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## Markert v. Johnston, 367 So. 2d 1003 (Fla. 1978)

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**Torts—CIVIL PROCEDURE—NONJOINER OF MOTOR VEHICLE LIABILITY INSURERS HELD UNCONSTITUTIONAL—*Markert v. Johnston*, 367 So. 2d 1003 (Fla. 1978).**

The nonjoinder of third party liability insurers as defendants in tort claims against the insured has been a fertile topic of both judicial and legislative debate over the past decade. On the one hand, the Florida Legislature, acting as the chief policy setting body of the state, has provided for the nonjoinder of motor vehicle liability insurers.<sup>1</sup> On the other hand, in *Markert v. Johnston*<sup>2</sup> the Florida Supreme Court has succeeded in frustrating this legislative objective by holding section 627.7262, Florida Statutes<sup>3</sup> unconstitutional. This statute, which was the legislature's first enactment of a nonjoinder policy for motor vehicle liability insurers, generally prohibited the joinder of these insurers at the initiation of a lawsuit.<sup>4</sup>

The *Markert* decision was issued in response to three consolidated cases.<sup>5</sup> The question before the court was whether joinder of liability insurers is a procedural issue controlled by the constitutional rule-making authority of the court, or a substantive issue controlled by the legislature.<sup>6</sup> The practical distinction between substance and procedure is difficult to ascertain in actuality, although theoretical distinctions are readily available.<sup>7</sup> Procedural concepts include the "course, form, manner, means, method, mode, order, process or steps . . ." in which litigation proceeds.<sup>8</sup> Substantive law encompasses those rules and principles which determine primary rights.<sup>9</sup>

*Markert* did not resolve the issue of whether joinder of liability insurers is a procedural or substantive issue. Instead, the court simply found that the statute was procedural in form, and therefore, an impermissible infringement upon the court's own constitutional powers.<sup>10</sup>

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1. FLA. STAT. § 627.7262 (1977).

2. 367 So. 2d 1003 (Fla. 1978).

3. (1977).

4. FLA. STAT. § 627.7262(1) (1977) provides in part that "[n]o motor vehicle liability insurer shall be joined as a party defendant in an action to determine the insured's liability." Initial joinder is not prohibited if the insurer has asserted or will assert a policy defense. *Id.* at § 627.7262(3).

5. 367 So. 2d at 1004 & n.1.

6. *Id.* at 1004. FLA. CONST. art. V, § 2(a) is the provision granting rulemaking authority to the supreme court. In pertinent part, that provision states that "[t]he supreme court shall adopt rules for the practice and procedure in all [state] courts . . . ."

7. See 367 So. 2d at 1004.

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

9. *Id.*

10. 367 So. 2d at 1005-06. The *Markert* court held the statute unconstitutional on the basis of FLA. CONST. art. II, § 3, which provides for the separation of governmental powers.

Public policy may be established by the judiciary in the absence of legislative action.<sup>11</sup> Prior to the adoption of section 627.7262, the Florida Supreme Court was the sole policymaker on the issue of joinder or nonjoinder of motor vehicle liability insurers.<sup>12</sup> In 1936, in *Artille v. Davidson*, the court ruled that joinder was not allowed.<sup>13</sup> The *Artille* court rejected the plaintiff's argument that he was a third party beneficiary to the contract between the insured and the insurer. Instead, the court found that the injured party was not in privity with the insurer, nor was the insurer liable in tort to the plaintiff. Therefore, the plaintiff had no cause of action against the insurer.<sup>14</sup>

*Artille* was overruled thirty-three years later in *Shingleton v. Bussey*.<sup>15</sup> The supreme court in *Shingleton* changed the nonjoinder rule as a matter of public policy.<sup>16</sup> The court recognized that the initial reason for nonjoinder was to prevent the disclosure of the defendant's insurance coverage to the jury. Knowing of the coverage, the jury might increase its award of damages on the assumption that an affluent insurance company would bear the cost of the judgment, rather than the individual defendant. However, the *Shingleton* court found that juries had matured and that their knowledge of joinder could actually benefit the insurer by allowing the jury to know the limits of the insurance policy and to adjust the award accordingly.<sup>17</sup> In addition, the court reasoned that the initial joinder of insurance companies was desirable because this procedure allowed "all cards [to be placed] on the table,"<sup>18</sup> including possible defenses to the claim. 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. Thus, initial joinder might reduce the multiplicity of suits.<sup>19</sup>

The basis for direct joinder was established by determining that an injured member of the general public was a third party beneficiary to a contract between an insured and an insurer.<sup>20</sup> Extrinsic support for this judicial determination was assumed from the intent of the parties. The court noted that the parties to a contract for a

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

12. 367 So. 2d at 1004-05.

