Legal Update

BELL & ROPER, P.A.

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RECENT DECISIONS REGARDING ATTORNEY FEE ISSUES

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In *Estilien v. Dyda*, 37 FLW D1875 (4th DCA August 8, 2012), the 4th District granted a Petition for Certiorari filed by Defense Counsel in an attempt to avoid production of Defense Counsel's time records.

Plaintiff's Counsel, the prevailing party pursuant to a Proposal for Settlement sought production of "any and all billing records" of Defense Counsel. Plaintiff's Counsel argued that he needed the information to reconstruct how much time he spent on the case <u>because he worked on a contingent fee basis and did not keep time records</u>!

In its decision, the 4th District Court of Appeal noted that the 1st and 5th District Courts of Appeal have determined that the Trial Court has discretion

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EMPLOYEE WELLNESS PROGRAMS AND ADA DISABILITY INQUIRIES

Bradley Seff v. Broward County, Florida, 23 Fla. L. Weekly Fed. C1432 (11th Cir. August 20, 2012)

Broward County imposed a charge of $20.00 bi-weekly for employees within their group health plan who refused to participate in the employee wellness program. The wellness program consisted of a glucose and cholesterol check and the completion of an online health risk assessment questionnaire. The County sought to screen its employees to determine whether they suffered from five particular disease states: asthma, hypertension, diabetes, congestive heart failure, or kidney disease. If employees were discovered to be suffering from any of these conditions they would receive the opportunity to participate in a disease management

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to permit discovery of billing records. *Anderson Columbia v. Brown*, 902 So. 2nd 838, 840 (1st DCA 2005); *Mangel v. Bob Dance Dodge, Inc.,* 739 So. 2nd 720, 724 (5th DCA, 1999).

The 4th District indicated that the discretion of the Trial Court should not be unfettered the parties need for information and the relevancy of the information must be balanced against the privacy rights of the attorney and client. The 4th District also quoted heavily from a 2nd District case, *HCA v. Hillman*, 870 So. 2nd 104 (2nd DCA, 2003) where the 2nd District Court of Appeal determined that billing records of counsel should generally be protected as work product.

In deciding to grant the Petition of Certiorari, the 4th District indicated that Plaintiff's Counsel's failure to keep billing records was an insufficient basis for ordering the production of Defense's Counsel's time records.

In our view, the Court may have ordered production of Defense Counsel's time slips if Plaintiff's Counsel argued that a comparison was necessary as Defense Counsel was contesting the amount of time claimed by Plaintiff's Counsel, rather than relying on Cousel's failure to keep records.

In *RTG Furniture Corp v. Coates*, 37 FLW D1836 4th DCA (August 1, 2012), the 4th District clarified the timeliness of a Proposal for Settlement.

The Trial Court denied the Defendant's entitlement to attorney's fees pursuant to a Proposal for Settlement filed at the last minute. The Trial Court determined that the first day of trial and the date of the service of the Proposal were both outside the forty-five day requirement for the filing of a Proposal for Settlement pursuant to Rule 1.442. On appeal, the 4th District Court of Appeal reversed, indicating that in order to determine whether the filing of a Proposal for Settlement is timely, the forty-five day requirement of the rule includes the date of service, but not the first day of trial.

By: Michael M. Bell

coaching program, after which they would be eligible to receive co-pay waivers for certain medications.

Seff refused to participate in the wellness program and brought suit asserting that the County's testing, questioning, and screening violated the ADA's prohibition on non-voluntary medical examinations and disability related inquiries due to his having to pay $20.00 bi-weekly non-participation.

Broward County sought, and obtained, summary judgment on the basis that though the ADA prohibits requiring medical examinations or making medical inquiries of employees, which are not shown to be job related, the ADA contains a safe harbor provision. This safe harbor provision provides that the ADA shall not be construed as prohibiting an entity "from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, clarifying risks, or administering such risks that are based on or not inconsistent with state law." The District Court found that the County's employee wellness program was a bona fide term of its group health plan. The Eleventh Circuit affirmed the District Court's summary judgment order, agreeing that the wellness program was a term of Broward County's group health insurance plan and fell within the ADA's safe harbor provision.

Interestingly, Broward County, which began imposing its $20.00 bi-weekly charges in June of 2010, suspended the charges effective January 1, 2011.

By: Michael H. Bowling

PAYMENT OF TOLL ON FLORIDA'S TURNPIKE WITH LARGE DENOMINATION BILL CAN LEAD TO TEMPORARY DETENTION

In the case of *Chandler v Florida Department of Transportation*, 2012 WL 4094518 (C.A. 11 Fla.) the plaintiffs brought a Section 1983 action for violation of their 4th and 14th Amendment rights under the US Constitution, claiming they had been illegally detained and seized by FDOT. The plaintiffs were traveling on the Florida Turnpike and used a large denomination bill to pay the toll. FDOT had in place a policy that required the toll collector to obtain certain information from a driver who pays a toll with a large bill ($50 or $100). If a driver pays with a large bill the toll collector was to detain the motorist for a reasonable amount of time to document the vehicle make, model, color, tag number, and state of issuance. The purpose of the policy was to detect and guard against the payment of tolls with counterfeit bills.

The plaintiffs alleged that in addition to this information, the toll collector also documented the driver's race, gender, and age. Furthermore, they alleged the driver was required to provide their drivers license information before being released by the toll operator. The defendant moved to dismiss the case for failing to plead a violation of the US Constitution. The trial court denied the motion to dismiss. On appeal the 11th Circuit Court of Appeals disagreed and directed that the case be dismissed.

The 11Th Circuit found the plaintiffs' factual assertions were insufficient to allege a violation of a constitutional right. The court stated that the operator of a toll road has a right to set reasonable terms and conditions for use of the road. The court reasoned that the plaintiffs freely chose to use the toll road. They consented to pay the toll, and had no legal right to pay the toll however they pleased and use the roadway. They chose to pay the toll by tendering a large denomination bill. They were free to use a smaller bill and avoid the detention. However, they implicitly consented to the delay by paying with a large bill. The court found they did not have an absolute right to proceed immediately through the toll booth and the detention to obtain the information was not unreasonable.

So when traveling the turnpike, if you are in a hurry you might want to use a small denomination bill to pay the toll, or invest in a Sun Pass.

By: Joseph D. Tessitore

FIRM WIN!

Michael J. Roper and Anna E. Engelman of Bell & Roper, P.A., Orlando, Florida, recently obtained a defense verdict in *Richard Davis v. Clay County Board of County Commissioners*, tried in Clay County, Senior Judge A.C. Soud presiding.

In this premises liability suit, plaintiff alleged that Clay County negligently maintained its stormwater drainage system adjacent to his residence. Specifically, plaintiff alleged that Clay County's failure to conduct routine maintenance caused the drainage grates to become clogged with vegetation and debris which prevented storm water from draining into the system. As a result, water backed up into the roadway, and flowed down his driveway, yard, and into his entire residence. He asserted in excess of $80,000 in real and personal property damage related to the flooding incident. Clay County's defense focused on lack of notice and its assertion that it properly maintained its system. In addition, Clay County asserted that the flooding occurred during an unusual rain event associated with Tropical Storm Fay.

During trial, plaintiff conceded that he could not establish when the condition initially occurred. Clay County's maintenance records were instrumental in assisting in its defense to show maintenance and lack of notice. It appears the jury accepted its defenses.

Your VOTE is your voice -
Speak out on November 6th

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Questions, comments or suggestions regarding our newsletter, please let us know your thoughts by contacting Sherry Hopkins at shopkins@bellroperlaw.com.