Legal Update

ROPER, P.A.

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FLORIDA LEGISLATURE PASSES LANDMARK TORT REFORM BILL

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On Friday, March 24, 2023, Florida Governor Ron DeSantis signed into law House Bill #837, which implements the most far reaching and significant changes to Florida tort law of the last 30 years. The new law seeks to correct many of the inequities and abuses taking place in the tort law system effectuated by the Plaintiff's bar. I was privileged to play a part in the passage of this Bill when I was asked to lobby the Legislature in support of the Bill by the Florida Chamber of Commerce. That process led to assisting in drafting language for the proposed Bill and multiple trips to Tallahassee to testify as an expert before House and Senate committees on behalf of the Chamber and their membership, primarily on the issue of the abuse of Letters of Protection (LOPs). The Bill itself is an omnibus Bill amending many existing statutes and creating new statutes. Below is a brief summary of the most significant of the areas of Florida law impacted by this new law:

1. Changing the Statute of Limitations (SOL) for tort lawsuits from four (4) years down to two (2) years.
2. Major changes to Bad Faith claims against Insurers.
3. Admissibility of medical bills in personal injury cases.
4. Creation of a safe harbor for multifamily property owners in premise liability case.
5. Allowing the criminal bad actor to be placed on the verdict form in negligent security cases.
6. Barring recovery by plaintiffs if a jury finds that they are more than 50% at fault for their own injuries.
7. Allowing discovery of referrals to medical providers by the plaintiff's lawyer and discovery of the financial relationship between the plaintiff's law firm/lawyer and the medical provider. – Correcting the *Worley* problem.

Specifically, on admissibility of medical bills and the use of LOPs the bill provides as follows:

If a plaintiff has medical insurance and choses to treat under an LOP, they cannot put before the jury for past or future medical bills more than what their health insurance would have paid. Not

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SUNSHINE LAW VIOLATION THROUGH INADVERTENT LATE PRODUCTION OF MEETING MINUTES

Florida's Fourth District Court of Appeal recently held that a county canvassing board violated the Florida's Sunshine Law through inadvertent late production of meeting minutes for one canvassing board meeting. The case is *Jackson v. City of South Bay*, 4D21-3503, — So. 3d —, 2023 WL 2027556 (Fla. 4th DCA Feb. 15, 2023). The plaintiff, who lost a municipal election by one vote, made a public records request on April 24, 2020. The canvassing board responded with all records, except for minutes of a March 13, 2020 meeting, before a deadline suggested by the plaintiff's attorney. The canvassing board did not initially realize that a meeting occurred on March 13, 2020, but once it did, discovered that the laptop of the person responsible for taking minutes was broken. After retrieving the March 13, 2020 minutes, the canvassing board produced them to the plaintiff on September 18, 2020.

Although the Fourth DCA held that the canvassing board did not violate the Public Records Act with respect to the March 13, 2020 minutes due to a good faith response, the Fourth DCA disagreed that the busy election, pandemic, and good faith effort of the canvassing board excused compliance with Section 286.011, Florida Statutes (the Sunshine Law), for the March 13, 2020 minutes. Instead, the Sunshine Law statute requires mandatory compliance. The court specifically noted there is no pandemic-related exception to the Sunshine Law, and the Governor's executive order issued in response to the pandemic expressly recognized that the Sunshine Law remained in effect. The Fourth DCA remanded the case to the trial court to determine a reasonable amount of attorney's fees and costs for the plaintiff. So, the *Jackson* case underscores the need for governmental entities to carefully maintain records subject to the Sunshine Law and promptly and carefully respond to public records requests.

