BLR NEWSLETTER

Survey of Insurance and Civil Rights Issues and Recent Court Decisions from Bell, Leeper & Roper

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CONDITIONS PRECEDENT IN PIP CASES

By Michael M. Bell

In **Simon, M.D., P.A. v. Progressive Express Ins. Co.**, 11 Fla. L. Weekly Supp. 47 (Palm Beach County, February 5, 2004), the trial judge granted Summary Judgment in favor of Defendant Progressive based on the Plaintiff's failure to comply with the conditions precedent to filing suit, **specifically Plaintiff's failure to send a copy of the Assignment of Benefits with its pre-suit demand letter**. The court agreed with Defendant that strict construction of technical requirements of the statute is required. Based on this ruling Plaintiffs will be expected to provide a copy of the Assignment of Benefits in the pre-suit demand letter required by Section 627.736(11), Florida Statutes.

In **Lakeland Spine Center v. Progressive Express Ins. Co.**, 11 Fla. L. Weekly Supp. 345 (Hillsborough County, February 2, 2004), the trial judge denied Progressive's Motion for Summary Judgment which was based on Progressive's argument that the insureds failed to attend a scheduled Examination Under Oath, as such failure was a material breach of the insurance contract, and a condition precedent to bringing suit.

The court however, found that the lawsuit was filed prior to any request by Progressive for an Examination Under Oath of its insured, and **in order for an EUO to be a condition precedent it must be requested by the insurance company before suit is filed**. Again, the courts can be expected to strictly construe provisions of the PIP statute.

In this Issue...

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DAMAGES/PAST MEDICAL EXPENSES/MEDICARE BENEFITS

By Michael M. Bell

In **Cooperative Leasing, Inc. vs. Johnson**, 29 Fla. L. Weekly D902 (April 14, 2004). The Second District Court of Appeal held that the Trial Court erred in not limiting evidence of the Plaintiff's medical expenses to the amount her medical providers accepted from Medicare as payment in full for their services.

At trial, Plaintiff's Counsel introduced medical bills totaling $56,950.70. The Plaintiff's Personal Injury Protection carrier paid $15,000.00 of her medical expenses and her medical providers agreed to accept $13,461.00 from Medicare as payment in full for the balance. The Plaintiff's medical providers could not collect the balance of $28,489.00 based on Federal Law, 42 U.S.C §1395 cc(a)(1).

On appeal, the Second District Court of Appeal reversed and remanded with instructions to recalculate the past medical expenses. The Court rejected the Plaintiff's argument that she was entitled to recover the full amount of her medical bills. The Court indicated that the Plaintiff's position would result in a windfall contrary to the legislative intent of Florida Statute §768.76.

This opinion follows a previous opinion of the Fourth District Court of Appeal in **Thyssenkrupp Elevator Corp v. Laksy**, 29 Fla. L. Weekly D103 (Fla. 4th DCA December 31, 2003),

clarified on Motion for Rehearing, 29 Fla. L. Weekly D608 (March 10, 2004). Obviously, these decisions will significantly reduce judgments entered in favor the Plaintiffs throughout the State.

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TORTS - IDENTIFYING A PARTY'S STATUS

By Joseph A. Tsombanidis

In **Armstrong v. Wal-Mart Stores, Inc. and State Farm Mutual Automobile Insurance Company**, 29 Fla. L. Weekly D712 (March 24, 2004), the Appellants, Claud and Angela Armstrong, appealed a final judgment entered in favor of State Farm Mutual Automobile Insurance Company. The Appellants brought suit against State Farm following an incident in June of 1995 wherein Claud Armstrong was involved in a car accident with an individual who was uninsured. Consequently, State Farm, Armstrong's uninsured motorist carrier, became a defendant. The matter proceeded to trial and the jury found that Armstrong had sustained past medical expenses, but no future medical expenses, no past or future lost wages and no permanent injury. Accordingly, State Farm filed a Motion for Setoff and the trial court granted same. Claud Armstrong's past medical expenses were set off as duplicative benefits.

The Armstrongs appealed the trial court's ruling and contended that the trial court erred by prohibiting State Farm from being identified as Armstrong's uninsured motorist carrier. The Armstrongs cited to the Supreme Court's decision in **Lamz v. Geico General Insurance Company**, 803 So.2d 593, 595 (Fla. 2001), wherein the court stated that "the failure to specifically identify the underinsured carrier as such leaves the jury to speculate about the exact role of the plaintiff's carrier in the lawsuit, perpetuating the 'charades in trials' denounced by this court." In that regard, the Fourth District Court of Appeal reversed the lower court's ruling and remanded the case for a new trial. Nevertheless, the court did state that State Farm may still properly assert any well pleaded claim for a setoff after the conclusion of the new trial.

