Legal Update

BELL ROPER LAW

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ADMISSIBILITY OF PSYCHOTHERAPY RECORDS

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Presently, Florida courts have uniformly prohibited a defendant from discovering psychological records of a plaintiff in a tort case if the plaintiff does not make a claim for mental anguish. Likewise, if a plaintiff makes a claim for mental anguish but subsequently withdraws that claim prior to or at the time of trial, a defendant is precluded from putting the psychotherapy records into evidence. This is because courts have routinely ruled that claims for pain and suffering are separate and distinct from mental anguish

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UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT CLARIFIES DPPA LIQUIDATED DAMAGES

The Eleventh Circuit recently clarified the liquidated damages provision of the Driver's Privacy Protection Act ("DPPA"), 18 U.S.C. § 2721, in *Ela v. Destefano*, Case No. 16-11548, 2017 WL 3725593 (11th Cir. Aug. 30, 2017). In *Ela*, the defendant was the spouse of the plaintiff's former husband. The defendant, an Orange County Sheriff's Deputy, used a driver's license database without any legitimate law enforcement purpose to obtain personal information regarding the plaintiff approximately 101 times over

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claims. As a result, we often see claims for pain and suffering only, or we see mental anguish claims withdrawn prior to trial to avoid the admissibility of the plaintiff's psychotherapy records. However, there may be a crack in the plaintiff's armor regarding this issue with a recent decision by the 4th District Court of Appeal.

In the case of *Sajiun, as Personal Representative of the Estate of Santiago v. Hernandez,* 42 Fla. L. Weekly D1857 (Fla. 4th DCA Aug. 23, 2017), the appellate court held that the trial court properly permitted admission of the psychotherapist's records at trial where the plaintiff requested a pain and suffering jury instruction.

The personal representative of the estate of Mr. Hernandez initially sought damages for pain and suffering on behalf of the decedent's two surviving children. The defense had moved to compel production of the psychotherapist records for one of the children, which was granted by the trial court. The plaintiff subsequently listed the psychotherapy records as a trial exhibit and offered no objection to their admissibility on the joint pretrial exhibit list. However, plaintiff's counsel stated on the record at trial that the plaintiff was withdrawing the claim for mental anguish damages on behalf of the one minor child and, therefore, the psychotherapy records should not be placed into evidence before the jury. The court ruled that even though plaintiff had withdrawn the mental anguish claim, she still asked for a pain and suffering jury instruction, thereby making the psychotherapy records admissible. Plaintiff appealed the ruling by the trial court post trial.

The Fourth District affirmed the trial court decision to admit the psychotherapy records. The appellate court found that since the plaintiff initially put the child's mental condition at issue and had not objected to the original disclosure of the psychotherapy records, and further asked for a pain and suffering instruction, plaintiff was prohibited from reinstating the privilege in the midst of trial. The appellate court held that the trial court did not abuse its discretion in permitting these records to go to the jury over plaintiff's objection.

In our law practice we often see cases where plaintiffs initially put forth both a pain and suffering claim along with a mental anguish claim, but later withdraw the mental anguish claim on the eve of trial, because the psychotherapy records are not favorable to their case. This case may present the defense with an opportunity to place the psychotherapy records into evidence over the plaintiff's objection, if plaintiff is still making a claim for pain and suffering.

