Legal Update

BELL ROPER LAW

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DISCOVERING BIAS OF THE "TREATING PHYSICIAN" – *Update*

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Last year, we published an article in our Legal Update titled, "Discovering Bias of the 'Treating Physician,'" discussing the impact of *Worley v. Central Florida YMCA, Inc.*, 163 So. 3d 1240 (Fla. 5th DCA 2015). Therein, we explained the Fifth DCA's decision allowing for discovery of bias information between a law firm and the plaintiff's treating physician(s). The ruling also certified a conflict with the Second DCA on the issue of whether the attorney-client privilege protects the referral of a client by an attorney to a healthcare provider. In a 4-3 decision, the Florida Supreme Court quashed the Fifth DCA's decision, and held the attorney-client privilege precluded the discovery of such information. *See Worley v. Central Florida YMCA, Inc.*, No. SC15-1086, 2017 WL 1366126 (Fla. Apr. 13, 2017).

In *Worley*, the Plaintiff alleged she fell in YMCA's parking lot and sustained injuries. After initially treating at the ER, Worley was advised to see a specialist but could not afford treatment. Thereafter, Worley retained Morgan & Morgan, P.A. and treated with various doctors. Morgan & Morgan filed a negligence claim on her behalf for damages, including the cost of treatment received from healthcare providers. Due to the high amounts of Worley's

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COUNTIES LOSE LAYER OF "PROTECTION" IN TORT CLAIMS

HB 925, titled "Department of Financial Services", was signed into law by the Governor on June 26, 2017, carrying an effective date of July 1, 2017. The bill changed statutory language which required that a claimant send written notice of a claim or serve a summons on the Department of Financial Services ("DFS") before bringing an action against a county. Florida Statutes, Section 768.2(6)(a) now provides:

> (a) An action may not be instituted on a claim against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency, and also, except as to any claim against a municipality, **county**, or the Florida Space Authority, presents such claim in writing to the Department of Financial Services, within 3 years after such claim accrues and the Department of Financial Services or the appropriate agency denies the claim in writing; except that, if:
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> 1. Such claim is for contribution pursuant to s. 768.31, it must be so presented within 6 months after the judgment against the tortfeasor seeking contribution has become final by lapse of time for appeal or after appellate review or, if there is no such judgment, within 6 months after the tortfeasor seeking contribution has either discharged the common liability by payment or agreed, while the action is pending against her or him, to discharge the common liability; or
> 2. Such action is for wrongful death, the claimant must present the claim in writing to the Department of Financial Services within 2 years after the claim accrues.

This extra step enjoyed by Florida counties had not been shared by Florida municipalities for some time. Rationale for changing the rule stems from the DFS reporting that it received many unnecessary notices involving claims in which DFS Division of Risk Management is not actually involved. While there is truth to the DFS report, the requirement had provided an added layer of protection of sorts for Florida counties. If the procedure had not been properly followed, a county would essentially have additional time to evaluate a claim with the added benefit of having the actual pleading instead of just the notice of claim without specific allegations. As of July 1, 2017, this additional layer of procedure was lost as it pertains to counties.

The bill retained the requirement that, if a claim against a county is for contribution among tortfeasors, pursuant to section 768.31, the claim must be presented to DFS within six (6) months after the judgment against the tortfeasor seeking contribution becomes final, by lapse

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medical bills, YMCA suspected a "cozy agreement" between Morgan & Morgan and the physicians. YMCA attempted to discover the relationship between Morgan & Morgan and Worley's treating physicians. First, at Worley's deposition, counsel for YMCA asked if she was referred to her specialists by her attorneys, and Worley's attorney objected on the grounds of attorney-client privilege. Second, in an effort to establish the existence of a referral relationship between Worley's attorneys and her treating physicians, YMCA served *Boecher* interrogatories directed to the treating doctors*. Third, YMCA served a supplemental request for production directed to Morgan & Morgan, which Worley's attorneys objected to as unduly burdensome.

The Fifth DCA affirmed the trial court's order for Worley and her attorneys to produce the information. Under *Boecher*, it was appropriate for YMCA to ask Worley about whether she was referred to the treating physicians by her attorneys because the information was directly relevant to the potential bias of the physicians.

