VanBibber v. Hartford Accident & Indemnity Insurance Co., 439 So. 2d 880 (Fla. 1983)

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On June 25, 1982, Ara Williams VanBibber sustained an injury in a Publix grocery store when a Publix employee pushed a shopping cart over her foot and ankle. VanBibber brought an action against Publix and its liability insurer, Hartford Casualty Insurance Corporation, for a number of afflictions either caused or aggravated by the employee’s action. Hartford filed a Motion to Dismiss and/or Strike, seeking its dismissal from the action as a party defendant pursuant to section 627.7262, Florida Statutes. The trial court granted Hartford’s motion, finding the nonjoinder statute constitutional both on its face and as applied to the facts and parties in the case. The First District Court of Appeal certified

2. Id.
3. Id. FLa. Stat. § 627.7262 (Supp. 1982) (now codified at FLa. Stat. § 627.7262 (1983)), which was in effect at the time VanBibber brought her action, provided:
   Nonjoinder of insurers.—
   (1) 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.
   (2) 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.
   (3) 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 authorized in this subsection shall be fully enforceable.
4. Record at 20-21, 37, VanBibber. The trial court stated that Hartford should be dismissed as a party until such time as VanBibber had obtained a judgment against Publix, thereby satisfying the statutory condition precedent. This decision was contrary to the overwhelming majority of circuit court judges who had ruled on the statute since it was passed. Prior to VanBibber, the Academy of Florida Trial Lawyers (AFTL) reported that of the 14 circuit court judges who had ruled on the statute, 11 had declared it void, 2 had upheld it as
the appeal as either passing on a question of great public importance or having a great effect on the proper administration of justice throughout the state. The Florida Supreme Court affirmed the order of the trial court to the extent that it held the statute constitutional but reversed that portion of the order which held the statute applicable to the instant action.

Just five years prior to this decision the Florida Supreme Court had declared a similar statute unconstitutional in *Markert v. Johnston.* The court had found that because the statute prohibited the joinder of the liability carrier at the commencement of the lawsuit, yet provided for possible joinder of the insurer at a later time in the proceedings, it thereby constituted an unconstitutional invasion of the court's exclusive rulemaking authority.

This note will examine the differences between the two statutes ruled upon by the supreme court and focus on the issue of whether an injured party's right to join a liability insurer in an action to determine the liability of the insured is substantive in nature, and thereby within the purview of the legislature, or a procedural right which is governed by the supreme court's exclusive rulemaking power. This note will discuss the historical development of this issue as determined by the decisions of the Florida Supreme Court, and it will explore the rationale and soundness of those decisions along with their constitutional implications.

I. HISTORY: JOINDER OF LIABILITY INSURER IN AN ACTION AGAINST THE INSURED

In the early days of insurance underwriting courts generally considered liability insurance to be an indemnity agreement between the insurer and the insured, rather than a contract insuring against liability under which an injured third party would be considered a third party beneficiary. Under this approach the insured under the policy had no cause of action for indemnification until such time as he had actually satisfied a judgment for an injured third party, valid, and 1 had declared it to be prospective only. See 254 AFTL J. 12 (1983); 246 AFTL J. 11 (1983); *Supplements* 247 AFTL J. 18 (1983) and 249 AFTL J. 22 (1983).

5. Brief of Petitioner at 3, VanBibber.

6. *VanBibber*, 439 So. 2d at 883. Because the incident on which the cause of action was based occurred prior to the effective date of the contested statute, October 1, 1982, the law in effect at the time of the incident (which permitted the joinder of the liability insurer) was controlling.

7. 367 So. 2d 1003 (Fla. 1978).

8. *Id.* at 1006.
thereby incurring a pecuniary loss. Accordingly, an injured party lacked standing to bring an action against an insurance carrier; a contract of indemnity precluded standing as a third party beneficiary; and the condition precedent of a satisfied judgment prevented the injured party from asserting horizontal privity in an attempt to enforce a cause of action by the insured against the insurer.9

This early approach created harsh results where an insured tortfeasor was insolvent or bankrupt and thereby judgment proof. Because the insured was unable to satisfy a judgment entered against him, either wholly or partially, he suffered no monetary loss which obligated the insurer to make any payment on the policy.10 Under this scenario the injured party was unable to recover from either the insured or the insurance carrier and hence was unable to satisfy his judgment.

In response to the plight of seriously injured persons who remained uncompensated, state legislatures finally began to enact remedial legislation. A typical enactment provided that "the insolvency or bankruptcy of the person insured . . . shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of the policy," subject to the limits of the policy."11 These remedial enactments also provided that if the judgment against the insured for injuries or loss remained unsatisfied for a specified length of time, the injured person was entitled to maintain an action "against the insurer under the terms of the policy for the amount of the judgment not exceed-

9. Nor could the injured party join the insured and the insurer as party defendants where the policy was considered a contract of indemnity. Early courts rejected this approach on the grounds that it constituted the improper joinder of an action ex contractu with an action ex delicto. See, e.g., Smith Stage Co. v. Eckert, 184 P. 1001, 1003 (Ariz. 1919), where the court held that joinder of the liability insurer in an action to determine the insured's negligence was improper:

There is also a misjoinder of parties defendant. They are not jointly liable on the policy. The [insured's] liability is one imposed by law for negligence. The indemnity company's liability is one arising out of contract. Their liabilities are separate and distinct. The [insured] could not be sued on the policy, as it has assumed none of the obligations thereof; nor can the indemnity company be sued for the tort, as it was not a party to it. The two causes of action do not run against or affect both of the defendants, which we have held to be necessary before they can be joined as defendants.


ing the amount of the policy.”

