Legal Update

BELL & ROPER, P.A.

July/August 2016

ATTORNEY'S FEES/MULTIPLIER/INSUFFICIENT EVIDENCE

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In *Florida Peninsular Ins. Co. v. Wagner*, 41 FLW D1279 (2d DCA, June 1, 2016), the Second DCA reversed the Trial Court's Order granting an attorney fee multiplier of 2.0.

Florida Peninsular insured the *Wagners* whose home sustained damage due to a refrigerator water line leak. Unable to agree on the cost of repairs, the *Wagners* retained counsel and filed suit. Following a non-jury trial, the Trial Court awarded the *Wagners* $71,123.79.

Thereafter, the parties agreed to a lodestar amount for attorney's fees of $243,755.00. The only issue to be determined at the hearing on the

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PROPOSALS FOR SETTLEMENT

In *Nunez v. Allen*, 2016 Fla. App. LEXIS 9670 (Fla. 5th DCA 2016), Appellants appealed a final judgment awarding Appellee attorney's fees pursuant to Section 768.79, Florida Statues, and Florida Rule of Civil Procedure 1.442. Appellants argued that the Appellee's proposals for settlement were ambiguous and therefore invalid.

The underlying case resulted from a motor vehicle accident in which Appellant Gabriel Nunez, operating a vehicle owned by his father, Co-Appellant Jairo Nunez, struck a truck owned by Appellee. Appellee filed suit alleging negligence. Subsequently Appellee served a proposal for

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plaintiff's motion for attorney's fees was whether a multiplier was appropriate. No evidence was provided indicating the Wagner's would have had difficulty obtaining counsel without the prospect of a multiplier. The trial court awarded a multiplier of 2.0 based on the efforts of the Wagners' counsel, and the fact that counsel prosecuted this matter through trial.

On appeal, the Second District Court of Appeal reversed the trial court's order and determined that there was insufficient evidence to support the award of a contingent fee multiplier. The court cited *Standard Guaranty Ins. Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990), for the proposition that the award of a contingent fee multiplier requires a finding that without the prospect of a multiplier, the Wagners would have faced difficulty obtaining competent counsel.

In cases involving a significant attorney fee award, we typically suggest that the claimant's deposition be obtained to ascertain the claimant's efforts in securing counsel. Typically, the claimant will testify that he only "shopped" the case to his present counsel, which, in our view, supports the argument that the application of a multiplier is appropriate.

By: Michael M. Bell, Esquire

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settlement on Appellants, separately, in the sum of $20,000.00. Each proposal had identical language, including a clause providing: "5. This Proposal for Settlement is inclusive of all damages claimed by Plaintiff, W. RILEY ALLEN, including all claims for interest, costs, and expenses and any claims for attorney's fees." Appellants rejected their proposals.

Following a bench trial, the trial court rendered a judgment in favor of Appellee against both Appellants in a sum exceeding the proposal for settlement by more than twenty-five percent. Thus, Appellee moved to enforce his proposals for settlement and for a determination that he was entitled to attorney's fees under Section 768.79, Florida Statutes, and Florida Rule of Civil Procedure 1.442. Appellants move to strike, arguing that paragraph five of the proposal for settlement was ambiguous as to whether acceptance and payment of one of the $20,000.00 proposals would have resolved the case against both Appellants or only against the one individual appellant accepting that particular proposal. The trial court denied Appellant's motion to strike and Appellants appealed.

The Fifth District Court of Appeal found that the language in the proposal was ambiguous, particularly as to paragraph five. Specifically, the language stating that the proposal was inclusive of "all damages" could arguably have included all damages imposed on both Appellants and paragraph five could have been reasonably interpreted to mean that the acceptance of the proposal for settlement by only one of the Appellants resolved Appellee's entire claim against both Appellants.

