

BELL & ROPER LEGAL UPDATE

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

Bell & Roper, P.A.
2707 East Jefferson St., Orlando, FL 32803
Phone: 407-897-5150
www.bellroperlaw.com

September-October 2011 Edition

LEGISLATIVE CHANGES TO STATUTE OF LIMITATIONS FOR WRONGFUL DEATH CLAIM AGAINST PUBLIC ENTITY

By Michael J. Roper

The Florida Legislature has amended Florida Statutes §768.28 to provide for a two-year statute of limitations for wrongful death claims against the state or its political subdivisions, which accrue on or after July 1, 2011. See Chapter 2011-113, Laws of Florida. Current law requires that a party asserting a wrongful death claim against a public entity, place said entity and, except for municipalities, the Department of Financial Services (Department) on written notice of the claim within three years of accrual of the cause of action and then file their suit within four years. Under the revised statute a party must now place the public agency and, except for municipalities, the Department on written notice of the claim within two years after the claim accrues. The agency and the Department of Financial Services then have ninety days within which to make a final disposition of the claim, after which time the claim shall be deemed denied. The suit must then be filed within two years from the date upon which the cause of action accrues, but the statute of limitations is tolled for the period of time taken by the Department or agency to deny the claim, up to 90 days.

The statute of limitations applicable to a wrongful death claim against a private party, under Florida law, is two years. It appears that the Legislature's impetus for this statutory change was to make the statute of limitations for wrongful death claims against a public entity comparable to that which applies to such claims brought against a private entity. Under the new statute a party asserting a wrongful death claim against a public entity will now have only two years to provide written notice of claim to the entity and/or Department and then up to two years plus 90 days (or the time taken to deny the claim) to actually file the suit.

If the claim is denied on "Day 1" by the agency, then the statute of limitations is two years plus one day. The statute does not provide any further "grace period" after the denial of the claim within which to file suit, and so claimants who wait the full two years to give written notice of their claim, will risk violating the limitations period if they do not file suit directly after the agency or Department denies their claim. As a result, we anticipate that we will see many such suits filed contemporaneously with the submission of the written notice of claim. We also

suspect that there will be future litigation relating to the date the claim was actually made, denied, etc. Since this amendment only applies to claims accruing on or after July 1, 2011, this will likely not become a hot topic until July 2013, but is certainly an issue we should all keep in mind.

Mr. Roper can be reached at mroper@bellroperlaw.com.

LAWYERS BEHAVING BADLY? THE FLORIDA SUPREME COURT REQUIRES CIVILITY FROM NEW ATTORNEYS

By Gail C. Bradford

The Supreme Court of Florida recently added a civility provision to the Oath of Admission to the Florida Bar. Effective September 12, 2011, new members of the Bar shall "pledge fairness, integrity, and civility [to opposing parties and counsel], not only in court, but also in all written and oral communications. (Order in re: Oath of Admission to the Florida Bar, Number SC11-1702 dated September 12, 2011.) The Supreme Court's Order is based on a similar Lawyer's Oath sworn to by South Carolina Bar members.

This amendment begs the question of why professionals need to be reminded to act professionally. Admittedly, the practice of law, particularly litigation, is a target-rich environment for snarky comments. But how much snark is too much? Can there be too much? After all, aren't we trained to zealously advocate our client's positions? Bar rules state "Zealous advocacy is not inconsistent with justice." It turns out that zeal in excess can result in snark and that some professionals do need to be reminded to act professionally.

In In re Snyder, 105 S. Ct. 2874, 86 L. Ed. 2d 504, 53 USLW 4833 (1985), the United States Supreme Court reversed the suspension of an attorney who had sent a letter to the secretary of the presiding judge complaining about the process for reimbursement of costs and expenses related to indigent criminal defendants. The attorney complained that he was "appalled" by the limited budget, frustrated by the "extreme gymnastics even to receive the puny amounts which the federal courts authorize for this work," and advised the court that it could "take it or leave it" with regard to the documentation he had already submitted. Finally, the attorney stated that he was "extremely disgusted by the treatment of [indigent criminal defense attorneys] by the Eighth Circuit in this case."