These statutes were the predecessors of present day “no action” clauses. They gave an injured party a right of action against an insurer, but only if the injured party first obtained a judgment against the insured.

The principal rationale advanced by liability insurers for inserting “no action” clauses into insurance policies is that joinder of an insurer causes the jury to believe that a substantial verdict will work no economic hardship upon the party who must satisfy the judgment. One prominent scholar commented in an early article:

It is a well-known fact to every attorney familiar with personal injury cases that if the plaintiff can make the jury realize that the defendant is insured he greatly increases his chance of recovering a large verdict, or for that matter, a verdict of any type. The same body of [persons] which will hesitate to penalize an individual where the elements of negligence do not clearly preponderate in favor of the plaintiff has no such compunctions against returning a substantial verdict against an insurance company.

. . . .

It is, of course, obvious that if the insurer is joined as a party defendant to the personal injury action the element of insurance is constantly confronting the jury.

12. 3 R. Long, supra note 10, at § 20.02.
13. 1 id. at § 1.08. An example of a standard “no action” policy provision reads as follows:

Action Against Company. No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured’s obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

Id.

Similar language is required by N.Y. Ins. Law § 167(1)(b) (McKinney 1983) to be in every policy before that policy is issued or delivered to the insured. The “no action” clause was originally intended for the benefit of, and to be enforced by, an injured person in an action against the insurer. Such statutes are remedial in nature and manifest an intent to modify the common law under which an injured person did not have a right of action against the insurer because there was no privity of contract between the insurer and the injured person.

14. Today a “no action” statute is viewed not as a benefit to the injured party but as an obstacle to relief. The statute operates to prevent a direct action by the injured party against the insurer because the injured party must first obtain a judgment against the insured before he can join the insurer. 3 R. Long, supra note 10, at § 20.02.

The Florida Supreme Court has rejected this rationale and consistently taken the position that the admission of the existence of insurance coverage at trial "should be more beneficial to insurers in terms of diminishing their overall policy judgment payments to litigating beneficiaries than the questionable 'ostrich head in the sand' approach which may often mislead juries to think insurance coverage is greater than it [actually] is."16

The Florida Supreme Court first considered the propriety of the joinder of an automobile liability insurer in an action to determine the liability of the insured in Artille v. Davidson.17 In Artille the joinder of the insurer was predicated on an insurance contract which had been issued to the tortfeasor in which the insurer had agreed to "settle or defend against claims resulting from the liability imposed upon the insured by law."18 The supreme court held that the lower court's order sustaining the demurrer by the insurance company was without error.19

It was not clear to the court whether the insurance contract was a liability contract for the benefit of a third party or an indemnity contract for the benefit of the insured. The court elected to treat it as if it were the latter, thus avoiding the determination of whether an injured third party was an intended beneficiary of a liability contract.20 The court reasoned that even if the facts alleged in the declaration against the insurance company were true, there could be no breach of contract until the insurance company failed to discharge its obligation to either settle or defend claims against the insured.21 Thus, if there had been no breach of contract which

17. 170 So. 707 (Fla. 1936).
18. Id. at 707. In Artille the plaintiff was allegedly injured in an automobile accident as the result of the defendant's negligence. In an amended pleading the plaintiff brought an action against the insured and his liability insurer. The defendants demurred to the pleadings, and judgment was entered in their behalf. On appeal the plaintiff conceded that the insurer had no tort liability arising out of the automobile accident and rested his case on the language of the policy. Id.
19. Id. at 708. The amended declaration contained two counts: one count against John Davidson, the owner of the automobile, and the second count against the insurance company. The court held that the declaration stated a good cause of action against Davidson, and hence the judgment based on sustained demurrers as to both defendants should have been conditioned upon the failure of the plaintiff to further amend the declaration by eliminating the insurance company as a party defendant within a reasonable amount of time.
20. The Artille court noted that no copy of the policy had been attached to the complaint. The plaintiff, in his pleadings, apparently did not consider the distinction to be significant, referring to the policy as "an automobile liability and indemnity policy of insurance." Id. at 707.
21. Id. at 708.
would give to the insured the right to maintain an action on the policy against the insurer, such a right could not accrue to an injured plaintiff having a claim against the insured even assuming that he were in fact a third-party beneficiary. The Artille court described the circumstances of those cases in Florida in which a third party had been permitted to maintain a suit against the insurer and found that none of these circumstances were present in the instant case.

II. Shingleton: Public Policy or Constitutional Rights?

In 1969, thirty-three years after the decision in Artille, Florida became the first state to adopt direct action by judicial fiat when the supreme court decided the landmark case of Shingleton v. Bussey. While the court did not explicitly state its holding, it is clear that the disposition of the case rested upon the Shingleton court's recognition of the right of an injured party to join the insurer in an action to determine the liability of the insured. What is not clear is whether that right was grounded on public policy considerations, on constitutional rights, or on some combination of the two. Indeed, the Shingleton opinion is replete with language supporting both bases.

In overruling Artille, the court concluded that "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

22. Id.
23. Id. A third party had been permitted to maintain a suit against the insurer where the right was based either upon a contract between the insurer and the insured plus a contract between the insured and the party maintaining the suit, or in cases where the statute gives the injured party the right to maintain the suit against the insurer of the party responsible for the injury, or in cases where judgment has been rendered against the insured and the insured has failed to pay the judgment, in which cases the judgment became equivalent to a contract and brought about privity between the plaintiff holding the judgment and the insurer liable to the insured for the payment of such judgment. Neither condition exists in this case.

