Legal Update

BELL & ROPER, P.A.

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NO CROSS-CLAIM FOR BAD FAITH IN THIRD PARTY LAWSUIT

GEICO General Ins. Co. v. Harvey, 38 FLW D178 (4th DCA, January 23, 2013)

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In *GEICO General Ins. Co. v. Harvey*, 38 FLW D178 (4th DCA, January 23, 2013). The 4th District granted GEICO's Writ of Certiorari determining that the trial court departed from the essential requirements of the law by denying GEICO's motion to dismiss.

In August of 2008, GEICO's insured, James Harvey, was involved in a motor vehicle accident wherein his vehicle collided with a motorcycle. The operator of the motorcycle (unnamed in the opinion) expired as a result of injuries sustained. The personal representative of the motorcycle operator filed suit against James Harvey. A verdict was eventually obtained in the amount of $8 million. Harvey's bodily injury policy limits were $100,000.

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LIMONES V. SCHOOL DISTRICT OF LEE COUNTY, 2013 WL 439988 — So.3d — (Fla. 2nd DCA Feb. 6, 2013).

This case presents the question of the duty of a School Board in light of Florida Statute §1006.165(2008). This statute imposed upon public schools, that are members of the Florida High School Athletic Association, the obligation that each school have an operational automated external defibrillator [AED] on school grounds. In addition the statute requires training of those school employees or volunteers who would be reasonably expected to use the AED, including CPR training for such persons.

Suit was brought by the parents of a minor student who collapsed during a soccer game. The coach and a nurse bystander performed CPR, but resuscitation was not effected until EMS arrived and used a defibrillator. The school had an ADE, and had trained personnel. However, for reasons in dispute, the AED was not used. The minor Plaintiff suffered a severe brain injury.

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Subsequent to the verdict, the estate filed a motion to add GEICO as a defendant pursuant to Florida Statute Section 627.4136(4). The statute provides that an insurer may be joined as a party to an action "for the purposes of entering final judgment or enforcing the settlement". Once GEICO was a party to the underlying action, Harvey filed a cross-claim for insurance bad faith against GEICO. The trial court denied GEICO's motion to dismiss or sever the bad faith cross-claim. The trial court's denial of GEICO's motion to dismiss precluded GEICO from removing the bad faith action to federal court.

GEICO appealed to the Court of Appeal arguing that the trial court should have dismissed the bad faith claim. The court agreed. The court determined that the cross-claim for bad faith was inappropriate, as Florida Rule of Civil Procedure 1.170(g), permits cross-claims only if arising out of the same transaction or occurrence as the original action. The court reasoned that the bad faith cross-claim did not arise out of the motor vehicle accident, and therefore, prosecuting the bad faith claim by cross-claim was inappropriate.

The court noted that a plethora of cases hold that the appropriate action is to abate the bad-faith action. The court pointed out that abatement is appropriate in first party bad faith action, but not a third party bad faith action, such as the one in Harvey.

This case involves an interesting ploy to prevent removal to federal court. This case illustrates that federal court is a far better venue for insurers in bad faith actions. In a previous issue of this newsletter, we discussed several recent cases where federal courts granted motions for summary judgment filed by insurers in bad faith actions. Considering that federal courts appear to be a more favorable venue to insurance carriers, we can expect additional strategies by the plaintiff's bar to attempt to keep bad faith actions in the state court.

By: Michael Bell

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The common-law duty of a School Board stems from the fact that it stands partially in the place of the student's parents. With regard to athletic activities the duty includes: 1) providing adequate instruction; 2) supplying appropriate equipment; 3) reasonably selecting or matching athletes; 4) properly supervising the event; and 5) utilizing appropriate post injury efforts to protect an injured student from aggravation. *Leahy v. School Board of Hernando County*, 450 So.2d 883, 885 (Fla. 5th DCA 1984).

But for the statute, the question presented would be whether a School Board had a duty to make available or use an AED. The Florida Fourth District Court of Appeals had concluded that a private business owner did not have a common-law duty to provide CPR, or maintain or use an AED when a business invitee collapsed while exercising at the owner's facility. *L.A. Fitness International, LLC v. Mayor*, 980 So.2d 550, 559 (Fla. 4th DCA 2008).

As to the duty imposed pursuant to §1006.165(4), for use of AED's by the employees and volunteers using same is specifically limited by §§768.13 and 768.1325. Florida Statute §768.13 is commonly known as the "Good Samaritan Act." This statute provides immunity from civil liability to any person who gratuitously, and in good faith, renders emergency care or treatment in emergency circumstances. Section 768.1325 is known as the "Cardiac Arrest Survival Act." This statute provides immunity from civil liability for persons who attempt to use an AED, and for any person who acquired the device and made it available for use. The immunity applies so long as there has been no failure to maintain or test the AED, or failure to provide appropriate training.

The Second DCA held that the School Board's common-law duty to use appropriate post injury efforts to protect a student from aggravation did not include a duty to make available or use an AED. As to Section 1006.165, the Court held that it did not require the School Board to do more than have an operational AED on school grounds, register its location, and provide appropriate training. The Court affirmed the summary judgment entered by the trial court in favor of School Board.

By: Michael Bowling

THE COST OF SELECTED COUNSEL: IT MAY BE HIGHER THAN YOU ANTICIPATE

The Fifth District Court of Appeal issued two opinions (at this time, both are non-final opinions) in 2012 highlighting defense counsel misconduct that surely had a negative impact on the defendants', or most probably, the defendants' insurance carriers' budgeted bottom line.