13. 170 So. 707, 708 (Fla. 1936).

14. *Id.*

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

16. *Id.* at 715, 718.

17. *Id.* at 718.

18. *Id.* at 720.

19. *Id.* at 718.

20. *Id.* at 716.

liability policy contemplated injury to a third party. Therefore, by operation of law, an injured party became a third party beneficiary who was "entitled to maintain a cause of action directly against the liability insurer of the tort-feasor . . . ."21

The *Shingleton* court also addressed the issue of when liability to the third party accrues. The court reasoned that the injured party's right to sue the insurance carrier should vest at the time the injured party became entitled to sue the insured.<sup>22</sup> 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 affect the insurer's liability to be sued initially.<sup>23</sup> After making this determination, the court found that nonjoinder clauses in liability policies infringed upon the plaintiff's right to a speedy trial.<sup>24</sup> The effect of these clauses was to postpone liability and to prohibit any direct action against the insurer. Therefore, the plaintiff's recovery was delayed.<sup>25</sup> Thus, the court found that the parties had no right to contract for nonjoinder unless the legislature, in its exercise of police power, affirmatively authorized insurers to include nonjoinder clauses in the policies.<sup>26</sup> This legislative action would apparently prevent the joinder of the insurer pursuant to the Florida Rules of Civil Procedure.<sup>27</sup>

One year after *Shingleton*, in *Beta Eta House Corp. v. Gregory*, the court extended initial joinder from automobile liability insurers to liability insurers in all tort claims.<sup>28</sup> However, even though pretrial discovery of insurance coverage was available to plaintiffs, the *Gregory* court thought that the "existence or amount of insurance coverage has no bearing on the issues of liability and damages,

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21. *Id.*

22. *Id.* at 716.

23. *Id.* at 716-17.

24. *Id.* at 717 (citing FLA. CONST. art. I, § 4).

25. 223 So. 2d at 717.

26. *Id.* at 717-19.

27. *Id.* at 718. Under FLA. R. CIV. P. 1.210(a), joinder may occur as follows:

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.

28. 237 So. 2d 163 (Fla. 1970).

and such evidence should not be considered by the jury."<sup>29</sup>

In 1976, the legislature responded to *Gregory* by enacting section 627.7262.<sup>30</sup> Apparently, the legislative intent in prohibiting initial joinder was to return the public policy of the state to its pre-*Shingleton* status of nonjoinder.<sup>31</sup> To accomplish this goal, the legislature enacted a statute which was a compromise between the legislative desire to prohibit initial joinder and the judicial concerns articulated in *Shingleton* and *Gregory*. The statute prohibited initial joinder but provided for an exception to this rule when the insurer raised policy defenses.<sup>32</sup> Thus, the jury would not be aware of an insurance carrier's interest in the litigation, as advocated by the court in *Gregory*.<sup>33</sup> Yet, the statute embraced *Shingleton's* reasoning by allowing "all cards [to be placed] on the table"<sup>34</sup> by mandating that the affected insurance carrier must file with the court its name, the limits of the coverage and any defenses the insurer might raise.<sup>35</sup> This information is available to the plaintiff during discovery, resulting in the injured parties' knowledge of the defendant's insurance assets.<sup>36</sup> The statute also provided for joinder after the verdict or judgment.<sup>37</sup> Thus the need for additional pro-

29. *Id.* at 165.

30. Ch. 76-266(12), 1976 Fla. Laws 726 (current version at FLA. STAT. § 627.7262 (1977)).

31. 367 So. 2d at 1005.

32. FLA. STAT. § 627.7262 (1977) provides that

(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.

33. 237 So. 2d at 165.

34. 223 So. 2d at 720.