Id.
24. 223 So. 2d 713 (Fla. 1969).
25. The court's decision to grant a right of joinder to an injured third party plaintiff may have been prompted by the insurance industry's position in the prior case of In re Rules Governing Conduct of Attorneys in Fla., 220 So. 2d 6 (Fla. 1969). In that case, the insurance industry successfully opposed a proposed Florida Bar rule which would have limited the use of in-house counsel to represent policyholders in litigation. The industry argued that in actions to determine the liability of the insured, the insurer is a real party in interest and therefore should be permitted to defend the insured with in-house counsel.
prevailing public policy of Florida."

Expounding upon the rationale of the district court, the supreme court recognized by operation of law that an injured party is in privity to a "quasi-third party beneficiary contract" entered into between the insurer and the insured, thereby rendering the insurer amenable to an action brought on the contract by the injured party.

The court was aware of the fact that the majority of those jurisdictions which had had the opportunity to adjudicate the efficacy of "no action" clauses had sustained them as a bar to a direct action against an insurer in an action to determine the liability of the insured. Nevertheless, the Shingleton court was "convinced that the time has arrived when the legal reasons advanced in favor of joinder and direct action against an insurer outweigh and preponderate over the traditional notions asserted to justify precluding an injured third party from enjoying such rights."

The primary reason advanced in those jurisdictions which have sustained "no action" clauses is that they serve to prevent

26. Shingleton, 223 So. 2d at 715 (emphasis added). To support the proposition that the judiciary may incorporate the prevailing public policy into the corpus juris the court cited the "classic opinion" by Justice Cardozo in MacPherson v. Buick Motor Co., 211 N.E. 1050 (N.Y. 1916).

27. Shingleton, 223 So. 2d at 715. The court cited extensively to the Illinois appellate court decision of Gothberg v. Nemerovski, 208 N.E.2d 12 (Ill. App. Ct. 1965), to support its third-party beneficiary rationale. It is interesting to note that in Gothberg the injured plaintiff had already secured a judgment against the insured and was bringing a separate action against the insurer. The plaintiff in Shingleton had not recovered a judgment against the tortfeasor at the time he sought to bring a direct action against the insurer.

The Supreme Court of Illinois has consistently rejected the argument that an injured party has a right of direct action against the insurer on the ground that it is contrary to "firmly-fixed public policy." Marchlik v. Coronet Ins. Co., 239 N.E.2d 799, 802 (Ill. 1968). See also Sullivan v. Midlothian Park Dist., 281 N.E.2d 659 (Ill. 1972).

The Gothberg court also noted that the injured plaintiff's interest in the insurance contract was buttressed by the language of the policy itself. The policy contained a specific provision inuring to the benefit of injured persons, giving them the right to recover from the insurer after securing a judgment against the insured: "Any person or organization or the legal representative thereof who has secured such judgment . . . shall thereafter be entitled to recover under this policy to the extent of the insurance afforded . . ."

Gothberg, 208 N.E.2d at 20-21.

The most narrow interpretation of Gothberg is that an injured party who first obtains a judgment against an insured then becomes a third-party beneficiary to the contract between the insured and the insurer and as such has a cause of action against the insurer.

The question of when an injured third-party beneficiary may exercise his right to bring suit on the cause of action is resolved by the effect of (1) the rules of civil procedure, (2) the provisions of the insurance policy itself, and (3) the process of weighing certain countervailing public policies present in each case. Shingleton, 223 So. 2d at 716.


30. Shingleton, 223 So. 2d at 717.
prejudice to the insurer by isolating from the jury’s consideration any knowledge that coverage for the insured exists.\textsuperscript{31} The \textit{Shingleton} court felt that the assumption that a jury is more inclined to find liability or to augment damages when it thinks an insurance company will bear the loss was no longer applicable because juries today are more “mature.”\textsuperscript{32} The court went as far as to suggest that a candid admission at trial of the existence of insurance and its policy limits would “be more beneficial to insurers in terms of diminishing their overall policy judgment payments to litigating beneficiaries.”\textsuperscript{33}

The \textit{Shingleton} court implied that a number of constitutional rights would be denied an injured plaintiff if the effect of a “no action” policy provision was to preclude him from maintaining a cause of action against the insurer. The court reasoned that motor vehicle liability insurance is a subject affected with a public interest and that its regulation is for the protection of the general public. Thus, the court concluded that it would not be unreasonable to limit the effect of express contractual provisions where they would collide with those considerations which affect the interests of the public generally, “[w]here, for example, [insurance policies] collide with principles of due process and equal protection, and the right to a full and adequate remedy of law guaranteed all citizens.”\textsuperscript{34} Recognizing further constitutional transgressions, the court stated that a policy provision prohibiting direct action against the insurer seeks to obviate the right of an injured third-party beneficiary to maintain a cause of action against the insurer, and that “[t]his hardly comports with Section 4, Declaration of Rights, State Constitution . . . that the courts shall be open so that persons injured shall have remedy by due course of law without denial or delay.”\textsuperscript{35}

In what was surely the impetus for later legislative action, the court remarked that the liberal joinder provisions of Rule 1.210(a), Florida Rules of Civil Procedure,\textsuperscript{36} were applicable only in the absence of any legislative action granting insurers the substantive right to insert “no joinder” clauses in liability policies.\textsuperscript{37}

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\begin{enumerate}
\item See supra text accompanying note 15.
\item \textit{Shingleton}, 223 So. 2d at 718.
\item Id. See supra text accompanying note 16.
\item \textit{Shingleton}, 223 So. 2d at 717.
\item Id. The suit in \textit{Shingleton} was filed prior to June 1968 and was thus controlled by the Constitution of 1885.
\item FLA. R. Civ. P. 1.210(a) provides in pertinent part: “Any person may be made a defendant who has or claims an interest adverse to the plaintiff.”
\item This requirement of the procedural rules raises the presumption that unless the
\end{enumerate}
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If, in fact, an injured plaintiff's constitutional rights are violated by denying him the right to join an insurer in a suit to determine the liability of its insured, as language in Shingleton arguably suggests, would not those constitutional rights also be violated if the legislature granted a substantive right to insurers to insert "no joinder" clauses in liability policies? If, however, Shingleton is grounded on public policy considerations alone, with no constitutional implications, as other language in Shingleton implies, then presumably the legislature could grant liability insurers the substantive right to insert "no joinder" provisions in liability policies through the exercise of its police power regulation of the insurance industry.

