Legal Update

BELL & ROPER, P.A.

February/March 2014

Sovereign Immunity Adequacy of Claims Letter

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Vargas v. City of Fort Myers, Florida
39 Fla. L. Weekly D165 (Fla. 2nd DCA January 17, 2014)

Vargas was involved in a traffic accident with a Fort Myers police car on March 3, 2005. On May 13, 2005, her attorney sent the City a letter informing it of the accident, requesting insurance information, and informing the City that she was represented by counsel. Shortly thereafter, the City responded to the letter disclosing that it was self-insured and describing its limits of liability coverage.

Cont'd 2

The Difficulty of a Dismissal for Failure to Prosecute

On November 20, 2013, the First District Court of Appeal, in *Kendry v. Meadowlark Real Estate, LLC, et al.*, reversed a lower court's ruling dismissing a case for lack of prosecution. After almost three years with no record activity, the lower court issued a notice of proposed dismissal pursuant to Florida Rule of Civil Procedure 1.420 (e), advising the parties the case would be dismissed within sixty days unless record activity occurred or a party showed good cause why the action should remain pending. Rule 1.420(e) states:

Cont'd 3

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On March 9, 2007, Vargas' lawyer wrote the City describing the accident, her injuries, her medical bills, and demanding full policy limits. On September 29, 2008, the City responded to Vargas' lawyer by again stating it was self-insured and setting out its limits of coverage.

On November 17, 2008; more than three years after the accident; Vargas sent a demand letter to the City asserting that she had previously complied with the statutory notice requirements set forth in § 768.28(6)(a). On November 20, 2008, the City responded to Vargas' November 17 letter acknowledging its receipt, but asserting that the three-year period for providing notice of claim under §768.28(6)(a) had expired and she had failed to timely comply with the requirements thereof.

Vargas thereafter filed suit. The issue of the timeliness of the notice of claim letter was brought forth by the City on Motion for Summary Judgment. The Trial Court granted the motion, holding that the Plaintiff had failed to comply with the requirements of Florida Statute §768.28 (6).

Section 768.28(6) requires that before suit is brought against a Florida governmental entity that a notice of claim be provided within three years of the accrual of the incident. The language of statute also requires that the claimant provide the place of his or her birth, social security number, and any adjudicated penalties. However, the Second DCA held that compliance with these requirements was not necessary. The Court relied on the general principle, set forth in a number of cases, to the effect that the purpose of the notice of claim letter is to place the governmental agency on notice of a claim filed against it with sufficient specificity so that it might investigate and respond to the claim.

The Second DCA held that since the March 9, 2007, letter described the accident, the Plaintiff's injuries, her medical bills, and that a demand was being made, the City was placed on adequate notice so as to be able to investigate the claim. Accordingly, the Second DCA reversed the Summary and remanded the case.

The logical difficulty with this decision, and other cases addressing the adequacy of notice of claims letters, is the acknowledgment by the Courts that the sovereign immunity statute is to be narrowly construed. Nevertheless, these same Courts then go on to hold that certain requirements specifically set forth in the statute, in this case place of birth, social security number, and adjudicated penalties; are not necessary for compliance.

In any event, as a practical matter governmental entities should treat any notice of claim which identifies the person making the claim, the date of the accident and which seeks recovery of damages as sufficient notice under the statute.

By: Michael H. Bowling, Esquire

> **Failure to Prosecute**. All actions in which it appears on the face of the record that no activity by filing of pleadings, order of court, or otherwise has occurred for a period of 10 months, and no order staying the action has been issued nor stipulation for stay approved by the court, any interested person, whether a party to the action or not, the court, or the clerk of the court may serve notice to all parties that no such activity has occurred. If no such record activity has occurred within the 10 months immediately preceding the service of such notice, and no record activity occurs within 60 days immediately following the service of such notice, and if no stay was issued or approved prior to the expiration of such 60-day period, the action shall be dismissed by the court on its own motion or on the motion of any interested person, whether a party to the action or not, after reasonable notice to the parties, unless a party shows good cause in writing at least 5 days before the hearing on the motion why the action should remain pending. Mere inaction for a period of less than 1 year shall not be sufficient cause for dismissal for failure to prosecute.

Less than two weeks after receiving the Notice, plaintiff, a pro se prisoner, filed a notice of trial and habeas corpus ad testicandum, a writ requiring a person under arrest to be brought before the court. After a hearing, the lower court dismissed the case, concluding the case was not at issue, so it could not be set for trial. Therefore, the lower court found that the filing of a notice of trial and the writ in an effort to avoid dismissal were nullities. Essentially, the trial court determined that "record activity" referenced in Rule 1.420 included only filings that would move the case forward, such as the filing of discovery requests or notice of trial if the case was at issue.

The First DCA disagreed with the lower court and reversed finding that any record activity was sufficient to avoid dismissal. The appellate court agreed it was debatable whether the plaintiff's filings advanced the litigation, but concluded any record activity within the sixty-day time period was sufficient. Specifically, it cited to the Florida Supreme Court's holding in Chemrock Corp. v. Tampa Elec. Co., 71 So.3d 786 (Fla. 2011), wherein the higher court found that any filing is sufficient to preclude dismissal.

