Legal Update

BELL & ROPER, P.A.

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Law Enforcement- Search of cellphone incident to arrest

In Smallwood v. State, 2013 WL 1830961 (Fla. 2013) the Florida Supreme Court held that during a lawful arrest, an officer can seize a cellphone from the person being arrested but cannot examine the contents of the phone without a search warrant, absent the suspect's consent or the existence of a genuine exigency.

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In this case, Mr. Smallwood was a suspect in a convenience store robbery and arrested pursuant to a valid arrest warrant. At the time of his arrest the officers found him to be in possession of a phone, which was seized incident to arrest. The phone was then examined without a search warrant. The officer found photographs on

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ELECTION OF NON-STACKED COVERAGE, *TRAVELERS v. HARRINGTON*, AMENDMENT TO UM STATUTE

In previous letters of our Newsletter, we address the troubling decision from the First District Court of Appeals in Travelers Commercial Insurance Company v. Harrington 86 So.3d 1274(1st DCA 2010). In Harrington, the trial court granted summary judgment in favor of the insured, determining that the insured was entitled to stacked UM benefits despite the election of non-stacked coverage by another insured. The First District pointed out subtle differences between subsection 1 and subsection 9 of the UM statute, and determined that an election of non-stacked coverage was only effective as to the insured who executed the election.

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the cellphone linking Smallwood to the robbery. Smallwood file a motion to suppress the photographs, arguing that the phone had been improperly searched without a warrant. The trial court denied the motion and Smallwood was convicted of robbery with a firearm. The 1st DCA affirmed the conviction. However, the Supreme Court overturned the conviction by ruling the search of the phone was illegal.

The Supreme Court held that a search incident to arrest is allowed for weapons, contraband or evidence which may be concealed or destroyed and therefore it was acceptable for the officer to seize the cellphone, to prevent photographs or other evidence from being erased. However, that authority did not extend to a search of the phone and a search warrant was necessary in order to lawfully perform that review. Importantly, this case did not discuss or overrule the existing case law which allows for a search, without a search warrant, where the suspect consents or a serious, genuine exigency exists.

Michael Roper, Esquire

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As discussed in our previous Newsletter article, the First District's interpretation of Florida Statute §627.727(9), could lead to absurd results. Our previous Newsletter article discussed examples where members of the insured's household were not licensed drivers when the non-stacked election was executed, but sustained injuries many years later after becoming licensed drivers.

The Harrington case is presently pending before the Florida Supreme Court (SC 12-1257). The appeal was initially filed in June of 2012 and the last entry in April 2013 was the filing of an Amicus Brief on behalf of GEICO.

In the interim, the Florida legislature has taken action to correct the differences concerning elections of UM coverage as set forth in subsections (1)(9) of the statute. HB 341 proposes to amend subsection (9) to provide that an insured's selection of non-stacked coverage would be on behalf of all insured's.

In future issues of the Newsletter we will report on the Supreme Court's resolution of the Harrington appeal, and the status of House Bill 341.

Michael Bell, Esquire

UNINSURED MOTORIST/BAD FAITH

The 5th District Court of Appeal recently issued an interesting, and troubling opinion, in Safeco Ins. Co. vs. Fridman, 38 FLW D1159 (5th DCA May 24, 2013).

Safeco insured Adrian Fridman under an automobile insurance policy that provided uninsured motorist benefits with limits of $50,000. In January, 2007, Mr. Fridman was involved in an automobile accident with an underinsured tortfeasor. The tortfeasor was insured under an automobile policy that provided bodily injury limits of $10,000. The tortfeasor' s carrier tendered policy limits to Mr. Fridman who accepted same.

Fridman demanded the $50,000 in policy limits from Safeco to resolve his uninsured motorist claim. Safeco refused. Fridman filed a Civil Remedy Notice in October, 2008. In April, 2009, Fridman filed suit against Safeco. Prior to trial, Safeco's counsel filed a Confession of Judgment and a Motion for Entry of Confession of Judgment. In these filings, Safeco expressly agreed to a judgment in favor of Fridman in the amount of $50,000.

The trial court denied Safeco's Motion for Confession of Judgment. The Court's Order provided that the matter would proceed to trial. The Court indicated that allowing Safeco to confess judgment for policy limits would ignore the legislative intent of Florida Statute §627.727(10).

The case proceeded to trial in December, 2011. The jury returned a verdict in favor of Fridman in the amount of $1,000,000. The Court subsequently entered judgment against Safeco in the amount of $50,000. The Court's judgment specifically addressed the excess damages ($980,072.91), and reserved jurisdiction for the prosecution of a bad faith claim against Safeco for the excess verdict.

Safeco appealed the judgment to the 5th District. The 5th District reversed the Trial Court's judgment and remanded the matter with instructions. The Trial Court was instructed to amend the judgment in favor of Fridman in the amount of $50,000, delete any reference of the jury's verdict, and delete any reference of the reservation of jurisdiction regarding the bad faith claim.

The 5th District contemplated that a separate bad faith action would subsequently be filed by Fridman, and in that bad faith action, the jury would determine Fridman's total damages and whether Safeco acted in bad faith in handling Fridman's claim.