III. FROM SHINGLETON TO MARKERT

The Shingleton decision, while clearly reversing Florida law on the joinder of automobile liability insurers, created many new questions which the court soon had the opportunity to address. In Beta Eta House Corp. v. Gregory, a minor sued Beta Eta House and its liability insurance carrier for personal injuries caused by the alleged negligence of Beta Eta House in the maintenance of its premises. The insurance carrier, joined as a party defendant under the doctrine of Shingleton, moved for dismissal, and the motion was denied. The appellate court certified two questions to the supreme court. In resolving the first question the supreme court extended the principles announced in Shingleton by holding them applicable not only to automobile liability insurance, but also to "other forms" of liability insurance. In its resolution of the sec-

Legislature in the exercise of its police power regulation of insurance, affirmatively gives insurers the substantive right to insert "no joinder" clauses in liability policies there is no basis in law for insurers to assume [that] they have such contractual right as a special privilege not granted other citizens to contract immunity with their insureds from being sued as joint defendants by strangers.

Shingleton, 223 So. 2d at 718-19.
38. 237 So. 2d 163 (Fla. 1970).
39. The questions presented were:
(a) [whether] the principles announced [in Shingleton] are applicable not only to automobile liability insurance but also to other forms of liability insurance; and (b) whether the suggested procedure for preserving the substantive law of Florida by ordering 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 should be followed by the trial courts of this state.

Beta Eta, 237 So. 2d at 164.
40. Id.
ond question, the *Beta Eta* court seemingly receded from *Shingleton*’s effect by affirming the insurer’s right to a separate trial pursuant to Rule 1.270(b), Florida Rules of Civil Procedure.41 While the *Beta Eta* court held that the trial court may, on motion of either party, order separate trials pursuant to Rule 1.270(b), the court quoted approvingly from language contained in the opinion of the district court of appeal which read:

Pursuant to the provisions of this rule the trial court *should* on the motion of a party order that the issues relating to the cause of action sued upon be first tried under circumstances which exclude any reference to insurance, insurance coverage or joinder in the suit of the insurer as a codefendant.42

The *Beta Eta* court stressed that *Shingleton* had endeavored to facilitate discovery proceedings, settlement negotiations, and pretrial hearings, but that *Shingleton* did not alter the long-established policy of keeping all evidence of liability insurance from the jury:43 “The existence or amount of insurance coverage has no bearing on the issues of liability and damages, and such evidence

41. FLA. R. CIV. P. 1.270(b) provides: “The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim or third party claim or of any separate issue or of any number of claims, cross-claims, counterclaims, third party claims or issues.”
42. *Beta Eta*, 237 So. 2d at 165 (emphasis added).
43. *Id.* In a separate opinion Justice Boyd argued that because the majority opinion affirmed the holding of the district court which required an automatic severance when a liability insurer is a codefendant in a suit with its insured, equal protection and due process are offended by giving liability insurance carriers special treatment which is not afforded other codefendants. *Id.* at 166 (Boyd, J., concurring and dissenting). However, the majority opinion explicitly modified the district court’s opinion by stressing that a trial court is not required to grant a severance when a liability insurance carrier is a codefendant. The majority emphasized that the trial court has discretion on this issue. *Id.* at 165.

Chief Justice Ervin, in a separate opinion, argued that it would be better “to eliminate furtive conjecture on the insurance factor by fully disclosing its presence to the jury. Such disclosure . . . would tend to encourage juries to adopt and implement a more honest analysis and consideration of the insurance factor . . .” *Id.* at 168 (Ervin, C.J., concurring and dissenting) (emphasis added). The chief justice went on to state that “complete disclosure of the insurance feature to the jury would seem to increase the probability that *prejudice generated by insurance* would be detectible [sic] through a proper utilization of methods presently available for challenging and testing the adequacy of a jury’s verdict.” *Id.* (emphasis added).

The chief justice recognized that jurors are prejudiced when they obtain information that the defendant is insured. This “consideration of the insurance factor” and “prejudice generated by insurance” referred to by Chief Justice Ervin is the very foundation for the insurer’s argument that joinder should not be permitted. Arguably, the presence of insurance should not be a consideration in determining a defendant’s liability and damages.
should not be considered by the jury." Consequently, a timely motion to sever by an insurer codefendant was all that was necessary to give the trial judge the opportunity to circumvent the principles of Shingleton.

In Stecher v. Pomeroy the supreme court took occasion to clarify the Shingleton and Beta Eta decisions. In Stecher the limits of the insurance policy were disclosed to the jury. The trial court refused to instruct the jury to disregard the limits and the district court affirmed. The supreme court stated that under the facts of the case the refusal to instruct the jury to disregard the limits was harmless error, but stressed that Beta Eta was never intended to take the issue of insurance to the jury. The court went on to explain that the result reached in Beta Eta and Shingleton, that of revealing the existence of an insurer as a real party in interest, was based on the rationale that it would justifiably reflect the insurer's responsibility to satisfy any judgment.

