

BELL & ROPER LEGAL UPDATE

Survey of Insurance and Civil Rights Issues and Recent Court Decisions from Bell & Roper, P.A.

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FIRST DISTRICT COURT OF APPEAL DETERMINES THAT GROSS MEDICAL EXPENSES SHOULD BE ADMITTED INTO EVIDENCE WITHOUT REDUCTION OR HEALTH INSURANCE WRITE DOWNS

By Michael M. Bell

In *Nationwide v. Harrell*, the First District Court of Appeal issued an opinion on December 21, 2010, determining that the Trial Court properly admitted into evidence the Plaintiff's gross medical expenses without reduction for discounts based on contractual agreements between the Plaintiff's health insurer and healthcare providers.

Sheila Harrell sued Nationwide, her uninsured motorist carrier, for injuries sustained in a motor vehicle accident. At all times material, Ms. Harrell had in force a private policy of health insurance. At trial, Ms. Harrell's Counsel sought to admit into evidence her total gross medical expenses without any reduction for discounts based on contractual agreements between her health insurer and her healthcare providers. Counsel for Nationwide objected and argued that Ms. Harrell's net medical expenses should be admitted into evidence based on *Goble v. Frohman*, 901 So. 2d 833 (Fla. 2005); *Thyssenkrupp Elevator Corporation v. Lasky*, 868 So. 2d 547 (Fla. 4th DCA 2004); and *Cooperative Leasing v. Johnson*, 872 So. 2d 958 (Fla. 2d DCA 2004).

The Trial Court overruled Nationwide's objection and the jury returned a verdict in favor of Harrell in the amount of her gross medical expenses. Post-trial, the Court reduced Harrell's medical expenses consistent with the applicable discounts.

On appeal, the First District Court of Appeal affirmed the Trial Court's decision. The First District's opinion relies heavily on an older Supreme Court opinion, *Florida Physician's Insurance Reciprocal v. Stanley*, 452 So. 2d 514 (Fla. 1984). The Court determined that when the Plaintiff's medical expenses are paid by Medicare, the net amount of the Plaintiff's bills should be admitted into evidence based on the cases on which Nationwide relied. In the instant case, however, where the Plaintiff's medical expenses were paid by a private health insurer, the

Court determined that the healthcare insurance discounts differed from Medicare benefits as the Plaintiff paid a premium for her health insurance and her health insurance was not a benefit available to all citizens.

Obviously, the *Harrell* case is a blow to the insurance industry. It will permit Plaintiffs to “board” their gross medical expenses which will likely inflate what the jury awards for future medical expenses as well as pain and suffering.

As you are aware from earlier issues of our Newsletter, the firm is currently handling an appeal involving the same issue before the Fifth District Court of Appeal, *Sumter County School Board v. Brown*. Briefing was completed in the *Brown* case in February of 2010, but we have yet to hear from the Fifth District Court of Appeal. We are cautiously optimistic that the Fifth District Court of Appeal will disagree with the conclusion of the First District Court of Appeal in *Harrell* presenting a conflict to be resolved by the Florida Supreme Court. We will keep you apprised as to the status of *Brown* case in future issues in our Newsletter.

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WHAT CONSTITUTES “TOTAL DAMAGES” AWARD FOR PURPOSES OF SET-OFF?

By Esteban F. Scornik

We previously addressed the case of *Somoza v. Allstate Indemnity Company*, 929 So. 2d 702 (Fla. 3d DCA 2006). In that case, the plaintiff settled with the tortfeasor’s insurer for the \$10,000.00 policy limits. The plaintiff then sued her UM carrier seeking both economic and non-economic damages. The jury awarded damages for medical expenses and lost earnings, but found that the plaintiff did not sustain a permanent injury and therefore did not award non-economic damages.

The plaintiff in the *Somoza* case argued that since the jury did not award non-economic damages, its verdict was not a “total damages” award, and therefore the UM insurer was not entitled to a set-off for the bodily injury liability limits since the set-off was only applicable only if the jury’s award was for “total damages” which duplicates benefits already recovered from the tortfeasor’s liability insurer. The Appellate Court disagreed, holding that the jury verdict was still a “total damages” award, even though the jury failed to award non-economic damages.

With the *Somoza* case as a backdrop, the First District Court of Appeals recently decided the case of *GEICO General Insurance Company v. Ingrid Cirillo-Meijer*, 35 Fla. L. Weekly D2695 (Fla. 4th DCA 2010). In this case, the plaintiff settled with the tortfeasor for the policy limits of \$10,000.00 and sued her UM carrier, GEICO. At trial, GEICO obtained a directed verdict on the permanency threshold question. Post-trial, plaintiff’s counsel argued that since a jury was not even permitted to hear the question of non-economic damages, it was not a “total damages” award such that GEICO should not be entitled to a set-off of the \$10,000.00 settlement.

