Legal Update

BELL ROPER LAW

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MEDICARE HOLDS PAT ON THRESHOLD REPORTING AMOUNT FOR 2018

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The Medicare threshold for reporting settlements to the Centers for Medicare & Medicaid Services (CMS) in 2018 remains the same as last year's level of $750.00. This amount applies to settlements where there is no ongoing responsibility for medicals. As a result, if the physical trauma-based settlement in such a case is $750 or less, you do not need to report the settlement to Medicare. Additionally, Medicare's conditional payment amount for the settlement does not need to be repaid.

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A DEFENDANT'S CORPORATE REPRESENTATIVE CANNOT BE QUESTIONED ABOUT MATTERS NOT RELATED TO DAMAGES WHERE LIABILITY IS ADMITTED

In *TT of Indian River, Inc. v. Fortson*, No. 5D16-2001, 2017 WL 6390381 (Fla. 5th DCA Dec. 15, 2017), Plaintiff brought a negligence action against a Mercedes-Benz dealership and others arising out of an automobile accident. Following a jury trial, the Circuit Court entered judgment in favor of the Plaintiff for $4,326,881.31. Defendant appealed, arguing the trial court erred

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JURY INSTRUCTION REGARDING EXCESSIVE FORCE AND QUALIFIED IMMUNITY WAS ERRONEOUS AND DEPRIVED DEPUTY OF QUALIFIED IMMUNITY DEFENSE

The U.S. Court of Appeals, Eleventh Circuit recently ruled that the district court's jury instruction, which essentially forced a jury to find either that the deputy used excessive force and, therefore, was not entitled to qualified immunity or that the deputy did not use excessive force at all, was erroneous because the instruction did not accurately reflect the law and improperly deprived the deputy of the opportunity to have the defense of qualified immunity considered by the district court.

In *Simmons v. Bradshaw,* 879 F.3d 1197, (11th Cir. 2018), the Plaintiff brought an action in her capacity as Guardian of the Property of Dontrell Stephens, against Deputy Lin as an individual and against Rick Bradshaw in his official capacity as Sheriff for Palm Beach County. The district court granted summary judgment in favor of the Sheriff on the claim against him for *Monell* liability. However, Deputy Lin's motion for summary judgment on the grounds of qualified immunity was denied. Deputy Lin then timely filed a notice of interlocutory appeal. A panel of the Eleventh Circuit affirmed the denial agreeing with the district court that a reasonable jury could find that Deputy Lin violated Stephens' clearly established constitutional rights by employing excessive force and that the alleged violation was clearly established by governing case law. *See Stephens v. Lin*, 612 F. App'x 581, 582 (11th Cir. 2015).

After the case was remanded, it subsequently proceeded to trial on a Section 1983 excessive force claim again Deputy Lin. The jury returned a verdict finding that Deputy Lin's intentional use of force against Stephens was excessive or unreasonable. The jury also found that Stephens suffered severe and permanent injuries as a result of Deputy Lin's use of force and awarded damages totaling more than $23 million.

Deputy Lin appealed the final judgment entered in Stephens' favor. The Eleventh Circuit reviewed the facts of the underlying case which involved contested factual issues bearing on Deputy Lin's entitlement to qualified immunity. It noted that the District Court, in its order disposing of the parties' motions for summary judgment, expressly reserved the qualified immunity question for later determination. The Eleventh Circuit also noted that even though the prior panel of the Court had concluded that Deputy Lin was not entitled to qualified immunity on the excessive force claim at the summary judgment stage, he was not precluded from pursuing the qualified immunity defense at the trial. Further, the Court stated that should the jury choose not to credit in whole or in part Stephens' version of the facts or should the facts not be presented at trial as alleged on summary judgment, then the qualified immunity analysis may change. However, the District Court, rather than submitting the contested factual issues to the jury at trial, opted to give the jury an instruction which was

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This same $750.00 threshold amount applies to no-fault and workers' compensation insurance where the insurer or workers' compensation entity does not otherwise have ongoing responsibility for medicals.