Addressing the severance issue, the court explained that Beta Eta employed the permissive "may" when it held that the trial judge may grant a severance to the named insurer. "However, . . . absent 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." The court reasoned that to rule otherwise would defeat the purpose of joining the insurer—"to reflect the presence of financial responsibility which should be left apparent before the jury."

In Godshall v. Unigard Insurance Co., the plaintiff brought

44. Id. at 165.
45. 253 So. 2d 421 (Fla. 1971). In Stecher the petitioners claimed conflict between the Beta Eta and Shingleton decisions and the decision of the district court in the instant case.
46. One of the objectives of [Beta Eta] and [Shingleton] was to provide a disclosure of policy limits between the parties which had not previously been allowed. The reasons were for purposes of negotiation and to encourage settlement between the parties and thus shorten litigation and speed up the courts' heavy trial dockets. It was never intended that policy limits should go to the jury and Beta Eta expressly said so.

Id. at 423 (emphasis in original).
47. The court noted that this approach obviated the ability of defense counsel to mislead the jury into believing that the burden of satisfying a judgment would work financial hardship upon the family of a sympathetic defendant. Id.
48. Id.
49. Id. at 424 (emphasis in original).
50. Id.
51. 281 So. 2d 499 (Fla. 1973).
suit for injuries resulting from a traffic accident and joined the defendant and her liability insurance company. The liability carrier was severed from the case and the jury returned a verdict for the defendant.

The district court of appeal affirmed without an opinion. On petition for a writ of certiorari to the supreme court, the district court's decision was quashed and the case remanded for reconsideration in light of Stecher. On remand the district court held that the trial court had erred when it granted the severance for the liability carrier, but that the severance was harmless. The supreme court reversed and held that the granting of a severance to an insurance company for any reason except those enumerated in Stecher could not be regarded as harmless error.52 The court reasoned that absent a justiciable issue relating to insurance, the plaintiff's interest "in presenting to the jury the truest possible picture of the existence of financial responsibility is much too important to allow the loss of that interest, through the granting of severance."53

IV. PRE-VanBibber LEGISLATION AND THE COURT'S RESPONSE

The legislature entered the joinder conflict with the enactment of section 627.7262, Florida Statutes,54 which became law on June

52. Id. at 502.
53. Id.
54. FLA. STAT. § 627.7262 (Supp. 1976) provided:

   Nonjoinder of insurers.—

   (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
The essence of the statute was to prohibit the joinder of an automobile liability insurer in an action against its insured prior to first obtaining a final judgment against the insured. However, the statute did provide for the joinder of the insurer prior to final judgment if the statement filed by the insurer as required by subsection (1) of the statute indicated that a policy or coverage defense would be asserted.

The supreme court responded to the legislature’s attempt to sidestep the principles announced in Shingleton in Markert v. Johnston. The Markert court saw the issue as whether the joinder of a motor vehicle liability insurer, in a suit to determine the liability of the insured, is a procedural aspect of trial reserved to the supreme court by virtue of its exclusive rulemaking authority granted by article V, section 2(a) of the Florida Constitution, or a substantive right which the legislature can freely grant or withhold. The court declined to resolve the issue of whether Shingleton established a substantive right to sue insurers in the absence of a legislative act on the subject, concluding that the language of section 627.7262 made the resolution of that issue unnecessary. In resolving the substantive/procedural issue, the court stated that the language of the statute “provides rather clearly

provisions of liability insurance coverage.

55. Ch. 76-266, 1976 Fla. Laws 726.
56. FLA. STAT. § 627.7262(4) (Supp. 1976).
57. Id. § 627.7262(3).
60. Markert, 367 So. 2d at 1004. The mention of insurers as distinct from their joinder has been treated as a procedural subject immune from legislative alteration. See Carter v. Sparkman, 335 So. 2d 802 (Fla. 1976), cert. denied, 429 U.S. 1041 (1977); School Board v. Surette, 281 So. 2d 481 (Fla. 1973). Cf. School Board v. Price, 362 So. 2d 1337 (Fla. 1978).
61. Markert, 367 So. 2d at 1005. An argument advanced by the proponents of the statute was that the issue of the joinder of insurers is simply a matter of public policy, the declaration of which is primarily a legislative function. They asserted that only in the absence of a constitutional or statutory declaration may the public policy of the state be determined by the courts. The court’s response was that

as a matter of constitutional imperative, only the Supreme Court has the power to adopt rules of practice and procedure for Florida courts. The fact that our rules may reflect the prevailing public policy—whether by design or by coincidence—obviously does not enable the legislature to encroach on our rulemaking authority.

Id. at 1005 n.8.
that the joinder of insurers is merely a procedural step” in the lawsuit.2 The court noted that the legislature, by enacting the statute, had not altered the Shingleton policy of recognizing the insurers as the real party in interest, but had merely specified the precise moment during the judicial proceeding in which the insurer is formally recognized as a real party in interest.63 Finally, the court held section 627.7262, Florida Statutes, to be an invasion of the court’s rulemaking authority in violation of article II, section 3 of the Florida Constitution, and therefore unconstitutional.64

Three years later, in Cozine v. Tullo,65 the supreme court addressed the constitutionality of section 768.045, Florida Statutes,66 a statute similar in all relevant respects to section 627.7262.67 The court, in a four-three decision, held the statute unconstitutional “[f]or the reasons expressed in Markert v. Johnston.”68

Justice McDonald, dissenting, felt that sections 627.7262(1) and 768.045 were not entirely procedural and therefore did not run afoul of the court’s exclusive procedural rulemaking power.69 He noted that the court was upholding the right of an injured party to join the insurer as a real party in interest, while at the same time recognizing the authority of the legislature to relieve insurance companies of the burdens of this rule.70 Justice McDonald opined that few people truly believe that the presence or absence of an insurance company in a suit does not affect the issue of liability or

