Legal Update

BELL & ROPER, P.A.

March/April 2017

SENDING A CLAIM FILE? USE CAUTION

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A recent case points out the hazard of using a cloud based file transfer and storage system without appropriate training and safeguards. In *Harleysville Insurance Company v. Holding Funeral Home, Inc., et al.,* Case No. 1:15cv00057 (W.D. Va. Feb. 9, 2017) the court considered whether an insurance company's use of a non-password-protected link to send a claim file waived its attorney-client privilege and work product protections. Because the insurance company failed to secure its link by making it password protected, the court determined it waived those privileges. *Cont'd 3b*

PROPOSALS FOR SETTLEMENT: INVITING UNENFORCEABILITY OR A COSTLY APPEAL

The issue of whether to attach a general release to a proposal for settlement was once again recently brought to light in *Costco Wholesale Corporation v. Llanio-Gonzalez*, No. 4D15-4869, 2017 WL 1076927 (Fla. 4th DCA Mar. 22, 2017), a slip and fall case. This appeal, and its associated and likely not insignificant expenses, could have been avoided by merely requiring a dismissal with prejudice and not attaching general releases with very broad language to the proposals for settlement.

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Absent case-specific circumstances, which should be discussed with counsel, it is this writer's opinion that the general rule should be to not attach a general release (or any release), especially one with broad language, to a proposal for settlement. The condition of requiring a dismissal with prejudice should typically be sufficient. After all, Rule 1.442(c)(2)(B), Florida Rules of Civil Procedure, requires that a proposal for settlement state that it "resolves all damages that would otherwise be awarded in a final judgment in the action in which the proposal is served…."

In *Costco*, the defendant served proposals for settlement on the bodily injury plaintiff and the consortium plaintiff, both with attached general releases. These releases not only included a release of the defendant corporation, but also

> any and all related, associated or affiliated companies, any and all related, associated or affiliated parent companies, corporations, partnerships, sole proprietorships, business entities, representatives, successors, insurers, attorneys, third party administrators, privies and assigns, together with each of their respective past, present and future officers, directors, shareholders, servants, agents, employees, representatives, partners, trustees, attorneys, insurers, predecessors, successors, privies, assigns, parent corporations, subsidiaries and any and all other related, affiliated or associated persons, partnerships, corporations, firms, or business entities of any type.

This just begs the question of who exactly is being released along with this large corporate defendant, which may have a lot of corporate tentacles.

Further, the general releases in *Costco* released any and all causes of action from the beginning of time until the releases were executed; they were not just releases concerning the pending dispute.

Despite the broad language of the releases, and the fact that they were inconsistent with the language of the proposals for settlement themselves, the *Costco* appellate court found that the proposals for settlement with the general releases were not ambiguous and were, therefore, enforceable. It reversed and remanded the action to the trial court, which had sided with the plaintiffs.

The *Costco* opinion does not specifically discuss whether the plaintiffs asserted – and maybe they could not assert -- any argument as to whether any non-specific releasees could potentially have a claim brought against them, such as for insurance benefits. After all, the broad release language included "insurers" and "related, associated or affiliated companies." Perhaps, as the *Costco* court alludes to, if a plaintiff presents some evidence showing that the general release could arguably have adverse consequences that impede acceptance of the

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proposal for settlement for the stated amount, then the proposal for settlement would be considered ambiguous and unenforceable. This may be a low bar to enforcement. In light of this case law, a plaintiff may also request in writing from the defendant before expiration a list specifically identifying all of the releasees so that an informed decision can be made. If such a list is not provided, is not timely provided, or is inadequately provided, this may present an argument for unenforceability.

The take away should be that the attachment of a general release, even a simple release, is potentially fraught with problems and provides an argument for unenforceability and for appeal when the goal is to fully and finally resolve the pending action. Therefore, in most matters, a dismissal with prejudice should be sufficient. Of course, you should consult with counsel if a particular case necessitates a release. If a release is necessary, it should be drafted as narrowly and as simply as possible.

By: David B. Blessing, Esquire

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A cloud based file sharing and storage site was used to transfer the insurance company's claim file to its counsel. However, when supplying its attorney with the link to use for accessing the records, the insurance company failed to create or use a password to secure the file. Instead, all that was provided was the non-password-protected link.

During discovery, a record was produced which displayed the link. When the opposing attorney searched the link, he gained access to the entire claim file. Once the insurance company realized its records were in the hands of the opposition, it attempted to disqualify the opposing attorney to remove him from the case by claiming a breach of attorney-client privilege had occurred and he had improperly obtained work product documents. The court found there was no such breach because the insurance company had left its file unsecured or "open" on the internet. Its file was available for anyone to discovery, whether by means of the link or by other means. Without making the link password protected the insurance company effectively waived its attorney-client privilege and work product protections.

In this changing world of technology attention must be paid to the potential gaps created when innovative document sharing methods are adopted and implemented.