In order to address the issue actually certified for review, the Florida Supreme Court decided it must first determine whether a financial relationship between the plaintiff's law firm and treating physician(s) is relevant to show bias. The Court held *Boecher* was not applicable. *Boecher* discovery pertains to the relationship between a party and its retained expert, which the Court distinguished from the relationship of a law firm and a plaintiff's treating physician. Worley's attorneys were not a party to the case. Further, treating physicians testify about their own performance and acquire knowledge for the purpose of making a patient well, whereas experts opine about the performance of another physician and acquire their knowledge for litigation. Regardless, the Court explained that a treating physician's credibility is still subject to impeachment based on bias, established through evidence of letters of protection ("LOP"). An LOP "may demonstrate that the physician has an interest in the outcome of the litigation" and is admissible to show that the physician's practice is based entirely on treating patients under LOPs. This was the case in *Worley*. Likewise, medical bills may be used to dispute the physician's testimony regarding the necessity of treatment and the claimed amount of damages.

On the issue actually certified, the Court disagreed with the Fifth DCA's "attempt to circumvent the attorney-client privilege." A plaintiff's treatment by or referrals to a particular doctor are underlying facts subject to discovery. However, the lawyer's act of referring a client to a treating physician is a communication, the disclosure of which requires the plaintiff to disclose part of a communication held between the plaintiff and attorney. Thus, YMCA could not ask Worley whether her attorney referred her to a physician for treatment. In addition, the Court found the supplemental request to produce for documents evidencing a relationship between Morgan & Morgan and plaintiff's treating physicians to be unduly

**Boecher* held parties are entitled to discover a party's relationship with an expert retained for litigation and the financial relationship paid by the party to the expert over a period of time. *Allstate Ins. Co. v. Boecher*, 733 So. 2d 993 (Fla. 1999).

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THIRD DISTRICT COURT OF APPEAL CONFIRMS BROAD REACH OF THE CLAIMS FILE EXEMPTION FROM THE PUBLIC RECORD LAW

The Third District Court of Appeal recently confirmed the applicability of the claims file exemption under section 768.28(16)(b), Fla. Stat., to a pre-suit, public records request made by a claimant who has filed a notice of intent to sue a governmental entity. *See City of Homestead v. McDonough*, 2017 WL 4937816 (Fla. 2d DCA Nov. 1, 2017).

In 2012, an incident allegedly occurred between McDonough and a city police officer while the officer was off duty. McDonough filed a notice of intent to file a claim against the city, under section 768.28(6), Fla. Stat. While the notice was pending, he filed a court complaint against the officer individually for defamation, for actions allegedly taken by the officer while he was off duty and not acting in any official capacity. The city was not named in the court complaint against the officer. McDonough later submitted a public record request with the city seeking documents related to the city's decision to defend the officer in the defamation action, and to retain a law firm to defend the officer. The city responded to the request by asserting the requested documents were exempt from production, primarily under section 768.28(16)(b), as they contained the mental impressions of attorneys retained by the city related to the pending notice of intent, and as they concerned the same 2012 incident at issue in the case against the officer. Section 768.28(16)(b)provides:

> Claims files maintained by any risk management program administered by the state, its agencies, and its subdivisions are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution until termination of all litigation and settlement of all claims arising out of the same incident, although portions of the claims files may remain exempt, as otherwise provided by law.

At the hearing on McDonough's public records claim, the lower court reviewed the documents in camera, and found the notice of intent and the action against the officer were inextricably intertwined. The five emails in question were all contained in the city's risk management file. However, at the end of the proceeding, after finding two of the emails were exempt under section 768.28(16)(b), the lower court concluded two of the other emails in the claims file were not confidential and exempt, and ordered the city to produce them (McDonough conceded the last email was exempt).

On appeal, the Third District disagreed with the lower court's determination as to the two emails it ordered to be released. The Third District broadly found the emails "are contained in the City's risk management file and are, pursuant to the plain language of section 768.28(16)(b), exempt from disclosure *for that reason alone*." *Id*. at *2 (emphasis added). The Third District also rejected the lower court's position that because no prejudice would result from

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burdensome. Affidavits submitted by Morgan & Morgan stated compliance with producing the information required over 200 hours of attorney review at a cost of $94,010. Although the determination of unduly burdensome is measured on a case by case basis, $94,000 was unduly burdensome to discover the collateral issue of bias in a case where the damages sought was $66,000.

What do we take away from this ruling? *Worley* inserts new limitations on the ability of the defense to discover the relationship between a plaintiff's treating physician(s) and plaintiff's attorneys. Despite this, impeachment of a treating physician is still possible. LOPs are admissible to show the physician's vested interest in the outcome of the litigation, because payment to the physician depends on the plaintiff obtaining a favorable verdict. Additionally, the defense can dispute the reasonableness of medical bills and the necessity of treatment when the bills appear inflated. However, these avenues of discovery require additional time and expense. The decision to pursue discovery of these issues must be analyzed on a case by case basis in light of the injuries and damages claimed by the plaintiff.

