Legal Update

BELL & ROPER, P.A.

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CONDITIONAL DEMAND/NO SETTLEMENT

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In Villareal v. Eres, 38 FLW D1959 (2d DCA, September 18, 2013), the 2d District Court of Appeal affirmed the trial court's order granting partial summary judgment in favor of Eres, determining that no settlement had been reached.

Villareal was insured under a policy insured by Progressive. Villareal rear-ended a vehicle operated by Eres forcing that vehicle into a moving train. As a result of the collision Eres' son, a passenger in her vehicle, was killed. Eres sustained serious personal injuries.

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The Chase (For Greater UM Coverage)

In 2008, Richard Chase and his daughter Allison Chase were out riding separate owned motorcycles when they were involved in an accident with the same underinsured motorist. Richard lost his life and Allison was injured. Allison became the personal representative of her father's estate. As the personal representative, and also individually, she sued her insurance carrier, Horace Mann Insurance Company, seeking underinsured motorist limits equal to the bodily injury limits and stacked coverage.

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Counsel for the Eres wrote to Progressive requesting insurance information (FSA §627.4137) and offered to settle the claims for policy limits. Counsel indicated that any proposed release must not contain a holdharmless/ indemnity provision.

Progressive made a timely tender of the information requested pursuant to Florida Statute §627.4137. Progressive also made a timely tender of policy limits. The releases provided by Progressive contained the following provision:

The undersigned reserve(s) their right to pursue and recover future medical expenses, healthcare and related expenses from any person, firm, or organization who may be responsible for payment for such expenses, including any first party, health or first party automobile coverage, if so entitled. However, said reservation does not include the party (ies) released who is/are given a full and final release of all claims, including, but not limited to, past, present, or future claims for subrogation arising out of the above referenced accident.

Eres' counsel refused to settle, arguing that the language in the release was a holdharmless/indemnity agreement. Counsel filed a Motion for Partial Summary Judgment arguing that no settlement had taken place as there had been no "meeting of the minds". The trial court agreed and granted Plaintiff's motion.

As a result, the case proceeded to trial and a verdict in excess of ten million dollars ($10,000,000) was returned.

After the verdict was reduced to judgment, the Defendant filed an appeal with the Second District Court of Appeal. On appeal, the Defendant argued that the language in the release was not a holdharmless/indemnity agreement, and/or the terms of the release were not an essential element of the offer. The Second District affirmed the trial court's ruling, determining that the terms of the settlement offer were not met unconditionally. The court cited extensively to a similar case, Trout v. Apicella, 78 So.3rd 681 (5th DCA 2012).

Counsel for the Plaintiffs in the instant case is well known statewide for setting up insurance carriers with conditional settlement offers. Great care should be taken anytime a conditioned settlement offer is received. Only the simplest release should be submitted when attempting to comply with a contingent settlement offer.

By: Michael Bell, Esquire

In 2001, Richard had taken out the Horace Mann insurance policy as the named insured and he listed Allison as a driver. He selected, on an appropriate form, UM limits lower than his bodily injury limits. He also rejected stacked UM coverage on the same form.

In 2004, Allison took over that same policy as the sole named insured and as the sole driver. The bodily injury limits on the policy remained the same. She did not sign any forms concerning UM rejection or stacking. She eventually added her father as a listed driver to that same policy in 2007. As stated, the unfortunate accident occurred in 2008.

The trial court held in favor of Allison and the estate concluding that there was a new policy when Allison took over the policy. Thus, new forms needed to be signed, and that was not done. The trial court held that the selection of lower limits by Richard did not apply to the estate and that the estate was entitled to stacking. The selection of lower UM limits also did not apply to Allison, and she too received stacked coverage.

Section 627.727(1), Florida Statutes, provides that a written rejection or selection of lower limits of UM coverage is effective on behalf of all insureds under the policy. Section 627.727(9), at that time, stated that if a form is signed by the named insured, it is conclusively presumed that there was a knowing rejection of stacking. It is important to note the then-distinction between these two statutory sections. Subsection 1 uses the "all insureds" language. Subsection 9 did not. (It has since been amended and is now applicable on behalf of all insureds. This amendment became effective June 14, 2013. However, due to the statute of limitations, there will likely be claims for stacked coverage by those who did not sign the form before the effective date.)

