

Legal update

**BELL, &
ROPER, P.A.**

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Survey of Insurance and Civil Rights Issues and Recent Court Decisions from Bell & Roper, P.A.

Bell & Roper, P.A. is pleased to announce

Molly E. Young

Hae J. Kim

and

Esteban F. Scornik

have joined the firm as associates.

Plaintiff argued that the metal bar running across the floor at the entrance of the pen was not readily visible due to poor lighting and the County should have warned her of the condition before allowing her to enter the pen.

The Defense contended that the condition which caused the plaintiff to trip was open and obvious. In addition, the Defense asserted that the Plaintiff was impaired by alcohol at the time and, therefore, her claim was barred by Section 768.36, Florida Statutes.

The Plaintiff was diagnosed post incident with a left sided L5-S1 disc herniation and she subsequently underwent a discectomy and fusion at that level, with implantation of an electrical stimulator to promote healing. The surgery was performed by Dr. Marcus Kornberg in Kissimmee, FL. The Plaintiff claimed approximately \$36,000.00 in past medical damages, \$36,000.00 in lost wages, for a total of \$72,000.00 in past special damages. Plaintiff's counsel asked the jury to award his client approximately \$55,000.00 in future medical damages, plus \$25,000.00 in past pain and suffering and \$134,000.00 in future pain and suffering, for a total award of \$286,000.00.

The jury deliberated for approximately an hour and a half and returned a defense verdict. The jury found that the County was not negligent and never reached the question of whether or not the plaintiff was impaired at the time of the incident.

The County served the plaintiff with a Proposal For Settlement in February of 2006 for \$45,000.00 and is currently moving forward for a judgment on its attorneys fees and costs incurred since that time.

RECENT FIRM TRIAL RESULTS

Brenda Bowers v. Osceola County Case Number CI-05-ON-625

by Joseph D. Tessitore

The Firm recently obtained a defense verdict on behalf of Osceola County in a jury trial, on a personal injury suit filed by Plaintiff, Brenda Bowers. Representing the Plaintiff were attorneys Clay Mitchell and Carolyn Salzman of Morgan & Morgan. Representing Osceola County were attorneys Michael Roper and Joseph Tessitore of Bell & Roper.

Plaintiff was injured when she tripped and fell over a metal bar which was part of a kennel at the County's animal control facility. The Plaintiff's dog "Nibbles" had been quarantined by the County because it had allegedly bitten a young child. Prior to going to the facility to visit her dog the Plaintiff admitted to consuming three to four beers.

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**Maria Aiello v.
Freeman Decorating Company
Case Number: 053CA-3804**

by Michael M. Bell

Firm members, Michael Bell and Mary Grace Dyleski recently defended Freeman Decorating Company in a jury trial before Judge Cynthia Mackinnon in the Circuit Court in and for Orange County, Florida.

The Plaintiff, Maria Aiello tripped over a large roll of carpet that she alleged was rolled up directly behind her by Freeman employees at the close of a trade show. Ms. Aiello claimed an injury to her left knee which resulted in one surgical procedure with a second surgical procedure anticipated by her treating orthopaedist.

Our defense concentrated on the Plaintiff's comparative negligence. We also argued that while the Plaintiff's first surgery was related to the accident, any future medical care and treatment was unrelated.

The jury returned a verdict in favor of the Plaintiff in the gross amount \$72,261.00. In its verdict the jury concluded that the Plaintiff was 49% comparatively negligent.

We were pleased with the jury's decision, as the jury's net verdict was significantly less than Freeman's settlement overtures.

RECENT FLORIDA CASE LAW

No Public Policy Exception for "Snowbirds"

By Mary Grace Dyleski

In **State Farm Mut. Auto. Ins. Co. v. Roach**, 31 Fla. L. Weekly S840 (December 14, 2006), the Supreme Court of Florida considered the issue of which state law applies to an insurance contract when an accident in Florida involves "snowbirds."

The Supreme Court considered the following question certified by the Second DCA to be of great public importance:

WHERE RESIDENTS OF ANOTHER STATE WHO RESIDE IN FLORIDA FOR SEVERAL MONTHS OF THE YEAR EXECUTE AN INSURANCE CONTRACT IN THAT STATE, MAY THEY INVOKE FLORIDA'S PUBLIC POLICY EXCEPTION TO THE RULE OF LEX LOCI CONTRACTUS TO INVALIDATE AN EXCLUSIONARY CLAUSE IN THE POLICY?

With regard to contract interpretations, the State of Florida follows the *lex loci contractus* rule which essentially states that the law of the jurisdiction where the contract is executed governs the rights and liabilities of the parties to the contract. The trial court granted State Farm's motion for summary judgment and applied a policy exclusion in the out-of-state policy based on Florida's *lex loci contractus* rule of comity. The Second DCA, however applied the public policy exception to the rule which prohibits application of *lex loci contractus* to protect Florida residents, thus invalidating the exclusion. The Second DCA determined that the injured "snowbirds" resided in Florida with a "significant degree of permanence," sufficient to invoke the public policy exception to the *lex loci contractus* rule.

The Supreme Court traced the history of the *lex loci contractus* rule and its "public policy" exception, which the Supreme Court emphasized is narrow. The "rules of comity may not be departed from, *unless* in certain cases for the purpose of necessary protection of our own citizens, or of enforcing some paramount rule of public policy." The Supreme Court also pointed out that the narrow exception to the rule requires both a Florida citizen in need of protection *and* a paramount Florida public policy. At least one more requirement must be met: the insurer must be on reasonable notice that the insured is a Florida citizen.