By: Joseph D. Tessitore

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the course of approximately 11 months. The plaintiff sued under the DPPA and prevailed at trial. The plaintiff sought $2,500 in liquidated damages for *each* of the defendant's 101 DPPA violations. However, the district court awarded a total of $2,500 in liquidated damages and no actual damages. The plaintiff appealed, contending that the DPPA's $2,500 liquidated damages provision operates to set a floor of $2,500 in damages for *each violation*. However, the Eleventh Circuit disagreed. The DPPA's liquidated damage provision states that the court "may award" actual damages no less than liquidated damages in the amount of $2,500. Nothing in the DPPA's language requires a liquidated damages award, nor does the DPPA's plain language require a liquidated damages award per violation. The Eleventh Circuit noted that where Congress intends to provide for a fixed amount of damages per violation, it has used explicit language indicating its intention. The DPPA does not contain clear "per violation" language, and the Eleventh Circuit refused to read that sort of language into the DPPA. Therefore, the Eleventh Circuit affirmed the district court's award of $2,500 in liquidated damages, despite numerous proven DPPA violations. The *Ela* decision will be important in defending DPPA cases, as DPPA plaintiffs nearly universally valued their cases at no less than $2,500 per violation based upon a self-serving reading of the DPPA's liquidated damages provision.

By: Frank M. Mari

A TRAP FOR THE UNWARY: FLORIDA'S CLAIMS ADMINISTRATION STATUTE

Who wants to be the adjuster who inadvertently waives a coverage defense? Any takers? In the recent Third District Court of Appeal opinion of *Geico General Insurance Company v. Mukamal,* 42 Fla. L. Weekly D1883 (Fla. 3d DCA Aug. 23, 2017), there was held to be a coverage defense waiver. What is unknown is whether Geico's non-compliance with the Claims Administration Statute was a tactical decision (the concurring opinion indicates it was). In any event, this failure potentially resulted in a significant payment on a jury verdict and final judgment of $15,350,000.

You should familiarize yourself with the Claims Administration Statute which can be found at § 627.426, Florida Statutes, so that its applicability can be determined and appropriate action taken, if warranted or desired.

This statutory section states, in pertinent part for this article, that

> A liability insurer shall not be permitted to deny coverage based on a particular *coverage defense* unless:

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> (a) Within 30 days after the liability insurer knew or should have known of the coverage defense, written notice of reservation of rights to assert a coverage defense is given to the named insured by registered or certified mail sent to the last known address of the insured or by hand delivery; and
>
> (b) Within 60 days of compliance with paragraph (a) or receipt of a summons and complaint naming the insured as a defendant, whichever is later, but in no case later than 30 days before trial, the insurer:
>
> 1. Gives written notice to the named insured by registered or certified mail of its refusal to defend the insured;
>
> 2. Obtains from the insured a nonwaiver agreement following full disclosure of the specific facts and policy provisions upon which the coverage defense is asserted and the duties, obligations, and liabilities of the insurer during and following the pendency of the subject litigation; or
>
> 3. Retains independent counsel which is mutually agreeable to the parties. Reasonable fees for the counsel may be agreed upon between the parties or, if no agreement is reached, shall be set by the court.

§ 627.426(2), FLA. STAT. (2017) (emphasis added).

First, what is a "coverage defense?" A "coverage defense" as used in the Claims Administration Statute is a "defense to coverage that otherwise exists." *AIU Insurance Company v. Block Marina Investment, Inc.*, 544 So. 2d 998 (Fla. 1989). So, ask yourself, is there coverage for the loss in the first place? If so, the Claims Administration Statute applies. If there is no coverage in the first place, it is not a "coverage defense." For example, is there an express exclusion that applies so that there is no coverage in the first place, or was the policy or particular endorsement not in effect on the date of loss? If so, a failure to comply with the Claims Administration Statute should not preclude a denial of coverage.

In *Mukamal*, the court entered final summary judgment in favor of wrongful death claimants and a court-appointed receiver for the putative insured in a declaratory judgment action. The court held that Geico waived its non-cooperation coverage defense by failing to comply with the Claims Administration Statute. The court found that insurance coverage existed as a matter of law for an insured who had absconded in the face of criminal charges.

There, Geico initially provided a defense for its putative insured under a reservation of rights as he was not listed as a driver on the insurance policy. Thereafter, the putative insured

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SOCIAL MEDIA AND FORMAL DISCOVERY

Over the past several years, the practice of defense law has increasing involved researching claimants through social media. Whether it be for status updates regarding their health or activities, comments on friends' posts, or, perhaps most importantly, photographs, social media provides a wealth of information that may be relevant to a variety of issues in a lawsuit.