By: Frank M. Mari

what was billed, but what was actually paid or would have been paid. Likewise, if a plaintiff has Medicare or Medicaid and treats under an LOP, then they can only place before the jury what Medicare of Medicaid would have paid. If they have no health insurance, they are limited to what Medicaid would have paid plus 170%. As you can see, this change is a seismic shift in the law and will stop the plaintiff's bar from using LOPs to inflate medical bills, in order to artificially inflate verdicts, and/or settlements. Finally, if a medical bill is sold to a factoring company the amount it was sold for is discoverable and admissible to show the true value of the bill, which will allow the jury to be informed of that scheme.

The changes in this law went into effect when the Governor signed the Bill, but will not apply to cases filed before the signing of the Bill. This explains the flood of civil, bodily injury and wrongful death lawsuits which have been filed by plaintiff's lawyers over just the past two weeks (estimated by some sources to be in excess of 100,000 new lawsuits statewide) in an effort to avoid the application of the new law. We would be happy to answer your questions or provide direction regarding the legal import of this new law and its consequences for business and governmental entities in Florida.

By: Joseph D. Tessitore

APPELLATE COURT FINDS LIMITATIONS ON LIFE CARE PLANNERS

Recently, the First District Court of Appeals issued an opinion regarding a life care planner's scope and ability to testify in *Dearta Anderson-Moody and Sandra Anderson v. Brandon Wilson*, 1st DCA, Case No. 1D21-2560 (February 15, 2023). In that matter, the Plaintiff was awarded a $1.6 million as a final judgment. The defense appealed the decision due to the Judge allowing the jury to hear evidence from Plaintiff's life care planner that the Plaintiff would need injections for the rest of her life. Plaintiff's life care planner based this opinion on his own medical opinion, as no medical record suggested that the Plaintiff needed injections for the remainder of her life. The Court cited to *Olges v. Dougherty,* 856 So. 2d 6 (Fla. 1st DCA 2003) (citing *Diamond r. Fertilizer v. Davis*, 567 So. 2d 451, 455 (Fla 1st DCA 1990) that a trial court erred in adopting a life care plan which gave the planner "discretion to oversee and supervise the claimant's medical and nursing care" because "the responsibility for establishing a treatment plan rests with the claimant's authorized physicians". In this matter, the life care planner was not offered as an expert in the medical field, but was only offered as an expert in life care planning. A physical exam does not establish a proper factual basis for his opinion as a life care planner, nor does the qualifications as a doctor. The Appellate Court found this to be an abuse of discretion and opined that it was error to allow this evidence to go to the jury as it lacked a factual basis because it was never recommended by a treating physician.

This gives an angle of attack for some of these life care planners that do not ever see the Plaintiff and/or recommend courses of treatment or a lifetime of treatment outside the recommendations of the treating medical doctors. This can significantly reduce the future medicals considered by the jury which can limit the award for future medical treatment. While this case is fact specific, deposing the life care planner and the treating doctors can assist in locking their opinions in and pitting those opinions against what the treating medical providers opinions can assist in securing the exclusion of some life care planning evidence. This is beneficial as many jurors base their value of claims on future medical expenses and lowering the future expenses can produce smaller verdicts.

By: Eric R. Arckey

INSURANCE-BAD FAITH-CLAIMS HANDLING

In *Ilias v. USAA General Indemnity Company*, 2023 WL 2487329 (11th Cir. Mar. 14, 2023), the Eleventh Circuit Court of Appeals, interpreting and applying Florida law, issued an important new decision in a case involving allegations of bad faith claim handling by an insurer. The pertinent facts in the case reveal that on July 29, 2017, Scott Dunbar lost control of his van while driving on a divided highway in Pasco County, Florida. The van jumped the center median and landed directly on top of an oncoming car driven by Daniel Ilias. Ilias was seriously injured in the resulting wreck. He tore his aorta, broke several bones, and had to spend ten days in the hospital in a medically induced coma.