By: Jennifer C. Barron

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of time for appeal, or after appellate review or, if there is no such judgement, within six (6) months after the tortfeasor seeking contribution has either discharged the common liability by payment or agreed, while the action is pending against her or him, to discharge the common liability. The bill also retained the requirement that, if a claim against a county is for wrongful death, the claimant must present the claim in writing to the DFS within two (2) years after the claim accrues.

Although this additional procedure is no longer required for making a claim against a county, the protection remains intact for other types of governmental entities such as school districts, dependent and independent special districts and statutorily created authorities.

By: Sherry G. Sutphen

FLORIDA SUPREME COURT DETERMINES THAT THE APPLICATION OF A CONTINGENCY FEE MULTIPLIER IS NOT LIMITED TO RARE AND EXCEPTIONAL CASES

William and Judith Joyce filed suit against Federated National for water damage to their home. Federated National initially denied the claim, but subsequently settled the claim after months of litigation. A hearing was held to determine the amount of attorney's fees the Joyces were entitled to pursuant to Florida Statutes, Section 627.428. The trial court determined that the Joyces' attorney was entitled to an hourly rate of $350.00 for 109 hours, representing a "lodestar" of $38,150.00. The trial court then applied a contingent fee multiplier of 2.0 based on the factors set forth in *Guaranty Insurance Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990).

On appeal, the Fifth District reversed the trial court determining that contingent fee multipliers should only be applied in rare and exceptional circumstances. The Fifth District concluded that the case was not complex and that the Joyces' had no trouble finding an attorney to represent them.

The Florida Supreme Court reversed the Fifth District Court of Appeal. The Supreme Court determined that contingency multipliers were not limited to rare and exceptional cases. The court pointed out that the trial court had determined that the case was complex, that the Joyces could locate no other attorney in St. Johns County who specialized in this type of litigation, mandating a multiplier based on *Quanstrom*.

Based on the Supreme Court's ruling, insurance companies can expect plaintiff's counsel to push for a contingency multiplier in every case where an award of attorney's fees is mandated by Florida Statutes, Section 627.428.

By: Michael M. Bell

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production, regardless of section 768.28(16)(b), the emails must still be produced. As a basis for its ruling, the Third District noted the emails at issue were generated well after McDonough filed his notice of intent to sue the city and they were placed in the risk management file before McDonough's first public record request.

McDonough confirms that the claims file exemption is applicable even when suit has not been filed against a governmental entity, but a section 768.28(6) notice of intent has been submitted. *McDonough* also confirms the exemption includes not only emails (or other documents) that concern claims directly against the entity as identified in a notice of intent, but also claims against other persons or entities which are inextricably intertwined with claims against the entity as identified in a notice of intent.

By: Dale A. Scott

INSURANCE COVERAGE: FLORIDA'S CLAIMS ADMINISTRATION STATUTE

In *Geico v. Mukamal*, 2017 WL 3611593 (Fla. 3d DCA 2017), the court engaged in a strict, literal interpretation and application of Florida's Claims Administration Statute, § 627.426, Florida Statutes (2015) in holding that an automobile liability insurer was precluded from denying coverage based upon a "coverage defense" because it had failed to comply with the specific requirements of that statute. The result reached seems, on its face, contradictory to the statute's intent to protect both the insured and the insurer when the issue of coverage has not yet been decided.

In this case, Carlos Lacayo ("Lacayo") was involved in a traffic accident while driving intoxicated, resulting in the death of five individuals. The vehicle Lacayo was driving was owned by Lacayo's mother and insured by Geico. Four days after the accident, Geico sent a reservation of rights letter to Lacayo advising him that, while it was providing him with a defense, Geico was reserving its right to deny coverage because he was not listed as a driver on the policy. The next day, an attorney retained by Geico wrote to Lacayo's mother, advising her that Geico had appointed the firm to represent her and her son. This letter included a statement of the insured client's rights.

Thereafter, Lacayo and his mother met with defense counsel, discussed the case with the lawyer, and signed financial and insurance affidavits and an authorization for disclosure of protected health information, identifying the Geico retained firm as counsel for Lacayo. Several weeks later, Lacayo signed another authorization for disclosure of protected health information, which again identified the firm as counsel for Lacayo.

