Legal update

Bell & Roper, P.A.

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

Civil Rights-Judicial Estoppel-Inconsistent Positions

By Michael H. Bowling

Robinson vs. Tyson Foods, Inc., 22 Fla. L. Weekly Fed. C521 (11th Cir. February 5, 2010)

In May of 2002 Robinson's Chapter 13 Bankruptcy Plan, which proposed complete repayment to both secured and unsecured creditors over a period of 60 months, was confirmed by the bankruptcy judge. In confirming the plan the Court held that "the property of the estate shall not vest in the Debtor until a discharge is granted… or the case is dismissed."

In September of 2005 Robinson resigned her employment with Tyson Foods alleging that she had been subjected to harassment, racial abuse and intimidation. In October of 2006, Robinson brought suit against Tyson alleging unlawful employment practices, race discrimination and constructive discharge. Robinson sought compensatory, punitive and liquidated damages.

In July of 2007 Robinson com-

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LIMITS ON DISCOVERY EXAMINATIONS OF ELECTRONIC DATA STORAGE DEVICES

By Dale A. Scott

In May, the Fifth District Court of Appeal confirmed various protections which must be provided to litigants with regard to the compelled seizure and examination of computers and electronic data storage devices. See *Holland v. Barfield,* 2010 WL 1812653 (Fla. 5th DCA, May 7, 2010). In *Holland*, the personal representative of the estate of a man who fell from the tenth floor balcony, Brandon Ledford, and died, sued Lorell Holland for "wrongful death." During discovery, the estate sought production of Holland's computer hard drives and cell phones which were in her possession during the 24 hours preceding the inci-dent. *Id.* at *1. Holland objected and asserted the information sought was irrelevant and not likely to lead to the discovery of admissible evidence. She also asserted the request was over broad with respect to time and subject matter, was harassing in nature and constituted a "fishing expedition," and invaded her right to privacy under the Florida Constitution. *Id.* The estate moved to compel production, and sought production of communications among the defendants (including Holland) accomplished via mobile phone text messages, and facebook.com and myspace.com accounts. *Id.* The trial court granted the motion, and directed Holland to agree to a protective order and confidentiality agreement wherein the information at issue could only be reviewed by the estate's attorney. *Id.*

Holland sought an interlocutory appeal to the Fifth District Court of Appeal. She argued the trial court's order violated Florida Rule of Civil Procedure 1.350, as it gave the estate unlimited access to her hard drive and Subscriber Identity Module ("SIM") card and since the estate could examine every bite of

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information on the devices in contravention of her right to privacy, and without regard to the attorney-client or work-product privileges. Additionally, she argued the order violated Rule 1.280(b)(5), because it ordered her to first relinquish her hard drive and SIM card without permitting her the opportunity to review the information and produce it. The order also allowed the estate's expert to review the hard drive and SIM card outside of her attorney's presence, thus depriving her the opportunity to object and preserve claims of privilege and right of privacy, which would result in irreparable harm. Finally, she argued the order was unduly burdensome as it deprived her of computer and phone for an unspecified period of time. *Id.*

Upon review of the appeal, the Fifth District agreed with Holland and found the trial court's order permitting the estate's expert to exam-ine the hard drive and SIM card failed to protect against disclosure of confidential and privileged information. *Id.* at *3. The Fifth District also found the order departed from the essential requirements of law and would cause material injury through the remainder of the trial court proceedings, effectively leaving no adequate remedy on appeal. *Id.* In reaching this conclusion, the Fifth District confirmed that Rule 1.350(a)(3) is broad enough to encompass requests to examine hard drives, but only in limited and strictly controlled circumstances. The Fifth District acknowledged unlimited access to a computer would constitute irreparable harm, because it would expose confidential, privileged information to the opposing party. *Id.* at *2, citing *Menke v. Broward Co. School Bd.*, 916 So.2d 8, 11 (Fla. 4th DCA 2005). In this regard, the court referenced three factors, the satisfaction of which may properly lead a court to permit an examination: (1) evidence of destruction of evidence or thwarting of discovery; (2) a likelihood that information exists on the devices; and (3) the absence of a less intrusive means to obtain the information. *Holland* at *2, citing Menke at 12. The Holland court also highlighted the Menke court's suggestion that, one acceptable alternative would be to permit the defendant's representative to physically access the computer in the presence of the requesting party's representative under an agreed upon set of procedures, to test whether it is possible to retrieve the information. Holland at *2. The Menke court also noted where "a need for electronically stored information is demanded, such searching should first be done by defendant so as to protect confidential information, unless, of course, there is evidence of data destruction designed to prevent the discovery of relevant evidence in the particular case." *Menke* at 12.

In *Holland*, there was no evidence of destruction, or evidence of an effort to thwart discovery. Additionally, the Fifth District noted the electronic information was sought as a "back-up" to information sought via other requests. Thus, the Fifth District found a less intrusive means to acquire the requested information was available. Finally, the Fifth District noted the trial court's order to allow the estate, without limit or a time frame, to review all the information on Holland's computer and SIM card violated her constitutional right of privacy, her right against self incrimination, and could violate the attorney-client and work-product privileges. *Id.* at *3.