Dunbar's insurer, USAA, immediately began investigating. But despite learning that Ilias had suffered grievous injuries, so that his damages would almost surely exceed Dunbar's Ten Thousand Dollar ($10,000.00) policy limit, and despite determining that Dunbar was solely at fault for the accident, USAA delayed initiating settlement negotiations for over a month. Then, USAA failed to confirm for Ilias' attorney, that Dunbar lacked additional insurance coverage with which to satisfy a judgment. Because Ilias' attorney allegedly needed this information to agree to USAA's settlement offer (and release Dunbar from liability), the case did not settle and proceeded to trial where Ilias obtained an approximately $5 million judgment against Dunbar. Ilias then commenced an action to hold USAA responsible for the judgment, bringing a single claim for bad faith under Florida common law. USAA moved for summary judgment, arguing that no reasonable jury could find that its conduct amounted to bad faith or that its conduct caused the entry of the excess judgment against Dunbar. The district court agreed, and entered final summary judgment for USAA. However, the Eleventh Circuit reversed that decision and remanded the case back to the district court for trial.

In its decision, the Eleventh Circuit articulated the following important principles pertinent to an insurer's claims handling and consideration of potential exposure for bad faith:

1. Bad faith "is determined under the 'totality of the circumstances' standard, and we focus 'not on the actions of the claimant but rather on those of the insurer in fulfilling its obligations to the insured.'"

2. Insurers have obligations to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid the same, as well as to investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so.

3. Florida's highest court has emphasized, "the critical inquiry in a bad faith [action] is whether the insurer diligently, and with the same haste and precision as if it were in the insured's shoes, worked on the insured's behalf to avoid an excess judgment."

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4. In cases [w]here liability is clear, and injuries so serious that a judgment in excess of the policy limits is likely, an insurer has an affirmative duty to initiate settlement negotiations. (citation omitted). In such a case, where the financial exposure to the insured is a ticking financial time bomb and suit can be filed at any time, any delay in making an offer . . . even where there [i]s no assurance that the claim could be settled could be viewed by a fact finder as evidence of bad faith.

In reaching its decision, the Eleventh Circuit found it relevant that USAA refused to tender its minimal policy limits for weeks after it was clearly on notice of the severity of Ilias' injuries. Furthermore, the court found it important that USAA failed to provide Ilias' attorney with relevant information which had been requested, namely whether Dunbar had any additional insurance coverage to satisfy an excess judgment. The court found USAA's contention that the terms of Florida's insurance disclosure statute (Florida Statutes § 627.4137) did not require an insurer to provide information regarding other insurance policies unless it knows that another policy applies, to be unpersuasive. The court concluded that because USAA did nothing in its capacity as the "go between" to facilitate the exchange of that information or to seriously apprise its insured of the risk posed by an excess judgment, a reasonable jury could conclude that USAA acted as an "impediment" to settlement, rather than doing everything possible to facilitate resolution of the claim.

This decision underscores the importance for a claims handler to take the initiative and extra steps necessary to timely evaluate claims and, if warranted, tender policy limits, even in the absence of a demand; communicate with the insured; and, utilize all reasonable means to comply with those conditions associated with a demand (such as affidavits, insurance information), even where said conditions are not mandated by the policy language, standard claims handling procedures or Florida law. After all, courts are charged with considering whether the insurer diligently, *and with the same haste and precision as if it were in the insured's shoes*, worked on the insured's behalf to avoid an excess judgment. Ultimately, that determination will likely be a question of fact for a jury.

By: Michael J. Roper

CIVIL REMEDY NOTICE RESPONSE: OBJECT, OBJECT, OBJECT!

In the recent case of *Neal v. GEICO General Insurance Company*, the Fourth District Court of Appeal reversed the trial court's award of final summary judgment in GEICO's favor.

There, Plaintiff, who was GEICO's insured, filed a breach of contract lawsuit accusing GEICO of wrongfully denying coverage and, on the same day, served a civil remedy notice ("CRN") accusing Geico of bad faith for wrongfully denying coverage. GEICO, in its CRN response (which may have only been faxed to Plaintiff's counsel and not uploaded to the Department of Financial Services), failed to claim that the CRN was legally insufficient in any respect, and merely responded as to the merits of the claim. In other words, this is what we did so we are not in bad faith. The case does not specifically state, but it appears that GEICO did not respond through an attorney.

