Legal Update

BELL & ROPER, P.A.

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MEDICARE PROVIDES INFORMATION TO CALCULATE DAMAGES FOR HIP AND KNEE REPLACEMENT SURGERIES

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Medicare just announced a model to be implemented in certain geographic areas nationally to address the cost of hip and knee replacement surgeries for its beneficiaries. With its announcement Medicare disclosed its average costs for surgery, hospitalization and recovery (including physical rehabilitation) which covers the 90 days after surgery.

> "And, the average Medicare expenditure for surgery, hospitalization, and recovery ranges from $16,500 to $33,000 across geographic areas." https://innovation.cms.gov/initiatives/cjr

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PICTURES POSTED ON FACEBOOK ARE DISCOVERABLE IN PERSONAL INJURY CASES

In the recent decision of *Nucci v. Target Corp*, the plaintiff, Maria F. Leon Nucci, filed a lawsuit against Target claiming that she suffered permanent injuries and emotional distress due to a slip and fall accident. Because Nucci's lawsuit raised issues about her physical and emotional condition, Target requested copies or screenshots of all photographs that Nucci posted on Facebook for a period of two years before the accident through the present day.

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The range is based on their national average and the "model" being implemented is aimed at reducing these costs. This information is applicable to the areas of Florida listed below where the program in being implemented. These average figures should be appropriate throughout the state for estimating a Medicare beneficiary's future medical costs for these types of procedures.

Comprehensive Care for Joint Replacement Model: Metropolitan Statistical Areas (MSAs) ***in Florida***

Naples-Immokalee-Marco Island, FL	**Counties -** Collier County
Miami-Fort Lauderdale-West Palm Beach, FL	**Counties** - Broward County, Miami-Dade County, Palm Beach County
Orlando-Kissimmee-Sanford, FL	**Counties** - Lake County, Orange County, Osceola County, Seminole County
Pensacola-Ferry Pass-Brent, FL	**Counties** - Escambia County, Santa Rosa County
Sebastian-Vero Beach, FL	**Counties -** Indian River County
Tampa-St. Petersburg-Clearwater, FL	**Counties** - Hernando County, Hillsborough County, Pasco County, Pinellas County

By: *Christopher R. Fay, Esquire*

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Nucci objected to Target's discovery request, arguing that it was overbroad, burdensome and that it violated the Right of Privacy contained in Art. I, §23 of the Florida Constitution. Specifically, Nucci's response to the motion explained that, since its creation, her Facebook page had been on a privacy setting that prevented the general public from having access to her account. Therefore, Nucci believed she had a reasonable expectation of privacy regarding her Facebook information and that Target's access would invade that privacy right.

The trial court overruled Nucci's objection and ordered her to produce Facebook "photographs depicting Nucci from the two years before the date of the incident to the present." Nucci appealed this decision.

In upholding the trial court's order compelling Nucci to turn over her Facebook photographs, the Fourth DCA relied on three rationales. First, it held that Nucci lacked sufficient grounds to be entitled to certiorari review as overbreadth of discovery alone does not constitute a basis for certiorari. Specifically, the Court held that Nucci did not show there had been a "violation of clearly established principle of law resulting in a miscarriage of justice" which would have entitled her to such review.

Second, the Fourth DCA noted that under Fla. R. Civ. P. 1.280 the parties are entitled to a broad scope of discovery and that pictures which individuals choose to put on Facebook and share with family and friends are highly relevant to a fact-finder in a personal injury case, as follows: *Cont'd 3a*

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> From testimony alone, it is often difficult for the fact-finder to grasp what a plaintiff's life was like prior to an accident. It would take a great novelist, a Tolstoy, a Dickens, or a Hemingway, to use words to summarize the totality of a prior life. If a photograph is worth a thousand words, there is no better portrayal of what an individual's life was like than those photographs the individual has chosen to share through social media before the occurrence of an accident causing injury. Such photographs are the equivalent of a "day in the life" slide show produced by the plaintiff before the existence of any motive to manipulate reality. The photographs sought here are thus powerfully relevant to the damage issues in the lawsuit. The relevance of the photographs is enhanced, because the post-accident surveillance videos of Nucci suggest that her injury claims are suspect and that she may not be an accurate reporter of her pre-accident life or of the quality of her life since then.

