Legal Update

BELL & ROPER, P.A.

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# ALCOHOL VENDOR LIABILITY/RESPONSIBLE VENDOR ACT

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In *Okeechobee Aerie 4137, Fraternal Order of Eagles, Inc., et al. v. Wilde*, 41 FLW D1783, 4th Dist. August 3, 2016, the Fourth District reversed an 11 million dollar judgment in favor of the Plaintiffs below.

Rodney Wilde sustained significant personal injuries when his motorcycle was struck by a motor vehicle operated by Leroy Felt. At the time of the accident, Felt was leaving the premises of Okeechobee Aerie (4137) Fraternal Order of Eagles, Inc. (the "Eagles"). Felt was significantly inebriated (0.26 BAC).

Following the accident, Rodney Wilde and his wife, Charlotte, sued the Eagles for damages alleging that the Eagles, in violation of Fla. Stat. § 768.125, served alcohol to "a person habitually addicted to the use of any or

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# FLORIDA SUPREME COURT PERMITS CLAIMS FOR NEGLIGENT REPORTING TO LAW ENFORCEMENT

The Florida Supreme Court has confirmed that a cause of action exists for negligently reporting possible criminal conduct to law enforcement. *Valladares v. Bank of America Corp*., 2016 WL 3090385 (Fla. June 2, 2016). In Valladares, an email was circulated within a Bank of America branch about a possible bank robber. The email included a limited physical description of the robber along with several photographs of the robber. Later that afternoon, Valladares entered the branch wearing similar attire as the alleged robber. He approached a teller and provided his driver's

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all alcoholic beverages." After a lengthy trial, the jury awarded the Wildes $11 million in damages.

On appeal, the Eagles challenged evidentiary rulings and the Trial Court's jury instructions concerning the Responsible Vendor Act, Fla Stat. § 561.701-706 (the "RVA"). Essentially, the Trial Court allowed Plaintiff's counsel to argue, and instructed the jury, that a violation of the RVA was evidence of negligence the jury could consider in determining negligence.

The RVA was initially enacted by the Florida Legislature in 1989. Its purpose was to reduce intoxication-related accidents and eliminate the sale and consumption of alcoholic beverages by minors. A vendor could qualify as a "responsible vendor" by providing instruction to employees, developing operating procedures, and maintaining certain records. If a vendor was found to be in compliance with the RVA, said status could mitigate certain beverage law violations.

The Fourth District Court of Appeal determined that the Eagles were not required to comply with the RVA, and that the RVA was not a "law" that could be violated. As a result, the Court determined that the Eagles failure to obtain "responsible vendor" status was not a breach of a standard of care, or evidence of negligence. The Court found that evidence relating to the RVA had minimal probative value which was outweighed by the potential for confusion and unfair prejudice.

The Eagles also argued that the Trial Court abused its discretion in failing to rein in Plaintiff's counsel's comments during closing statements. These comments included "the man the Eagles killed" (referring to a prior lawsuit), and Plaintiff's counsel's call to "hit them where it hurts."

The author was retained by the Eagles to serve as its attorney fee expert, as the Plaintiffs filed a proposal for settlement which was greatly exceeded by the verdict. Given the decision of the Fourth District Court of Appeal, the Wildes are not entitled to an award of attorney fees based on the proposal for settlement, unless the Supreme Court views the issues raised in this Appeal otherwise.

*By: Michael M. Bell, Esquire*

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license and a $100 check he sought to cash. Neither the license nor the check were suspicious, and Valladares made no attempt to rob the bank. A teller believed that Valladares was the bank robber, although she did not compare Valladares to the photographs from the email. The teller immediately activated a silent alarm and failed to cancel it despite having a friendly, routine, and non-threatening interaction with Valladares. Bank employees failed to cancel the silent alarm even after the bank's corporate security called to verify activation of the silent alarm. Police officers swarmed the building and ordered all occupants to the floor. The teller purposely delayed Valladares' transaction and identified Valladares as the robber as police entered the building. After Valladares was handcuffed and lying on the ground, a police officer kicked him in the head, severely injuring Valladares.

