BLR NEWSLETTER

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

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UM REJECTION - MULTIPLE VEHICLES

By Michael M. Bell

In **Allstate Ins. Co. v. Durham**, 28 Fla. L. Weekly D725 (5th DCA 3/14/03), the Fifth District Court of Appeal reversed Summary Judgment in favor of the insured and remanded the case to the Trial Court to enter judgment in favor of Allstate. The Durhams first obtained insurance from Allstate in 1988. In 1997, the Durhams purchased a fifth vehicle. The Durhams contacted Allstate to add the fifth vehicle to their policy. Allstate's underwriting rules mandate that only four vehicles be listed per policy. As a result, a separate policy was issued for the fifth vehicle.

In 1999, Ms. Durham was involved in an automobile accident while operating one of the vehicles insured under the four vehicle policy. Allstate denied UM coverage due to a rejection of such coverage under the original policy. Ms. Durham filed suit against Allstate, alleging that no written rejection was obtained with regard to the policy issued for the fifth vehicle. The Fifth District Court of Appeal reversed the Trial Court ruling that a second UM rejection was not required as the Court concluded there was only one policy of insurance to the Durhams despite Allstate's underwriting rules and the fact that a second policy had been issued for the fifth Durham vehicle.

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CIVIL RIGHTS - TITLE VII - SEXUAL HARASSMENT

By Michael J. Roper

In **Watson v. Blue Circle, Inc.**, 2003 W.L. 1418073 (11th Cir. March 21, 2003), the court held that an employer's anti-harassment policy may not be valid and effective where the employer does not adequately investigate and respond to complaints. The court noted the general rule that a valid, effective, well-disseminated policy prohibiting sexual harassment precludes a finding of constructive notice on the part of the employer. However, the court noted that there was evidence that the employer did not adequately investigate and respond to harassment complaints, and accordingly was not entitled to entry of Summary Judgment in its favor, on the issue of constructive notice, even though it had an anti-harassment policy.

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INTENTIONAL MISREPRESENTATION

By Mary Grace Dyleski

In **Desmond Brown v. Allstate Ins. Co.**, 28 Fla. Weekly D722 (5th DCA 3/14/03), the Fifth District Court of Appeal affirmed the Trial Court's dismissal of the insured's lawsuit against Allstate with prejudice based on the insured's intentional misrepresentations at deposition.

At deposition, the insured testified that he was working as a truck driver at the time of the

accident. Allstate produced records indicating that Mr. Brown's employment had been terminated the day prior to the accident. Based on this discrepancy the Trial Court concluded that Brown knowingly and intentionally concealed his lack of employment to obtain PIP benefits and as a result dismissed Brown's case for UM benefits with prejudice.

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MUNICIPAL CORPORATIONS

By Joseph A. Tsombanidis

In **Castano v. The City of Miami**, 28 Fla. L. Weekly D 742 (March 19, 2003), the Third District Court of Appeal reversed the trial court's ruling wherein the court granted the Defendant's Motion for Directed Verdict.

Plaintiff, Castano, alleged that she fell and injured her knee when the heel of her shoe became wedged between the broken tiles of a sidewalk maintained by the City of Miami ("City"). At the trial and at the close of plaintiff's case, the trial court granted the City's motion for a directed verdict finding that the plaintiff had failed to present evidence of the City's actual or constructive knowledge of the sidewalk's condition. The plaintiff contended that the trial court erred by directing a verdict. In its review, the appellate court agreed with plaintiff. Specifically, the appellate court found that "the general rule in Florida is that while a city is not an insurer of the motorist or the pedestrian who travels its streets and sidewalks, it is, of course, responsible for damages resulting from defects which have been in existence so long that they could have been discovered by the exercise of reasonable care, and repaired."

Since plaintiff presented evidence at trial that the City conducted monthly inspections on the block where she fell, and since there was a lack of evidence that any repair was done in the six months prior to her fall, the appellate court reversed the entry of the directed verdict and remanded the case for a new trial.

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INSURANCE COVERAGE

By Matthew J. Haftel

In **Valdivia, et al v. St. Paul Fire & Marine Ins. Co.**, 28 Fla. L. Weekly D 849 (April 2, 2003), the plaintiffs appealed from a summary judgment determining no coverage existed under an insurance policy issued by St. Paul Fire & Marine Insurance Company ("St. Paul").

St. Paul issued a liability insurance policy to Knight Bike Shop for 1995 through 1996 which was effective through 12:01 a.m. on October 11, 1996. As the time for renewal approached, St. Paul advised Knight about a rate increase and policy change. Knight's owner, angered by the changes, purchased replacement coverage with Sphere Drake Insurance Company.