At subsequent hearings conducted as a result of the letter, the attorney refused to apologize. As a result, he was suspended from the practice of law for six months. Curiously, the record reflects that the trial judge's secretary encouraged the attorney to send the letter to document his concerns about the reimbursement process and that the trial judge did not take offense to the letter but simply forwarded to the chief judge to address the administrative concerns. The Supreme Court noted that the letter might be read as "ill mannered" but that "All persons involved in the judicial process – judges, litigants, witnesses, and court officers – owe a

duty of courtesy to all other participants. The necessity for civility in the inherently contentious setting of the adversary process suggests that members of the bar cast criticisms of the system in a professional and civil tone." The Supreme Court reversed the suspension, holding that a single incident of rudeness does not merit a finding that a lawyer is not fit to practice law and warranting suspension. So, some snark is okay.

In comparison, the Ninth Circuit Court of Appeals reversed court-imposed sanctions against an attorney who was no longer representing any parties in the case. In U.S. v. Wunsch, 84 F. 3d 1110 (9th Cir. 1996), an attorney was disqualified from representing various members of the family subject to federal criminal investigation. The attorney had also represented two witnesses that the government planned to call during its case in chief in the same matter. After the court issued its order disqualifying the offending attorney, a man, sent a letter to the prosecuting attorney, a woman, stating that her disqualification was unfair to both him and his law partner and the defendants but that it "serves your interests because now it will be easy for you." He also enclosed a single sheet of paper on which was printed "MALE LAWYERS PLAY BY THE RULES, DISCOVER TRUTH AND RESTORE ORDER. FEMALE LAWYERS ARE OUTSIDE THE LAW, CLOUD TRUTH AND DESTROY ORDER," in capitalized and enlarged font. (Giving credit where credit is due, the attorney didn't write the phrase himself; he copied it from a magazine article regarding negative stereotypes of female lawyers in television and movies.) The prosecutor moved for sanctions.

At the time, in addition to the applicable federal rules of procedure, California code required attorneys "to abstain from all offensive personality." The Circuit Court determined that the "offensive personality" standard was constitutionally vague and that it chilled activities protected by the First Amendment. "Offensive personality" could refer to any number of behaviors that many attorneys regularly engage in during the course of their zealous representation of their clients' interests..." Interestingly, the court was able to distinctly discern between "offensive personality" and "conduct unbecoming a member of the bar," noting that the latter has "some definable substance" and is therefore legally sufficient. In this instance, more snark was okay, even if it was permissible only because it wasn't strictly prohibited.

Several months ago, the South Carolina Bar took the opportunity to comment on bad behavior by an attorney disciplined under the same provision adopted by the Florida Supreme Court. In In re Anonymous Member of South Carolina Bar, 392 S.C. 328, 709 S.E.2d 633 (2011), an attorney sent opposing counsel an email telling her that her teenage daughter had been detained for buying cocaine and heroin and pointing out that her daughter's situation was far more complicated and serious than the case that the two were contentiously litigating. He had obtained the information from a client of his who was a drug dealer. The email asked, "There is nothing more complicated and serious than having a child grow up in a high class white family with parents who are highly educated and financially successful and their child turning out buying drugs from a crack head at night on or near ... Street. Think about it. Am I right?" Neither the daughter nor any family member of either counsel had anything to do with the case. The recipient's spouse, who was also an attorney, initiated a Bar complaint against the offending attorney.

The offending attorney argued that the civility provision violated his First Amendment

rights. The court disagreed. It balanced the state's interest in regulating lawyers with the lawyer's First Amendment rights and determined that the state's interest in regulating lawyers to ensure the integrity of the judicial process and to ensure that lawyers objectively represent their clients weighed more heavily. However, because the offending attorney acknowledged his misconduct and expressed remorse, the court was lenient in punishment. Snark can be tempered with repentance.

In Florida, some snarky behavior warrants comparison to offensive cartoon characters. In 5500 North Corp. v. Willis, 729 So. 2d 508 (Fla. 5th DCA 1999), the court noted the lack of cooperation between counsel during discovery. The court stated that "we would expect more civility from Beavis & Butthead than was displayed here by [the attorneys]." Beavis and Butthead appear again in Beekie v. Morgan, 751 So. 2d 694 (Fla. 5th DCA 2000), in which two attorneys disputed the scheduling and taking of the defendant's deposition. The court noted that "one could characterize the behavior of counsel in this case as 'Beavis and Butthead' like, or to put it in milder terms, uncivilized." No attorneys were disciplined by the Florida Bar in either case.

