



KIRWAN & SPELLACY, P.A.
ATTORNEYS AT LAW

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.....briefly.....

Kirwan & Spellacy, with offices in Miami, Fort Lauderdale, West Palm Beach, and Jupiter, Florida, is a full-service insurance defense litigation law firm providing liability, personal injury protection (PIP), subrogation, special investigation unit and fraud unit support to insurance carriers and public adjustment clients throughout South Florida. The attorneys at Kirwan & Spellacy are professionals dedicated to providing excellence in every aspect of our service and commitment to our clients in each of these areas, and would welcome the opportunity to consult with you regarding your legal needs. For further information, please contact Shawn Spellacy at spellacy@kirwanspellacy.com or call 954.463.3008.

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New meaning to the Word Bologna?: Fraud on the Court

Bologna v. Schlanger, 33 Fla.L. Weekly D1626 (5th DCA, June 20, 2008)

In what has become a popular topic in recent months with Florida Appellate Courts, the 5th District Court of Appeals found that it was error to dismiss a personal injury suit with prejudice for intentional and fraudulent conduct in responding to discovery *without an evidentiary hearing*. This is at odds with the 2nd DCA's *Ramey v. Haverty Furniture* decision, which can be found at 33 Fla. L. Weekly D 251, which upheld the dismissal of a claim where the plaintiff denied prior neck injuries that were subsequently revealed.

In the *Bologna* case (pun intended), the plaintiff sued for back injuries she claimed were from the March 2000 accident cited in her complaint. In the plaintiff's deposition she testified that she had been involved in another accident in October 1998 but that she did not sustain any personal injuries or seek any medical treatment as a result of that accident.

The medical records obtained by defense counsel indicated that the plaintiff had in fact treated with a chiropractor for what she described to the physician as "severe" or "very bad" low back pain a total of fifteen (15) times, with the last treatment taking place only two (2) weeks prior to the automobile

accident for which she was suing the defendant.

The defense filed a motion to dismiss the claim based upon Bologna having *knowingly and deliberately made perjurious statements* under oath to conceal her prior back and neck injuries. The trial court held a hearing on the motion at which time the plaintiff's attorney suggested that the plaintiff's inconsistent statements could perhaps be explained by "oversights or failed memory," but heard no evidence on the issue, instead entering final judgment for the defendant.

The Fifth DCA found that many questions arose in the case as to what may have been the circumstances surrounding this apparent inconsistency, including even the possibility of a "fraud" strategy on the part of the defense, as the Court found that the deposition questions asked of plaintiff were very broad, with "virtually no follow-up" questions, and that the plaintiff herself had identified, in her answers to interrogatories, the doctor who provided the treatment for the prior injuries.

The Court found that the trial court erred in dismissing the claim without conducting an evidentiary hearing, and reversed and remanded *Bologna* for further proceedings.



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A PIP Perspective...

Abuse of Discretion to Strike Expert for Discovery Violations Where No Prejudice

Kaye vs. State Farm Mutual Automobile Insurance Co., 33 Fla. L. Weekly D1691 (4th DCA, July 2, 2008)

In an action by an insured against her UM carrier, plaintiff named Richard Swope, an accident re-constructionist, as her only expert witness and added him to her witness list in December 2005. In January 2006, State Farm attempted to take the deposition of Swope but both Kaye and Swope failed to appear. State Farm obtained a Certificate of Non-Appearance for the deposition. In February 2006, Kaye's attorney advised State Farm that he had never received the notice of deposition, and was not aware of the January deposition setting.

State Farm served Swope personally with a subpoena duces tecum set for March 6, 2006. State Farm was advised by the plaintiff's attorney that Swope was unavailable for the date, due to his scheduled testimony

at another trial. State Farm filed a motion to strike Swope as a witness alleging he had failed to provide his reports as ordered by the Court. On March 15, the trial court ordered Swope to provide State Farm with a final report and a copy of his files within 15 days and to appear for a deposition within 30 days.

State Farm filed a notice of deposition setting Swope's deposition for April 13, and then another notice setting it for April 7, 2006. On March 30, 2006, State Farm filed another motion to strike Swope as a witness alleging violation of the court's discovery order and set it for hearing on April 6, at which time, the plaintiff advised that Swope's files were available at that time for copying but that no report had been written yet. At the time of the hearing, trial had been previously set for June 12, 2006. The trial court granted State Farm's motion to strike Swope.

Plaintiff requested a rehearing after Swope's report was completed on April 8 and was made available to State Farm on April 11. The trial court was made aware of this situation yet it denied the request for rehearing and trial was held in the case on September 25, 2006. Swope had been the plaintiff's only expert witness in the case. The jury returned a verdict for State Farm and the trial court denied the plaintiff's motion for a new trial based upon the exclusion of Swope's testimony.

The 4th DCA held that the trial court abused its discretion by excluding the testimony of an expert witness when a report was created within three days of the expert being struck as a witness and where there was "ample time" between the order striking the witness and the trial date, such that any possible prejudice could have been cured.