Based on the forgoing, the Fourth DCA clearly treats photographs as an especially important class of materials to litigation. Its ruling implies a type of photo "exceptionalism" in discovery, and suggests that photos should typically be more freely discoverable in future personal injuries lawsuits than other types of social media content. Also of note is that Target, in its initial discovery, requested all photographs taken by Nucci with her cell phone camera for two years before the accident through the present day. Nucci did not choose to appeal the trial court's ruling that these materials were discoverable.

Finally, in examining Nucci's claims that these requests violated the Florida Constitution's Right of Privacy, the Court noted that the privacy right must be balanced against the need for discovery in a personal injury case. Per the Fourth DCA, when a person chooses to post a picture on Facebook and share it with family and friends there is no real privacy expectation. Even if there is a minimal privacy right, the Court held, it is outweighed by the defendant's legitimate interest in conducting before-and-after discovery.

By: Dani S. Theobald, Esquire

THE USE OF PROFANITY IN FRONT OF STUDENTS NOT A SEVERE ACT OF MISCONDUCT THAT WARRANTED CIRCUMVENTING PROGRESSIVE DISCIPLINE POLICY

In *Quiller v. Duval County Sch. Bd.,* 171 So.3d 745 (Fla. 1st DCA 2015), the School Board terminated a teacher without following the progressive discipline policy contained in the Collective Bargaining Agreement between the Union and the School Board despite a recommendation from the Administrative Law Judge ("ALJ") that the teacher not be terminated. The Collective Bargaining Agreement agreed to by the Union and the School Board provided for the following progressive discipline to be administered: verbal reprimand; written reprimand; suspension without pay; and termination. However, it was understood that *some more severe acts of misconduct may warrant circumventing the established procedure. Quiller,* 171 So. 3d at 745. *Cont'd 4a*

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After receiving complaints from students and parents that the teacher was using profanity in front of the students, the School Board began its discipline of Quiller with a step one verbal reprimand that was then followed by a step two written reprimand. However, rather than moving to step three of the policy, after receiving a third complaint, the School Board moved to step four and terminated Quiller's employment. Quiller appealed her termination, and after an administrative hearing, the ALJ found that because there was no evidence of "severe acts of misconduct" as contemplated in the agreement the School Board should not have skipped step three of the policy. The ALJ recommended that the School Board rescind the termination and enter a final order suspending Quiller for a period of time without pay. While the School Board adopted the ALJ's findings of fact and conclusions of law, it rejected the ALJ's recommendation and entered a final order terminating the Appellant. *Id.* at 746.

Upon appeal, the First DCA determined that while the School Board could reject the ALJ's recommendation, the progressive disciplinary policy mandated that the School Board was required to follow progressive steps in administering discipline and that the use of profanity in front of students was not a severe act of misconduct that warranted circumventing the third step in the progressive discipline policy. The First DCA reversed the School Board's final order of termination with instructions that the School Board adopt the ALJ's recommendation that Quiller be suspended without pay.

By: Cindy A. Townsend, Esquire

FIRM SUCCESS!

Summary Judgment Entered in Favor of Brevard County

In *Peterson v. Brevard County*, the County was one of several Defendants named in a lawsuit arising from injuries the Plaintiff sustained while using a propane gas grill. Plaintiff alleged that the County was negligent with respect to reviewing, approving and inspecting the built-in summer kitchen and closed in propane gas Viking grill housing, unit and system located on the premises of the apartment complex where Plaintiff resided.

Cindy Townsend successfully argued that the County did not owe either a common law or statutory duty of care to Plaintiff pursuant to the well-established principles set forth in *Trianon Park Condominium Ass'n., Inc., v. City of Hialeah,* 468 So. 2d 912 (Fla. 1985). Ms. Townsend further argued that since the County did not owe a duty to Plaintiff, it could not be held liable for any of his alleged injuries. The Court agreed that there could be no liability in the absence of a duty and granted summary judgment in favor of the County.

EMPLOYMENT—AGE DISCRIMINATION

Two recent age discrimination opinions from the 11th Circuit Court of Appeals warrant close attention by employers considering the hiring or discharge of employees within the protected class, namely over forty (40) years old.

In *Villarreal v. R.J. Reynolds Tobacco Co.*, 25 Fla. L. Weekly Fed. C1811 (11th Cir. 2015), the court decided, as a matter of first impression in this circuit, that the Age Discrimination in Employment Act (ADEA) authorizes disparate impact claims, for both existing employees and job applicants. Disparate impact occurs when an employer uses "practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). The Supreme Court case which first recognized the existence of a claim for disparate impact under the ADEA involved only claims brought by current employees. *See Smith v. City of Jackson*, 544 U.S. 228 (2005). Accordingly, the defendant in Villarreal argued that the ADEA did not authorize job applicants to pursue an age discrimination claim based a disparate impact theory as opposed to disparate treatment theory of liability.

