Legal Update

BELL & ROPER, P.A.

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BAD FAITH/SUMMARY JUDGMENT

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In *Goheagan v. American Vehicle Insurance Company*, 37 FLW D1388 (4th DCA, June 13, 2012), the Fourth District Court of Appeal affirmed the Trial Court's Order granting Summary Judgment in favor of AVIC in this common law bad faith action.

AVIC issued an automobile policy to its insured, Perkins, which provided bodily injury coverage with limits of $10,000.00/$20,000.00. On February 24, 2007, Perkins rear-ended a vehicle operated by Molly Swaby. As a result of the accident, Ms. Swaby was hospitalized until she expired on May 12, 2007.

On February 26, 2007, two days after the accident, Perkins reported the accident to AVIC. Starting the very next day, the AVIC adjuster assigned to the claim attempted contact with Goheagan, Swaby's mother. *Cont. 2A*

DISMISSAL FOR FRAUD ON COURT

Firm members Michael J. Roper & Cindy A. Townsend recently secured a dismissal, with prejudice, of a personal injury suit which had been brought against firm client, Brevard County, FL, based upon the trial court's determination that plaintiff had committed a fraud upon the court, when she failed to disclose a subsequent accident and sought damages for an injury which was unrelated to the subject accident. Plaintiff filed suit against the County alleging that she had been injured on July 14, 2007, when an ambulance owned & operated by the County struck her motorcycle and knocked her over. She claimed to have fractured her left shoulder, left leg and left hip as a result of that event. This claim was asserted in her answers to two separate sets of interrogatories, her deposition testimony and in the history which she provided to the physician retained by the defense to perform a Compulsory Medical Examination. During her deposition she also denied any subsequent falls or accidents, denied that she had injured any part of her body after July 14, 2007, and specifically denied any subsequent motorcycle accidents. The medical records relating to her treatment made no

Cont. 2B

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2A

Goheagan either ignored AVIC's calls or put them off utilizing a number of excuses. On April 19, 2007, Counsel for Goheagan filed a wrongful death suit against Perkins. AVIC offered to tender policy limits to Goheagan's attorney on April 26, 2007, and June 7, 2007. These settlement overtures were rejected by Goheagan's Counsel.

On January 20, 2009, the jury returned a verdict in favor of Goheagan in an amount in excess of $2.7 million dollars. Goheagan subsequently filed a common law bad faith suit against AVIC. AVIC moved for summary judgment, arguing that no genuine issue of material fact existed as to whether AVIC had fulfilled its duty of good faith toward it's insured.

The Trial Court granted Summary Judgment in favor of AVIC. On appeal, the Fourth District affirmed. The Fourth District's opinion cites the cases of *Boston Old Colony v. Gutierrez*, and *Powell v. Prudential*. The Court determined AVIC fulfilled its obligation of good faith to its insured.

Before the Trial Court, Goheagan argued that AVIC had not satisfied its obligation of good faith despite the numerous calls made by the AVIC adjuster. Goheagan argued that AVIC failed to send a letter enclosing a check for policy limits to Goheagan, and therefore an issue of material fact existed as to whether AVIC has satisfied its obligation of good faith.

The fourth District Court of Appeal rejected the arguments made by Goheagan's Counsel. However, these arguments were accepted by one of the panel members who filed a dissenting opinion, indicating that Summary Judgment should be reversed.

Insurance carriers in the State of Florida will certainly welcome the Goheagan opinion. Motions for Summary Judgments in bad faith cases are rarely granted in favor of the insurer in State Court, but are somewhat routine in Federal Court. The Court's opinion in Goheagan is welcome news to insurance carriers who are put off and setup by claimants and their Counsel in an effort to ultimately obtain a bad faith judgment in excess of policy limits.