Adams v. Barkman involved an accident between a SUV and a motorcycle in which liability was "hotly disputed." The court bifurcated the trial between liability and damages. Of course, there were motions in limine on which the court ruled, and the hearings were lengthy. Therefore, certain issues were now off limits. Defense counsel appears to have thought otherwise by looking at his conduct. The court's ruling was violated during jury selection. It was violated during cross examination of a lay witness. And it was violated during the law enforcement officer's testimony. The latter was the last straw. The plaintiff requested and was granted a mistrial. At the time, the court stated that sanctions would be imposed, and an evidentiary hearing eventually followed to level sanctions.

At the hearing, defense counsel insisted on testifying. The judge gave him the rope; perhaps counsel should have fallen on the sword. Counsel said that he had done no wrong. The error was invited, he exclaimed. The court, noting that there was also some questionable pre-trial actions that did not go unnoticed, felt otherwise and imposed a very severe sanction: The defendant's pleadings were stricken. Thus, the only issue to be tried was damages to the tune $3.1 million.

A defense verdict was obtained in *Jones v. Publix*, a slip and fall action as one would correctly guess. The plaintiffs appealed believing, among other things, that the trial court should have sanctioned the defendant for failing to timely disclose a key witness' address. This witness was the proverbial smoking gun.

The backstory: Within three months of the 2001 accident, and before suit was filed, the plaintiff asked for the identity of any witness. The defendant refused that request. Suit was filed and the plaintiff propounded discovery asking for the identity of any witness. The defendant provided a name, and only a name, and further represented that it did not have an address. The defendant refused to disclose the statement obtained of the witness on work-product grounds. The 2008 trial approached and witness lists were filed and witness lists were amended. Still, the representation was "address unknown." Then, a week before trial, an amended witness list was filed providing a last known address for the witness. Apparently, the witness had been living at this address for quite some time, and was still living there when plaintiff's counsel contacted him. By 2008, his memory had faded, as memories often do. So, the plaintiff filed a motion to strike the defendant's pleadings and for default due to the discovery violation.

The court held a hearing. Defense counsel represented that the defense did not know how to get in touch with the witness. The trial judge was skeptical and ordered another hearing at which defense counsel was to explain when and where the witness' address was obtained, and was further ordered to produce the witness statement and the incident report at the hearing. At the second hearing, counsel stated that the defense never had and never did have the address. He said he had reviewed the statement and it only contained a then-phone number (that was also never disclosed). As one would expect, the judge asked where they got the address on the amended witness list. Counsel said it was from the phone book. After a recess, the court asked whether the statement was a possible source for the address. Counsel said there was no statement, but only a synopsis. He said that, as an officer of the court, he had no idea of the actual address. The judge seemed to be satisfied, but plaintiff's counsel was not and reminded the judge that the attorney was to bring the witness statement and the incident report. The documents were produced and the disclosed address was listed. The defense had the address the entire time. The trial court eventually declined to grant the plaintiff's motions and the case proceeded to trial.

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The trial court ordered that the statement and incident report be produced to the plaintiff. The witness had stated that the plaintiff fell because water was on the floor. Further, there was indication that the defendant may have had contact information for the person who spilled the water. The appellate court also ordered that specific expenses be paid to the plaintiff by the defendant, and that its opinion be sent to The Florida Bar for examination of counsel's conduct.

The appellate court in *Adams* sums it up nicely: "By sanctioning a party as [the trial judge] did in this case, maybe attorneys will get the message to either change their tactics or clients will stop hiring them."

The take away: Choose counsel wisely.

By: David Blessing

2013 Best Lawyers

We would like to congratulate **Michael Bell** as being named as one of the best Personal Injury Litigation Defense Attorneys in the Orlando area for 2013.

The annual Best Lawyers list provides the names of Orlando-area attorneys most recommended by their colleagues in the field. A national attorney evaluation firm, Woodward/White, Inc., conducted an extensive peer-review survey asking established local lawyers to name top practitioners in their particular fields. The lawyers were asked, "if you could not handle a case yourself, to whom would you refer it?"

The 2013 list has nearly 400 lawyers listed in 80 fields and **Michael Bell** was one of eighteen chosen in his field.

FIRM WIN!

Michael J. Roper and Dale A. Scott of Bell & Roper recently obtained a defense judgment on behalf of the City of Flagler Beach in *Caribbean Condominium, L.P., and Ocean Palm Limited Partnership, v. City of Flagler Beach, Florida* (case no. 10-0445, Fla. 7th Cir. Ct.), following a bench trial in Flagler County. The trial was the culmination of a roughly ten-year dispute between the city, and the owners/developers of a 34-acre golf course parcel and a contiguous 3-acre residential parcel, both located in Flagler Beach. The issues in the case revolved around the contemplated conversion of the property to a large residential subdivision. The owners believed the city wrongfully curtailed their rights to develop the property. Among other claims, they asserted claims under the Bert J. Harris, Jr., Private Property Rights Protection Act, and claims for unconstitutional inverse condemnation or regulatory "taking." Based on these claims, the owners sought $10.1 million in damages from the city. In June 2012, the court granted summary judgment in the city's favor as to the owners' Bert Harris claims. In September 2012, Circuit Judge Dennis P. Craig conducted a three-day bench trial on the "taking" claims, during which he considered testimony related to the history of the properties, and the actions of the city and the owners. He also considered expert testimony as to the disputed economic uses and values of the parcels. After considering the evidence, Judge Craig issued a *Final Order and Judgment for Defendant*, which found for the city and disposed of the case in its entirety. Bell & Roper congratulates the City of Flagler Beach as to this favorable outcome, and looks forward to serving the interest of the city in the future.

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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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