A lengthy dissent was authored by Judge Sawaya. Judge Sawaya indicated that he would affirm the Trial Court's order. The dissent provided that the Trial Court properly allowed the matter to proceed to a jury to determine the Plaintiff's total damages. The dissent discussed the problem with the majority's opinion i.e., with having a jury assess the Plaintiff's damages and consider evidence from the claim handling process as to whether Safeco handled Fridman's claim in bad faith.

First party bad faith claims were authorized by the legislature in 1982 with the enactment of Florida Statute §624.155. In the thirty-one years that followed, the insured's damages have been quantified in the tort lawsuit, (Fridman's lawsuit against Safeco). Subsequently, the bad faith claim was tried in a separate lawsuit. In the bad faith lawsuit, the jury simply answered yes or no on a verdict form resolving the issue of whether the insurer acted in bad faith.

Obviously, the 5th District Court of Appeals decision, if it stands, will greatly effect the prosecution of an uninsured motorist claims with a value in excess of policy limits, and subsequent bad faith actions. As pointed out in Judge Sawaya's dissenting opinion, the practical problem of having the bad faith jury resolve damages and bad faith is troubling, to say the least.

A Motion for Rehearing has been filed in the Fridman case. If the decision of the 5th District Court of Appeals stands, this matter will likely be addressed by the Florida Supreme Court.

We will continue to keep you advised of the status of the Fridman case in future issues of the Newsletter.

Michael Bell, Esquire

GRAVES AMENDMENT BURIES LONG-TERM LESSOR LIABILITY

The Florida supreme court, in Rosado v. DaimlerChrysler Financial Services, has held that the federal Graves Amendment preempts §324.021(9)(b)1, Florida Statutes (2002). Note that the 2012 Florida statutory section is identical in language. In Florida, the owner of a motor vehicle is typically vicariously liable for damages caused by the vehicle under Florida's dangerous instrumentality doctrine. However, §324.021(9)(b)1 provides that a long-term lessor (i.e., the lease term is one year or greater) is not the owner of a leased vehicle if certain insurance limits of liability are obtained by the lessee and are in effect. The Graves Amendment (49 U.S.C. §30106) generally provides that the owner of a motor vehicle who leases the vehicle is not vicariously liable for damages from the use, operation, or possession of the vehicle during the lease period.

In Rosado, a law firm entered into a long-term lease agreement that required the purchase of liability insurance. The driver of the leased vehicle caused an accident resulting in injuries. The required insurance obtained by the law firm lessee on the vehicle lapsed the day before the accident for non-payment of premium.

Thus, a lawsuit was not only initiated against the driver and the law firm lessee, but also against the long-term lessor as the owner of the vehicle. The lessor was sued because the lessee failed to have in place at the time of the accident the required insurance which, under the Florida statute, opened the lessor up to vicarious liability as the owner of the vehicle. The lessor contended, among other arguments, that the Graves Amendment preempted Florida Law. The Florida supreme court agreed holding that the Graves Amendment preempts Florida law and, as a result, a long-term lessor is not subject to vicarious liability. This holding comports with the court's previous holding regarding short-term lessor liability under the Graves Amendment.

David Blessing, Esquire

FLORIDA EXPERT WITNESS STANDARD

After some legislative maneuvering, a bill changing the standard for admitting expert witness testimony has been sent to Gov. Rick Scott's desk. HB 7015 passed the House on April 18, 2013. The bill was amended by the Senate on April 26, 2013, and subsequently passed the House on April 26, 2013. The bill abolishes the *Frye* standard and adopts the *Daubert* standard relating to expert witness testimony.

Previously, both Federal and Florida courts used the standard established in *Frye v. United States* to determine whether scientific and expert testimony could be admitted into evidence. In *Frye*, the court established a test regarding the admission of expert testimony about new or novel theories. The court held that in order to introduce expert testimony deduced from a scientific principle or discovery, the principle or discovery "must be sufficiently established to have gained general acceptance in the particular field in which it belongs." Under the *Frye* standard, a judge must determine that the basic underlying principles of scientific evidence have been tested and accepted by the scientific community.

This bill however rejects the *Frye* standard and provides a three-part test to determine whether expert testimony will be admitted in a particular case. This bill adopts a standard commonly referred to as the *Daubert* standard, which requires the court to determine if (1) the testimony is based upon sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has applied the principles and methods reliably to the facts of the case.

Proponents of the bill suggest that *Daubert* is a better standard that will prevent junk science from being used in cases and prevent frivolous lawsuits. Opponents, including plaintiff-

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attorneys and the Florida Prosecuting Attorneys Association, has stated this bill will create an increase in workload as it will become a trial within a trial; requiring a much larger use of expert witnesses and court hearing time.

As of 5/20/13, the Bill has been signed by Officers and has been presented to the Governor. Subject to the Governor's veto powers, the effective date of this bill is July 1, 2013.

Christian Anderson, Esquire

FIRM NEWS

The Firm was pleased to serve as a sponsor for the recent 2013 Golf Outing hosted by the Tampa Bay Chapter of PRIMA.

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

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