Legal update

Bell & Roper, P.A.

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Survey of Insurance and Civil Rights Issues and Recent Court Decisions from Bell & Roper, P.A.

INSURANCE - BAD FAITH

By Michael J. Roper

In *Vigilant Insurance Company v. Continental Casualty Company*, 35 Fla. L. Weekly D750 (Fla. 4th DCA, March 31, 2010), the Court held that an excess insurer could still assert a claim for bad faith against the primary insurer, even in those circumstances where the injured party/Plaintiff had released the insured, and the excess insurer had not received an assignment from the insured of any bad faith claim.

In this case, the insured had primary liability insurance in the amount of $1 million, subject to a $500,000 Self-Insured Retention, and the policy limits were eroded by defense costs. The insured also had excess liability coverage in the amount of $25 million. The primary insurer informed the excess insurer that the claim was within the primary limits of liability, and that the excess insurer could close its file. Thereafter, Plaintiff made several demands for settlement within the limits of the SIR and primary insurance policy, which the primary insurer rejected, without notifying the excess insurer. After three years of litigation, and incurring $530,000 in defense costs, the primary insurer notified the excess insurer that a demand had been made in excess of the underlying limits, and suggested that the excess insurer take over the defense or settlement of the case. Ultimately, the Plaintiff's claim was settled

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INSURER CAN WITHDRAW PIP COVERAGE BASED ON PEER REVIEW REPORT

By Kathryn A. Johnson

In *United Automobile Insurance Company v. Hollywood Injury Rehab Center, a/a/o David Prince*, 27 So.3d 743, 35 Fla. L. Weekly D334 (Fla. 4th DCA February 10, 2010), the Fourth District held that a "valid report" under section, 627.736(7)(a), Florida Statutes does not require an insurer to order an IME before denying a claim for PIP benefits.

United Automobile Insurance Company sought a review of a circuit court's decision affirming the county court's summary judgment in favor of Hollywood Injury & Rehab Center. The circuit court agreed with the county court that the peer review report United Auto furnished to defend the summary judgment motion was not valid because it did not state that the doctor either physically examined the insured or that his opinion was based on an independent medical examination as required by section 627.736(7)(a), *Florida Statutes*.

The disagreement between the lower courts arose from the 2001 amendment to section 627.736(7)(a),

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IMPACT OF VICARIOUSLY LIABLE DEFENDANT ON PROPOSAL FOR SETTLEMENT

By Cindy A. Townsend

The Fifth District Court of Appeal recently addressed whether an undifferentiated proposal for settlement that was served on two defendants, one of whose liability is undisputedly vicarious, is valid. *Andrews v. McPartland*, 29 So 3d 342 (Fla. 5th DCA 2010).

The plaintiff, George Andrews, was injured in an automobile accident with Sandra McPartland. Mrs. McPartland was driving a vehicle she jointly owned with her husband, Thomas McPartland.

As such, Thomas' liability was purely vicarious, based solely on his joint ownership of the vehicle. Andrews served an undifferentiated Proposal for Settlement, pursuant to Section 768.79, *Florida Statutes,* and Florida Rule of Civil Procedure 1.442 on the McPartlands for $175,000.00. The offer was rejected.

At trial, the lone issue was damages since liability was not contested. The jury awarded the plaintiff compensatory damages exceeding $800,000.00 plus $7,000.00 in punitive damages. Following entry of judgment, the plaintiff filed a motion for attorney's fees which was denied based on the Supreme Court's decision in *Lamb v. Matetzschk*, 906 So.2d 1037 (Fla. 2005). The Fifth District Court of Appeal found that although *Lamb* interpreted Rule 1.442 to mandate differentiated offers, a key fact underlying the holding was that the issue of vicarious liability was disputed.

The Fifth District Court of Appeal stated the instant case was distinguishable from *Lamb* because vicarious liability was undisputed. The Court then held that when vicarious liability is undisputed, it may be possible to apportion liability.

It also noted that to require differentiated settlements when vicarious liability is undisputed is unworkable and could potentially wreak havoc with jury instructions and verdict forms thus resulting in additional litigation.

As such, the Fifth District Court of Appeal found that serving undifferentiated proposals for settlement on two defendants, one of whose liability is undisputedly vicarious, is valid.

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Florida Statutes. This amendment added the following underlined language to this subsection:

"An insurer may not withdraw payment of a treating physician without the consent of the injured person covered by the personal injury protection, unless the insurer first obtains a valid report by a Florida physician licensed under the same chapter as the treating physician whose treatment authorization is sought to be withdrawn, stating that treatment was not reasonable, related, or necessary. *A valid report is one that is prepared and signed by the physician examining the injured person or reviewing the treatment records of the injured person and is factually supported by the examination and treatment records if reviewed and that has not been modified by anyone other than the physician*."

The Fourth District referred to its recent decision in *Cent. Magnetic Imaging Open MRI of Plantation, Ltd. V. State Farm Fire & Cas. Ins. Co.*, 22 So.3d 782 (Fla. 4th DCA 2009), where they noted the case law before the 2001 amendment clearly permitted "peer review reports" and squarely held that an insurer was not required to obtain an IME before denying a PIP claim.