Subsequently, the personal representatives, on behalf of the various estates, filed a wrongful death action (the "plaintiffs"). Discovery ensued, and both Lacayo and his mother attended a litigation settlement conference. However, because Lacayo was facing arrest for DUI manslaughter, he subsequently fled the jurisdiction, and his whereabouts remain unknown. Based on Lacayo's flight and failure to cooperate, Geico sent numerous additional reservation of rights letters but continued to represent Lacayo and provided him with a defense. Lacayo did not return any of Geico's phone calls, appear for deposition, or answer interrogatories, which resulted in Lacayo's pleadings being stricken for his failure to comply with discovery.

In September 2012, the plaintiffs made a settlement offer of $100,000, the policy limit. Because defense counsel had not had any communications with Lacayo, had no knowledge of his whereabouts, and had no authority to accept the settlement offer, the case proceeded to trial, and the jury returned a verdict of $15.35 million in favor of the plaintiffs. No appeal of the judgment was filed on Lacayo's behalf, however; insurer-retained defense counsel did

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represent Lacayo at various post-judgment proceedings. Geico then issued a denial of coverage to Lacayo based upon the coverage defense of his breach of the duty of cooperation contained in the policy. Thereafter, the plaintiffs and the court-appointed receiver for Lacayo filed a lawsuit against Geico alleging Geico exercised bad faith in its handling of the claims and its obligations under the insurance contract. Because no final determination of coverage had been made, Geico filed a declaratory judgment to address the issue of coverage.

Both the trial court and appellate court found in favor of the plaintiffs/appellees on the coverage issue based on its finding that Geico did not comply with the expressly listed methods of compliance with Florida's Claims Administration Statute. Specifically, Geico did not deny coverage, obtain a non-waiver agreement from Lacayo within sixty days of its reservation of rights letter, or retain independent mutually agreeable counsel to represent Lacayo. Thus, Geico was precluded as a matter of law from denying coverage. Pursuant to § 627.426, once Geico sent its reservation of rights notice to assert a coverage defense, Geico had three options: (1) refuse to defend Lacayo; (2) obtain a non-waiver agreement from Lacayo; or (3) retain independent, mutually agreeable counsel to represent Lacayo. Failure to perform any of these three options precludes a later attempt to deny coverage based upon a "coverage defense" as that term has been interpreted by Florida courts.

Geico did not refuse to defend Lacayo within sixty days of its reservation of rights. And because Lacayo absconded, Geico could not obtain either a non-waiver agreement from Lacayo or Lacayo's agreement for the appointment of independent counsel to represent Lacayo. Thus, Geico was placed in the proverbial catch 22 position. It could either (1) abandon Lacayo entirely, leaving Lacayo with no representation or defense, and potentially subject itself to bad-faith litigation if it was later determined that Lacayo was covered by the policy, or (2) continue to defend Lacayo in his absence and waive its coverage defense. Geico chose the second option.

The opinion is not clear as to why defense counsel retained by Geico was not deemed by the court to be "mutually agreeable" to both Geico and Lacayo, but we must assume that there was no reference to that issue in the multiple reservation of rights letters, or other correspondence, between Geico and Lacayo, before Lacayo went missing. The opinion is also silent as to why Geico's original basis for reserving its rights (namely that Lacayo was not a listed driver on the policy) did not result in a finding of no coverage.

The dissent in this case, while agreeing that a literal application of the statute mandated this result, pointed out the outcome was contrary to the intent of the statute, which is to protect both the insured and the insurer when the issue of coverage remains an open question. The dissent invited review of this result by the Legislature and wrote, in pertinent part as follows:

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"Requiring the insurer to abandon a putative insured in order to protect the insurer's coverage defense only benefits the plaintiff, who will be able to litigate his/hers/its claims without opposition. And if it is subsequently determined that the putative insured's absence or failure to cooperate was not willful, and the putative insured was in fact covered by the policy, then the insurer would be subject to a bad faith litigation claim for failing to defend the insured. It is unlikely that the Legislature intended such a result when it enacted § 627.426." *Id*

It will be interesting to see whether the Legislature elects to address this seeming anomaly in the statute. It is also important to note that Florida law makes a distinction between a provision of a policy subject to a coverage defense and a provision that constitutes an exclusion from coverage. According to Florida law, the assertion of a coverage defense comes within the Claims Administration Statute and its corresponding time limits, but a defense that a policy provision excludes coverage is not subject to the Claims Administration Statute's deadlines or even to its requirement that notice be given. See *AIU Insurance Company v. Block Marina Investment, Inc.*, 544 So. 2d 998 (Fla. 1989)