By Michael Bell

2B

reference to a hip injury and plaintiff claimed that the doctors had originally "missed" that injury and that it had only been diagnosed at a much later date. This obviously caused us to be suspicious and to carefully investigate this aspect of the claim. Ultimately, based upon information contained in her primary care physician's records, obtained via subpoena, we were able to determine that she had, in fact, been involved in a subsequent motorcycle accident on August 8, 2008. Those records further reflected that as a result of that subsequent accident she sustained a fracture to her left hip and underwent surgery for that injury. Plaintiff's counsel argued that the misrepresentation was not material, because plaintiff had withdrawn her damage claim related to the left hip, albeit after we filed the motion to dismiss for fraud. The judge rejected that argument and found that plaintiff's repeated misrepresentations and conscious efforts to conceal the existence of the subsequent accident and resulting injury, compounded by her attempt to relate the left hip fracture to the suit against the County, amounted to a willful fraud on the court and he, therefore, dismissed her case, with prejudice.

By Michael Roper

SPOLIATION AND THE PRESERVATION OF VIDEO EVIDENCE

The Second District Court of Appeal recently issued a broad opinion concerning the duty to preserve video evidence in the absence of a written request. In *Osmulski v. Oldsmar Fine Wine*, 37 Fla. L. Weekly D1578 (Fla. 2d DCA June 29, 2012), the court affirmed the trial court's finding that the plaintiff was not entitled to a spoliation jury instruction because the plaintiff never made a written request for the preservation of the video evidence.

Osmulski is a premises liability action wherein it was alleged that the plaintiff slipped and fell at a store owned by the defendant. There was testimony that the store's video surveillance cameras would have recorded the plaintiff's alleged slip and fall, but the video was never actually reviewed to determine whether the cameras captured the incident. The video was destroyed in the ordinary course of business.

The court stated, in order for a remedy to be imposed for spoliation of evidence, that the following must be determined: (1) whether the evidence existed at one time; (2) whether the spoliator had a duty to preserve the evidence; and (3) whether the evidence was crucial to an opposing party being able to prove its prima facie case or a defense. The court concentrated on whether the defendant had a duty to preserve the video evidence. The plaintiff argued that it was reasonably foreseeable that the plaintiff would have a claim and, therefore, the defendant had a duty to preserve the video evidence.

The court appears to be making a public policy infused decision due to the increased use of video technology in society today. In fact, it stated that the issue would be better resolved by the legislature through the enactment of a statute. The court stated as follows:

> We observe that in recent years, the use of digital video technology has significantly increased in our communities. Yet there are many uncertainties regarding this video technology as it relates to the resolution of legal disputes. The recording systems may vary greatly in quality as well as methodology. Some recordings may be erased automatically, and some may be erased manually. Some recordings may not be in the immediate control of the ultimate defendant. The recordings may or may not contain information that is critical to the civil action. Given this myriad of uncertainties, it would not be fair to business or homeowners to require them to preserve video evidence in the absence of a written request to do so.

Therefore, the court went on to hold that if a defendant has knowledge that an incident occurred on its property and the defendant has a video camera that may have recorded the incident, there is a duty to preserve relevant recorded information if a written request has been made by the injured party (or a representative) before the information is destroyed or lost in the normal course of the defendant's video operations.

By: David Blessing

2012 SESSION CHANGES TO CHAPTER 50 COULD MEAN COST SAVINGS FOR LOCAL GOVERNMENT

Changes to Florida Statutes, Chapter 50, Legal and Official Advertisements, should reduce local government expenditures associated with publishing legal notices.

Effective July 1, 2012:

•Limitation on the rate that may be charged for government legal notices required to be published more than once (less than 85 % of original rate);

•Authorizes electronic proof of publication affidavits; and

•Deletes requirement that certain legal notices be published in Leon County (licensee and bond validation actions and certain administrative complaints).

Effective July 1, 2013:

•Legal notices must be placed on a newspaper's website the same day the notice appears in the newspaper at no additional charge;

•Newspaper must provide a free link to access legal notices on its website;

•Newspaper must provide a search function; and

•Newspaper must post notices on Florida Press Association website – floridapublicnotices.com.

By: Sherry Hopkins

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Questions, comments or suggestions regarding our newsletter, please let us know your thoughts by contacting Sherry Hopkins at shopkins@bellroperlaw.com.