The Fourth District Court of Appeals disagreed, indicating that the plaintiff introduced issues of the economic and non-economic damages to the jury, and therefore once again the jury's award was one of "total damages" so that the bodily injury liability set-off would apply. Interestingly, the Court appeared to surmise that if plaintiff's counsel tried the case only on non-economic damages, then the UM insurer would not have been entitled to a set-off of the bodily injury liability award. This is something we need to keep in mind in defending UM cases.

On another issue, the Appellate Court in *Cirillo-Meijer* case affirmed the trial court's directed verdict on the permanency issue. The Court held that the possibility that the plaintiff would receive some future scarring from a future surgery was wholly insufficient to permit the jury to make a determination that the scar would rise to the level of "significant and permanent" which was necessary for a finding of permanency. The Court found that the testimony regarding this possible scarring was simply not detailed and sufficient enough to allow a jury to make a proper determination on permanency.

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**THE FOURTH DISTRICT COURT OF APPEAL DETERMINES
COVERAGE BASED ON THE PLAIN AND UNAMBIGUOUS
MEANING OF WORDS IN HOMEOWNERS INSURANCE POLICY**

By Cindy A. Townsend

In *Harrington v. Citizens Property Ins. Corp.*, 2010 WL 5093204 (Fla. 4th DCA 2010), Bruce and Janet Harrington ("the Harringtons") appealed a summary final judgment entered in favor of Citizens Property Insurance Corporation ("Citizens") in a declaratory judgment action brought by the Harringtons to establish liability coverage under a Citizens' policy for an accident that occurred at their residence.

The Harringtons owned real property in West Palm Beach at 477 Mozart Road ("the Mozart property"), their primary residence, and at 301 Vallette Way ("the Vallette property"), their rental property, where they did not live. Citizens issued the Harringtons a homeowner's insurance policy with personal liability limits of \$300,000. Stuart Williams was seriously injured on the Mozart property while performing work. Williams filed a claim against the Harringtons, who, in turn, sought liability coverage under the Citizens policy. Citizens denied coverage, contending that the policy covered only the Vallette property. The Harringtons filed a complaint against Citizens, seeking declaratory relief that the Mozart property was an "insured location," as defined by the policy; thus, the policy provided liability coverage for Williams's accident.

The Harringtons moved for final summary judgment, arguing that the Mozart premises fell under the definition of "insured location," despite Citizens' contention that the Mozart property was not listed in the Declarations as the "residence premises." Asserting that the Mozart property was not covered, Citizens also moved for summary judgment. After a hearing, the trial court ruled

that Citizens was entitled to final summary judgment as a matter of law and denied the Harringtons' motion for summary judgment.

The Fourth District Court of Appeal found that the Mozart property did not fall under the definition of “residence premises.” The policy defines “residence premises” in pertinent part as:

- a. the one family dwelling, other structures and grounds; or
- b. that part of any building;

where you reside *and* which is shown as the “residence premises” in the Declarations.

The Court stated that the word “and” is used to join the elements of “where you reside” and “which is shown as the ‘residence premises’ in the Declarations”; “and” is a conjunction to mean that both elements must be met. Based on the plain, unambiguous meaning, to meet the definition, one must both reside in the dwelling and that location must be shown as the “residence premises” in the Declarations. The Court held that the Mozart property did not meet this definition because although the Harringtons resided in the Mozart property, the Mozart property was not shown as the “residence premises” in the Declarations.

However, the Fourth District agreed with the Harringtons' next argument that the Mozart property fell under subsection (b)(1) of the “Insured Location” definition, which states as follows:

“Insured Location” is defined in the policy as:

- b. the part of other premises, other structures and grounds used by you as a residence, and:
 - (1) which is shown in the Declarations;....

The Court found that the Mozart property, based on the plain, unambiguous meaning, fell under this definition. Since “premises” were not defined in the insurance policy, the Court reviewed the definition contained in legal and non-legal dictionaries and determined the plain meaning of “other premises” qualified the Mozart property. Additionally, the Mozart property was the Harringtons' principal residence. The final element of “insured location” is residence property “which is shown in the Declarations.”

A review of the Declarations showed that the Mozart property was listed in the mailing address and that the Vallette property was listed as the location of the residence premises. However, the Court determined that nothing in the definition of “insured location” excluded the mailing address listing. The Court opined that although Citizens may not have intended for coverage to extend to the Mozart property for an injury that occurred there and had nothing to do with the Vallette “residence premises,” the insurance policy appeared to cover it, based on the plain reading of subsection (b)(1) of “insured location.”

