

September 25, 2018

Florida Court of Appeals Rejects Insurer's Attempt to Intervene in Underlying Lawsuit to Submit Special Interrogatories

BY: Jeremy S. Macklin

On August 10, 2018, the Florida Court of Appeals for the Second District upheld a trial court's dismissal of an insurance company's intervention in a tort lawsuit brought against its insured for the purposes of submitting special interrogatories and verdict forms.

In *Houston Specialty Ins. Co. v. Vaughn*, 2018 Fla. App. LEXIS 11197, 2018 WL 3795785 (Fla. 2d DCA Aug. 10, 2018), the insured, All Florida Weatherproofing and Construction, Inc. ("All Florida") provided pressure washing, roof coating, and other roof-related services. Houston Specialty issued a general liability policy to All Florida. In 2012, a worker fell off a roof while applying protective coating on behalf of All Florida. The worker and his family sued All Florida in connection with the worker's injuries.

The Houston Specialty Policy contained an exclusion for injuries sustained to employees but provided coverage through an endorsement for injuries sustained to independent contractors. Houston Specialty filed a declaratory judgment action against All Florida seeking a determination that the worker was an employee of All Florida. Houston Specialty also filed a motion to intervene in the tort lawsuit filed by the worker against All Florida for the purpose of submitting special interrogatories and special verdict forms relevant to the worker's employment status. In its motion to intervene, Houston Specialty argued that limited intervention was proper to avoid conflicting findings and inconsistent results.

The trial court granted Houston Specialty's motion to intervene, but also held that "[a]ny party may file a motion to sever in the future in the event that circumstances change or that intervention otherwise subjects any party to unfair prejudice." Following that order, and after rejecting Houston Specialty's defense, the parties to the tort lawsuit agreed to resolve the tort lawsuit through non-binding arbitration. The court ordered Houston Specialty to participate in arbitration, despite the company's disagreement to the method chosen for resolution. The arbitrator found that the roofer was not All Florida's employee and also liable for eighty percent of his own injuries.

Several legal battles ensued from the events leading up to and following the arbitration award. In 2017, following the arbitration award and other developments in related judicial proceedings, the worker filed a motion to dismiss Houston's intervention, which the court granted. Houston Specialty appealed the trial court's order.

The Florida Appellate Court utilized a two-part test for determining whether Houston Specialty's intervention was proper. First, the trial court must make a preliminary determination as to whether "the interest asserted is appropriate to support intervention." Second, the trial court must exercise its discretion whether to permit intervention.

As respects part one, the Florida Appellate Court held that Houston Specialty only presented a speculative or contingent interest – i.e., that Houston Specialty will be harmed if the trial court enters judgment against its insured and then the insured seeks to enforce the judgment against Houston Specialty. Unpersuaded, the court held that Houston Specialty failed to show a direct or immediate interest in the state court lawsuit. The court reasoned that Houston Specialty's position contradicts Florida's nonjoinder statute, which states: an injured third party may not file a direct cause of action against a liability insurer unless it obtained either a settlement or verdict from the insured. The court held that the statute fosters a jury's determination of an insured's liability and damages unaffected by the availability of insurance.

With respect to the abuse of discretion part of the intervention test, the Florida Appellate Court weighed several factors (including derivation of the asserted interest, any pertinent contractual language, the size of the interest, the potential for conflicts or new issues, and other relevant circumstance) to hold that the trial court did not abuse its discretion when it denied Houston Specialty's intervention.