35. FLA. STAT. § 627.7262(1)(a)-(d) (1977).

36. *Id.* at § 627.7262(5).

37. *Id.* at § 627.7262(4).

ceedings is eliminated, thereby facilitating the *Shingleton* concern for a speedy recovery.

In *Markert*, Chief Justice England noted that the *Shingleton* court had allowed the joinder of insurance companies as a matter of public policy.<sup>38</sup> He stated that the real issue presented was whether the *Shingleton* court had created a substantive right to sue insurers or merely a procedural right when it indicated that the insurer was a real party in interest.<sup>39</sup> The *Markert* majority avoided a direct ruling on this issue, choosing instead to assert that the statute merely provided the time at which joinder may occur.<sup>40</sup> In other words, according to the court the statute was procedural in form. Yet, the court stated that section 627.7262 was consistent with *Shingleton* in that the statute also recognized "insurers as the real parties in interest . . . ."<sup>41</sup> However, the court held that the statute's specification of when joinder could occur invaded its rulemaking authority, and the court refused to adopt the substance of the statute as a rule of procedure, as advocated in the concurring opinion.<sup>42</sup> By invalidating the statute, the supreme court has once again required joinder at the outset of a lawsuit.

Motor vehicle liability carriers are not the only type of insurer affected by the joinder debate. Before *Markert*, the legislature enacted section 768.045, Florida Statutes,<sup>43</sup> which applies to all liability carriers, and section 46.051, Florida Statutes<sup>44</sup> which applies to products liability insurers. These statutes are essentially the same as section 627.7262.<sup>45</sup> Although the court in *Markert* recognized the

38. 367 So. 2d at 1005.

39. *Id.* Although the *Shingleton* court stated that insurers may be joined as parties in interest, it stated that the legislature could change this situation by authorizing nonjoinder clauses. 223 So. 2d at 718-19.

40. 367 So. 2d at 1005.

41. *Id.* However, the *Shingleton* court envisioned initial joinder. 223 So. 2d at 716. In contrast, section 627.7262 prohibits initial joinder, and permits joinder after the verdict or judgment.

42. 367 So. 2d at 1005-06. The court had endorsed a similar approach as a rule in *Carter v. Sparkman*, 335 So. 2d 802, 806 (Fla. 1976). See text accompanying notes 58-59 *infra* for a discussion of *Carter*.

43. (1977).

44. (Supp. 1978).

45. FLA. STAT. § 46.051 (Supp. 1978) provides in part that

(1) No products liability insurer shall be joined as a party defendant in an action to determine the insured's liability. However, . . .

. . . .

(3) . . . [if] a policy or coverage defense has been or will be asserted, then the insurer may be joined as a party.

FLA. STAT. § 768.045 (1977) provides in part that

(1) No liability insurer shall be joined as a party defendant in an action to determine the insured's liability; however, . . .

. . . .

existence of section 768.045, it made no determination of its constitutionality.<sup>46</sup> To date, section 46.051 has not been presented to the court for a constitutional determination.

In addition to prohibiting initial joinder, the legislature has prohibited reference to joinder or insurance in other areas of tort litigation. Section 455.06(2), Florida Statutes,<sup>47</sup> deals with the liability of political subdivisions of the state and prohibits any suggestion of the existence of insurance at a trial concerning the tort liability of the subdivision. The prohibition is a condition precedent to the partial waiver of sovereign immunity for the subdivision's liability damages.<sup>48</sup> In 1973, in *School Board of Broward County v. Surette*, the court held the prohibition unconstitutional because it was procedural.<sup>49</sup> However, in *School Board of Broward County v. Price*<sup>50</sup> the court receded from *Surette* and upheld subparagraph 230.23(9)(d)2, Florida Statutes, which prohibits any suggestion at trial of liability insurance held by a school board.<sup>51</sup> The statute was upheld because the prohibition was a condition precedent to a partial waiver of sovereign immunity.<sup>52</sup> While the prohibition of reference to liability insurers is procedural, subparagraph 230.23(9)(d)2 is also substantive since it implemented a constitutional right of the legislature.<sup>53</sup> In other words, because the legislature is constitutionally authorized to waive sovereign immunity, it may also establish the conditions of that waiver.