62. Id. at 1005. The court cited to In re Florida Rules of Criminal Procedure, 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J., concurring), in which Justice Adkins defined “practice and procedure” within the meaning of art. V, § 3 of the Florida Constitution.
63. Markert, 367 So. 2d at 1005.
64. Id. at 1006. FLA. CONST. art. II, § 3 prevents the powers of one branch of government from being exercised by another branch.
65. Cozine, 394 So. 2d at 115 (Fla. 1981).
67. The principal difference between the two statutes was the inclusion of “liability” in the title of § 768.045 and the exclusion of “motor vehicle” in the first sentence of that same statute.
68. Cozine, 394 So. 2d at 115.
69. Id. at 116 (McDonald, J., dissenting, in an opinion in which Overton and Alderman, JJ., concurred). It is interesting to note in light of the similarities between the two statutes that Justices Overton and Alderman concurred in the majority opinion in Markert which had held § 627.7262 unconstitutional as an impermissible encroachment upon the court’s exclusive rulemaking authority. Markert, 367 So. 2d at 1006.
70. Cozine, 394 So. 2d at 116 (McDonald, J., dissenting).
the amount of damages awarded. In view of the legislature's legitimate interest in policing the field of insurance, he concluded that because the legislature had determined that the public interest is best served by the nonjoinder of the insurance company, the court should recognize that interest and uphold the nonjoinder statutes.

V. THE REVISED STATUTE AND VanBibber

The Florida Insurance Code, which had been enacted in 1959, was scheduled for blanket repeal on October 1, 1982. In the process of reviewing the entire Insurance Code, the legislature enacted a revised version of section 627.7262. The revised statute attempts to create a substantive right of nonjoinder in the liability insurance carrier as opposed to regulating the timing of joinder of the carrier. The statute effectively transfers the accrual of a beneficial interest in the injured plaintiff from the date of occurrence until that time when the plaintiff's action against the insured has matured to a judgment. Does the revised statute, like its predecessor, violate article II, section 3, of the Florida Constitution by invading the supreme court's exclusive rulemaking power? Was the Shingleton decision to grant a right of action to an injured plaintiff against the tortfeasor's insurer grounded on public policy considerations, thus enabling the legislature to abrogate that right; or was Shingleton grounded on constitutional principles which would deny the legislature the power to abrogate that right and thereby mandate the unconstitutionality of the revised statute?

A. The Court's Exclusive Rulemaking Authority

In VanBibber v. Hartford Accident & Indemnity Insurance

71. Id.
72. Id. at 117. Justice McDonald gives the reader some indication of his views as to the grounds for the Shingleton holding. Because it would be inconsistent for Justice McDonald to argue the constitutionality of the statute in Cozine and at the same time argue that Shingleton was grounded on constitutional principles, we can deduce that, in Justice McDonald's opinion, Shingleton was based on public policy considerations.
73. On April 7, 1982, during the fourth special session of the 1982 legislature, the revised Insurance Code was passed by unanimous vote in both houses. Fla. H.R., Committee on Insurance, Staff Report, 1982 Insurance Code Sunset Revision (Fla. HB 4F, as amended by HB 10G), at 4 (1982).
75. See supra notes 59-60 and accompanying text.
the supreme court explained that because of the substantial differences between the statute in Markert and the present statute, the Markert decision was not controlling. The first perceived difference was that "[t]he present statute requires, as a condition precedent to having a third-party interest in the insurance policy, the vesting of that interest by judgment; the prior statute did not." A second distinction was that "[t]he present statute specifically authorizes a contractual provision prohibiting direct third-party suits; the prior one did not."

The court found the revised statute to be substantive; therefore, it would not fail on the grounds enunciated in Markert. The revised statute is substantive in nature because it creates a right of action in the injured plaintiff only after the condition precedent is satisfied. It does not regulate the timing of joinder, as its predecessor did, but merely permits joinder of the insurer at only one point in the litigation, i.e., that point where the substantive right of action accrues to the injured plaintiff through a final judgment against the insured.

76. 439 So. 2d 880 (Fla. 1983). See supra notes 1-6 and accompanying text.
77. See supra note 54 for the text of the statute declared unconstitutional in Markert.
78. VanBibber, 439 So. 2d at 882-83. VanBibber was a four-two-one decision. It is not surprising to note that the majority consisted of Justice McDonald (author), Chief Justice Alderman, and Justices Overton and Ehrlich. Justice McDonald authored the dissenting opinion in Cozine, where he argued that the nonjoinder statutes were not entirely procedural so as to run afoul of the exclusive rulemaking power of the court. Justices Alderman and Overton concurred in that dissent.

It is interesting to note that Raymond Ehrlich, now Justice Ehrlich, filed an amicus curiae brief in Shingleton on behalf of the American Insurance Association, American Mutual Insurance Alliance, and the National Association of Independent Insurers.

Justice Shaw, joined by Justice Adkins, concurred in the VanBibber majority's determination that because the incident in the present case occurred prior to the effective date of § 627.7262, Florida Statutes (1983), and because there was no clear legislative intent to make the statute retroactive, the statute was not applicable to the instant case. However, Justice Shaw expressed the view, contrary to the majority opinion, that the statute was "unconstitutional because it impermissibly abrogates a right of action which existed under the Florida Constitution of 1885; unconstitutionally denies due process, and unconstitutionally denies or delays the right of access to the courts under sections 9 and 21, respectively, article I, Florida Constitution of 1968." VanBibber, 439 So. 2d at 883 (Shaw, J., concurring and dissenting).