This information was provided by Medicare through an alert titled *2018 Recovery Thresholds for Certain Liability Insurance, No-Fault Insurance, and Workers' Compensation Settlements, Judgments, Awards or Other Payments*. This alert is posted in the downloads section of the Non-Group Health Plan Recovery page on CMS.gov, the Centers for Medicare & Medicaid Services web site.

Please note this threshold settlement amount specifically excludes claims in which the insurer has an "ongoing responsibility for medicals." This means a single payment for ongoing treatment which is $750.00 or less does not qualify under this reporting and payment exception. Likewise, recurring reports of ongoing payments for medical service on the same claim do not qualify. Questions regarding how Medicare defines and classifies insurers with ongoing responsibility for medicals may be addressed through the CMS tutorial on the Medicare web site at https://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Mandatory-Insurer-Reporting-For-Non-Group-Health-Plans/NGHP-Training-Material/Downloads/Ongoing-Responsibility-for-Medicals-ORM.pdf

By: Christopher R. Fay

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by allowing Plaintiff to question Mercedes-Benz's corporate representative about the accident, where the dealership admitted liability shortly before trial.

At the beginning of trial, Defense counsel moved to quash Plaintiff's subpoena of the corporate representative, noting they stipulated to liability and the corporate representative had "no personal knowledge of anything" including damages. Plaintiff's counsel refused to disclose the basis for calling the corporate representative, stating he did not want to reveal his "trial strategy."

The trial court denied the motion to quash and allowed Plaintiff to call the corporate representative. During direct examination, Plaintiff's counsel asked numerous questions that were not related to damages, but instead tended to denigrate Mercedes–Benz and inflame the jury. For instance, Plaintiff's counsel asked "when" Mercedes-Benz admitted "guilt," noting that it was very close in time to the trial. Plaintiff's counsel also described Fortson as "innocent" and continued to use the term "guilt" to described Defendant's stipulation to liability.

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problematic not only because it was an incorrect statement of the law, but because it effectively delegated resolution of the issue of qualified immunity to the jury, presumably as to both facts and law, and thus, the District Court never decided whether Deputy Lin was entitled to his claim defense of qualified immunity.

The Eleventh Circuit noted that consistent with Supreme Court precedent, the factual issues bearing on the excessive force inquiry are distinct from the legal issues bearing on the defendant's entitlement to qualified immunity. Thus, in the instant matter, the excessive force inquiry was not sufficiently divorced from the qualified immunity inquiry in that the instruction improperly conflated the two inquiries and presented the jury with both together. As such, the jury was forced to find either that Deputy Lin used excessive force and therefore, was not entitled to qualified immunity or that Deputy Lin did not use excessive force at all.

The Eleventh Circuit further stated that the instructions to the jury was erroneous for two reasons. First, it was not within the province of the jury to decide a defendant's entitlement to qualified immunity. Second, there was no room for the jury to find that Deputy Lin used excessive force and also for the district court to decide that he was entitled to qualified immunity. Based upon these errors, the Eleventh Circuit found that Deputy Lin was not afforded the right to have his claimed defense of qualified immunity determined by the court as he was entitled to have. The court found that the errors were not harmless, reversed the verdict, and ordered a new trial.

By: Cindy A. Townsend

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In closing, Plaintiff's counsel highlighted the testimony of the corporate representative, noting to the jury that Defendant brought someone identified as "risk management," who did not even work for the company. He then asked the jury to speculate about what that meant.

The appellate court observed that "when a defendant admits the entire responsibility for an accident and only the amount of damages is at issue, evidence regarding liability is irrelevant and prejudicial." The appellate court also noted it is improper to refer to "guilt" or "innocence" at a civil trial on negligence.

The appellate court further held the error was not harmless. The great majority of Plaintiff's direct examination of Defendant's corporate representative was not only entirely irrelevant to damages, but was also formulated with the inescapable end of inflaming the jury. The error was then compounded by closing argument. As such, the case was reversed for a new trial on damages.