Valladares sued Bank of America alleging that it was negligent in activating and failing to cancel the silent alarm when it knew or should have known that Valladares was not attempting to rob the bank. Following trial that resulted in a substantial verdict for Valladares, Bank of America moved for judgment notwithstanding the verdict. The motion was denied, and the bank initiated an appeal. As an issue of first impression, the Florida Supreme Court held that a cause of action for negligent reporting to law enforcement exists when there is incorrect reporting plus conduct on the part of the reporting party that rises

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to the level of punitive conduct. This standard demands gross and flagrant disregard, indifference, or recklessness with respect to the rights of the individual exposed to harm. A qualified privilege exists for negligently inaccurate reports that result from innocent mistakes. Finally, while a cause of action for negligent reporting requires punitive conduct, a plaintiff need not make a corresponding demand for punitive damages and can therefore bring such a claim in his or her initial complaint and maintain compliance with section 768.72, Florida Statutes.

*By: Frank M. Mari, Esquire*

## *REBUTTING NEGLIGENCE PRESUMPTION IN REAR-END COLLISIONS*

In the recent case of *Padilla v. Schwartz*, 2016 WL 4680475 (Fla. 4th DCA September 7, 2016), the Fourth District Court of Appeal overturned a summary judgment entered in favor of the front driver in a read-end motor vehicle collision. This particular case was different from the rear-end collision case that we typically see. In this case, the plaintiff, Mr. Padilla, was the rear driver and he sued the front driver, Schwartz, claiming that Schwartz suddenly and unexpectedly changed lanes in front of him thereby causing the accident. At his deposition, the plaintiff testified that he was traveling down the turnpike and he did not see any cars nearby on the road immediately before the accident occurred. The plaintiff claimed the defendant appeared suddenly in front of him, without warning, and he could not avoid striking the defendant's car. He had no idea where the defendant came from.

Defendant Schwartz moved for summary judgment based on the rebuttable presumption under Florida law that negligence attaches to the rear driver in a rear-end motor vehicle collision. The trial court found that the plaintiff was solely negligent and granted the defendant summary judgment. The Fourth District Court of Appeal overturned the summary judgment, finding that the plaintiff rebutted the presumption that he was solely negligent for the accident, based on his deposition testimony that the defendant appeared in his lane of travel suddenly and without warning. Because of this testimony, there was a factual dispute at to who caused the accident and only a jury can determine whether or not the defendant was comparatively at fault for the accident.

Typically, we see in our cases the plaintiff moving for summary judgment against the defendant, using the presumption of negligence against the defendant when the defendant is the rear driver. In this case, the presumption was used to keep the defendant from obtaining a summary judgment. When defending rear-end collision cases, it is important to establish facts in the case record that the plaintiff performed some action or operated his/her vehicle in such a way that he/she could have contributed to or caused the accident. With such evidence, the presumption of negligence on the rear driver can be rebutted, precluding a summary judgment for the defendant on the issue of negligence.

*By: Joseph D. Tessitore, Esquire*

## *PUBLIC RECORDS - ATTORNEY'S FEES*

There are two new cases of note which address the propriety of an award of attorney's fees to a prevailing party, when said party has filed suit to enforce the provisions of Florida's Public Records Act ("Act").

In *Board of Trustees, Jacksonville Police & Fire Pension Fund v. Lee*, 189 So. 3d 120 (Fla. 2016) the Florida Supreme Court ("Court") held that the Act does not require a showing that the public agency acted "unreasonably" or "in bad faith" before attorney's fees can be awarded to a prevailing party. By way this decision, the Court resolved a conflict on this point which had previously existed amongst the separate district courts of appeal. The Court noted that the Act was intended to make public records openly accessible to the public and should be construed liberally in favor of disclosure of said public records. The Court concluded that the prevailing party is entitled to an award of statutory attorney's fees when the trial court finds that the public agency violated a provision of the Act by its unlawful refusal to permit a public record to be inspected or copied, regardless of whether the agency acted in good faith in denying access to the records. The Court also held that the public agency, in this case, had violated the Act because it had imposed certain conditions upon the requestor obtaining the records which were not provided for in the Act.