The breach of contract lawsuit was eventually settled and a final judgment entered against GEICO, which included a provision requiring filing of a bad faith action within 30 days. Plaintiff filed a bad faith action which drew a motion to dismiss that did not complain about any CRN deficiencies. Then, after the motion was denied, GEICO answered and asserted affirmative defenses, again failing to raise any CRN deficiencies.

After the case pended for one and a half years, during which discovery was conducted and a tentative trial date set, GEICO again moved to dismiss, this time arguing that the CRN was legally deficient. That motion was denied. GEICO then moved to amend its affirmative defenses asserting that the CRN failed to comply with Florida statute. An agreed order was entered granting the motion "as of the date of the order." In other words, it did not relate back to the original filing. Plaintiff replied asserting that GEICO was estopped from raising that defense due to the passage of time.

GEICO then moved for summary judgment on that affirmative defense arguing that the CRN failed to adequately describe the specific facts and circumstances giving rise to the statutory violations, failed to specifically reference any policy language, and failed to set forth any curative action sought from GEICO. The trial court granted the motion for summary judgment. Plaintiff's request for a rehearing was denied. The appeal resulted.

The appellate court found that GEICO waived its objections to any CRN deficiencies by failing to raise them in its CRN response, and also due to untimely asserting the deficiencies as affirmative defenses.

The moral of the story is that all legal defenses (*i.e.*, non-compliance with section 624.155) to a CRN must be asserted in the CRN response and, if a bad faith action follows, in the initial answer and affirmative defenses. Otherwise, an insurance carrier risks waiver of those defenses. Merely responding to a CRN on the merits of the claim itself is insufficient. Therefore, retention of counsel is recommended for any CRN response.

By: David B. Blessing

FIRM SUCCESS

1ST DCA Upholds Summary Judgment Granted in Favor of Bradford County

Recently, attorney Sherry Sutphen successfully defended against a property owners appeal to the First District Court of Appeals on behalf of Bradford County in the *Romulous Alderman v. Bradford County* case. In July of 2022, the firm obtained Summary Judgment in favor of Bradford County related to the County owing no duty for its employees to give accurate development information to a property owner outside of a formal development application process. The property owner timely filed its appeal in August of 2022, arguing that the trial court erred in concluding that the County owed no duty of care to convey accurate information and that sovereign immunity barred the claim.

In its Per Curiam opinion, the First District upheld the Circuit Court decision, citing authority from each District essentially holding that a sovereign entity does not owe a duty to convey accurate information to individual members of the public and because there is no duty of care owed with respect to alleged negligent conduct, there is no government liability and the question of whether the County should be immune from suit need not be addressed.

Roper, P.A., congratulates Bradford County in this favorable outcome, and looks forward to continuing serving the interests of local government entities throughout the State of Florida in the future.

Firm Secures Rare Directed Verdict Prevailing for Our Clients

Starting off the year with a firm victory for our clients, Eric Arckey and Jeffery Carter recently secured a defense verdict for Feather Edge Condominium Association in late February. *Marcia Fox v. Feather Edge Condominium Association* involved personal injury and property damage claims arising from a water intrusion event due to Hurricane Irma. Ms. Fox claimed exposure to mold caused various permanent injuries, including asthma and COPD. She also claimed property damage losses of household items and costs for reconstruction of the interior of her unit due to water and mold. After 4 days of trial and numerous exclusions of Plaintiff's evidence, the Judge had no other choice but to enter a directed verdict on the matter; thus, awarding the Defense an outright dismissal of the case. We were delighted to provide our client with this trial result in a heavily contested matter and appreciate their Association's commitment to assisting us in doing so.

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