

VERDICTS & SETTLEMENTS

South Florida Attorneys Win \$8M Bad Faith Verdict in Quadriplegia Case

by Celia Ampel

South Florida attorneys won an \$8 million bad faith verdict against an insurance company that allegedly failed to properly handle a settlement check for a young man rendered quadriplegic in a 2011 car crash.

The Jan. 26 verdict in favor of Palm Beach Gardens firm Domnick Cunningham & Whalen hinged on questions about how insurers should address settlements of personal injury claims when medical liens are involved.

Jacksonville resident Kevin Whitney, then 23, was riding in the backseat of a car with friends when passenger Aaron Ensley jerked the steering wheel and



J. ALBERT DIAZ

Case: Kevin Whitney vs. Mercury Insurance Company of Florida

Case No.: 16-2016-CA-000925-XXXX-MA

Description: Bad faith

Filing date: Feb. 11, 2016

Verdict date: Jan. 26, 2018

Judge: Duval Circuit Judge Adrian Soud

Plaintiffs attorneys: Fred Cunningham and Gregory Yaffa, Domnick Cunningham & Whalen, Palm Beach Gardens

Defense attorneys: Kathy Maus and Julius "Rick" Parker, Butler Weihmuller Katz Craig, Tallahassee

Verdict amount: \$8 million

Gregory Yaffa and Fred Cunningham of Domnick Cunningham & Whalen won an \$8 million verdict after the jury found an auto insurer acted in bad faith by not removing a potential lienholder from a settlement check for a man paralyzed in a crash.

caused a crash, according to the lawsuit. Whitney was paralyzed less than a year after becoming a father.

Ensley's insurer, Mercury Insurance Company of Florida, tendered the limits of his policy — \$10,000 — to Whitney less than a month after the December 2011 crash. The check was made out to the man and his attorneys.

But when Whitney discharged his law firm several months later, things began to get complicated.

The man's mother, Amy Whitney, received the case file, signed the release and sent it to Mercury. She asked the company if she could cash the check, according to Whitney's attorneys in the bad faith case, Fred Cunningham and Gregory Yaffa of Domnick Cunningham & Whalen in Palm Beach Gardens.

Mercury re-issued the check, but this time made it out to Whitney and Shands Teaching Hospital and Clinics Inc. in Gainesville, where the man received care after the crash. The insurance company argued at trial it's industry practice to include a lien holder on a settlement check if no attorney is involved.

"Obviously, we disagreed with that," Cunningham said.

At that point, the Whitneys could not cash the check without an endorsement from Shands. Amy Whitney wrote to Mercury to ask them to remove the hospital's name from the check. She said she called Shands and was told she had a zero balance because Medicaid was paying for her son's hospital stay. (Shands has no record of the call.)

"That letter was responded to by Mercury to say, 'Sure, we can take Shands off the check, but if Medicaid paid, we may have to protect the

lien,'" said Mercury attorney Kathy Maus of Butler Weihmuller Katz Craig in Tallahassee.

The plaintiffs attorneys said Amy Whitney does not remember receiving that voicemail and Mercury did not follow up, so the Whitneys decided to return the check and file litigation against Ensley. The personal injury lawsuit never made it to trial, resolving with an \$8 million consent judgment in 2015.

Domnick Cunningham & Whalen then filed a bad faith claim against Mercury in February 2016, alleging Mercury did not do enough to protect Ensley from the exposure. Because Ensley didn't want to be involved, the firm took the "very unusual" step of bringing the claim on Whitney's behalf, Cunningham said.

At trial in Jacksonville before Duval Circuit Judge Adrian Soud, the defense argued Mercury believed any claims against Ensley were settled. Maus and her colleague Julius "Rick" Parker also told the jury Amy Whitney's letter asking for Shands' removal from the check was a question, not a demand.

Kevin Whitney "never made a demand to change anything, and in fact signed a release and sent it back to Mercury, so Mercury therefore at all times thought the case was settled," Maus said.

Whitney's attorneys argued Mercury did not act reasonably in protecting Ensley from the multi-million-dollar quadriplegia claim. Mercury and Shands had just gone before the Florida Supreme Court in another case, receiving a 2012 decision saying a hospital asserting an insurance company impaired a lien may only recover the policy limits.

Thus, even though the Whitney lien with Shands was about \$31,000,

Mercury knew it would only be on the hook for \$10,000 at most if it impaired the lien by leaving a lienholder off the check, Cunningham argued.

"They knew that Aaron Ensley had nothing, and so they were understandably concerned that the hospital or Medicaid could come after Mercury ... [But the company] should have been focused on protecting him from Kevin Whitney's claim, which was the greatest exposure by far," Cunningham said.

The jury found Mercury acted in bad faith, which put the company on the hook for the \$8 million judgment against Ensley.

Mercury filed a motion for new trial on Friday, challenging the jury instructions and some of the evidence.

The main evidentiary dispute revolves around the fact that Geico, which insured the driver of the car, paid Whitney the policy limits without putting any lienholders on the check.

The judge ruled plaintiffs counsel could not make arguments about Mercury's alleged bad faith based on Geico's actions. Instead, Geico could only be mentioned to give jurors an idea of Amy Whitney's mindset when she contacted Mercury about taking Shands off the check.

Maus said a plaintiffs witness told the jury "Geico did it right," which she argues "poisoned the jury." A mistrial motion at the time was denied.

"We believe very strongly that [the verdict] will be reversed or a new trial will be granted," Maus said.

Celia Ampel covers South Florida litigation. Contact her at campel@alm.com or on Twitter at [@CeliaAmpel](https://twitter.com/CeliaAmpel).



Domnick
Cunningham
& Whalen