On October 15, 1996, a representative for St. Paul contacted Knight's owner and learned that Knight did not accept the proposed renewal by St. Paul and thus obtained replacement coverage from another insurer. Knight's owner requested that the policy be returned to St. Paul and wanted to ensure that Knight would not be charged a premium for the renewal.

Since Knight did not make a payment under the renewal policy, St. Paul delivered to Knight a Notice of Cancellation for the 1996 through 1997 policy and stated that the renewal policy was canceled as of November 11, 1996 for nonpayment of the premium. In the meantime, plaintiff, Valdivia, purchased a bicycle from Knight which Knight assembled. Valdivia was involved in an accident while riding the bicycle. Although the Sphere Drake policy was in effect at the time of the accident, the policy did not contain completed operations coverage. As part of a settlement agreement, Knight and its owner assigned to the plaintiffs whatever rights they had to insurance proceeds from St. Paul. Accordingly, plaintiffs sought insurance proceeds from St. Paul and argued that the Notice of Cancellation for nonpayment had the effect of extending coverage through November 11, 1996.

The court disagreed with plaintiffs and noted that the insured instructed St. Paul that it did not want the renewal policy, had obtained replacement coverage elsewhere, and did not want to be charged a premium. As such, the insured had already rejected the renewal policy entirely despite the language contained in the Notice of Nonpayment. Consequently, the court found that the Notice of Nonpayment of premium could not breathe new life into the rejected renewal.

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FLORIDA'S DECEPTIVE AND UNFAIR TRADE PRACTICES ACT

By Ernest H. Kohlmyer, III

In **PNR, Inc. v. Beacon Property Management, Inc.**, (March 13, 2003), the Florida Supreme Court reversed the Fourth District Court of Appeal's ruling as well as other jurisdictional opinions that a private cause of action can be brought under Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA") even if the alleged action is based on a "single transaction."

The Fourth District Court of Appeal held that FDUPTA fails to embrace single acts of inequity or deception because the operative words of Section 501.204(1) Fla. Stat. are *methods* and *practices* which are 'defined as a regular and systematic way of accomplishing something. . .'" The Florida Supreme Court disagreed and held that the district court's interpretation contravenes the plain meaning of the statute and stated that the Florida Legislature's intent was to protect against misdeeds directed to a single party, as well as those directed to multiple parties. The court noted that Section 501.211(1) states that "anyone aggrieved by *a violation* of this part may bring an action to obtain declaratory judgment that *an act* or practice violates this part and enjoin a person who has violated . . .this part."

Although the court was concerned about a separate and additional cause of action that may arise out of every breach of contract action, the court stated that a claim under the FDUTPA would be precluded unless the court determined the action was "unfair" or "deceptive" as defined by controlling case law. Therefore, a cause of action under the FDUTPA would be actionable if the court determined that the conduct "offends established public policy, and was immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers."

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UM BENEFITS - FAMILY MEMBERS

By Andrew J. Leeper

In **Scott Dwelle v. State Farm Mutual Insurance Company**, 28 Fla. Weekly D730 (1st DCA 3/13/03), the First District Court of Appeal reversed the Trial Court's determination that Scott Dwelle was not a resident of his parent's household on the date of a motor vehicle accident and not entitled to UM benefits. The First District Court of Appeal remanded the case with instructions to enter judgment as to the insured's entitlement to UM benefits. The First District Court of Appeal's opinion indicates that the insured established close ties of kinship, enjoyment of all living facilities and a fixed dwelling unit, factors which were sufficient to establish that the insured maintained residency with his parents.

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TORTS - MUNICIPAL CORPORATIONS - DUTY

By Michael H. Bowling

In the case of **City of Melbourne, Florida v. Linda L. Dunn**, 28 Fla. L. Weekly D538 (Fla. 5th DCA February 21, 2003), the Plaintiff, Dunn, was awarded damages by the jury as a result of injuries sustained when she fell from a raised planter in a public park. Apparently, Ms. Dunn was tiptoeing along a raised wooden planter when she fell. The

Fifth District Court of Appeal reversed the jury's award, finding, among other reasons, that the City had no duty to make the planter safe for walking. The Court reasoned that the City had no reason to suspect that a grown woman would consider the planter an exit path, instead of proceeding to the parking lot by simply walking around it along the adjacent path.

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"America was not built on fear. America was built on courage, on imagination and an unbeatable determination to do the job at hand."

- Harry S. Truman

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