Legal Update

BELL & ROPER, P.A.

March/April 2018

AUTOMOBILE ACCIDENT/DAMAGES/SETOFF FOR SOCIAL SECURITY DISABILITY PAYMENTS RECEIVED

In *Woudhuizen vs. Smith*, No. 5D17-575, 2018 WL 665139 (Fla. 5th DCA Feb. 2, 2018), the Fifth District Court of Appeal ruled that the trial court erred in failing to set off the jury's award of past lost earnings by social security disability payments received.

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In *Woudhuizen*, Mary Smith was rear-ended by Oswald Woudhuizen. At the trial's completion, the jury returned a verdict in favor of Ms. Smith in the aggregate amount of $125,000. The verdict included an award for past lost earnings, in the amount of $50,000.

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WATCH OUT FOR THE GOLF CART!

In September of 2014, Sylvia Willis was walking on a paved path when she was struck by a golf cart. She made a claim for her injuries on her auto insurance carrier under her uninsured/ underinsured motorist coverage. Her auto policy provided liability coverage for injuries and damages arising out of use of a non-owned golf cart, but specifically excluded UM or UIM coverage for injuries resulting from a non-owned golf cart. The Circuit Court entered summary judgment for Ms. Willis, finding the UM/ UIM exclusion was against public policy requiring UM coverage

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STATUTES OF LIMITATION TOLLED FOR STATE-LAW CLAIMS WHILE PENDING IN FEDERAL COURT

In *Artis v. District of Columbia*, 138 S. Ct. 594 (2018), the Supreme Court of the United States considered whether, for state-law claims asserted in federal court, 28 U.S.C. § 1367(d) stops the running of the applicate state-law statute of limitations or merely provides a 30-day grace period in which to re-file the claim in state court after the claim is dismissed from federal court. Section 1367(d) provides that the period of limitations for any claim asserted in federal court pursuant to supplemental jurisdiction that is dismissed "shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." The parties to the *Artis* case disputed whether § 1367(d) "stopped the clock" of the statute of limitations during the time the state-law claim was pending in federal court. The defendant maintained (and the D.C. Court of Appeals held) that the "clock" was not "stopped" and that § 1367(d) merely provided a 30-day grace period (following the date of dismissal from federal court) in which to re-file the state-law claim if it would otherwise be time-barred by the applicable state-law statute of limitations. However, the Supreme Court disagreed, stating: "Ordinarily, 'tolled,' in the context of a time prescription like § 1367(d), means that the limitations period is suspended (stops running) while the claim is *sub judice* elsewhere, then starts running again when the tolling period ends, picking up where it left off." The Court also held that a "stop-the-clock" interpretation of § 1367(d) did not violate the constitution because it was within Congress' authority under

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to be reciprocal to liability coverage. In *Amica Mut. Ins. Co. v. Willis*, 235 So. 3d 1041 (Fla. 2d DCA 2018), the Second District Court of Appeal affirmed summary judgment in favor of Ms. Willis.

Florida law generally provides liberal application of UM coverage and courts generally are reluctant to limit or restrict applicability of UM coverage beyond the restrictions permitted in the UM statute. Courts often err on the side of inclusivity rather than exclusivity when it comes to application of UM coverage. In this case, the plaintiff had purchased liability coverage beyond the minimums required under law by purchasing liability insurance that provided coverage for non-owned golf carts. Where a person purchases liability insurance beyond the minimums required by law, public policy dictates that any UM coverage purchased should be reciprocal or equal to the liability coverage purchased. The Florida Supreme Court has held that to not do so would result in a whittling away of the UM statute, and that is against public policy because the UM statue is intended to protect persons from uninsured or underinsured bad actors.

