Fla. 1971).

18. By use of the appeal on such grounds, the insurers could effectively postpone a plaintiff's recovery of a judgment. Pending the outcome of the appeal, the insurer could, of course, offer a lesser amount in settlement of the judgment. Thus, the delay associated with the appeal gives the insurer a bargaining edge.

previously been allowed. The reasons were for purposes of negotiation and to encourage settlement between the parties and thus speed up the courts' heavy trial dockets.<sup>19</sup>

Secondly, the court dealt with the question of mentioning insurance limits and coverage to a jury, though not as satisfactorily as it might have. Even though there was an express mention of policy limits during trial in the case before them, the court found on the facts of the case that the error was harmless. Still, it emphatically stated that "[i]t was never intended that policy limits should go to the jury and *Beta Eta* expressly said so."<sup>20</sup> However, in concluding the opinion, the court pointed out that "the presence of financial responsibility . . . should be left apparent before the jury (without other express mention, of course)."<sup>21</sup> This language, then, leans in the direction of the approach advocated by *Shingleton* which is diametrically opposed to previously existing case law in Florida.<sup>22</sup>

Finally, the court dealt with the problem of joinder of the insurer as a party defendant. Alluding to the rationale of the *Shingleton* decision, the court re-emphasized that the insurer is a real part in interest. On that basis, the court explained that

[a]bsent a justiciable issue relating to *insurance*, such as a question of coverage or of the applicability or interpretation of the insurance policy or other such valid dispute on the matter of insurance coverage, there is no valid reason for a severance and it should not be granted.<sup>23</sup>

Thus, it would appear that the confusion regarding the trial judge's discretionary power to sever has been definitely settled.

For the most part, *Stecher* adequately dealt with several questions left unanswered by *Shingleton* and *Beta Eta*. The problem remaining would appear to revolve around the mention of insurance at the actual trial. As indicated above, the Supreme Court of Florida apparently hedged the issue of whether mention of the existence of insurance coverage should be prejudicial to the insurer. Interestingly enough, in *Stecher*, the policy limits were expressly mentioned to the jury. However, since there was only one isolated mention of insurance in an otherwise lengthy record, and since the verdict returned represented but a fraction of the policy limits, the court found that such mention was harmless error. No doubt this decision was merely an expression of the existing law concerning the injection of insurance at trial. However, it may also be subject to the interpretation that the mere, isolated mention of in-

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19. *Stecher v. Pomeroy*, 253 So.2d 421, 423 (Fla. 1971) (emphasis added by court).

20. *Id.* at 423.

21. *Id.* at 424.

22. See note 13 *supra*.

23. *Stecher v. Pomeroy*, 253 So.2d 421, 424 (Fla. 1971) (emphasis added by court).

insurance coverage and policy limits at trial may not always constitute reversible error.<sup>24</sup>

Finally, notice should be taken of a corollary which has arisen from the principles of *Shingleton* and *Beta Eta* as explained in *Stecher*. Operating on the premise that the plaintiff in a personal injury action is in fact a third party beneficiary of a contract of insurance between the defendant and his insurer, the Supreme Court of Florida has held that

a judgment creditor may maintain suit directly against [the] tortfeasor's liability insurer for the recovery of the judgment in excess of the policy limits' based upon the alleged fraud or bad faith of the insurer in the conduct or handling of the suit.<sup>25</sup>

In the light of this holding, the potential impact of *Stecher* becomes even greater. In preparing a case, a liability insurer must be mindful of two possibly conflicting factors. First, there is possible liability to the plaintiff for any bad faith in handling the claim. Secondly, *Stecher* provides that joinder will be required and the "presence of financial responsibility . . . should be left apparent before the jury (without other express mention, of course) . . ." <sup>26</sup> should the insurer decide to go on trial.

What effect the presence of financial responsibility will have on jury verdicts is, of course, speculative. However, the court felt that in at least one type of situation the amount of damages would be affected. Where an uninsured defendant is a hardworking individual, who is not of substantial means, the court recognized that juries could be moved out of pity to keep down an award of damages.<sup>27</sup> Presumably, where the presence of financial responsibility is before the jury, the economic position of the individual defendant will become immaterial. However, the insurers may conceivably be treading on dangerous ground. If, for whatever reason, damages greatly exceed policy limits, this may constitute an indication of bad faith in the handling of the claim by the insurer which could result in insurer liability.<sup>28</sup> In effect, then, the potentially higher verdicts which may result from *Stecher* may in turn lead to possible liability under *Thompson*.