The 11th Circuit noted that on this point, there were two reasonable, but conflicting, readings of Section 4(a)(2) of the ADEA, which statutorily authorizes disparate impact claims. One reading would limit such claims to existing employees only; the other would extend such protection to prospective employees. In order to resolve this conflict the court deferred largely to the EEOC's interpretation of its own regulations regarding the scope of the ADEA, noting that under the agency's disparate impact regulations, there was no distinction between the rights of prospective and existing employees. Accordingly, if an employer's facially neutral hiring practices adversely impact job applicants who are over the age of forty (40), said individuals are now able to pursue a disparate impact claim under the ADEA. Importantly, in order for a plaintiff to prevail on a discrimination claim through a disparate impact theory, no proof of discriminatory intent is required. In *Villareal*, the alleged unlawful employment practices included "resume review guidelines" which told hiring managers to target candidates who were "2-3 years out of college" but to stay away from candidates with "8-10 years" of prior sales experience.

The ADEA requires an aggrieved person to file a charge of discrimination with the EEOC within 180 days of the discriminatory act, and compliance with that limitations period is a prerequisite to bringing a federal suit. The court in *Villarreal* also held that this limitations period is equitably tolled "until the facts which would support a cause of action are apparent or should be apparent to a person with reasonably prudent regard for his rights." *Id.* (citing *Reeb v Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975)). The court reiterated that equitable tolling does not require employer misrepresentation; that "mere suspicion of age discrimination" does not trigger the limitations period; and, "due diligence" does not require an employee to undertake an investigation into hidden discriminatory employment practices. In *Villarreal*, plaintiff did not file his EEOC charge until 2 ½ years after he first applied for a job, and successfully argued that he did not and could not have been aware that he was discriminated against until he became aware of the allegedly discriminatory hiring practices. This interpretation obviously has the likely effect of extending the limitations period well beyond the contemplated 180 days after an applicant is rejected.

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In *Liebman v. Metro. Life Ins. Co.*, 25 Fla. L. Weekly Fed. C1881 (11th Cir. 2015) the court held that for purposes of establishing a prima facie case under the ADEA, a plaintiff could satisfy the requirement for showing that he was replaced by a "substantially younger person," by demonstrating that his replacement was seven years younger---49 versus 42 years old---even though the replacement was also a member of the protected class. First, the court noted that the fact that one person in the protected class has lost his position to another person in the same protected class is irrelevant, so long as he lost out **because** of his age. The court also relied upon prior decisions in which it had held that as little as a three (3) year difference in age was sufficient to satisfy the "substantially younger" requirement for purposes of establishing a prima facie case of age discrimination.

Employers should be aware therefore that they cannot insulate themselves from ADEA liability simply by hiring a replacement or candidate who is also in the protected class. An employee's age should never be a determinative factor utilized in an employment decision.

By: Michael J. Roper, Esquire

DISCOVERING BIAS OF THE "TREATING PHYSICIAN"

In the matter of *Worley v. Central Florida YMCA, Inc.*, the Fifth District Court of Appeal quashed Heather Worley's (plaintiff in the underlying action) petition for writ of certiorari, and upheld the trial court's order requiring her to produce billing agreements between her law firm and her treating physicians, and information from cases in which her firm referred other clients to the physicians. In doing so, the Fifth DCA has confirmed an important aspect of discovery for defendants… the bias of the "treating physician."

The underlying claim arose from an alleged trip and fall Worley sustained on the Central Florida YMCA's ("YMCA") premises. After Worley fell, she sought treatment in the emergency room and was advised to see a specialist for pain in her right knee. Worley claimed she could not afford treatment, and instead retained counsel, Morgan & Morgan, P.A. Thereafter, Worley treated with various doctors, and Morgan & Morgan filed a negligence claim on her behalf, seeking, of course, damages including the treatment she received after retaining counsel.

During her first deposition, YMCA asked Worley generally how she came to see the specialists who treated her, and whether she was referred by a physician or attorney. Worley's attorney objected to both questions based on attorney-client privilege. Thereafter, YMCA served Worley three sets of *Boecher* interrogatories and a supplemental request for production, designed to determine the extent of the relationship between Morgan & Morgan and Worley's treating physicians. YMCA had reason to believe a "cozy agreement" existed due to the high cost of Worley's medical bills.