The Court reasoned that Citizens, when defining “residence premises,” stated the property must be “shown as the ‘residence premises’ in the Declarations.” Therefore, Citizens knew how to clarify what it intended and could have used a more precise term in explaining exactly what was to be “shown in the Declarations.”

The Court further determined that Citizens presumably knew how to draft the language in the policy and could have made it more precise if it so desired. Thus, while Citizens may not have intended the homeowner’s policy to extend to the Mozart property, the property met the plain, unambiguous language of the definition of “insured location” and qualified as “other premises” used by the insureds as a residence which is shown in the Declarations. Moreover, even if the language is ambiguous, the language must be construed against Citizens, the drafter of the policy, in favor of the insureds. Accordingly, the Fourth District Court of Appeal reversed the final summary judgment entered in favor of Citizens.

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A “NOMINAL” PROPOSAL FOR SETTLEMENT IS NOT NECESSARILY MADE IN BAD FAITH

By Kathryn A. Johnson

In *Gawtre v. Hayward*, 35 Fla. L. Weekly D28886 (Fla. 2d DCA 2010), Janet Gawtre was the defendant in a dog-bite case. After the entry of a defense verdict, Ms. Gawtre moved for attorney’s fees and costs based on a proposal for settlement that had been rejected by the plaintiff, Tonette Hayward. The trial court struck the proposal for settlement and denied the motion. The trial court reasoned that the fifteen hundred dollar (\$1,500.00) offer was “nominal” and that Ms. Hayward’s case was “worthy of trial”. However, under section 768.79, *Florida Statutes*, and Florida Rule of Civil Procedure 1.442, Ms. Gawtre was entitled to an award of attorney’s fees and costs unless the trial court determined that Ms. Gawtre’s proposal was not made in good faith. Because the trial court failed to find that the proposal was not made in good faith and because the facts would not have supported such a finding, the Court reversed the trial Court’s order.

In making a determination of Ms. Gawtre's good faith, the reasonableness of Ms. Hayward's decision to reject the proposal for settlement was irrelevant. *See TGI Friday's v. Dvorak*, 663 So. 2d 606, 613 (Fla. 1995); *Wagner v. Brandeberry*, 761 So. 2d 443, 445 (Fla. 2d DCA 2000). Instead, the question of whether the proposal was served in good faith depended on whether Ms. Gawtre had a reasonable foundation to make her offer and made it with the intent to settle the claim made against her by Ms. Hayward if the offer had been accepted. *See Wagner*, 761 So. 2d at 446 (citing *Dep't of Highway Safety & Motor Vehicles v. Weinstein*, 747 So. 2d 1019, 1020 (Fla. 3d DCA 1999)). The fact that Ms. Gawtre's offer was nominal in amount is not necessarily determinative of the issue of good faith. *See Weesner v. United Servs. Auto. Ass'n*, 711 So. 2d 1192, 1194 (Fla. 5th DCA 1998) (citing *Peoples Gas Sys., Inc. v. Acme Gas Corp.*, 689 So. 2d

292 (Fla. 3d DCA 1997)). In assessing whether Ms. Gawtreys nominal offer was made in good faith, the trial court was required to look at whether Ms. Gawtreys had a reasonable basis when the offer was made to conclude that her exposure in the case was nominal. *See Fox v. McCaw Cellular Commc'ns of Fla., Inc.*, 745 So. 2d 330, 333 (Fla. 4th DCA 1998); *see also State Farm Mut. Auto. Ins. Co. v. Marko*, 695 So. 2d 874, 876 (Fla. 2d DCA 1997) (holding that an offer of one dollar was made in good faith). The Courts review of the trial courts determination of the good faith issue is for abuse of discretion. *See Talbott v. American Isuzu Motors, Inc.*, 934 So. 2d 643, 647 (Fla. 2d DCA 2006) (citing *Hall v. Lexington Ins. Co.*, 895 So. 2d 1161, 1166 (Fla. 4th DCA 2005)).

The Court found that Ms. Gawtreys established that she had a reasonable foundation to make her offer. When she served her offer, all three of the adults who were present during the incident had been deposed and additional discovery had provided information about the child victims injuries and medical expenses. Ms. Gawtreys also could have reasonably concluded that a jury would reject Ms. Hayward's claim that she intentionally allowed the dog in and therefore caused the injury to the child. Additionally, *Fabre* defendants made it probable that the jury would assign all or substantially of the liability to them, therefore reducing Ms. Gawtreys liability. Therefore for the foregoing reasons, the Court reversed the trial courts order and remanded for the entry of an order warding attorneys fees and costs to Ms. Gawtreys.

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HAPPY NEW YEAR!!

All of us at Bell & Roper, P.A., wish you and yours a happy and prosperous 2011.

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