In *Citizens Awareness Foundation, Inc v. Wantman Group, Inc*., 195 So. 3d 396 (Fla. 4th DCA 2016) the court addressed the question of whether a delay in providing public records was so unjustifiable that it amounted to an unlawful refusal under the Act, so as to warrant an award of attorney's fees in favor of the requestor of the records. In this case, Wantman, a private entity, entered into a contract with a public agency and contractually agreed to allow public access to project documents, in accordance with the Act. Wantman received a very vague and suspicious email requesting certain records but, because they did not realize this was a legitimate public records request, as opposed to a spam or phishing email, no records were provided. Citizens Awareness then filed suit to compel production of the records under the Act. The court, relying in large part on a factually similar case, *Consumer Rights, LLC v. Union County*, 159 So. 3d 882 (Fla. 1st DCA 2015) held that Wantman's confusion and concerns about the validity of the email request were understandable and its failure to provide the records did not amount to an "unlawful refusal" to provide public records, so as to trigger an obligation to pay attorney's fees, under the Act. The court noted, "The public records law should not be applied in a way that encourages the manufacture of public records requests designed to obtain no response, for the purpose of generating attorney's fees." The Fourth District Court of Appeals specifically distinguished this situation from the precedent established in *Lee*, *supra*, by noting that its decision was based upon the fact that there had been no "unlawful refusal" to provide public records, not on whether the failure to provide was done in good faith. It remains to be seen whether the Florida Supreme Court will find that distinction to be valid.

*By: Michael J. Roper, Esquire*

## *UPDATE: PIP DEDUCTIBLE APPLICATION TO EMERGENCY SERVICE PROVIDER BILLLING*

The firm currently represents an insurer in personal injury protection (PIP) litigation involving the application of the policy's PIP deductible to the billing of an emergency services provider. The issues involve the interplay between sections 627.736(4)(c) and 627.739(2), Florida Statutes. Section 627.736(4)(c) generally provides that an insurance carrier, upon receiving notice of an accident that is potentially covered by personal injury protection benefits, must reserve $5,000 of PIP benefits for payment to physicians who provide emergency services and care or who provide hospital inpatient care, and that the reserve amount may be used only to pay such claims from those healthcare providers until 30 days after the insurer receives notice of the accident. Thereafter, reserve amounts for which where there was no proper notice given may be used to pay other claims. There is no mention of "deductible" in this statutory section. Thus, emergency services providers argued that the deductible did not apply to timely and properly submitted billing even though insurers are statutorily allowed to offer PIP deductibles in three specific amounts pursuant to section 627.739(2). This latter statutory section also provides that the chosen deductible amount "must be applied to 100 percent of the expenses and losses described in s. 627.736."

In *Mercury Insurance Company v. Emergency Physicians of Central Florida*, 182 So. 3d 661 (Fla. 5th DCA 2015), the court reasoned, under the facts of that case, that "reading the two statutory provisions together leads to the inescapable conclusion that the $500 deductible was correctly applied to [the plaintiff's] $191 bill. The plain language of the two sections is not in conflict and provides that, where an emergency service provider submits its claims within the 30–day reserve period provided in section 627.736(4)(c), those claims will be prioritized for payment; however, any such payment will be subject to any deductibles that exist in the insurance contract between the insured and the insurer. Under these circumstances, it was a departure from the essential requirements of the law for the circuit court to affirm the county court's order." This opinion in Mercury's favor was issued on October 16, 2015. The plaintiff thereafter sought review of the district court's opinion by the Florida Supreme Court. The Supreme Court declined to accept jurisdiction and denied the petition for review on September 29, 2016.

The plaintiff in the *Mercury* case is the same as the plaintiff in our case. In *Metropolitan Casualty Insurance Company v. Emergency Physicians of Central Florida*, 178 So. 3d 927 (Fla. 5th DCA 2015), the same district court relied upon *Mercury* and issued an opinion on November 6, 2015, in Metropolitan's favor, less than a month after it issued the *Mercury* opinion. The plaintiff thereafter sought review of the district court's opinion by the Florida Supreme Court. In light of its decision to decline jurisdiction in *Mercury*, the Supreme Court, also on September 29, 2016, ordered the plaintiff (the petitioner) to show cause why the Court should not decline to accept jurisdiction in our case. The time allowed to show cause is still running, but it appears at this time that the *Mercury* decision will be left standing.