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YMCA's Boecher interrogatories sought: (1) the names of all cases for the last three years in which the doctor or another doctor within the same affiliation treated a Morgan & Morgan client; (2) the total medical bills charged; (3) the amount paid to any third-party company that purchased the client accounts; and (4) the names of all cases in which the doctor or another doctor within the same affiliation testified at trial or in a deposition on behalf of a Morgan & Morgan client and the expert fee paid in those cases. YMCA's request to produce sought any and all agreements between Morgan & Morgan and Worley's treating physicians pertaining to the referral of and billing for patients, and all documents reflecting the amounts collected, compromised, or adjusted for any bills rendered for medical evaluations and treatment by these treating physicians for Morgan & Morgan clients. Not surprisingly, Worley objected to these discovery requests.

At a hearing on solely the deposition objections, the trial court sustained plaintiff's objection only as to YMCA's question of whether she was referred by her attorneys. The trial court overruled all other objections, and it did not address the objections to the YMCA's other discovery. As a result of the court's ruling, YMCA deposed plaintiff a second time, and during that deposition, Worley confirmed she was not referred to her treating physicians either by another doctor, or a friend or relative. Consequently, YMCA filed a motion to compel as it related to its *Boecher* discovery and supplemental request for production. The court ruled, for a time period between three years prior to and six months after Worley's first deposition, she was to produce all documents reflecting agreements regarding billing for patients or any referral of a client by any Morgan & Morgan attorney to Worley's treating physicians; and names of any and all cases where a client was referred by any Morgan & Morgan attorney to Worley's treating physicians. The court sustained without prejudice Worley's objection as to producing financial discovery, to be reconsidered later depending on the results of the other discovery.

The court summarily denied Worley's motion for reconsideration, which prompted her to file a petition for writ of certiorari, arguing the court's order was improper because: (1) it required production of information protected by attorney-client privilege; (2) it required Worley to produce documents that did not exist; (3) it required Morgan & Morgan, a non-party, to produce the information; (4) it required Worley or Morgan & Morgan to engage in unduly and financially burdensome production; (5) it required Morgan & Morgan to incur costs associated with the production of the ordered discovery; and (6) it expands the scope of bias-related discovery that is otherwise permitted. The Fifth DCA quashed Worley's petition, finding the trial court's order at issue essentially requires Worley to produce information regarding the referral relationship between her attorneys and her treating physicians, which is directly relevant to the potential bias of the physicians. It did not require production of any records regarding money exchanged between Morgan & Morgan and the physicians.

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As the Fifth DCA explained, in general, defense attorneys are entitled to seek discovery concerning the existence of a referral relationship between opposing counsel and the plaintiff's treating physician (s), especially when there is some indication the fees charged by the physician are inflated. Moreover, YMCA was entitled to ask Worley whether her attorney referred her to her treating physicians after exhausting all other means to get that information (e.g., deposing her treating physicians and ruling out referrals from other sources). It is on this last point the Fifth DCA certified conflict with a Second DCA opinion, *Burt v. GEICO*, 603 So.2d 125 (Fla. 2d DCA 1992), which is pending.

The take away: the Fifth DCA's decision bolsters a defendant's ability to discover bias information between a law firm and a plaintiff's treating physician, especially where it is suspected there is a particular arrangement between the two. It appears best to follow YMCA's lead in this respect, by first ruling out other referral sources through plaintiff, then serving written discovery only pertaining to any referral agreements between the firm and physician only, before delving into more intrusive financial bias.

By: Anna E. Engelman, Esquire

FIRM NEWS

Michael J. Roper has recently been appointed as a member of the American Board of Trial Advocates (ABOTA), by the National Board of that association. ABOTA is a premier national organization made up equally of plaintiffs and defense attorneys who have demonstrated outstanding skills in the trial of jury cases, and have exhibited professionalism and civility in the practice of law.

CONGRATULATIONS

We would like to congratulate Anna E. Engelman on being appointed as a Partner to the Firm

If you are interested in being added to our newsletter e-mail list, or if you wish to be taken off of this list, please contact Krysta Reed at kreed@bellroperlaw.com.

Questions, comments or suggestions regarding our newsletter, please let us know your thoughts by contacting Cindy Townsend at ctownsend@bellroperlaw.com

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