Accordingly, since the proposals for settlement were ambiguous, they were invalid. Proposals for settlement must, at a minimum, meet all of the technical requirements of both Section 768.79, Florida Statutes, and Florida Rule of Civil Procedure 1.442 in order to be valid, and proposals will be strictly scrutinized for compliance.

By: Mai M. Le, Esquire

HARRIS ACT SETTLEMENTS; LIMITED EXCEPTION TO "CONTRACT ZONING" PROHIBITION

Consider the following scenario: A city amends its comprehensive plan, thereby restricting the uses permitted on a certain landowner's property (once a comp plan has been adopted or amended, all subsequent development must be consistent with the plan, *see* § 163.3194, *Fla. Stat.*). The landowner, believing the change has diminished the value of his property, files an inverse condemnation or Bert J. Harris, Jr., Private Property Rights Protection Act (Harris Act) lawsuit. At mediation, the landowner reveals his plan for the property, perhaps a small business enterprise which is prohibited by the amended comp plan, but would have been allowed under the old comp plan. The city, upon further consideration, is supportive of the proposal and wishes to permit its development, and the landowner agrees if it is allowed, he will drop his potentially-costly lawsuit. So, may the city brush aside the comp plan amendment to allow the development and avoid the lawsuit? Is this a permitted form of "contract zoning"? It appears the general answer is yes—in Harris Act cases.

The Fifth District Court of Appeal recently addressed this general scenario in *Rainbow River Conservation, Inc. v. Rainbow River Ranch, LLC*, 189 So.2d 312 (Fla. 5th DCA, April 15, 2016). In *Rainbow River*, property owners initiated a Harris Act lawsuit against the City of Dunnellon and the State of Florida, related to a comp plan amendment. During the litigation, the property owners and Dunnellon reached a settlement agreement which would allow development *inconsistent* with the amended comp plan. A conservation organization and private citizens intervened and demanded compliance with the amended comp plan, and objected to the circuit court's order approving the settlement.

In considering the legality of the settlement agreement and the circuit court order, the Fifth District Court of Appeal appears, first, to have implicitly confirmed that a city or county must indeed require compliance with its comp plan. But, the Court of Appeal agreed the Harris Act provides a limited exception from the comp plan requirements found in Chapter 163, *Fla. Stat.*, citing to portions of the Harris Act which authorize parties to settle by agreeing to an "adjustment of land development or permit standards," if the "relief granted" protects the "public interest." *See* § 70.001(4)(c). However, the Harris Act requires circuit court approval for such an agreement, and the judge is tasked with "ensuring that the relief granted protects the public interest served by the statute at issue and is the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the [plaintiff's] real property." *See* § 70.001(4)(d). The Court of Appeal reversed the circuit court's order approving settlement, as the judge failed to make sufficient findings in this respect, and did not hear directly from the intervenors and consider any evidence they may have presented. Therefore, the Court of Appeal remanded the case for further proceedings.

Rainbow River confirms that the Harris Act provides a limited exception to the general requirement that all development in a jurisdiction must comply with the applicable comp plan. But, *Rainbow River* relates only to Harris Act claims. The question of whether a governmental entity might disregard its zoning and comp plan requirements to reach a settlement in a non-Harris Act case remains unanswered. *Rainbow River* indicates the answer may be no. That said, key to the Court of Appeal's consideration was the degree to which public input was considered in the settlement process. Indeed, the comp plan amendment provisions in Chapter 163 are replete with references to public notice and input. Thus, any governmental entity considering a settlement in a non-Harris Act case, which involves a contractual relaxation of zoning and comp plan requirements, would be well advised to receive and fully consider public input before consummating the settlement.

By: Dale A. Scott, Esquire

UM BENEFITS/SUBROGATION

In *Kotlyar v. Metropolitan*, 41 F.L.W. D1182, the Fourth District Court of Appeal determined that uninsured motorist benefits paid by *Metropolitan* to its insured were "unliquidated damages," the determination of which required the presentation and evaluation of evidence. *Metropolitan* paid its insured, Cheryl Dambrosio, uninsured motorist benefits in the amount of $50,000.00. *Metropolitan* subsequently filed a subrogation lawsuit against the tortfeasor, *Kotlyar* to recover the money paid to its insured.