Justice Boyd, dissenting, would have held that the statute unconstitutionally encroaches upon the supreme court's exclusive authority to promulgate rules of procedure. Id. at 886 (Boyd, J., dissenting).

79. VanBibber, 439 So. 2d at 882-83.
80. Id. at 883 (footnote omitted).
81. Id.
B. VanBibber's Right of Access to the Courts

The VanBibber court clearly stated that Singleton was grounded on that court's public policy determinations in the absence of any legislative action. The court also recognized that their policy considerations would have to yield to a valid, contrary legislative pronouncement. Justice Shaw, concurring and dissenting in VanBibber, argued that Singleton was grounded on constitutional principles as well as public policy considerations. He argued that by enacting the revised nonjoinder statute the legislature had abrogated a right of action that existed under the Florida Constitution of 1885 because it denied due process and delayed the plaintiff's right of access to the courts. Language supporting Justice Shaw's argument can be found in Singleton, where the court, after recognizing that the "no action" provisions do not merely attempt to defer the liability of the insured but, in addition, seek to defer the right of an injured third party beneficiary to maintain a cause of action against the insurer, stated that "[t]his hardly comports with section 4, Declaration of Rights, State Constitution, . . . that the courts shall be open so that persons injured shall have remedy by due course of law without denial or delay."

Citing this language from Singleton, VanBibber argued that the "no action" clause permitted to be inserted into liability policies as a result of the nonjoinder statute is, in effect, a denial of access to the courts in the same manner as the "no action" policy.

82. Id. See also Markert, 367 So. 2d at 1005, where the majority stated that Singleton was decided on public policy considerations.
83. VanBibber, 439 So. 2d at 883.
84. Id. at 884 (Shaw, J., concurring and dissenting).
85. Id. at 883. The tort suit in Singleton was filed prior to June 1968 and was therefore controlled by the Constitution of 1885.
86. Singleton, 223 So. 2d at 717. The Declaration of Rights § 4, Fla. Const. of 1885, is currently Fla. Const. art. I, § 21. Section 21 provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

Section 21 has been interpreted by the court to mean that where a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. § 2.01, . . . the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973).
provision in *Shingleton*.\(^{87}\) If the policy provision in *Shingleton* violated an injured plaintiff's constitutional right of access to the courts, then surely no act by the legislature can cure that constitutional defect. In response, Hartford argued that the constitutional guarantee to the redress of any injury and access to the courts bars only the statutory abolition of an existing remedy without providing an alternative protection for the injured party.\(^{88}\) Hartford stated that VanBibber's alternative remedy was to file an action against the insured.\(^{89}\)

C. VanBibber's Right to Due Process and Contractual Rights

VanBibber argued, and Justice Shaw agreed, both relying on *Shingleton*, that the nonjoinder statute violated her constitutional right to due process of law.\(^{90}\) The *Shingleton* court had recognized the importance of a plaintiff's right to sue defendants jointly, stating that it "is so universal and essential to due process that it can rarely be curtailed or restricted by private contract between potential defendants."\(^{91}\) Apparently, the *VanBibber* court felt that it had one of these rare situations before it.

Other language supporting VanBibber's due process argument can be found in *Shingleton*, where the court, after recognizing the state's interest in insurance regulation for the protection of the public, reasoned that it would not be unreasonable to limit the effect of express contractual provisions where they would collide with the interests of the public generally, "[w]here, for example, they collide with principles of due process and equal protection, and the right to a full and adequate remedy of law guaranteed all citizens."\(^{92}\) Again, the court in *VanBibber* did not discuss or even acknowledge this language found in *Shingleton*.

The Florida Supreme Court recognized in *Shingleton* that an insurance contract is "no longer a private contract merely between two parties."\(^{93}\) The *Shingleton* court rendered the third-party ben-

\(^{87}\) Petitioner's Reply Brief at 9, *VanBibber*.


\(^{89}\) Respondent's Answer Brief at 17, *VanBibber*.

\(^{90}\) Petitioner's Initial Brief at 18, *VanBibber*. See *VanBibber*, 439 So. 2d at 883 (Shaw, J., concurring and dissenting).

\(^{91}\) *Shingleton*, 223 So. 2d at 717.

\(^{92}\) Id.

\(^{93}\) Id. at 716 (emphasis in original) (quoting Gothberg v. Nemerovski, 208 N.E.2d 12, 20 (Ill. App. Ct. 1965), which in turn was quoting Simmon v. Iowa Mutual Cas. Co., 121 N.E.2d 509, 511 (Ill. 1954)).
eficiary doctrine applicable to automobile liability insurance contracts and thereby recognized VanBibber's third-party beneficiary contract rights. VanBibber argued that the application of the non-joinder statute to her, a third-party beneficiary to the insurance contract entered into by Hartford and its insured, would unconstitutionally impair her contractual rights as provided by article I, section 10, of the Florida Constitution.\(^4\) She further argued that because her accident occurred prior to the effective date of the nonjoinder statute,\(^5\) she was governed by the law in effect at that time.\(^6\) She contended that her contract rights on June 25, 1982 permitted her a direct cause of action against Hartford; the statute would unconstitutionally deprive her of such a right.\(^7\)

While recognizing that the new statute became effective on October 1, 1982, Hartford argued that subsection (1) of the nonjoinder statute requires the injured plaintiff to obtain a judgment against the insured as a condition precedent not only to the accrual but also to the maintenance of a cause of action against a liability insurer.\(^8\) It follows, therefore, that the nonjoinder statute should apply to all existing lawsuits in which the liability insurer has been named as a defendant.\(^9\)

Finally, Hartford argued that the legislature of a state may mod-

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4. Petitioner's Initial Brief at 19, VanBibber. FLA. CONST. art. I, § 10 provides: "No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."