Case law addressing issues associated with social media is slowly evolving and, recently, a trial court order from Florida's Thirteenth Judicial Circuit provided a favorable defense ruling as to the discoverability of certain social media information. In *Bates v. City of Tampa*, 25 Fla. L. Weekly Supp. 339a (Fla. 13th Cir Ct. May 10, 2017), the Court granted the Defendant City of Tampa's Motion to Compel, ordering the Plaintiff to identify all social media accounts

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went missing and Geico issued another reservation of rights for failing to cooperate, but continued to defend. More reservation of rights letters followed. Geico continued to provide a defense for years all the way through trial and post-judgment proceedings. Then, Geico attempted to decline coverage for a failure to cooperate. However, Geico did not comply with the Claims Administration Statute to preserve this defense.

More specifically, Geico did not comply with the written "refusal to defend" and provided a defense. Geico also failed to obtain the nonwaiver agreement or retain mutually acceptable counsel. In fact, Geico could not meet the latter two options because the putative insured had absconded and Geico did not know his whereabouts.

Geico was between a rock and a hard place in a tough set of facts. It may have tactically continued to defend in an attempt to minimize a verdict when looking down the barrel of a potential future bad faith action. If it declined to defend, the verdict or consent judgment could have been far greater. However, if Geico was firm in its belief that it had a valid coverage defense, it could have issued the written refusal to defend. It is unknown what actions Geico took to locate the wayward "insured." Perhaps, it could have put forth greater effort in that regard so as to obtain a nonwaiver agreement of the right to contest coverage or to retain mutually acceptable counsel.

In any event, when there are coverage issues, the Claims Administration Statute lightbulb should go off in your head so that its applicability can be determined and any action taken.

By: David B. Blessing

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and provide all photographs of herself associated with those accounts since the date of the underlying incident.

Concerning relevancy of such information, the Court ruled that the City's requests for this information were relevant to Plaintiff's claims of pain and suffering, disability, loss of enjoyment, explaining as follows: "It may very well be that Plaintiff has posted pictures of herself doing or enjoying things that would speak volumes with regard to whether she is in legitimate pain, or is disabled to a point where she cannot do certain activities, and whether or not she has 'enjoyed life' since the incident, all of which are relevant and necessary for a jury to consider."

Concerning privacy issues, the Court, citing the Florida Fourth District Court of Appeal opinion in *Nucci v. Target Corp.*, 162 So. 3d 146 (Fla. 4th DCA 2015), noted that "social media accounts and posts are created with the acknowledgement that personal information will be shared with others." Accordingly, "any privacy interest in pictures posted to social networking sites is very limited," and the relevancy of such information would outweigh the minimal privacy concern.

Going forward, this decision, and others like it, should aid defense counsel in investigating a plaintiff's social media accounts. At a minimum, it provides the defense with guidance for properly seeking social media information through formal discovery.

By: John M. Janousek

LIABILITY UNDER THE FAIR HOUSING ACT—UPDATE

Last year, we published an article in our Legal Update titled, "11th Circuit Expands Potential Liability Under the Fair Housing Act," in which we discussed the impact of the appellate decision in *City of Miami v. Bank of America Corp.*, 800 F.3d 1262 (11th Cir. 2015). Therein, we explained that the Eleventh Circuit vastly expanded the scope of the Fair Housing Act's ("FHA") term "aggrieved persons" who are eligible to bring claims under the FHA.

The case involved an allegation that Bank of America ("BOA") targeted Black and Latino customers in Miami for predatory loans that carried more risk, steeper fees, and higher costs than those offered to identically situated white customers and created internal incentive structures that encouraged employees to provide these types of loans. The City alleged that by steering minorities toward these predatory loans, BOA caused minority-owned properties throughout Miami to fall into unnecessary or premature foreclosure, depriving the City of tax revenue and requiring it to spend more on municipal services, such as police, firefighters,

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trash and debris removal, to combat the resulting blight. Thus, the City asserted a claim against BOA under the FHA, maintaining that it was an "aggrieved person" under the FHA as a result of BOA's allegedly unlawful and discriminatory lending practices.