Okay for Spouse to Reject Stacked Coverage for Named Insured

Mercury Ins. Co. v. Sherwin, 33 Fla. Law Weekly D1444 (4th DCA, June 13, 2008).

Husband and wife Louis and Lisa Sherwin had four vehicles insured with Mercury, Lisa was the named insured, and Louis, along with their two daughters, were designated as additional drivers under the policy. Louis had executed a rejection of stacked UM coverage. Louis was seriously injured in an automobile accident and the Sherwins sought declaratory relief from the Palm Beach County

Circuit Court, which entered a summary final judgment finding that the rejection of the stacked UM coverage was invalid, as the form had been signed by Louis Sherwin, not Lisa Sherwin, the named insured.

Mercury appealed, alleging that Louis had signed the rejection form on behalf of Lisa, Louis had signed all parts of the insurance application, and that Louis's rejection of the stacked coverage was authorized by Lisa. In addition, the record showed that the Sherwins had been

charged the lower premium for non-stacked coverage.

The Fourth DCA found that Louis was acting as his wife's agent in rejecting the stacked coverage and stated that case law is "replete" with decisions binding insureds to coverage selected for them by agent. The case was reversed for entry of declaratory judgment in Mercury's favor.

A PIP Perspective...

August 2008

Nationwide v. Bruscarino, 33 Fla. L. Weekly D 1454 (4th DCA, June 4, 2008)

What the Court Said:

Once a wage loss claim is dropped, the issue of income becomes a collateral matter, and impeachment on a collateral matter is not permissible.

Consequences and Application to PIP Litigation:

This could pose a problem when regarding any number of issues because it appears that a savvy Plaintiff would voluntarily dismiss an offending claim in order to rob the Defendant of the remedies available...especially if their client is caught in a lie or inconsistency during deposition or discovery.

Plana and Plana v. Sainz, 33 Fla. L. Weekly D 1596 (3rd DCA, June 18, 2008)

What the Court Said:

Plaintiffs generally receive compensation for diagnostic testing even if a jury finds that they were not injured as a result of the subject accident.

Question for the Future:

Could this standard in the State of Florida allow diagnostic testing facilities to almost automatically clear the bar for Reasonable, Related, and Necessary?

Bologna v. Schlanger, 33 Fla. L. Weekly D 1626 (5th DCA, June 20, 2008)

Principle to Keep in Mind:

You must have an evidentiary hearing in order to dismiss a case for fraud on the Court.

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Through ongoing education including seminars and in-house training, the attorneys at Kirwan & Spellacy maintain up-to-the-minute familiarity with late breaking changes and trends in the law, including new case law decisions, legislation and regulatory provisions. To learn about what we may be able to do for you, please contact Shawn Spellacy at our Fort Lauderdale office, spellacy@kirwanspellacy.com or call 954-463-3008.

A PIP Perspective...

Relevance to PIP:

Does it appear that Plaintiff's throw the words "Fraud on the Court" around way too much? If so, the law, as stated in Bologna, would allow for a nice cross motion for sanctions should the Plaintiff file a Motion for Sanctions for Fraud on the Court for some non-existent offense. Oftentimes, it appears that Plaintiff's attorneys file these motions in order to supplement their income and catch over-worked defense counsel off-guard.

Kaye v. State Farm, 33 Fla. L. Weekly D 1691 (4th DCA, July 2, 2008)

Principle to Keep in Mind:

It was an abuse of discretion for the trial Court to strike an insured's accident reconstruction expert as a sanction for non-compliance with the Court's discovery orders.

Relevance to PIP:

What is good for the goose is good for

the gander. As many judges are Plaintiff oriented, it would appear that this case will provide grounds for an appeal when a judge strikes an expert as a sanction for the violation of discovery orders. Hopefully, this holding will keep judges from striking experts from either side of the litigation.

Proskauer Rose LLP v. Boca Airport, 33 Fla. L. Weekly D 1699 (4th DCA, July 2, 2008)

What the Court Said:

Fla. Stat. § 90.613 requires discovery only if a witness used a document "while testifying," and there is no common law right in Florida to the discovery of documents used to prepare a party to testify.

Relevance to PIP:

Could we now have a stronger argument to keep the Plaintiff's hands off our claim files? If an adjuster used their file to prepare for deposition and did not use it

while testifying, would the Plaintiff still be entitled to discover those documents?

Makar v. Gowni, 33 Fla. L. Weekly D 1563 (5th DCA, June 13, 2008).

What the Court Said:

The active tortfeasor's voluntary settlement does not, standing alone, extinguish a Plaintiff's potential claim against passive tortfeasors who are vicariously liable on the claim. An evidentiary hearing is required to determine whether the active tortfeasor's voluntary settlement intended to include all parties.

Relevance:

When the person who is liable for the majority of damage settles, the court will conduct an evidentiary hearing to determine if that settlement was meant to include all parties...which means more litigation.



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