Kotlyar failed to answer the complaint and a default was entered. *Metropolitan* filed a motion for entry of final default judgment asserting its damages, i.e. UM benefits paid to its insured were "liquidated." The trial court entered final summary judgment against *Kotlyar*.

Kotlyar filed a motion to vacate the default arguing that *Metropolitan's* complaint sought unliquidated damages. The trial court denied *Kotlyar's* motion and *Kotlyar* filed an appeal with the Fourth District Court of Appeal.

The Fourth District Court of Appeal reversed the final default judgment. The Court determined that the uninsured motorist benefits paid were "unliquidated" as the claim was comprised of many components, including:

> "personal injury, disability, discomfort, pain and suffering, mental anguish, loss of capacity for the enjoyment of life, loss of wages and loss of wage earning capacity, and aggravation of pre-existing conditions, all of which conditions are continuing or are permanent in nature; and further, for the care and treatment of these injuries."

Metropolitan argued that the trial court's final default judgment should be affirmed, based on a similar case in which the Fifth District Court of Appeal determined that damages paid by an insurer to its insured for a personal injury claim were liquidated damages. *Dunkley Stucco, Inc. v. Progressive American Ins. Co.*, 751 So. 2d 723 (5th DCA 2000). The Fourth District Court of Appeal's Opinion cites authorities that favor its position, which are contrary to the Fifth District Court of Appeal's decision in *Dunkley*.

The *Kotlyar* case illustrates the difficulty facing insurers in prosecuting subrogation actions. In cases such as *Kotlyar*, it will be necessary for insurers to prove the value of injury claim paid. Likely, proof will require the testimony of the plaintiff, medical records, lost wage supports, and perhaps, medical testimony.

By: Michael M. Bell, Esquire

IMPROPER TO GRANT A DIRECTED VERDICT ON THE ISSUE OF PERMANENCY

In *James v. City of Tampa*, 2016 WL 3201221 (Fla. 2d DCA June 10, 2016), the plaintiff suffered injuries when a sanitation truck owned and operated by the City of Tampa backed up and collided with the vehicle in which he was a passenger.

Four months *prior* to the accident with the City sanitation truck, the plaintiff was a passenger in a truck that was "t-boned" by another vehicle. He sought medical treatment for the injuries he sustained in that accident roughly one month before the crash involving the sanitation truck.

During the trial against the City, in which the plaintiff sought damages for the injuries he sustained in the sanitation truck collision, the City admitted its driver was negligent. The City, however, denied the plaintiff suffered any permanent injuries stemming from the crash and that he had sustained, at most, a minor aggravation of his existing injuries.

At the conclusion of the presentation of evidence, the trial court granted a directed verdict in favor of the City on the issue of permanency. Thus, the jury was not permitted to consider whether the plaintiff had sustained a permanent injury resulting from the sanitation truck collision. Instead, the jury was only allowed to consider the amount of the plaintiff's lost wages and past and future medical expenses resulting from the sanitation truck collision.

The Second District Court of Appeals found the lower court committed a reversible error when it instructed the jury not to consider permanency. The plaintiff put on expert testimony regarding the issue of permanent damages and the defendant cross-examined the plaintiff and presented its own rebutting expert. Thus, the issue of permanency was really a question for the jury. A directed verdict would only be appropriate where the evidence of injury and causation is such that no reasonable inference could support a jury verdict for the plaintiff on the permanency issue. Only if the plaintiff fails to present evidence of permanency may a directed verdict on that issue in favor of the defendant properly be entered.

By: Dani S. Theobald, Esquire

FIRM SUCCESS!