Essentially, based on these rulings, it will likely be impossible to obtain a dismissal for failure to prosecute where a party timely files any document after receiving a Notice of Failure to Prosecute. Moreover, a party trying to obtain a dismissal should be mindful that even a minor filing made on his/her/its part (e.g., Notice of E-mail Designation, Notice of Address Change) could "restart" the clock on calculating record activity. The First DCA's ruling was not limited to filings made by the party attempting to avoid dismissal.

BY: ANNA ENGELMAN, ESQUIRE

Medicare Changes Reporting Threshold:
Settlements of $1,000 or less no longer need to be reported.

On February 18, 2014 the Centers for Medicare & Medicaid Services issued its alert entitled: Change in Reporting Threshold for Certain Liability Settlements, Judgments Awards, or Other Payments. The body of the alert is set out below. What you need to know however, is from this point on CMS will not require reporting of, and will not seek reimbursement for, settlements of $1,000 or less. Please note this does not affect settlements in place before the date of this alert. So, settlements of $300 or more made before February 18, 2014 must still be reported and CMS will still pursue recovery of its demands issued prior the date of this alert.

As required by section 202 of the Strengthening Medicare and Repaying Tax Payers Act of 2012 (SMART Act), the Centers for Medicare & Medicaid Services (CMS) has reviewed the costs related to collecting data and determining the amount of Medicare's recovery claim and has calculated a revised single threshold for physical trauma-based liability insurance settlements. (Note: This threshold does not apply to settlements for alleged ingestion, implantation or exposure cases.) Based on this review, CMS is increasing its current reporting threshold from $300 to $1000. This new threshold is effective immediately. This means that physical trauma-based liability settlements of $1000 or less do not need to be reported and recovery of Medicare's conditional payment amount from these settlements will not be pursued.

The content of this Alert supersedes the content of the existing Medicare Secondary Payer Mandatory Reporting Non-Group Health Plan User Guide (Version 4.1), and will be incorporated into the next version of the User Guide.

(Note: The CMS will pursue recovery of any demand issued prior to the date of this Alert.)

CMS Alert - http://www.nqbp.com/sites/default/files/Alert-Change-in-Reporting-Threshold-for-Certain-Liability-Settlements-Judgments-Awards-or-Other-Payments.pdf

CMS Computation of threshold - http://cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Mandatory-Insurer-Reporting-For-Non-Group-Health-Plans/Downloads/New-Downloads/Computation-of-Annual-Liability-Insurance-Settlement-Reporting-and-Recovery-Threshold.pdf

This change in the reporting threshold is the result of CMS's annual review of its collection efforts. It evaluates its estimated cost of collecting a conditional payment arising from physical trauma-based liability settlements. Apparently, CMS has determined its return on collection efforts for settlements below $1,000 are not sufficiently cost effective. Nevertheless, this change in the reporting threshold will continue until CMS's next annual review when this level may change. Until then, reporting settlements below this level is not required and Medicare's conditional payment amount for these settlements does not need to be repaid.

By: Christopher R. Fay, Esquire

Trial Success

Michael J. Roper and Anna E. Engelman recently obtained a defense verdict in the matter of Cheryl and Theophelus Chambers v. City of Wildwood, a personal injury case which was tried in Sumter County, Judge William H. Hallman presiding.

In this motor vehicle accident lawsuit, Cheryl and Theophelus Chambers alleged that the City of Wildwood, through its police officer, negligently operated a patrol vehicle which rear-ended their vehicle at a stoplight. Plaintiffs further alleged the force of the impact caused Theophelus Chambers to lose consciousness at the scene, and that both plaintiffs were permanently injured, including a herniated disc in Theophelus Chambers' lower back, and a herniated disc in Cheryl Chambers' neck. Both plaintiffs incurred medical expenses in excess of $100,000 each, including spinal surgery, and both sought damages for past and future pain and suffering. Cheryl Chambers also alleged she would need future treatment in the amount of $125,000 for a second spinal surgery.

The City admitted liability for the accident, but denied that the low-speed impact could have caused any injury to either plaintiff, so the case was tried on the issues of causation and damages only. Plaintiffs relied upon their own testimony and that of their treating orthopaedic surgeon, Scott Katzman, M.D., to support their claims. The defense was able to discredit Plaintiffs' cases primarily by way of cross-examination and the testimony of a biomechanical expert and CME physician.

Following a three day trial, the jury ultimately deliberated less than one hour and returned a verdict in the City's favor as to both plaintiffs. Plaintiffs had earlier rejected reasonable proposals for settlement, making them potentially liable for the City's attorney fees, in addition to taxable costs.

FIRM NEWS

Date, Time and Location

Thursday, April 17, 2014
7:15 pm
Lake Eola, Downtown Orlando

About

Orlando's largest office party! Held exclusively for Florida's corporate community; businesses and non-profit organizations form teams and participate in the IOA Corporate 5k for camaraderie, friendly competition and celebrating with co-workers.

Tent Location

Bell & Roper's tent location will be in practically the same location as last year, near the corner of E. Robinson Street and N. Eola Drive (across from Panera Bread). We are tent ***Number 20***.

4Rivers will once again be catering the event so expect some delicious BBQ.

We hope to see each of you there.

CONGRATULATIONS

- We would like to congratulate **Christopher R. Fay** on being made a Partner.

If you are interested in being added to our newsletter e-mail list, or if you wish to be taken off of this list, please contact Krysta Reed at kreed@bellroperlaw.com.

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