The Eleventh Circuit held that the FHA is not restricted to providing a cause of action solely to the direct victim of discrimination. We explained that as a result, any party that sells housing, leases housing, manages housing, or provides lending related to a sale or lease of housing should take caution that facially-viable claims under the FHA can be made by individuals or entities that are not privy to the transaction or management relationship itself.

The United States Supreme Court recently considered an appeal of the Eleventh Circuit's opinion. In *Bank of America Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296 (2017), the Supreme Court, in a 5-3 decision*, agreed that the City is an "aggrieved person" authorized to bring suit under the FHA. It explained that the City's claims of financial injury are at least arguably within the zone of interests protected by the FHA. However, the Court found that the Eleventh Circuit erred in concluding that the FHA's proximate causation requirement for damages was met. Foreseeability of damages, standing alone, is not sufficient for proximate cause. Instead, the FHA causation analysis requires "'some direct relation between the injury asserted and the injurious conduct alleged.'" *Id.* at 1311 (quoting *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992)). However, the Court declined to provide any specific boundaries for proximate cause under the FHA, instead leaving the Eleventh Circuit and the district courts to define the contours of the subject.

Notably, Justices Thomas, Kennedy, and Alito concurred in part and dissented in part with the majority's opinion. They argued that the City's injuries should fall outside the FHA's zone of interests. Regarding proximate causation, they agreed with the majority's analysis; however, they would find that said analysis places the City's claims outside of proximate cause and, as such, they believe the Court should have decided the case in BOA's favor.

Based on this decision, it still appears that individuals or entities not directly privy to an FHA transaction or management relationship may still be able to assert a facially-viable FHA claim, as such individuals or entities may be able to satisfy the "aggrieved persons" requirement; however, such claims may be subject to dismissal or adverse judgment based on a failure to satisfy the proximate cause requirement. Accordingly, as we previously warned, any party that sells housing, leases housing, manages housing, or provides lending related to a sale or lease of housing should take caution of these issues.

By: John M. Janousek

*Justice Gorsuch took no part in the consideration or decision of the case.

FIRM SUCCESS!

U.S. District Court Dismisses with Prejudice Building Permit Case Against the City of Flagler Beach

The U.S. District Court for the Middle District of Florida recently dismissed with prejudice a case against the City of Flagler Beach. *Pillitieri, Sally v. City of Flagler Beach, Fla.*, 2017 WL 3840433 (M.D. Fla., Sept. 1, 2017). In April 2014, the City issued a building permit to the plaintiff/landowner authorizing construction at the subject property. Roughly two weeks later, the City determined the permit was "issued in error," and issued a stop work order. The City's Planning and Architectural Review Board subsequently considered and denied two variance requests for the property. Dissatisfied with the City's actions and claiming such actions cost her some $115,000, the plaintiff sued the City in federal court, and asserted "Damages," "Violation of Equal Protection," and "Violation of Procedural Due Process" claims under the Fifth and Fourteenth Amendments. The U.S. District Court ultimately granted with prejudice the City's motion to dismiss the initial complaint. The Court dismissed the "Damages" claim as it was subsumed by the equal protection and due process claims. The Court dismissed the "Violation of Equal Protection" claim as plaintiff could not identify "similarly situated" comparators who received better treatment from the City. And, the Court dismissed the "Violation of Procedural Due Process" claim as plaintiff had available to her, but failed to utilize, state law remedies prior to suing the City. Firm attorney Dale A. Scott handled the matter on behalf of the City of Flagler Beach, and welcomes any inquiries concerning the case.

WELCOME TO THE FIRM

Bell & Roper, P.A., would like to announce that

Jennifer C. Barron

has become associated 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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