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INSURANCE-RELATED APPELLATE UPDATE

October 4, 2004

For more information on these and other insurance-related cases, contact Katherine E. Giddings or Felicia Leborgne Nowels at 850-224-9634 or by e-mail at katherine.giddings@akerman.com and felicia.nowels@akerman.com.

Florida Supreme Court

Insurance — Homeowners — Declaratory judgments — Coverage — Insurer may pursue a declaratory action requiring a determination of the existence or nonexistence of a fact upon which the insurer's obligations under an insurance policy depend — It is within trial court's discretion, by weighing factors outlined by Court as well as factors of the particular case, to determine whether the declaratory judgment action or the underlying tort action against the insured should proceed first — Trial court did not abuse discretion in allowing declaratory judgment action to be tried prior to underlying negligence action against insured *Higgins v. State Farm Fire and Casualty Company*, 29 Fla. L. Weekly S533a September 30, 2004.

Florida District Courts of Appeal

Workers' compensation — Compensable accidents — Traveling employees — Construction worker's act of driving to dinner, after playing pool for an hour, was risk reasonably incidental to conditions of employment — Although claimant may have been engaged in amusement activities immediately prior to accident, JCC did not make findings sufficient to conclude that claimant was not attending to normal creature comfort and reasonable necessity when injuries were sustained. Remanded. *Thompson v. Keller Foundations, Inc*, 29 Fla. L. Weekly D2159a (Fla. 1st DCA Sept. 27, 2004.)

Workers' compensation — Compensable accidents — Personal comfort doctrine — Judge of compensation claims properly found that claimant substantially deviated from work activities when he walked outside to his car which was parked in store parking lot to get a cigarette and was shot in the leg when a loaded firearm fell to ground and discharged as claimant opened his car door — Personal comfort doctrine incorporates foreseeability element to cause of injury— Possession of a firearm was a violation of claimant's employer's policy and being exposed to a firearm is not a foreseeable consequence of an authorized cigarette break — Claimant's additional argument that accident is compensable under "horseplay doctrine" is rejected. *Galaida v. Atutozone, Inc.*, 29 Fla. L. Weekly D2160d (Fla. 1st DCA Sept. 27, 2004.)

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Continued

Insurance — Discovery — Attorney-client and work product privilege — Breach of contract and bad faith action against liability insurer after insurer had agreed to defend insured in underlying counterclaim under reservation of rights for negligent and intentional infliction of emotional distress to deny coverage for intentional acts — Damages were awarded against insured, and insurer denied coverage for the damages based on an opinion from the law firm retained to represent insured that the verdict was based on intentional conduct — In light of fiduciary relationship during trial of underlying action where parties shared common interests during that proceeding, any correspondence or communications between insurer and law firm which represented insured concerning insured and his case are not privileged under attorney-client privilege and must be produced by insurer — Communications between insurer's employees or agents and insurer's in-house counsel are protected by attorney-client privilege — Because portions of alleged acts against insured were not covered by policy, many of documents in claims file, including some trial notes of the underlying proceedings, are protected from discovery by work product privilege — Any notes, observations, or evaluations by representatives of insurer concerning legal work or performance by law firm while representing insured must be produced. Petition for Writ of Certiorari granted and remanded for further proceedings to conduct review of documents. *Liberty Mutual Fire Insurance Co. v. Kaufman*, 29 Fla. L. Weekly D2116b (Fla. 3d DCA Sept.22, 2004.)

Florida Unauthorized Insurer Act — Action by insured's assignee against trade credit insurance broker alleging breach of Act by its negligence and malfeasance in representing that insurer was authorized to do business in Florida, by not selecting an insurer authorized to do business in Florida, and negligently preparing and submitting claims under policy; and breach of contract — Trial court properly found that broker, who placed insured with an insurer who was not authorized to offer, sell, or place insurance in Florida, thereby falling within 626.901 — To confer liability upon broker/agent, trial court must look at insured's claims and determine which would have been covered under policy — Trial court erred in finding that broker was liable for all claimed damages, without regard to policy terms and coverages. *Aon Risk Services, Inc. v. Quintec, S.A.*, 29 Fla. L. Weekly D2125a (Fla. 3d DCA Sept. 22, 2004.)