Attorneys Michael J. Roper and Joseph D. Tessitore recently obtained a defense verdict in a trucking accident case in Jacksonville, Florida. Plaintiff was allegedly asleep in the sleeper compartment of his truck when the defendant's driver backed his trailer into the plaintiff's vehicle. Plaintiff claimed the force of the impact knocked him out of the bed of his sleeper cab causing him to land on his shoulder and suffer injury. Plaintiff never returned to work post-incident and incurred in excess of $32,000.00 in medical bills. Photographs of the vehicles showed no damage to the defendant's trailer and minimal damage to the plaintiff's sleeper cab. Plaintiff originally brought suit against the defendant driver and his employer. On the eve of trial the plaintiff dropped the defendant driver from the suit and proceeded against the trucking company only. After a 3 day trial the jury returned a complete verdict on behalf of the defendant trucking company.

ELEVENTH CIRCUIT AFFIRMS SUMMARY JUDGMENT

In *Boynton v. City of Tallahassee, et al.* (N.D. Fla. 4:14-cv-292-MW-CAS; 11th Cir.15-14343-E), attorneys Joseph D. Tessitore and Frank M. Mari obtained summary judgment in favor of the firm's clients and successfully defended the judgment on appeal. The firm represented two employees of Leon County Emergency Medical Services, a paramedic and an EMT, who responded to a call of an individual, the plaintiff, passing out in a grocery store. Our clients found the plaintiff initially unresponsive and sometimes responding with slurred, nonsensical speech. However, the plaintiff became physically combative with EMS upon being moved to an ambulance for evaluation and treatment. EMS contacted law enforcement for assistance. The plaintiff continued to struggle against the first responding law enforcement officer, who was eventually able to bring the plaintiff under control for evaluation and treatment after using his TASER upon the plaintiff multiple times. Once the plaintiff was under control, the paramedic determined that the plaintiff's blood sugar level was dangerously low and administered a glucose solution through an IV. The plaintiff then became alert, oriented, and was able to speak to the paramedic.

The plaintiff sued the EMS personnel, the first responding law enforcement officer, and the City of Tallahassee. The plaintiff claimed that EMS personnel failed to treat him, thereby depriving him of his rights guaranteed under the Fourteenth Amendment to the United States Constitution. The district court granted our motion for summary judgment in favor of the EMS personnel, agreeing that EMS personnel were not deliberately indifferent to the plaintiff's serious medical need. The plaintiff appealed to the United States Court of Appeals for the Eleventh Circuit, which affirmed the district court's decision in favor of our clients.

FIRM SUCCESS!

CIVIL RIGHTS-FIRST AMENDMENT - DISMISSAL

In *Rogers v. City of Winter Park* (M.D. Fla. 6:15-cv-958-Orl-41GJK), firm members Michael J. Roper and Frank M. Mari secured, for the City of Winter Park, the dismissal with prejudice of a federal civil rights lawsuit that challenged the application and constitutionality of the City's residential picketing ordinance. The plaintiffs were pro-life activists who repeatedly protested outside of the residence of a Planned Parenthood official, in a manner that expressed criticism of the resident and was harassing and intrusive to the resident, in violation of the City's ordinance. Despite prior warning of their unlawful conduct by the City's police department, the plaintiffs persisted in their picketing activity and were ultimately arrested for that infraction. The plaintiffs sued the City and the arresting officer, claiming that the arrests violated their First Amendment rights to free speech and free exercise of religion. The suit also included claims that the defendants violated the plaintiffs' rights protected by Florida's Religious Freedom Restoration Act and their First Amendment right to freedom of the press. The defendants denied all liability for the claims asserted and mounted a vigorous defense to the suit. Ultimately, by virtue of that evidence which was generated during the discovery process, defense counsel were able to confront the plaintiffs, and their attorney, with overwhelming proof that the claims asserted were wholly without merit. Faced with the prospect of sanctions, the plaintiffs authorized their attorney to voluntarily dismiss the entire suit with prejudice. No consideration was paid in order to secure the complete vindication of the City and its police officers for the claims asserted in this litigation.

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