By: Joseph D. Tessitore

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Post-verdict, Woudhuizen requested the Court reduce the jury's verdict by $93,569.40, which Smith had received in Social Security Disability payments. The trial court opined that the jury likely awarded Smith $50,000 for lost earnings incurred in the first year following the accident, before receipt of Social Security Disability payments. Woudhuizen filed an appeal with the Fifth District Court of Appeal arguing that the trial court erred in failing to set off the verdict for Social Security Disability payments. Woudhuizen argued that the express language of Florida Statute § 768.76 does not require a party to present evidence matching "the period covered by the disability benefits with the 'period covered by the jury's award for lost wages.'"

In reversing the trial court, the Fifth District Court of Appeal agreed with the position asserted by Woudhuizen. The court noted the specific language of Florida Statute § 768.76(1) that requires setoff in the "total of all amounts which have been paid for the benefit of the claimant, or which are otherwise available to the claimant, from all collateral sources."

The Fifth District refused to accept Smith's position that a setoff was improper as there was no evidence that the jury had intended to award past lost earnings prior to the time Social Security Disability payments commenced. Recognizing that such an analysis by the jury would require an itemized verdict form, the Fifth District Court of Appeal indicated that Smith's argument, if accepted, would require "a party to request an itemized verdict form in every case, potentially as detailed as each individual item of care or benefit received."

The Fifth District Court of Appeal's ruling is certainly favorable to defendants in personal injury matters as defendants may take advantage of collateral source payments made against claimed losses that may not have been paid by a collateral source.

By: Michael M. Bell

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the Necessary and Proper Clause to effectively enlarge state-law statutes of limitations in certain cases.

The *Artis* case is significant because federal cases often involve state-law claims heard on the basis of supplemental jurisdiction. Because federal cases may be pending for many months or longer before state-law claims are dismissed, § 1367(d) may often result in significant extension of the applicable state-law statute of limitations. For example, if a state-law claim with a four-year statute of limitations is asserted in a federal case pursuant to supplemental jurisdiction and then one year later is dismissed without prejudice, the statute of limitations for re-filing would effectively be five years after the date the statute of limitations initially began to run.

By: Frank M. Mari

THE ONGOING STATUTORY STRUGGLES OF PIP: THERE MAY BE MORE FORUM SHOPPING

The Fourth District Court of Appeal has certified conflict with the Fifth District Court of Appeal on the issue of whether, pursuant to section 627.736 and 627.739, Florida Statutes, an insurer is required to apply a policy deductible to the total amount (100%) of a healthcare provider's bills before applying any fee schedule found in section 627.736, Florida Statutes.

The Fifth District, in *Progressive Select Insurance Company v. Florida Hospital Medical Center a/a/o Jonathan Parent*, 43 Fla. L. Weekly D318 (Fla. 5th DCA Feb. 9, 2018), held that insurers cannot use the fee schedule to reduce healthcare provider bills before the deductible had been satisfied. Thus, the full amount of the bill is to be applied to the deductible.

The Fourth District, in *State Farm Mutual Automobile Insurance Company v. Care Wellness Center, LLC a/a/o Bardon-Diaz*, 43 Fla. L. Weekly D573a (Fla. 4th DCA Mar. 14, 2018); *Progressive Select Insurance Company v. David A. Blum, M.D., P.A., a/a/o Vanessa Moreno*, 43 Fla. L. Weekly D569 (Fla. 4th DCA Mar. 14, 2018); and in *USAA General Indemnity Company V. William J. Gogan, M. D., a/a/o Tara Ricks*, 43 Fla. L. Weekly 570 (Fla. 4th DCA Mar. 14, 2018), held that an insurer is not required to apply the deductible to the total amount (100%) of a healthcare provider's bills before applying any fee schedule. In other words, an insurer can use the fee schedule to reduce healthcare provider bills with the reduced amount being applied to the deductible.

The Fourth District includes the 15th, 17th , and 19th Circuits. These circuits cover the following counties: Palm Beach, Broward, Indian River, Martin, Okeechobee, and St. Lucie.

The Fifth District includes the 5th, 7th, 9th, and 18th Circuits. These circuits cover the following counties: Citrus, Hernando, Lake, Marion, Sumter, Flagler, Putnam, St. John's, Volusia, Orange, Osceola, Brevard, and Seminole.