At the present time the exact extent to which art. I, § 10 prohibits the passage of any law impairing the obligation of contracts is unsettled. In Yamaha Parts Distrib. Inc. v. Ehrman, 316 So. 2d 557, 559 (Fla. 1975), the supreme court stated that virtually no degree of contract impairment has been tolerated in this state. In Pomponio v. Claridge of Pompano Condo., Inc., 378 So. 2d 774, 779-80 (Fla. 1979), the court adopted the United States Supreme Court's analysis of the federal contract clause. This analysis employs a balancing test, balancing the reasonableness, necessity, and purpose of the law against the parties' obligations and rights under the contract. Clearly this analysis permits greater latitude on the part of the state in enacting laws that will not be determined to be unconstitutional.

Finally, the court in State v. Chadbourne, 382 So. 2d 293, 297 (Fla. 1980), has returned to the rigid, unflexible stance they took prior to Pomponio and stated that there is a "wall of absolute prohibition" against laws impairing the obligations of contract. The question of whether the court will take a stance that will strictly prohibit the impairment of contracts or one employing a balancing test may depend upon whether Chadbourne will be distinguished as a case in which the state was a party to the contract, thereby exacting a stricter prohibition against impairment under the federal analysis as adopted in Pomponio.


6. Petitioner's Initial Brief at 19-21, VanBibber. See Kirkland v. State, 424 So. 2d 925 (Fla. 1st DCA 1983); Galbreath v. Shortle, 416 So. 2d 37 (Fla. 4th DCA 1982).

7. Petitioner's Initial Brief at 21, VanBibber.


ify an existing remedy, including a statute of limitations, without impairing the obligation of contracts as long as a sufficient alternative remedy is provided. The legislature has not forever barred VanBibber from bringing an action against Hartford, but has merely required as a condition precedent thereto a judgment against its insured. Quoting from the supreme court in *Ruhl v. Perry*, Hartford concluded that “if the legislature may modify existing remedies by shortening or lengthening the statute of limitations without impairing the obligation of contract, it may also modify the time when a cause of action accrues.”

Once again, the court in *VanBibber* did not express its opinion on whether the application of the nonjoinder statute to VanBibber would violate her contract rights. Because the court found the statute to be substantive, it would be applied prospectively only due to the absence of a clear legislative intent that it should be applied retroactively. Thus, because the nonjoinder statute did not apply to *VanBibber*, the principles announced in *Shingleton* controlled the instant case.

VI. CONCLUSION

The court's opinion in *VanBibber* was short and conclusory rather than analytical. Perhaps because of extensive language in *Shingleton* which implied that there would be constitutional transgressions if an injured plaintiff were not permitted to join the insurer in a suit against the insured, the court felt that it could not cogently distinguish *Shingleton* from *VanBibber* and therefore opted to refrain from an analytical approach. Nevertheless, the language of *Shingleton* remains unexplained by the court.

While the *VanBibber* court can be criticized for its failure to address the constitutional issues raised by *Shingleton*, the court should not be criticized for the results it reached in *VanBibber*.

Has the legislature been permitted to regulate procedure under the guise of substantive law? The cases of *Shingleton*, *Markert*, and *Cozine* dealt with the timing of joinder, which is clearly a procedural issue, and not with whether a cause of action exists by virtue of the substantive law. Section 627.7262, Florida Statutes,

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100. *Id.* at 20-21 (citing *Ruhl v. Perry*, 390 So. 2d 353 (Fla. 1980)).
101. 390 So. 2d at 356.
102. Respondent's Answer Brief at 21, *VanBibber*.
103. *VanBibber*, 439 So. 2d at 883.
104. *Id.*
merely codifies the long accepted requirement in the majority of jurisdictions that an injured party first obtain a judgment against the insured before proceeding against his insurer. The statute recognizes that it is the judgment against the insured which gives the injured party status as a third party beneficiary to the contract of insurance between the insurer and the insured. Finally, section 627.7262 affirmatively grants a substantive right to insurers to insert "no action" clauses in liability insurance policies pursuant to the Shingleton court's unequivocal language which recognized the legislature's authority to do so by virtue of its police power.\footnote{Shingleton, 223 So. 2d at 718-19.}

The question of whether a tortfeasor has purchased liability insurance or not simply should not enter into the jury's determination of liability. It is clear that the resolution of the factual issue of liability does not require that the jury have knowledge of which person or entity will bear the burden of satisfying a judgment. It is the burden of the legislature, pursuant to the substantive law, to determine risk and loss allocation. While it is understandable that a jury would rather see a large financial institution respond to a loss as opposed to an individual, such a determination is clearly outside the scope of the function of the jury.

The proponents of the nonjoinder statute advance the economic argument that the jury will augment damages awarded, or even find liability in the first instance, if it perceives that an insurance carrier rather than an individual will bear the loss. However, where the insured is itself a financially strong business entity as was the case in VanBibber, the joinder of the insurance company should have little or no effect on the jury. In such a situation the jury perceives that the loss will rest upon one who is capable of bearing it, just as it arguably does when an insurer is joined as a party defendant.

Resting its decision on a determination of public policy, the Shingleton court recognized a substantive right of an individual to join an insurer in an action against the tortfeasor pursuant to its determination of the common law. The legislature, however, has now acted with respect to the subject matter of those substantive rights and has made its determination as to the prevailing public policy of the state of Florida. The supreme court, therefore, acted properly in not substituting its judgment for that of the legislature,
no matter how wise, foolish, harsh, or lenient the statute appears to the court.

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