Legal Update

BELL ROPER LAW

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FLORIDA SUPREME COURT PROHIBITS FEE REDUCTION IN CLAIM BILLS

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The well-known plaintiff's law firm of Searcy, Denney, Scarola, Barnhart & Shipley, Etc., obtained a $28 million dollar judgment in a medical negligence case against a state hospital. The Florida Legislature granted a claims bill for the judgment in the amount of $15 million dollars. In granting the claims bill, the legislature limited the recoverable attorney's fee to $100,000.00 dollars. The plaintiff's law firm brought an action to declare the actions of the Legislature in limiting the recoverable attorney's fee as unconstitutional. The Fourth District Court of Appeal found the action of the Legislature

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PREMISES LIABILITY

In *The Las Olas Holding Company v. Michael Demella, a/p/r of the Estate of Alana Demella*, 2017 WL 3085329, (Fla. DCA 2017), the Fourth District Court of Appeal reversed a $3.6 million damage award in the case of a pregnant woman killed while lounging in a cabana at the Riverside hotel, where she was struck by a drunk driver. Plaintiff, decedent's husband and father of their unborn child, who also died, alleged the hotel was negligent in failing to create a barrier between the cabana and the road, which plaintiff alleged was known to be a hazardous condition.

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The accident occurred when Rosa Rivera Kim ("Kim") was driving east on SE 4th Street, also known as Sagamore Road, in Fort Lauderdale, Florida. Kim's blood alcohol content was three times the legal limit. As Kim approached a curve in the road, she failed to turn her steering wheel and accelerated straight into Riverside's cabana, which was located fifteen feet away from the road. The force of the impact collapsed the walls of the structure, killing Alana Demella, who was seven months pregnant. The jury ultimately found both Riverside and Kim responsible and awarded total damages of $24,057,283.00. The jury found Riverside's negligence caused fifteen percent of the damages.

At trial, the plaintiff introduced several aerial photographs showing that as Sagamore Road curves, motor vehicles travel straight toward the cabana before turning right. Plaintiff alleged this created a foreseeable zone of risk encompassing the cabana. Plaintiff's expert testified that placing palm trees as a barrier in front of the cabana would have averted the danger. Plaintiff also presented evidence indicating drivers routinely sped on that road and that the hotel manager and employees were aware of same. However, per photographs taken of the premises prior to the incident, to reach the outer wall of the cabana, a vehicle would need to "jump" an approximately three-inch curb, cross a sidewalk, drive through a wall of bushes, and avoid hitting both a utility pole and a palm tree.

At the conclusion of the plaintiff's case, Riverside moved for a directed verdict. Riverside argued the plaintiff failed to sustain the burden of demonstrating that before this accident happened, it was reasonably foreseeable that an incident of this nature would take place on its premises. Riverside noted the cabana complied with all building codes and zoning regulations since its creation in 1963. Riverside also argued speeding on Sagamore Road posed a foreseeable threat only to invitees *crossing* that road, and not to individuals *in* the cabana. Riverside further noted that in the more than forty-nine-years of the road's existence, there had never been an off-road accident. The trial court was ultimately unpersuaded, and denied Riverside's motion. Following the denial of its motion, Riverside presented evidence supporting the forgoing arguments.

At the conclusion of the case, Riverside renewed its motion for a directed verdict, which the trial court again denied.

Appellate Ruling

The Fourth District Court of Appeal reversed the trial court's denial of Riverside's motion for a directed verdict and remanded with instructions to grant said motion. Specifically, the appellate court found Riverside owed no duty of care to plaintiff's wife where the cabana's placement near the road did not create a dangerous condition of which the hotel should have been aware. The road had a twenty-five mile per hour speed limit sign, visibility was clear,

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there was no recent history of any off-road accidents, and there were no other physical conditions that would indicate the road was dangerous.

The Court further held that even if a duty existed, the facts showed Riverside met this duty by erecting various barriers to vehicles, meeting all building and zoning codes, and taking action to minimize the speed at which traffic passed. Finally, the Court found that even if a duty and breach had been established, the entirely unforeseeable ("freakish and improbable") scenario which led to the plaintiff's wife's death removes, as a matter of law, the necessary element of proximate cause connecting any duty and breach on the part of Riverside to the injuries sustained.

By: Dani S. Theobald

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not to be unconstitutional, but certified the question to the Florida Supreme Court.

The Florida Supreme overturned the Fourth District and found the action by the Legislature to be unconstitutional. The Court precluded any reduction of the fee below the amount recoverable pursuant to Florida Statute Section 768.28. The Court found that said statute permits an attorney fee of 25% when recovering on a tort claim such as this one. The Court found the right to recover a 25% fee is in no way linked to or restricted by that portion of the statute that provides for a party to seek a claims bill. The Florida Supreme Court readily acknowledged that the passage of a claims bill is purely a legislative discretionary function. However, the fee an attorney can recover is subject to and governed by the contract between the plaintiff and his/her lawyer. To permit the Legislature to reduce a fee below the 25% provided by statute would be an impermissible abridgement of the statute and would be an unconstitutional impairment of a right guaranteed by contract.