By: David B. Blessing

EXCESSIVE FORCE AND QUALIFIED IMMUNITY

Recently, the Eleventh Circuit Court of Appeals reversed a decision of the United States District Court for the Middle District of Georgia, finding that the trial court erred when it denied a police officer's motion for summary judgment on the basis of qualified immunity.

In *Horn v. Barron*, No. 16-16166, 2018 WL 286108 (11th Cir. Jan. 4, 2018), Officer Barron arrested the plaintiff, DeeAnn Horn, for disorderly conduct at a concert. During the concert, Horn was involved in an altercation with another patron in which a woman shoved Horn and Horn shoved back. Officers Bray and Taylor escorted Horn to the exit gate. Horn was described as "uncooperative" and "very belligerent," using profanity with several young kids around.

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Officer Barron, who was not involved in escorting Horn, was already near the exit gate. Two of the young women who were involved in the physical altercation with Horn approached Officer Barron and told him they had been assaulted by Horn. While at the exit gate, Horn, who was ten (10) feet away from Officer Barron, repeatedly cursed at Officer Barron. Officer Barron testified he did not know if she was going to attack him, as she was walking towards him and using profanity.

Officer Barron decided to arrest Horn for disorderly conduct. He approached her and took her left arm. He did not announce to Horn that she was under arrest or that he was going to handcuff her. As he attempted to arrest Horn, she pulled her arm away from him. He testified she jerked away from him and walked 14–15 feet away before he was able to grab her again. Horn denied resisting. Officer Barron "then used a soft hands, straight arm bar takedown technique in order to gain control of Horn, by which he took hold of her left arm, put his right arm over it, and brought her to the ground using gravity and his own weight. Horn claims that a bone in her arm snapped when she hit the ground." *Id.* at *2. A CT scan revealed she had a broken left humerus, for which she underwent surgery.

Horn filed a federal lawsuit asserting, *inter alia*, a Fourth Amendment excessive use of force claim under 42 U.S.C. § 1983 against Officer Barron. On his motion for summary judgment, the trial court rejected Officer Barron's argument of qualified immunity, finding that a disputed issue of material fact existed as to whether Horn resisted.

The Eleventh Circuit disagreed, finding that even assuming Horn was "totally compliant with Officer Barron, he was allowed to use some force in effecting her arrest" even if the force used was unnecessary. It found the force was not "gratuitous" as Horn was not restrained at the time the force was used. Additionally, the Court noted that such force was no more severe than the force the Court has previously described as *de minimis* and lawful in other materially similar cases. It also noted that although the crime was not severe, a reasonable officer in Officer Barron's position could think [Horn] posed a threat to himself, other officers, and other concert-goers. The Court also highlighted that Officer Barron "used a minimal level of force" and did not use a weapon, did not hit, punch, or kick her, did not have assistance from multiple officers, and did not throw Horn to the ground with intentional, or gratuitous, unwarranted force, and did not use any force against her after she was on the ground. Accordingly, Officer Barron's use of a "soft hands, straight arm bar takedown technique to handcuff Horn" was not a *clearly established* violation of her constitutional rights. Therefore, Officer Barron was entitled to qualified immunity and summary judgment.

Fourth Amendment excessive use of force claims are common § 1983 claims we see in our practice in federal lawsuits brought against law enforcement officers. The *Horn* ruling is certainly favorable to individual defendant officers in such claims as it provides a baseline for analyzing claims involving the use of minimal force in effectuating an arrest.

By: John M. Janousek

FIRM NEWS

Date, Time and Location:
Thursday, April 12, 2018
6:45p.m.
Lake Eola, Downtown Orlando

About:
Orlando's largest office party!
Held exclusively for Florida's corporate community; businesses and non-profit organizations form teams and participate in the IOA Corporate 5k for camaraderie, friendly competition and celebration with co-workers.

We hope to see you there!

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Questions, comments or suggestions regarding our newsletter, please let us know your thoughts by contacting John Janousek at jjanousek@bellroperlaw.com

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