The appellate court, for the most part, felt otherwise. It was not a new policy, but the continuation of an existing policy and the bodily injury liability limits had not changed when taken over by Allison. Therefore, new forms did not have to be signed. Section 627.727(1), Florida Statutes, tells us that :

uJnless an insured … having the privilege of rejecting uninsured motorist coverage, requests such coverage or requests higher uninsured motorist limits in writing, the coverage or such higher uninsured motorist limits need not be provided in or supplemental to any other policy which renews, extends, changes, supersedes, or replaces an existing policy with the same bodily injury liability limits when an insured … had rejected the coverage. When an insured … has initially selected limits of uninsured motorist coverage lower than her or his bodily injury liability limits, higher limits of uninsured motorist coverage need not be provided in or supplemental to any other policy which renews, extends, changes, supersedes, or replaces an existing policy with the same bodily injury liability limits unless an insured requests higher uninsured motorist coverage in writing.

The appellate court held that Richard's selection of lower UM limits and rejection of stacking was binding on the estate. Also, as Richard had signed the form on behalf of all insureds, the selection of lower UM limits was also binding on Allison. Allison was entitled to stacked coverage because she did not sign the rejection form as, at that time, the statute did not state that it was executed on behalf of all insureds. Therefore, she obtained stacked coverage of the lower UM limits.

By: David Blessing, Esquire

Social Media and Free Speech Rights of Governmental Employees

In Shepherd v. McGee , 2013 WL 5963076, 1 (D. Oregon, 2013) the court addressed the limits of a government employee's free speech in the form of postings on Facebook. The plaintiff in that case, Jennifer Shepherd, was a child protective services worker employed with the Oregon Department of Human Services ("DHS"). She was terminated by her employer after she posted her personal feelings about individuals receiving public assistance. She then brought a 42 U.S.C. § 1983 First Amendment retaliation claim against DHS.

In her position as a child protective services worker, Shepherd investigated reports of child abuse and neglect that came to the attention of DHS. One of her primary functions was to prepare juvenile court cases and make recommendations for juvenile court disposition. The purpose of the work was to determine whether a child was safe in his or her home or should be removed from the home. If a child was not safe in his or her home, Shepherd would develop a plan to ensure the child's safety. Shepherd and the District Attorney's Office would typically jointly file a juvenile petition for protective custody.

While working at DHS, Shepherd had a Facebook page. On that page, she identified herself as a child protective services case worker at DHS. Her Facebook page contained no general disclaimer that any content on the page was her opinion and not that of DHS and she never added such a disclaimer to any particular post. Shepherd had hundreds of Facebook friends who had access to all of the content she posted on her Facebook page, including a Judge, prosecutors, several defense attorneys and law enforcement officers.

Shepherd posted several comments on her Facebook page about her home visits with the families and questioned whether the individuals living there should be receiving public assistance such as food stamps and from other tax funded programs. She also posted lengthy comments on her own "rules" about those receiving public assistance and how she would limit what assistance was provided to them.

These posts were seen by the Judge and one of the defense attorneys and subsequently brought to the attention of DHS which then began an internal investigation. Based upon the findings of the internal investigation including input from the prosecuting attorneys, DHS terminated Shepherd's employment on the grounds that her actions "compromised her ability to effectively perform her job."

In the lawsuit Shepherd argued that DHS failed to show that her Facebook postings caused any "actual" disruption of her duties. The court disagreed. The court noted that DHS was not required to wait until an actual disruption occurred to establish that Shepherd's actions impaired the efficiency of its operations. In reaching its conclusion, the court noted that "in balancing the interests of the government employer and the public employee, the employer must show greater disruption to its provision of services when the speech is at the core of First Amendment protection or is directed at a large audience; correspondingly, the employer is given wider deference when the speech is at the edge of First Amendment protection, a smaller audience is targeted, or a close working relationship is at stake." Id. at * 8.

The court discounted Shepherd's First Amendment interests primarily because her speech was: (1) directed to a narrow audience, her Facebook friends, rather than a larger audience; and (2) her comments did not strike at the core of First Amendment protections "because they were banter rather than speech intended to help the public evaluate the performance of a public agency." The court stated that even if Shepherd's posts had been widely distributed and were at the heart of the First Amendment, "the balance would still tip in DHS' favor given the record of potential disruption." Id. at * 9.

By, Cindy Townsend, Esquire

FIRM NEWS

- Bell & Roper was pleased to serve as a sponsor for this year's Florida PRIMA Conference in Ft. Lauderdale, and we congratulate the conference committee on hosting such a successful and informative event.

Happy Holidays

- It is our pleasure this Holiday Season to extend to you our warm greetings and best wishes for a Happy Holiday and a prosperous New Year.

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Questions, comments or suggestions regarding our newsletter, please let us know your thoughts by contacting Christian Anderson at canderson@bellroperlaw.com

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