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BOND FOR STAY OF EXECUTION

By Mary Grace Dyleski

In **Platt v. Russek and Lenvest, Inc.**, 29 Fla. L. Weekly D899 (2nd DCA, April 14, 2004), the Second DCA considered the Trial Court's Order Staying Execution of a money judgment for attorney's fees and costs without requiring Platt to post a supersedeas bond pursuant to 9.210(b)(1), Florida Rules of Appellate Procedure. The appeal involved a verdict of no liability in a personal injury lawsuit and a Motion to Tax Fees and Costs filed by Russek and Lenvest pursuant to 768.79, Florida Statutes. The trial court granted that motion and entered judgment against Platt in the amount of $103,198.38. Subsequently, Platt filed a Motion to Stay Execution of the judgment without bond pending the appeal of the final judgment. The Trial Court entered an Order granting the stay without bond and stayed the execution on the judgment for fees and costs until June 30, 2004.

In its analysis, the Second DCA considered the specific issue of whether a trial court can stay a judgment without imposing *any* conditions upon the judgment debtor, and concluded that the trial court did not have that authority. The Second DCA considered the fact that Platt had no assets subject to execution and no income subject to garnishment and pondered why Platt would need a stay of execution. Platt would not be prejudiced by an outstanding judgment during the pendency of appeal, as he had no assets or income that could be used by judgment creditors. Conversely, if Platt had or obtained assets or income that could satisfy the judgment, the Trial Court would have prejudiced the judgment creditor by staying execution of the judgment on conditions that did not provide the judgment creditor with protection. **The Second DCA ultimately decided that without a full bond, the Trial Court should not grant a stay that prevents a judgment**

creditor from establishing liens against real or personal property, or that prevents a judgment holder from obtaining priority over subsequent creditors.

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JUROR MISCONDUCT

By Matthew J. Haftel

In **State Farm Fire & Casualty Ins. Co. v. Susan Levine**, 29 Fla. L. Weekly D916 (3rd DCA April 23, 2004) after a jury had awarded Levin $615,000.00 in damages from an automobile accident, State Farm discovered that one of the jurors may have been involved in a fatal automobile accident six years earlier. State Farm alleged that the juror had not disclosed this accident, even though the trial judge had asked the jury panel whether anyone had ever been involved in a "serious car accident." State Farm's Motion for New Trial was denied.

In **Delarosa v. Zequeira**, 659 So.2d 239 (Fla. 1995), the Florida Supreme Court had determined that a party seeking a new trial on the basis of juror non-disclosure must establish that the undisclosed information is (1) relevant and material to jury service in the case; (2) that the juror concealed the information during questioning; and (3) that the failure to disclose the information was not attributable to the complaining party's lack of diligence.

The Supreme Court noted that materiality could be shown only "where the omission of the information prevented counsel from making an informed judgment - which would in all likelihood have resulted in a peremptory challenge."

State Farm did not interview the juror in question. Instead, State Farm submitted its trial counsel's proffer that he would have exercised a peremptory challenge as to the juror. State Farm also proffered the accident report. The trial court found that State Farm's proffer was insufficient to establish materiality. Accordingly the trial court denied State Farm's Motion for New Trial.

On appeal, the 3rd DCA stated that it was State Farm's burden to prove materiality. State Farm failed to prove the materiality of the alleged (juror) misconduct by the juror in question. Due to State Farm's failure to develop the record by not questioning the juror, the trial court was not able to address the materiality prong of the **Delarosa** test.

Without the information that would have been elicited from interviewing the juror, State Farm could not show that it would have been likely to strike her. Accordingly, the trial court did not abuse its discretion in denying State Farm's Motion for New Trial with respect to this issue.

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CONVERSION

By Douglas J. Petro

Frank v. Wyatt, 29 Fla. L. Weekly D887 (4th DCA April 13, 2004) addresses an appeal from a negligence action arising out of a collision involving two motor vehicles. The Fourth District Court of Appeal reversed the trial court's directed verdict entered against the Defendant at the close of the evidence which precluded submission to the jury of his affirmative defense of conversion of his automobile prior to the collision. The Fourth District Court of Appeal found that ample evidence was presented, in the form of the Defendant's trial testimony and the police report for unauthorized use of a motor vehicle made by the Defendant prior to the collision, from which the jury could have found that the vehicle had been converted before the collision. Although there were some inconsistencies between the Defendant's trial testimony and his earlier deposition testimony, the Fourth District Court of Appeal found that those inconsistencies went merely to the weight to be given to the Defendant's testimony and were, therefore, exclusively for the jury to resolve.

On another issue out of the same appeal, the Fourth District Court of Appeal found that the trial court correctly denied Plaintiff's Motion for Directed Verdict that the injuries he received as a result of the

collision were permanent. Although there was conflicting expert testimony regarding the issue of a permanent injury in *this* case, a jury is free to weigh the credibility of an expert witness just as it does any other witness, and to reject such testimony, even if uncontradicted.

"I do not think much of a man who does not know more today than he did yesterday."

- Abraham Lincoln

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