

## Florida Court of Appeals Holds Underlying Tort Case Must Resolve Before Third-Party Spoliation Action Can Be Litigated

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In *Amerisure Ins. Co. v. Rodriguez*, 43 Fla. L. Weekly 2225 (Fla. Dist. Ct. App., Sept. 26, 2018), the Third District Court of Appeals of Florida addressed whether a third-party spoliation claim should be litigated and tried at the same time as the plaintiff's underlying tort case. The court held that since the third-party spoliation claim did not accrue until the underlying claim was resolved, the spoliation cause of action could not proceed until the plaintiff resolved his underlying claim.

The underlying matter in *Amerisure* involved a personal injury claim by plaintiff Lazaro Rodriguez. While working as an employee for BV Oil, Inc. (BV), Mr. Rodriguez was knocked from the top of a gasoline tanker he was fueling at a gasoline storage warehouse owned by Cosme Investment (Cosme). Mr. Rodriguez filed a personal injury lawsuit against Cosme. He also collected worker's compensation benefits from Amerisure Insurance Company (Amerisure), BV's worker's compensation carrier, while his lawsuit was pending.

After Rodriguez learned that BV and Amerisure had a video of his accident that would support his case but had negligently lost or destroyed the videotape, he amended his complaint to add both parties as defendants. In his amended complaint, Rodriguez alleged spoliation of evidence against BV and Amerisure. Specifically, Rodriguez alleged that their actions impaired his ability to prove his underlying tort claim and respond to comparative negligence defenses.

After the trial court issued orders compelling Amerisure to provide discovery and try the spoliation claim at the same time as the plaintiff's personal injury claim, Amerisure filed a writ of certiorari requesting that the appellate court quash the trial court's orders. Amerisure argued that it should not have to provide discovery or try the case prior to resolution of the underlying tort claim.

The appellate court, relying on precedent, stated that a spoliation claim requires proof that the inability to use the spoliated evidence negatively affected the plaintiff's ability to prove his underlying claim. Since a party cannot prove how its inability to use the spoliated evidence affected its underlying claim until the underlying claim is resolved, the court held that a spoliation claim does not accrue until that time. Based on this reasoning, the court held that third-party spoliation claims should be dismissed or abated until the underlying tort claim is resolved. Thus, the Third District Court of Appeals granted Amerisure's request to have the trial court's orders quashed.

Besides setting a precedent for third-party spoliation claims in Florida, the *Amerisure* case should act as notice to all subrogation professionals that, despite the negligence of the third-party actor, the relief afforded in a spoliation claim may not be available until after the trial of the underlying action. The holding in this case highlights the importance of securing evidence as early as possible. As time passes, the availability of evidence can often become increasingly tenuous and, especially if a third party is at fault for evidence going missing, a carrier may be unable to support its subrogation case.

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