Further, the court explained it could find no language in the statute that requires the medical report to be based upon a physical examination of the insured and without express language from the legislature, and there was no reason to conclude that a physical examination was required. *Nationwide Mut. Fire Ins. Co. v. Se. Diagnostics, Inc.*, 766 So.2d 229 (Fla. 4th DCA 2000).

The Fourth District held that by erroneously affirming the county court's summary judgment in favor of Hollywood Injury Rehab Center, the circuit court departed from the essential requirements of law. The Fourth District quashed the circuit court's order and remanded for proceedings consistent with this opinion.

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for $1.7 million, with the primary insurer paying $459,494 and the excess insurer paying $1,230,506. Plaintiff executed a release and settlement which provided for the release and discharge of the insured, primary insurer and excess insurer. The excess insurer did not obtain an assignment of any bad faith claim which the insured may have had against the primary insurer before the release was executed.

The excess insurer then sued the primary insurer for bad faith, because it was required to pay more than $1.2 million in excess coverage, when it contended that the Plaintiff's claim should have been paid at a time that it could have been settled within the underlying policy limits. The primary insurer moved for summary judgment on the grounds that Plaintiff had released the insured as to all claims in the underlying litigation, without any assignment of a bad faith claim to the excess insurer, and also argued that because an excess judgment was never entered in the underlying litigation, the excess insurer could not state a claim against the primary insurer. The trial court granted summary judgment for the primary insurer. On appeal, the Fourth DCA reversed that decision. In its opinion, the Fourth DCA reaffirmed its earlier decision that an excess insurer could bring a bad faith claim against the primary insurer and that an excess judgment was not a prerequisite to the claim. Instead, an action could be based upon a settlement executed by the excess insurer. The Court noted that a primary insurer has the same duty to exercise good faith to an excess insurer as it does to an insured. The Court also noted that excess insurer was not required to obtain an assignment from the insured, because the excess carrier has a cause of action under a theory of equitable subrogation, and essentially steps into the shoes of the insured with respect to a claim for bad faith against the primary insurance company.

The Court also distinguished its holding in this case from the precedent established in *Fidelity & Casualty Co. of New York v. Cope*, 462 So.2d 459 (Fla. 1985) which held that if an excess judgment had been satisfied, absent an assignment of that cause of action prior to satisfaction, a third party cannot maintain an action for a breach of duty between the insurer and its insured. The Fourth DCA determined that the reasoning of Cope did not apply when an insured pays the judgment, or an excess insurer pays the judgment for the insured as a consequence of the bad faith conduct of the primary insurer. In such a case, the insured, or the excess insurer standing in the shoes of the insured, is damaged because it has paid the judgment.

This case serves as a timely reminder of the importance of prompt, periodic reporting by a primary insurer to an excess insurer, particularly in those circumstances involving an eroding limits policy.

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FIFTH DISTRICT COURT OF APPEAL AFFIRMS DEFENSE VERDICT IN CONSTRUCTION/INDEMNITY CASE

In the August 2008 edition of the Newsletter, we discussed a defense verdict obtained by firm partner Michael M. Bell in a construction/indemnity case. Efforts to resolve this 1994 case at mediation were unsuccessful due to the Plaintiffs' demand of $14.5 million dollars.

On appeal, the Fifth District Court of Appeal entered a *per curiam* decision affirming the rulings of the Trial Court. We anticipate that a Motion for Rehearing, Clarification/Certification and/or Rehearing en banc will be filed.

Motions for Rehearing have a relative low chance of success at the District Court of Appeal (less than 2%).

We are cautiously optimistic that this matter will be remanded to the Trial Court for further proceedings on the Defendant's Proposal for Settlement which was filed in September of 2000.

Firm Success: *Kjeldsen v. Tropical Ford*

Firm partner Michael M. Bell recently defended Robert and Erik Kjeldsen in a jury trial before Judge Lawrence Kirkwood in the Circuit Court in and for Orange County, Florida.

Erik Kjeldsen began experiencing problems with his 1997 Lincoln Town car in early May 2007. At one point, he opened the hood and noticed a small fire on the driver's side of the engine. Four days later, Erik left the car at the service department of Tropical Ford in Orlando. When Erik Kjeldsen dropped off the car on Sunday, the service department was closed. He filled out an envelope indicating that he had seen a small fire in the engine compartment, placed his keys in the envelope and dropped the envelope in a "drop box". Twelve hours later the car caught fire, damaging other vehicles and the service department building.

Three months after the fire, Tropical Ford filed suit against Erik Kjeldsen and Robert Kjeldsen for negligence. During discovery, it was determined that fire started near the master brake cylinder. It was further determined that three months after the fire, Ford issued a recall on the subject vehicle to replace a switch in the master brake cylinder which had a potential for causing engine compartment fires.

At trial, the Trial Court ruled that the defense could not inform the jury of the recall as the recall was issued subsequent to the fire. Despite our arguments that the recall had been in force since 1999 as to other vehicles, the Trial Court still refused our proffer of evidence relating to the recall. At trial, we argued that the Kjeldsens were not negligent as they could not have foreseen that the vehicle would erupt in flames some twelve hours after it was dropped off.

At the conclusion of the trial, we moved for directed verdict on behalf of Robert Kjeldsen arguing that an owner is vicariously liable only for the negligent operation of a vehicle. The Trial Court granted this motion. After forty minutes of deliberation, the jury returned a verdict in favor of Erik Kjeldsen.

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