Ultimately, the Supreme Court answered the certified question in the negative, and quashed the decision of the Second DCA. As stated by Justice Cantero, although Florida welcomes its many visitors, whether for short or extended stays, the Court cannot rewrite out-of-state contracts because to do so would throw conflicts-of-law jurisprudence into disarray and destroy the stability in contractual arrangements that the rule is designed to insure.

Admissibility of Plaintiff's Settlement

by Hae J. Kim

In **State Farm Mut. Auto. Ins. Co. v. Williams**, 31 Fla. L. Weekly D3104 (Fla. 1st DCA December 13, 2006), Plaintiff was involved in two separate motor vehicle accidents that occurred two months apart. Plaintiff settled his claim from the second motor vehicle accident and sued State Farm, his uninsured motorist carrier for the first motor vehicle accident. The trial court granted Plaintiff's motion for mistrial following the jury's verdict on the ground that State Farm's attorney had asked a question implying that Plaintiff had settled with a subsequent tortfeasor. On appeal, the appellate court found that the trial court erred as a matter of law when it granted Plaintiff's motion for mistrial, and reversed and remanded.

At trial, Plaintiff was claiming that his injuries could not be apportioned between the two accidents and therefore State Farm should be responsible for all of his injuries. State Farm admitted that the uninsured motorist from the first accident was negligent, and although State Farm agreed that it would be responsible for all damages if the jury could not apportion between the two accidents, it maintained that the damages could be apportioned.

At trial State Farm's attorney asked Plaintiff's treating doctor whether he had received a letter from Plaintiff's attorney notifying the doctor that Plaintiff had resolved the claim arising out of the second accident. Plaintiff's attorney demanded a mistrial on the basis that State Farm's attorney had implied that the Plaintiff's claim arising out of the second accident had been settled. In response, State Farm's attorney argued that the doctor's records indicated that after the letter from the Plaintiff's attorney, the doctor was asked to compromise his bills and then began attributing all charges for treatment to the first collision. The trial court reserved ruling on the motion for mistrial until the trial concluded.

After the jury returned a verdict, the Plaintiff requested that the trial court grant the previously made motion for mistrial and order a new trial. The court ultimately granted the motion for mistrial, citing as support for its decision Section 768.041(3) (addressing releases between joint tortfeasors and specifically, paragraph three of the statute states that any release or covenant not to sue or the fact that a defendant had been dismissed by order of the court shall not be made known to the jury).

On appeal, the First District found that Section 768.041 applies only to cases involving joint tortfeasors. Thus, the

appellate court found that section 768.041 had no application to the instant lawsuit as the negligent party in the second accident was not a joint tortfeasor but rather a subsequent tortfeasor. The appellate court found that the statute does not apply to settlements involving subsequent tortfeasors.

The First District found that the settlement between Plaintiff and the party responsible for the second accident was relevant because it was intended to explain why medical records which before the settlement had indicated treatment was attributable to the second accident, began indicating after the settlement that treatment was attributable to the first accident. Therefore, the appellate court found that the trial court erred when it granted the motion for mistrial, and ordered a new trial.

This case certainly highlights the importance of obtaining PIP records and medical billing records in cases involving multiple accidents to determine how the providers apportion the injuries and to provide impeachment material.

Litigation Privilege Applies to All Actions

By Molly E. Young

In **Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole**, 32 Fla. L. Weekly S64 (Fla. February 1, 2007), the Supreme Court clarified that the litigation immunity privilege applies in all causes of actions, and is not limited to matters involving tort.

Respondent, along with others, filed suit and petitioned the lower court for class certification based upon reinstatement letters, which included certain costs incurred by lenders in the course of the proceedings. The trial court certified the class, but limited it to those individuals who received the letters but whose failure to pay did not result in a foreclosure sale or judgment.

Respondent appealed this decision to the First District. Petitioners argued that the trial court limited the class so that claimants who had been involved in foreclosure actions would not face the possibility of being barred by litigation privilege. The First District rejected Petitioner's argument and decided that the litigation privilege did not apply because the suit originally alleged statutory violations of Florida's Consumer Collection Practices Act and Deceptive and Unfair Trade Practices Act.

Petitioners appealed to the Florida Supreme Court arguing that the First District's decision was in conflict with the Third District's decision in *Boca Investors Group, Inc. v. Potash*, 835 So. 2d 273 (Fla. 3d DCA 2002). In that case, the Third District upheld a dismissal and denial of a motion to amend a tortious interference with business claim to add a statutory anti-trust claim based upon *Levin Middlebrooks, Mabie, Thomas, Mayes Mitchell, P.A. v. United States Fire Insurance Co.* 639 So.2d 606 (Fla. 1994) which gave absolute immunity for any actions which occurred during judicial proceedings.

The Supreme Court, in deciding this matter, confirmed its holding in *Levin* which granted the litigation privilege to all torts and extended the immunity to all underlying causes of action, based on the reasoning in *Levin* that candor is necessary in judicial proceedings so that parties may

prosecute or defend their positions without worrying that the consequences of their actions might lead to their having to defend themselves in subsequent litigation.

Upcoming Events

Michael J. Roper will be speaking at the 1st Annual PGIT® Educational Membership Conference, "Celebrating Successful Partnerships" on May 2-4, 2007 at Disney's Contemporary Resort in Orlando, Florida. For more details, please visit: www.publicrisk.com/conference

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