"Section 627.426(2), by its express terms, applies only to a denial of coverage, 'based on a particular coverage defense,' and in effect works an estoppel. This court recently reiterated the general rule that, while the doctrine of estoppel may be used to prevent a forfeiture of insurance coverage, the doctrine may not be used to create or extend coverage.... Therefore, we hold that the term 'coverage defense,' as used in § 627.426(2), means a defense to coverage that otherwise exists. We do not construe the term to include a disclaimer of liability based on a complete lack of coverage for the loss sustained. Under this construction, for example, if the insurer fails to comply with the requirements of the statute, it may not declare a forfeiture of coverage which otherwise exists based on a breach of a condition of the policy. However, its failure to comply with the requirements of the statute will not bar an insurer from disclaiming liability where a policy or endorsement has expired or where the coverage sought is expressly excluded or otherwise unavailable under the policy." *Id*. at 1000; *see also Danny's Backhoe Svc., LLC v. Auto Owners Ins. Co.*, 116 So. 3d 508, 511 (Fla. 1st DCA 2013) (notice requirement under CAS only applies where insurer asserts coverage defense to coverage that otherwise exists; where the policy expressly excluded coverage of rental property, the CAS does not apply); *Max Specialty Ins. Co. v. A Clear Title & Escrow Exch., LLC*, 114 F. Supp. 3d 1191, 1196 (M.D. Fla. 2013) (non-compliance with CAS did not estop insurer from indemnifying based on a criminal act that was expressly excluded by the policy); *Hartford Ins. Co. of the Midwest v. Bellsouth Telecomm., Inc.*, 824 So. 2d 234 (Fla. 4th DCA 2002) (insurer's assertion of policy provision containing an anti-stacking clause that limited insurer's amount of liability for each accident did not constitute a denial of coverage and was, therefore, not subject to the CAS).

By: Michael J. Roper

A PRIMER ON CURRENT FEDERAL (FLORIDA) LAW ON SEXUAL ORIENTATION AND SEXUAL IDENTITY

Governmental entities (Cities, Counties, and School Boards) potentially face issues involving sexual orientation and sexual identity* in various settings. Most frequently these claims relate to employment or the provision of governmental services or entitlements. Typically, Counties and Cities face claims brought pursuant to Title VII or 42 U.S.C. § 1983. School Boards face an additional statutory basis, Title IX.

Employment Title VII.**

Sexual Orientation: Title VII provides no protection to employee/applicants against discrimination due to their sexual orientation. *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017)***.

Sexual Identity: Title VII prohibits discrimination on the basis of sexual identity. *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

Employment and Programs and Services: 42 U.S.C. § 1983****

Equal protection: such claims are brought through 42 U.S.C. § 1983 and commonly relate to issues regarding both employment and the provision of governmental services, rights, or access. The liability of governmental entities under § 1983 is arguably broader than liability under Title VII or Title IX since the scope of the protection afforded is defined by rather broad and generaly language*****. The analysis employed with regard to equal protection claims depends upon the nature of the right being asserted.

Sexual orientation: The United States Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015), held that a state cannot deny marriage licenses based upon the sexual orientation of the parties because marriage was a "fundamental right." However, there is no fundamental right to government employment. *Massachusetts v Murgia*, 427 U.S. 307 (1976).

* By sexual identity, we are including the terms transgender and gender non-conformity.

** Title VII, 42 U.S.C. § 2000e prohibits discrimination in hiring, firing, or the terms and conditions of employment because of "race, color, religion, sex or national origin…."

***This case recognizes that it is in direct conflict with *Hirely v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2013).

****"That suit may be brought against any person/governmental entity that deprives a person of rights, privileges, or immunities secured by the Constitution…" The equal protection clause provides that no state governmental entity may deny "any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

*****The reason not all of these types of claims are brought under § 1983 is that there are additional elements of proof required under § 1983 which are not required under Title VII or Title IX.

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There is no clear law in the Eleventh Circuit applying equal protection analysis to discrimination against homosexuals in government employment under the Equal Protection Clause. Though the Courts employ Title VII standards in analyzing equal protection claims in employment, in my opinion the lack of protection afforded to homosexuals under Title VII will not apply under § 1983. The Courts will likely analyze the decision to take adverse employment action against an employee based upon his sexual orientation under a rational basis standard. In other words, a government entity which has taken adverse employment action against an employee/applicant due to his or her sexual orientation must be prepared to articulate a legitimate and rational governmental interest behind such action.