Reference to an insured's liability coverage was also prohibited in medical malpractice actions, under section 768.47(1), Florida Statutes.<sup>54</sup> The statute, which is authorized by the exercise of police power,<sup>55</sup> bars "any reference to insurance, insurance coverage, or joinder of the insurer as a co-defendant in the suit."<sup>56</sup> In *Carter v. Sparkman*, the court noted that the statute prohibited only refer-

(3) . . . [if] a policy or coverage defense has been or will be asserted, then the insurer may be joined as a party.

46. 367 So. 2d at 1005 n.7.

47. (1977).

48. *School Bd. of Broward County v. Price*, 362 So. 2d 1337, 1339-40 (Fla. 1978).

49. 281 So. 2d 481, 483 (Fla. 1973).

50. 362 So. 2d 1337, 1339 (Fla. 1978).

51. (Supp. 1978). FLA. STAT. § 230.23(9)(d)2 (Supp. 1978) utilized the same language as FLA. STAT. § 455.06(2)(1977) insofar as both provisions prohibit any suggestion at trial regarding any insurance which would cover, in whole or in part, a judgment or award for the plaintiff.

52. 362 So. 2d at 1339.

53. *Id.* FLA. CONST. art. X, § 13 authorizes the legislature to enact provisions for bringing suit against the state.

54. (1977).

55. *Price*, 362 So. 2d at 1339.

56. FLA. STAT. § 768.47(1) (1977).

ence to joinder and not actual joinder itself.<sup>57</sup> The court held that any prohibition of reference to joinder was procedural, and thus, unconstitutional. But the court was impressed by the legislature's attempt to lower insurance costs by prohibiting the exposure of the defendant's insurance coverage at trial. Accordingly, the court incorporated the essence of the statute as a rule of procedure for medical malpractice trials.<sup>58</sup>

Although *Markert* frustrates the legislative intent of nonjoinder, the legislature may reassert its constitutional prerogative. The full court has never ruled that denial of joinder is outside the purview of the legislature.<sup>59</sup> In fact, the court has specifically stated that the legislature may provide for nonjoinder.<sup>60</sup> Thus, the time is ripe for another legislative attempt to reassert its established policy of nonjoinder of liability insurers.

Both houses of the 1979 legislature introduced similar bills which restated the nonjoinder policy.<sup>61</sup> Although neither bill was enacted in either house,<sup>62</sup> the bills demonstrate possible constitutionally valid solutions to the nonjoinder debate. Since the senate bill was endorsed by a full committee, it will be utilized for this analysis.

Florida committee substitute (CS) for senate bill (SB) 1239 provides for the repeal of section 627.7262 and section 768.045.<sup>63</sup> The bill amends section 46.051 to cover all liability insurers, rather than product liability insurers only.<sup>64</sup>

The senate bill directly opposes the *Shingleton* decision with respect to the initial joinder of insurance carriers.<sup>65</sup> The *Shingleton*

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57. 335 So. 2d 802, 806 (Fla. 1976), *cert. denied*, 429 U.S. 1041 (1977).

58. *Id.* FLA. R. Civ. P. 1.450(e) provides that "[i]n any civil medical malpractice action, the trial on the merits shall be conducted without any reference to insurance, to insurance coverage, or to the joinder of an insurer as co-defendant in the suit."

59. The *Markert* majority had the opportunity to hold that joinder was a procedural subject since the question was squarely before them. 367 So. 2d at 1004. However, the court held that since section 627.7262 was "clearly" procedural in form, there was no need to reach the issue of whether a substantive right was involved. *Id.* at 1005. The concurring opinion, however, did state that joinder was a procedural matter reserved to the court. *Id.* at 1006.

60. *Shingleton*, 223 So. 2d at 718-19.

61. Fla. SB 1239 (1979); Fla. HB 1471 (1979).

62. Fla. HB 1471 was referred to the House Committee on Commerce and then referred to subcommittee, where it rested until the end of the session. Florida Legislature, History of Legislation, 1979 Regular Session, House Bill Actions Report at 332. Fla. SB 1239 was referred to the Senate Committee on Commerce, which adopted a Committee Substitute (CS) for SB 1239 in lieu of the original bill. Fla. CS for SB 1239 was favorably referred to the Senate Committee on Rules and Calendar, in which it remained until the end of the session. Florida Legislature, History of Legislation, 1979 Regular Session, Senate Bill Actions Report at 315.