In recent years, Florida has seen a slow, but steady, erosion of one's right to privacy with regard to the contents of computer hard drives and cellular phone memory cards, and social networking and e-mail accounts. In fact, litigants are beginning to include requests for access to such accounts and electronic data storage devices, as part of "standard" discovery requests. However, *Holland* confirms that such access may be granted only under a particular set of circumstances (in particular, where there is evidence of destruction of evidence or an effort to thwart discovery), and after the party upon whom the request is made has the opportunity to extract the information and produce it. Of course, it is incumbent upon litigants to assert timely and full objections to such discovery requests to protect the right to privacy, the privilege against self-incrimination, and also to assert the attorney-client and work-product privileges, since discovery objections are generally deemed waived if not asserted in a timely manner.

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pleted her bankruptcy plan, repaying all debts and receiving full discharge from bankruptcy.

In September of 2007 Tyson took Robinson's deposition in the discrimination suit and Robinson testified that she had not disclosed her claim against Tyson to the bankruptcy court. Tyson then moved to have Robinson's case dismissed contending that she was precluded from pursuing the suit on the basis of judicial estoppel. Tyson asserted that Robinson's non-disclosure constituted inconsistent positions under oath which were calculated to make a mockery of the judicial system. The district court agreed and granted summary judgment for Tyson.

On review, the Eleventh Circuit explained that the purpose of judicial estoppel is to prevent a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding, thereby prohibiting parties from changing positions according to the exigencies of the moment. The Eleventh Circuit wrote that the two primary factors in establishing the bar of judicial estoppel are that, it must be shown that the alleged inconsistent positions were made under oath in a prior proceeding and that such inconsistencies must be shown to have been calculated to make a mockery of the judicial system.

The Eleventh Circuit recognized that Robinson took inconsistent positions under oath and stressed the importance of full and honest disclosure in bankruptcy proceedings, explaining that it was crucial to the system's effective functioning.

As to inconsistent positions, the estopped party must have made same intentionally. The Eleventh Circuit held that intentional conduct may be inferred from the record and that it would only reverse a district court's finding where it was left with a definite and firm conviction that a mistake had been made. The court reasoned that Robinson had motive, in that there was a nine month window during which Robinson could have received a settlement from Tyson about which the bankruptcy court would have been unaware.

The Eleventh Circuit concluded that Robinson had a duty to disclose, agreed with the district court that Robinson had a motive to conceal and that the district court's conclusion that Robinson had the requisite intent to make a mockery of the judicial system was not clearly erroneous. Thus, the Eleventh Circuit affirmed the dismissal of Robinson's action.

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Bell & Roper, P.A. Firm News

Bell & Roper, P.A., is pleased and honored to announce that Hae Kim has been named a Partner with the firm. Also, as many of you already know, Gail C. Bradford and David B. Blessing have recently joined the firm as associate attorneys. They both add considerable talent, experience, and expertise to our legal team. You can learn more information about all of our attorneys at www.bellroperlaw.com.

DISCREDITING DOCTORS' BILLING PRACTICES

By Esteban F. Scornik

It is well known among those representing the interests of defendants that hospitals and treating physicians often charge substantially more to patients who do not have insurance and are instead being treated under letters of protection then those patients who actually have insurance. Is discovery regarding such practices permissible under Florida Law?

This was the issue confronted in the case of *Columbia Hospital Limited Partnership v. Hasson,* 2010 WL 1879469 (Fla.4th DCA 2010). This case involves a personal injury action in which the plaintiff had a percutaneous disc surgery performed at Colombia Hospital, for which the hospital billed over $19,000.00. The attorneys for the defendants sent a non-party subpoena to the hospital including a demand for the following: Documents indicating the amount the hospital has charged patients with and without insurance, those with letters of protection, and perhaps most importantly, the differences in billing for litigation patients versus non-litigation patients.

Columbia Hospital responded by moving for a protective order, asserting that information requesting by the subpoena was confidential and constituted protected trade secrets. The trial court denied the Motion for Protective Order, finding that the information sought was reasonably calculated to lead to the discovery of admissible evidence.

On Appeal, the Appellate Court indicated that there was no disagreement that the requested information did amount to trade secrets of the hospital. The Court further stated that when trade secret privilege is asserted as the basis for resisting production, the trial court must determine whether the requested production constitutes a trade secret; if this is the case, the Court then must require the party seeking production to show reasonable necessity for the requested materials.

The trial court concluded that the defendants did explain why the requested information was pertinent to the lawsuit. Indeed, a claimant for damages for bodily injuries does have the burden of proving the reasonableness of his or her medical expenses. The Appellant Court concluded that the hospital was entitled to relief, but only to the extent that the hospital had the right to negotiate a confidentiality agreement with respect to the discovery.

We have heard that subsequent to this ruling, Columbia Hospital has had a shakeup of management and may have revoked the privileges of certain physicians including the notorious Dr. Jeffery Katzman and Dr. Heldo Gomez. You may wish to consider sending similar subpoenas to medical providers in cases where the plaintiff had surgery under a letter of protection or was otherwise without health insurance coverage.

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