Last year in Florida, an attorney was disciplined for his bad behavior during a deposition. In The Florida Bar v. Ratiner, 46 So. 3d 35 (Fla. 2010), the Bar Referee's report found that, during a deposition, the offending attorney stood up and spoke forcefully to opposing counsel, touched opposing counsel's hand and attempted to run around the table towards him after opposing counsel attempted to put an exhibit sticker on his laptop computer. The offending attorney then "lambasted" opposing counsel while tearing up the sticker, wadding it into a ball, and flicking it at opposing counsel. A consultant to the offending attorney told him that he needed to "take a Xanax." All this activity frightened the deponent and caused the court reporter to claim "I can't work like this!" The entire deposition was videotaped.

In a Delaware case, the statements an attorney made and his conduct during a deposition in Paramount Communications Inc. v. QVC Network Inc., 637 A. 2d 34 (De. 1993) have become the stuff of urban legend. Although the case came before the court on another issue, the Supreme Court of Delaware felt compelled to address the misconduct of an attorney during deposition during which the attorney improperly directed his client to not answer questions, repeatedly interrupted and interfered with the taking of the deposition, and was generally rude and disrespectful. Specifically, the offending attorney called the deposing attorney an "a—hole" to start off, told him that he was tired of him, that he "could gag a maggot off a meat wagon," that "nobody wants to socialize with you," "shut up," and "you don't know what you're doing...You have no concept of what you're doing." He closed with "You fee makers think you can come here and sit in somebody's office, get your meter running, get your full day's fee by asking stupid questions."

The Delaware Supreme Court wrote in its opinion that, "it is a mark of professionalism, not weakness, for a lawyer zealously and firmly to protect and pursue a client's legitimate interests by a professional, courteous, and civil attitude toward all persons involved in the litigation process," but in this case, the offending attorney did not properly represent his client. (It didn't help that the offending attorney was from out of state and not authorized to practice law in Delaware. However, because he was from out of state and unauthorized, he was not subject to

discipline from the court.) The court also criticized the behavior of the deposing attorney who, although civil during the primary offending attorney's tirade, apparently engaged in similar behavior reflected elsewhere on the transcript. Maybe it is contagious.

Ms. Bradford can be reached at gbradford@bellroperlaw.com.

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THE CONFUSING CASELAW ON THE INTRODUCTION OF MEDICAL BILLS INTO EVIDENCE

By Esteban F. Scornik

For years, the plaintiff and defense bars have been fighting over the issue of what portions of medical bills can be introduced into evidence at trial. For example, assume a plaintiff is treated by a medical provider as a result of injuries sustained from the accident, and the provider sends the plaintiff a bill for \$50,000.00. Then assume that the provider ultimately accepts \$25,000.00 in full satisfaction of his bill for the services in question. Can the plaintiff introduce as evidence the full \$50,000.00 bill, or the \$25,000.00 in full satisfaction of the bill? Based on recent caselaw, the answer depends on how the medical bill was satisfied.

Are the plaintiff's medical bills being paid and reduced by Medicare? If yes, recent cases have held that the plaintiff can only introduce the amounts of bills accepted by and paid for by Medicare. Cooperative Leasing, Inc. v. Johnson, 872 So. 2d 956 (Fla. 2nd DCA 2004), Thyssenkrupp Elevator Corporation v. Lasky, 868 So. 2d 547 (Fla 4th DCA 2003).

Are the plaintiff's medical bills being paid and reduced by a contract with a health insurance company? If yes, most courts have been following the interpretation that the plaintiff can introduce the full amount of the medical bills, subject to a collateral source set-off to take place post-trial. This interpretation is based upon Goble v. Frohman, 901 So.2d 830 (Fla 2005), in which the Florida Supreme Court held that it is appropriate to reduce an award of past medical expenses by the amount of medical bills that were written off by the Plaintiff's medical providers pursuant to their contracts with the Plaintiff's health insurance company. This interpretation was also followed in Nationwide Mutual Fire Insurance Company v. Harrell, 53 So.3d 1084 (Fla. 1st DCA 2010).

What happens when the plaintiff does not have either private health insurance or governmental health benefits? This was the issue confronted by the Fourth District Court of Appeals in Durse v. Henn, 36 Fla. L. Weekly D1472 (Fla. 4th DCA, July 6, 2011). In Durse, the plaintiff did not have health insurance but still negotiated with his medical providers for satisfaction of the bills which were lower than the amounts of the original bills. The defense filed a motion in limine to preclude the plaintiff from presenting evidence of the full amount of the bills. The plaintiff argued that he needed to present the full amount of his bills in order to establish the value of future medical expenses and non-economic damages. The trial court granted the motion in limine.