Sexual identity: Discrimination on this basis is prohibited under the equal protection clause. *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

Programs and Services: Title IX*.

Sexual orientation discrimination is not actionable. *Rodriguez v. Alpha Institute in Florida, Inc.*, 2011 WL 5103950 (S.D. Fla. Oct. 27, 2011).

Sexual Identity Discrimination: Unknown. There is no Eleventh Circuit law on point. The seminal decision holding that Title IX prohibits discrimination based on transgender status, *Grimm v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016), was vacated and remanded by the Supreme Court on March 6, 2017. *Gloucester County School Board v. Grimm*, 137 S. Ct. 1239 (2017)*†.

The purpose of this primer is to set forth the state of the law as of the date this newsletter is published. Please keep in mind that the law is in flux, and is inconsistent throughout the federal circuits.

* Title IX, 20 U.S.C. § 1681 prohibits discrimination on the basis of sex in the participation in any educational program receiving federal financial assistance.

*† The reason being the Trump Administration's revocation of the Obama Administration's DOE guidance to School Districts which held that transgender students were protected by Title IX.

By: Michael H. Bowling

FIRM SUCCESS!

Eleventh Circuit Affirms Dismissal of First Amendment Retaliation Case

Attorney Frank M. Mari succeeded in obtaining dismissal with prejudice of two plaintiffs' First Amendment retaliation claims. In *Wall-DeSousa v. Johnson* (M.D. Fla. 6:14-cv-1959-Orl-41DAB; 11th Cir. 16-10410-HH), the plaintiffs claimed our client retaliated against them in violation of their First Amendment rights by allegedly "advising" officials at the Florida Department of Highway Safety and Motor Vehicles to cancel the plaintiffs' driver's licenses after the plaintiffs appeared on TV news and criticized supposed policies of our client's agency. The trial court dismissed the plaintiffs' claims with prejudice, finding our client was entitled to qualified immunity. The plaintiffs appealed the order of dismissal to the United States Court of Appeals for the Eleventh Circuit. After briefing and oral argument, the Eleventh Circuit affirmed the trial court's order of dismissal. The plaintiffs then unsuccessfully petitioned for re-hearing by all of the judges on Eleventh Circuit. The time for plaintiffs to petition for further review has expired. Therefore, the trial court's order of dismissal with prejudice is final and not subject to any further review.

Firm Successfully Defends Veterans' Preference Claim Against HART

The Public Employees Relations Commission recently entered a final order of dismissal in favor of Hillsborough Area Regional Transit ("HART") and against a serial complainant who alleged that HART had violated Florida's Veterans' Preference Statute.

HART was represented by Cindy A. Townsend, Esquire, during the evidentiary hearing and she successfully established that: (1) the complainant was not minimally qualified for the position at issue; (2) HART provided the complainant with special consideration at each step during the hiring process; and most importantly (3) HART did not violate Chapter 295 because it hired the more qualified candidate.

UNITED STATES DISTRICT COURT GRANTS SUMMARY JUDGMENT OSCEOLA COUNTY IN ADA/REHABILITATION ACT CASE

The United States District Court for the Middle District of Florida recently entered summary judgment on behalf of Osceola County in the case of *Thomas Downing v. Osceola County Board of County Commissioners*, 2017 WL 5495138 (M.D. Fla. Nov. 16, 2017). Downing, a deaf inmate, was confined in the Osceola County Jail for 17 days without access to a working TDY phone, or other accommodation to allow him to call out of jail as was allowed for hearing inmates. The Jail's TDY phone was nonfunctional during his confinement, and though known to the Jail's phone service contractor, and possibly to non-supervisory Jail staff, the problem was never brought to the attention of Jail Administrators who could have taken steps to remedy the problem. Moreover, Downing failed to take advantage of the available grievance procedure, set forth in the Inmate Handbook which he was provided, which would have brought the matter before Jail Administrators who could have resolved his problem. Accordingly, the District Court found that Downing failed to establish "deliberate indifference" on the part of Jail Officials with the authority to act, which is an essential element of a claim against a governmental entity brought pursuant to Title II of the ADA or the Rehabilitation Act. Thus, the Plaintiff's civil rights action was dismissed and judgment was entered on behalf of the County. Firm attorney Michael H. Bowling handled the matter on behalf of Osceola County and welcomes any inquiries concerning the case.

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Questions, comments or suggestions regarding our newsletter, please let us know your thoughts by contacting John Janousek at jjanousek@bellroperlaw.com

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