Since the law firm was not seeking a fee in excess of the 25% as permitted by statute, and since it had a contract with the client to seek no more than the fee permitted by law, the Court ruled that the contract could not be impaired by a discretionary action of the Legislature. Additionally, the Court pointed out that the statute does not provide for reduction of the fee through the claims bill process.

In summary, moving forward, if the Legislature grants a claims bill, it cannot reduce the attorney's fee below the 25% permitted by statue. It is unclear if prospectively this ruling will have an impact on how the Legislature addresses claims bills. One possible impact is the Legislature may consider reducing the amount of a granted claims bill in order to try and limit recoverable attorney's fees. Whether or not this will happen remains to be seen.

By: Joseph D Tessitore

VOID V. VOIDABLE
What Happens When There Is No Meeting of the Minds As To A PIP Settlement?

The Second District Court of Appeal recently faced a unique set of facts in an appeal of a trial court order granting a motion under Fla. R. Civ. Pro. 1.540(b) to vacate a stipulated judgment in an action to recover personal injury protection ("PIP") benefits.

Loretta Statsick had a policy of auto insurance with State Farm providing PIP benefits. In 2011, Ms. Statsick filed suit against State Farm in circuit court to recover those benefits. The case proceeded to trial and State Farm offered that Ms. Statsick stipulate to the entry of a judgment to resolve the claim for $30,000. Ms. Statsick accepted and in a later hearing, the court entered the judgment to which the parties had agreed. State Farm paid the $30,000.

Subsequently, in 2014, Ms. Statsick brought a second action against State Farm for additional PIP benefits arising from the same subject policy and accident in the 2011 litigation. State Farm moved for summary judgment ("MSJ"), arguing that this new claim was barred by res judicata; however, Ms. Stasick argued that the stipulated judgment in 2011 did not reach claims for PIP benefits incurred subsequent to the 2011 complaint. The court found there was no "meeting of the minds" when the parties resolved the 2011 case and entered an order denying State Farm's MSJ.

Based on the court's finding that there was no "meeting of the minds," Ms. Statsick then filed a motion to vacate the 2011 judgment pursuant to Fla. R. Civ. Pro. 1.540(b). The court agreed with Ms. Statsick and vacated the 2011 judgment. State Farm then appealed to the Second District.

The Second District reversed. It found the trial court erred in holding that a judgment entered pursuant to a void settlement agreement is itself void. The Court clarified that a judgment entered pursuant to a void settlement agreement is merely *voidable* under Florida case law, but not *void*. Secondly, the Court found that to the extent the trial court's "meeting of the minds" finding was intended to support relief under rule 1.540(b), it was not supported by competent substantial evidence. The Court reinstated the stipulated judgment. The transcript of the 2011 hearing resulting in the parties' agreement shows that the parties agreed, without ambiguity, that the trial court should enter the judgment. That the 2011 judgment may or may not preclude claims for medical expenses subsequently incurred by Ms. Statsick does not mean that the minds did not meet about *entering* that judgment. That, the Second District said, is an issue of preclusion law, and not contract law, and that question was not before them to resolve.

By: Mai M. Le

FIRM SUCCESS!

SUMMARY JUDGMENT GRANTED FOR THE CITY OF WINTER PARK

Congratulations to the City of Winter Park on its summary judgment win in a trip-and-fall negligence action on July 17, 2017. Plaintiff sued the City alleging it failed to warn her of a change in elevation along a walkway which she described as dangerous. On summary judgment, the City joined the co-defendant who constructed the step, arguing the area where plaintiff fell was open and obvious, and as a matter of law could not be a dangerous condition. Photographs of the location showed a step from the sidewalk to the entrance of a retail establishment. The step was not defective and was constructed with white tiles on the top which marked the change in elevation. Plaintiff had also walked in this location several times before the date of her alleged fall. In granting summary judgment, the Court agreed with the established law in Florida that certain conditions, like this, are open and obvious and cannot be deemed dangerous.

FIRM NEWS

On August 24, 2017, firm members Michael Roper, Cindy Townsend, and Michael Bowling will be the invited speakers at an employment law seminar designed for management and supervisory personnel with the City of Ocala and Marion County. The presentation will include a discussion of recent developments under Title VII, the ADA, and FLSA, which impact upon the duties and liabilities of governmental employers.

CONGRATULATIONS!

WE WOULD LIKE TO CONGRATULATE SHERRY G. SUTPHEN IN HER RECENT ACHIEVEMENT OF BECOMING BOARD CERTIFIED IN CITY, COUNTY AND LOCAL GOVERNMENT LAW.

CONGRATULATIONS!

WE WOULD LIKE TO CONGRATULATE DAVID B. BLESSING AND SHERRY G. SUTPHEN FOR BEING APPOINTED AS PARTNERS WITH THE FIRM!

If you are interested in being added to our newsletter e-mail list, or if you wish to be taken off of this list, please contact Krysta Reed at kreed@bellroperlaw.com.

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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