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24. Particularly striking in regard to the mention of insurance coverage to the jury is the recent case of *Compania Dominicana de Aviacion v. Knapp*, 251 So.2d 18 (Fla. 3d Dist. 1971). There, the jury heard testimony that Lloyd's of London was the defendant's insurer and that Lloyd's had paid to have certain cars cleaned of the oil blown upon them as a result of a plane crash being litigated. Summarizing the Florida law on the subject of injection of insurance at trial, the District Court of Appeal, Third District, concluded that there the mention of insurance was not prejudicial. However, even if it were prejudicial, it would have been remedied by the curative instruction given.

25. *Thompson v. Commercial Union Ins. Co.*, 250 So.2d 259, 264 (Fla. 1971) [hereinafter cited as *Thompson*].

26. *Stecher v. Pomeroy*, 253 So.2d 421, 424 (Fla. 1971).

27. *Id.* at 423.

28. In the *Thompson* case, the policy limits were \$25,000 while plaintiff was awarded \$89,500 on a directed verdict. This was one of the facts plaintiff felt was indicative of bad faith handling. Unfortunately, the court did not resolve the problem of what minimum facts will generally be necessary to evidence a bad faith handling of the claim.

The decision in *Stecher* should eliminate much of the delay and frustration brought on by the confusion following *Shingleton* and *Beta Eta*. Clearly, the solution reached will be welcomed by plaintiffs' counsel for it eliminates the possibility of insurers capitalizing on the uncertainty which previously existed. However, it is submitted that the combined effects of *Stecher* and *Thompson* may remove a sense of equilibrium between plaintiffs and insurers. In fact, it may well be that plaintiffs' counsel will emerge with something of an upper hand, or, at least, a better bargaining position. Whether this is desirable is still to be determined. Nevertheless, the principles of *Stecher* represent an approach which recognizes realities rather than artificial legal distinctions. Such an approach preserves the judicial system as a viable means for the settlement of personal injury claims. Should the *Stecher* and *Thompson* decisions result in a re-evaluation of this area of litigation, it is the author's position that the principles explained in *Stecher* should prevail.

JEFFREY A. DEUTCH

### TAXATION OF AGRICULTURAL PROPERTY—WHEN IS A FARM NOT A FARM?

Plaintiff, a forester for about fifty years, sought the preferential tax treatment granted owners of agricultural property under Florida's complex, confusing, and often overlapping ad valorem taxation statutes.<sup>1</sup> When county taxing officials refused to designate the property as agricultural land for tax purposes, plaintiff brought two actions in the circuit court of Volusia County challenging the classification and assessments for 1966 and 1967.<sup>2</sup> The circuit court held that the lands were properly classified non-agricultural for taxation purposes because plaintiff was not conducting a "bona fide forestry operation" as contemplated by the statute.<sup>3</sup> On appeal, the District Court of Appeal, First District, relying

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1. FLA. STAT. § 193.071(3) (1969) [formerly FLA. STAT. § 193.11(3) (1967)] provides: All lands being used for agricultural purposes shall be assessed as agricultural lands upon an acreage basis, regardless of the fact that any or all of said lands are embraced in a plat of a subdivision or other real estate development. Provided, *agricultural purposes* shall include only lands being used in *bona fide* farming, pasture, grove or forestry operations by the lessee or owner, or some person in their employ. (emphasis added).

FLA. STAT. § 193.461(3) (1969) [formerly FLA. STAT. § 193.201(3) (1967)] provides that "[a]ll lands which are used primarily for bona fide agricultural purposes shall be zoned agricultural."

2. Plaintiff purchased the 3,300 acre tract of woodland in Volusia County for \$302.68 per acre in December, 1965. Plaintiff contended that the proper assessed value of the land in 1966 was \$56 an acre, the land's value for agricultural purposes.

3. FLA. STAT. § 193.071(3) (1969) was applicable to plaintiff's property. See note 1, *supra*. In reaching this decision, the chancellor considered, *inter alia*, the fact that the plaintiff had made no improvements to the property suited to forestry work and had no forestry