The Fourth DCA looked to Harrell to determine the rationale behind the above cases. Specifically, in Florida Physician's Insurance Reciprocal v. Stanley, 452 So.2d 514 (Fla. 1984), the Florida Supreme Court held that evidence of governmental or charitable benefits available to all citizens should not be precluded by the evidentiary portion of the collateral source rule. "Governmental or charitable benefits available to all citizens, regardless of wealth or status, should be admissible for the jury to consider in determining the reasonable cost of necessary future care." In Nationwide, the 1st DCA stated that "our supreme court intended to limit abrogation of the evidentiary portion of the collateral source rule to cases where the benefits received to reduce the cost of medical care were not earned (or paid for) *in some way* by the plaintiff." Nationwide, 53 So.3d at 1087 (emphasis added).

In Durse, the Fourth DCA concluded that although the plaintiff did not pay the premiums for health insurance, he still had "earned in some way" the lowered final amount of his medical bills by being able to negotiate a lower amount. Therefore, he was entitled to introduce the full amount of the charges.

The Durse opinion is troubling for the defense industry. Indeed, a plaintiff can potentially choose to rely on letters of protection rather than health insurance to pay bills related to litigation and obtain the advantage of introducing the entire amount of the elevated bill before the jury.

Mr. Scornik can be reached at escornik@bellroperlaw.com.

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CHANGES TO THE BERT J. HARRIS PRIVATE PROPERTY RIGHTS PROTECTION ACT

By Gail C. Bradford

On June 21, 2011, Gov. Rick Scott signed HB 701, amending the Bert J. Harris, Jr., Private Property Rights Protection Act, as set forth in § 70.001, Florida Statutes. The bill, effective July 1, 2011, makes some important changes to the Act. The Bert J. Harris Act was first enacted in 1995 to create a new cause of action for property owners whose properties are inordinately burdened by new governmental regulations. The amendment revises definitions and procedures and clarifies the State's waiver of Sovereign Immunity with regard to Bert J. Harris Act claims.

The amended Act now provides that temporary impacts that last for more than a year on a development may constitute an "inordinate burden," depending on the facts. Fla. Stat. § 70.001(3)(e)(2).

The amended Act has decreased the time in which a potential plaintiff must present the claim in writing to the governmental entity. Effective July 1, 2011, a property owner has 150 days, not 180 days, to present his claim regarding non-agricultural property. The notice period for agricultural property has not changed and remains 90 days. Fla. Stat. § 70.001(4)(a).

Likewise, the time in which a governmental entity must make a written settlement offer identifying possible solutions to the claim, or none, has decreased from 180 days to 150 days, with the exception of claims regarding agricultural property. As above, the time requirement for a written settlement offer in response to a claim regarding agricultural property has not changed from 90 days. Fla. Stat. § 70.001(4)(c).

The time in which a governmental entity must now issue its written “statement of allowable uses,” formerly known as the “ripeness decision,” for non-agricultural properties, has also decreased from 180 days to 150 days. The amended Act also identifies the governmental entity’s failure to timely issue a written statement of allowable uses as a denial. Whether a written statement of allowable uses is timely issued or no statement is issued, the property owner has met the last prerequisite to filing suit. Fla. Stat. § 70.001(5)(a).

The one-year time limit in which a property owner must present a written claim to the governmental entity has not changed. However, the method by which one determines when the one-year claim period accrues has changed. Effective July 1, 2011, in situations where the impact of a law or regulation is “clear and unequivocal in its terms” and written notice is provided by mail to the property owner, the property owner may have only one year from receipt of the written notice to pursue a Bert J. Harris claim. Otherwise, the one-year period begins to accrue when there is a “formal denial of a written request for development or variance.” The provision tolling time if a property owner seeks relief through other available administrative or judicial proceedings remains the same. Fla. Stat. § 70.001(11.)

Finally, in an effort to clarify the applicability of the sovereign immunity benefits to which a governmental entity may be entitled, the amendment adds language that sovereign immunity is waived for causes of action pursued under this statute. Fla. Stat. § 70.001(13).

Note that the changes to the Bert J. Harris Act apply only to claims and actions filed after July 1, 2011. The changes do not apply retroactively. Fla. Stat. § 70.001(13).

Ms. Bradford can be reached at gbradford@bellroperlaw.com.

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