By: Dani S. Theobald

RECENT RULING ENCOURAGES SUMMARY JUDGMENT MOTION CONSIDERATION ON NOTICE ISSUE IN SLIP AND FALL CASES

Plaintiff Blanca Lago filed a premises liability lawsuit against Costco Wholesale Corporation in Miami-Dade County, alleging it failed to maintain its property in a reasonably safe condition. Lago asserted she slipped on a liquid substance, fell, and broke her knee. Costco moved for summary judgment arguing there was no genuine issue of material fact as to whether Costco had actual or constructive knowledge of the alleged slippery liquid substance.

Costco argued, as provided under *Fla. Stat.* § 768.0755, if a person slips and falls on a transitory foreign substance in a business establishment, it is that person's burden to establish the business had actual or constructive knowledge of the alleged condition and should have taken action to remedy it, either by showing the condition had existed for a sufficient length of time or was a recurring foreseeable condition. Lago had been unable to meet her burden of proof. She testified in her deposition she was not aware of any Costco employee around the liquid or entrance at the time she fell to prove actual notice. Further, it had not been raining, she did not see the liquid on the floor before she fell, she did not know what the liquid was except that it was wet, and she did not know how long it had been there, to be able to prove constructive notice. Lago also had no knowledge of anyone else slipping in the area before or after her fall. Based on this testimony (and the lack of any contradictory evidence), the trial court granted Costco's motion for summary judgment.

Lago appealed arguing, in part, it was error to grant summary judgment on only Lago's deposition testimony. The Third Circuit Court of Appeal disagreed and affirmed the trial court's ruling. It held that it was plaintiff's burden to present evidence to prove actual or constructive notice, and she did not do so. The trial court's ruling was consistent with the Third District's prior rulings under similar circumstances.

Such rulings are significant to our defense in slip and fall matters where plaintiffs are often unable to identify with any certainty the substance that allegedly caused the fall, other than that it was wet or slippery, and therefore cannot testify as to how long it had existed or if it could be a recurring problem. There is often no evidence of any "dangerous" substance other than plaintiff's testimony. In these instances, defendants should consider moving for summary judgment, citing *Lago* and similar case law, in an effort to discourage such claims.

By: Anna E. Engelman

FIRM SUCCESS!

Summary Judgment Entered in Favor of the City of Jacksonville Beach

In *Ramp Realty of Florida, Inc. v. City of Jacksonville Beach* (Case No.: 16-2016-CA-001971-XXXX-MA, Fourth Judicial Circuit of Duval County), Plaintiff challenged the City of Jacksonville Beach Board of Adjustment's approval of a rear yard setback variance and a lot coverage variance pursuant to Florida Statutes, Section 163.3215, claiming the variance approval increased the allowable density on the property.

Sherry Sutphen successfully argued that the subject variance was not being used to alter density on the property, and because the variance being challenged did nothing to alter the density on the subject property, Plaintiff could not show that the development order materially altered the density in a manner inconsistent with the City's Comprehensive Plan, as required by Florida Statutes, Section 163.3215. Therefore, the Court granted summary judgment in favor of the City.

Firm Successfully Defends Boating Accident Case where Plaintiff was Rendered a Quadriplegic

The firm recently had the privilege of successfully representing the St. Johns River Water Management District in a complex, multi-party lawsuit, arising out of an airboat collision with a cattle fence. The suit involved claims for catastrophic injuries to multiple plaintiffs, including quadriplegia, as a result of the tragic accident. The case also presented several novel legal issues, including admiralty jurisdiction and sovereign immunity. Joseph D. Tessitore and Frank M. Mari handled the case for the firm and, by way of strategically filed proposals for settlement and the astute development of liability defenses, were able to facilitate the dismissal, with prejudice, of all claims which had been asserted against the District. Notably, no money was offered, or paid, in order to secure the complete release and dismissal of the claims asserted against the District, in this significant case.

FIRM NEWS

Date, Time and Location:
Thursday, April 12, 2018
6:45p.m.
Lake Eola, Downtown Orlando

About:
Orlando's largest office party! Held exclusively for Florida's corporate community; businesses and non-profit organizations form teams and participate in the IOA Corporate 5k for camaraderie, friendly competition and celebration with co-workers.

We hope to see you there!

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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