63. Fla. CS for SB 1239 § 2 (1979).

64. Fla. CS for SB 1239 § 1 (1979).

65. See 223 So. 2d at 716, where the court discussed initial joinder of insurance carriers in terms of when a cause of action against an insurer "vests" in an injured third party beneficiary.



court based its rulings on a judicial declaration of public policy in the absence of legislative directives.<sup>66</sup> The senate bill explicitly articulates legislative directives in this area. If the bill is enacted, the judiciary would not be free to nullify the provisions on the grounds of judicially determined public policy.<sup>67</sup>

Florida CS for SB 1239 begins with a strong statement of legislative intent which asserts the legislature's police power. The bill provides that "it is the intent of the Legislature, through the exercise of its inherent police power to regulate insurance, to implement this public policy by the substantive law set forth in this section."<sup>68</sup>

The primary test for determining the validity and desirability of the legislature's approach is derived from *Shingleton*. There, the court endorsed the possibility of an affirmative legislative authorization for the inclusion of nonjoinder clauses in liability policies as a valid exercise of the legislature's police power to regulate insurance.<sup>69</sup> Accordingly, Florida CS for SB 1239 specifically authorizes nonjoinder clauses:

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 herein authorized shall be fully enforceable.<sup>70</sup>

The *Shingleton* court allowed joinder by designating the injured party as a third party beneficiary to the liability contract.<sup>71</sup> To overcome this definition, the proposed legislation states that an injured party is neither a third party beneficiary to the contract between the insured and the insurer nor a party in privity to the contract prior to a judgment against the insured.

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.<sup>72</sup>

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66. *See id.* at 715, 718-19.

67. *See* *Holley v. Adams*, 238 So. 2d 401, 405 (Fla. 1970).

68. Fla. CS for SB 1239 § 1(1) (1979).

69. 223 So. 2d at 718-19.

70. Fla. CS for SB 1239 § 1(4) (1979).

71. 223 So. 2d at 715.

72. Fla. CS for SB 1239 § 1(3) (1979).

Because this portion of the bill is based on a legislatively established public policy which delineates a substantive right, it should not be altered by the Florida Supreme Court's perception of public policy.<sup>73</sup>

The *Shingleton* decision established, as a matter of public policy, that joinder should not only be allowed but should occur at the initiation of a lawsuit.<sup>74</sup> In contrast, the bill maintains that the liability of the insured for judgment is a condition precedent to the liability of the insurer to be sued.

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.<sup>75</sup>

This provision would prevent joinder of the insurer in the original suit. Since the court in *Shingleton* endorsed legislative authorization of nonjoinder contract provisions as an exercise of police power,<sup>76</sup> it is reasonable to assume that the court would endorse a legislative enactment which effectively allows for nonjoinder.

Each of the foregoing legislative approaches should be sufficient to effect nonjoinder. Yet, to ensure that at least one approach survives a negative judicial construction, the bill includes a severability clause.<sup>77</sup>

*Markert* represents a judicial frustration of the legislative intent to prevent joinder of motor vehicle liability insurers. The judiciary established a policy of joinder prior to any declaration of intent by the legislature. Subsequently, the legislature, in several statutes, expressed an intent to prohibit joinder of liability insurers. Three provisions, one of which was attacked in *Markert*, should be read-dressed as a result of the holding in *Markert*. The case law on the issue offers suggestions for feasible legislation. Thus, it appears that if the legislature qualifies each of its efforts as an exercise of its police power and carefully drafts a substantive provision, the court should uphold the legislation. A bill presented to the 1979 legislature is properly drafted and should withstand constitutional attack.

The legislative policy concerning the nonjoinder of insurance companies is clear. It only remains to enact a bill to implement that policy.

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73. See 223 So. 2d at 715-16.

74. *Id.* at 716.

75. Fla. CS for SB 1239 § 1(2) (1979).

76. 223 So. 2d at 718-19.

77. Fla. CS for SB 1239 § 3 (1979).