By: Christopher R. Fay, Esquire

ELEVENTH CIRCUIT DENIES QUALIFIED IMMUNITY TO SHERIFF'S DEPUTY IN FIRST AMENDMENT RETALIATION CASE

In *Bailey v. Wheeler*, 843 F.3d 473 (11th Cir. 2016), the United States Court of Appeals held that a sheriff's deputy was not entitled to qualified immunity on the plaintiff's First Amendment retaliation claim brought under 42 U.S.C. § 1983. The plaintiff was a police officer who filed a written complaint stating that officers in his police department and deputies of the sheriff in the same county were racially profiling minority citizens and committing other constitutional violations. The defendant sheriff's deputy allegedly retaliated by issuing a be-on-the-lookout advisory ("BOLO") stating that the plaintiff was a "loose cannon" and presented a "danger to any [law enforcement officer]" in the county. However, there was no indication in the record that the plaintiff suffered any adverse consequence by any other law enforcement officer as a direct result of the BOLO.

The defendant moved for summary judgment on the basis of qualified immunity; however, the Eleventh Circuit denied the defendant qualified immunity. The court held that the plaintiff satisfied the first prong of the qualified immunity analysis by showing that the defendant had retaliated against him in violation of the First Amendment. The court noted that issuance of a BOLO against an individual would "likely deter a person of ordinary firmness from the exercise of First Amendment rights." The court also held that the plaintiff carried his burden on the second prong of the qualified immunity analysis by showing that the law was clearly established that the defendant's conduct would amount to First Amendment retaliation. The court held that the defendant's issuance of the BOLO in retaliation for the plaintiff's report was "so egregious that [the defendant] did not need case law to know what he did was unlawful." As such, the Eleventh Circuit held that this case presented facts within the narrow "obvious clarity" exception to the requirement that a plaintiff show that the unlawfulness of the defendant's conduct was clearly established in the specific factual context of the case. That is, the plaintiff was not required to demonstrate that the law was clearly established by directing the court to case law binding upon the Eleventh Circuit and existing at the time the alleged wrongful act was committed that would put the defendant on fair and clear notice that his conduct would amount to a constitutional violation. The *Bailey* case is thus notable for the Eleventh Circuit's unusual willingness to utilize the "obvious clarity" exception to defeat qualified immunity in the law enforcement context.

By: Frank M. Mari, Esquire

TITLE VII AND SEXUAL ORIENTATION DISCRIMINATION

Evans v. Georgia Regional Hospital, 850 F.3d 1248 (11th Cir. 2017)

This case came before the 11th Circuit Court of Appeals on the appeal of the District Court's order dismissing, with prejudice, the complaint of Jameka Evans. The Plaintiff had asserted in her complaint that her employer, Georgia Regional Hospital, denied her equal pay and work, and subjected her to harassment because she failed to carry herself in a "traditional womanly manner," and because she is a gay woman. The 11th Circuit, in a two to one panel decision, reversed the order of dismissal of the District Court as it related to the Plaintiff's gender non-conformity claim, but affirmed the order dismissing her sexual orientation claim. The dissenting judge would have reversed the District Court's order in its entirety.

The 11th Circuit panel majority in this case wrote (correctly at the time), that every federal appellate court that had addressed the issue had held that Title VII did not provide employees with protection from discrimination based on the employees' sexual orientation. The 11th Circuit had not clearly addressed this subject prior to the instant case. The majority in this case concluded that dicta/alternative holdings from prior 11th Circuit decisions, the decisions of all other federal appellate courts, and the fact that Congress had repeatedly refused to amend Title VII to cover sexual orientation, required it to sustain the District Court's dismissal of Ms. Evans' sexual orientation claim. The majority recognized that the Supreme Court had issued decisions finding that Title VII prohibited same sex discrimination, and gender non-conformity discrimination. However, the panel majority wrote that neither decision squarely addressed sexual orientation.

Three weeks after the 11th Circuit panel issued its opinion in *Evans*, the 7th Circuit Court of Appeals, sitting en banc, in an eight to three decision, reversed a panel decision, and receded from its prior cases, which held that Title VII did not prohibit sexual orientation discrimination. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, No. 15-1720, 2017 WL 1230393 (7th Cir. Apr. 4, 2017). The 7th Circuit majority relied on the Supreme Court decisions prohibiting same sex and gender non-conformity discrimination, the EEOC's position that sexual orientation discrimination was a violation of Title VII, and the Supreme Court's due process/equal protection decisions permitting same sex marriage, as the basis for its decision.

The 7th Circuit's decision now creates a conflict between the United States Courts of Appeals and presents a basis for Supreme Court jurisdiction. This opinion also might impel the 11th Circuit to rehear the *Evans* case en banc. But as of today, in Florida, the law in the federal courts remains that Title VII does not prohibit discrimination against employees based on their sexual orientation.