*By: David B. Blessing, Esquire*

# *FOREIGN SERVICE OF PROCESS VIA U.S. MAIL AND FEDEX*

Image the following scenario: a plaintiff brings suit against a corporate defendant located outside of the United States and now seeks to serve process on that defendant. Federal Rules of Civil Procedure 4(f) and 4 (h)(2) govern service of process on foreign corporations. Rule 4(h)(2) provides the plaintiff with the authority to serve the defendant in any manner prescribed by Rule 4(f), except for personal delivery under Rule 4(f)(2)(C)(i). With that limitation in mind, Rule 4(f) provides three methods for service in a foreign country. As set forth in *Geopolymer Sinkhole Specialist, Inc. v. Uretek Worldwide Oy*, No. 8:15-cv-1690-T-36JSS, 2015 WL 4757937, at *1 (M.D. Fla. Aug. 12, 2015), these methods are as follows:

> The first method permits service "by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents." FED. R. CIV. P. 4(f)(1). The second method describes the types of permissible service "if there is no internationally agreed means, or if an international agreement allows but does not specify other means." FED. R. CIV. P. 4(f)(2). *This includes "using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt," unless this method of service is "prohibited by the foreign country's law."* FED. R. CIV. P. 4(f)(2)(C)(ii). The third method permits service "by other means not prohibited by international agreement, as the court orders." FED. R. CIV. P. 4(f)(3).

*Id.* (emphasis added).

Normally, to serve the foreign defendant corporation, the plaintiff would be able to simply follow the requirements of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Document. Generally, this requires that a judicial officer of the United States, such as the lawyer for the party seeking service, serve a request for service documents on the designated Central Authority of the subject foreign country, in conformity with the particular requirements of that foreign country.

However, where the foreign country at issue is not a party to either the Hague Convention or any other relevant international agreement on service of process, Rule 4(f)(2)(C)(ii) allows the plaintiff to use "any form of mail that the clerk addresses and sends to the [foreign defendant] and that requires a signed receipt," so long as such service method is not "prohibited by the foreign country's law."

Analyzing this provision, several federal district courts have found that Rule 4(f) may allow service of process through such means as United States postal service international express mail, or via a private courier service such as FedEx. For example, in *Geopolymer Sinkhole Specialist, Inc.*, 2015 WL 4757937, at *5, the Middle District of Florida explicitly found that in addition to service via U.S. postal service international mail, "service via FedEx, requiring a signed receipt, is permissible under Rule 4(f)(2)(C)(ii)." Likewise, in *TracFone Wireless, Inc. v. Bequator Corp., Ltd.*, 717 F. Supp. 2d 1307, 1310 (S.D. Fla. 2010), the Southern District of Florida found that foreign service via both international express mail and FedEx is permissible under Rule 4(f). Finally, in *IntelliGender, LLC v. Soriano*, No. 2:10-cv-125-JRG, 2012 WL 215066, at *2 (E.D. Tex. Jan. 24, 2012), the Eastern District of Texas rejected the proposition that Rule 4(f)(2)(C)(ii) permits service via United States mail *only*. The Court found that a plain reading of the Rule "permits service via *any form* of signed receipt mail, including Federal Express." *Id.*

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The major potential limitation on whether a party may use international mail and/or FedEx to effectuate foreign service under Rule 4(f) is whether such methods are "prohibited by the foreign country's law." *See* FED. R. CIV. P. 4(f)(2)(C). However, "'[t]he vast majority of cases to consider the issue have held that a method of service is not prohibited under Rule 4(f)(2)(C)(ii) unless it is *expressly prohibited* by a foreign country's laws.'" *SignalQuest, Inc. v. Tien-Ming Chou*, 284 F.R.D. 45, 48, 50 (D.N.H. 2012) (emphasis added) (adopting the majority view); *IntelliGender, LLC*, 2012 WL 215066, at *2 (adopting the majority view); *Trueposition, Inc. v. Sunon, Inc.*, No. 05-3023, 2006 WL 1686635, at *4 (E.D. Pa. June 14, 2006) (adopting this position and listing several district court cases that have construed Rule 4(f)(2)(C)(ii) in this manner). In other words, methods of service such as international mail or FedEx need not be expressly prescribed by foreign law to be permitted under Rule 4(f)(2)(C)(ii). "To conclude that any method of service not prescribed by a foreign country's law is prohibited under subsection (f)(2)(C) of Rule 4 would appear to render that provision superfluous." *SignalQuest, Inc.*, 284 F.R.D. at 49.

Accordingly, prior to attempting foreign service under Rule 4(f)(2)(C)(ii) via U.S. postal service international mail or FedEx, the plaintiff should determine whether the laws of the foreign country expressly prohibit such methods of service. If the foreign laws do not expressly prohibit such means, then service may be effectuated in such manners.

*By: John M. Janousek, Esquire*

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