By: Michael H. Bowling, Esquire

DISSOLUTION OR MODIFICATION OF A TEMPORARY INJUNCTION – RECENT FLORIDA CASE LAW

Recently, in *Planned Parenthood of Greater Orlando, Inc. v. MMB Props.*, No. SC15-1655, 2017 WL 709484 (Fla. Feb. 23, 2017), the Florida Supreme Court resolved a conflict among the Florida District Courts of Appeal as to whether a party moving to modify or dissolve a temporary injunction must establish "changed circumstances" when moving to dissolve or modify a temporary injunction. The facts showed that in 2013, the defendant, Planned Parenthood of Greater Orlando, Inc. ("Planned Parenthood"), purchased property located in a medical complex called Oak Commons. The developer of Oak Commons had executed a Declaration of Restrictions ("the Declaration"), which prohibited persons from using the property for certain activities, including various medical procedures. The plaintiff, MMB Properties, had operated a cardiology practice in Oak Commons since 1996. *Id.* at *1.

In June 2014, approximately one (1) month before Planned Parenthood opened its Health Center, MMB Properties filed a single-count complaint, alleging that Planned Parenthood's use of the property violated the Declaration. Soon after filing its complaint, MMB Properties moved to temporarily enjoin Planned Parenthood from "performing abortions, providing outpatient surgical services, or providing emergency medical services, including emergency contraception . . . , until [the] lawsuit [was] fully resolved on the merits." After a hearing, the trial court granted the motion and imposed a temporary injunction against Planned Parenthood. *Id.* at *2.

Five (5) days later, Planned Parenthood filed a motion to reconsider, dissolve, or modify the order granting the temporary injunction, arguing that the temporary injunction was based on an erroneous reading of the Declaration and included several additional errors of law and fact. The motion did not acknowledge any change in the underlying facts or law from when the temporary injunction was entered. In response, MMB Properties argued that the motion should be denied because Planned Parenthood failed to show a change in facts or circumstances. The trial court denied the motion without explanation and without holding a hearing. *Id.* at *3.

On appeal, the Fifth District Court of Appeal found that, with regard to Planned Parenthood's motion to modify or dissolve the temporary injunction, Planned Parenthood needed to establish changed circumstances, which it did not do. The Fifth District, however, acknowledged conflict with the Third and Fourth District Courts. Based on this conflict, Planned Parenthood obtained discretionary jurisdiction with the Florida Supreme Court. *Id.* at *4.

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The Florida Supreme Court acknowledged that the First, Second, Third, and Fifth District Courts of Appeal had each previously required that a party moving to modify or dissolve a temporary injunction must first make a threshold showing of "changed circumstances" or "changed conditions." *Id.* at *4. Only the Fourth District had rejected this rule, explaining in *Precision Tune Auto Care, Inc. v. Radcliff*, 731 So. 2d 744, 745 (Fla. 4th DCA 1999), that "a trial court's decision as to whether to reconsider, on a motion to dissolve, a temporary injunction entered after notice and a hearing, is discretionary."

The Florida Supreme Court agreed with the Fourth District, holding that "a trial court abuses its discretion in not modifying or dissolving a temporary injunction in such an instance, regardless of whether the movant shows changed circumstances." *MMB Props.*, 2017 WL 709484, at *1. The Court found that "requiring a threshold showing of changed circumstances when moving to modify or dissolve a temporary injunction is incompatible with equity principles when a party shows clear misapprehension of the facts or clear legal error on the part of the trial court in entering the temporary injunction." *Id.* at *5.

In short, the *MMB Properties* opinion stands for the proposition that a party will no longer need to show "changed circumstances" or "changed conditions" when moving to dissolve or modify a temporary injunction. Instead, the party need only show that the trial court's original order granting the temporary injunction was based on a clear misapprehension of the facts or clear legal error. This decision should prove helpful to defendants fighting a temporary injunction where the injunction was issued very early in a case, at which point the parties would have had little time to investigate the evidence and applicable case law and otherwise develop their arguments prior to the initial temporary injunction hearing.

By: John M. Janousek, Esquire

FIRM SUCCESS!

Summary Judgment Entered in Favor of Treasure Island

In Hamilton v. City of Treasure Island (Case No.: 14-003813 CI 11, Sixth Judicial Circuit of Pinellas County), Plaintiff sought a trial de novo pursuant to Florida Statutes, Section 163.3215, following the City's denial of a variance application.

Sherry Sutphen successfully argued that Plaintiff had not shown that the Development Order (variance denial) issued by the City did not materially alter the use or density or intensity of use on Hamilton's property in a manner inconsistent with the City's comprehensive plan. Mrs. Sutphen further argued that if Plaintiff was seeking to appeal the City's denial of the variance application, it must do so by Petition for Writ of Certiorari filed within 30 days of the date of rendition of the City's Development Order. The Court granted summary judgment in favor of the City.

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