Legal update

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

Don't Call Me, I Won't Call You

by Michael J. Roper and Anna E. Engelman

Cell phone use has reached a new high. The Cellular Telecommunications and Internet Association ("CTIA") estimates the number of cell phone subscribers, as of June 2006, has risen to over 219 million people in the United States, up more than 24.9 million from the prior year. More cell phones mean more distracted drivers on the roadway. A study conducted at the Harvard Center for Risk Analysis estimates 300,000 highway injuries, over 2,600 deaths per year, and approximately 1.5 million "instances" of property damage are a result of cell phone use. The increase of incidents on the road has led to an increase in litigation, which has exposed not only the cell phone user to liability, but also his employer.

Pursuant to the vicarious liability doctrine, employers may be held liable for its employees negligent acts (e.g. careless driving while talking on the phone) which occur in the course of employment. Specifically, an employer may be liable if it supplied the phone, or encouraged the driver to use it, regardless of whether the call is business-related. Additionally, the dangerous instrumentality doctrine imposes liability upon vehicle owners by mere ownership of the vehicle, regardless of any negligence on the owner's part. Although governmental employers cannot be held liable under this doctrine, it is another potential exposure for private and non-governmental employers.

Employers with deep-pockets are an easy target, and without a clear cell-phone use policy, the employer may be exposed to liability. And, as seen in recent cases, the pay-out may be crippling. The potential financial exposure is illustrated by the actual jury verdicts on record.

In 2001, in the largest verdict in Miami-Dade County's history, a jury awarded $21 million dollars to a 78 year-old female, Alicia Bustos, who was a passenger in an automobile rear-ended by Lazaro Leiva, a truck driver for a lumber company, Dyke Industries, Inc. Bustos sustained injury which required permanent bedside care. Leiva, who was in the scope of his employment during the accident, initially denied he was using his cell phone just prior to impact, but his cell phone records told a different story. The jury found Dyke Industries liable in the incident as Leiva's employer. The case settled for $16.1 million after the verdict.

Other states have seen similar lawsuits. In 1995, Robert Tarone, a Salomon Smith Barney stockbroker, while driving and talking on his cell phone in Allentown, PennysYlvania, ran a red light and hit and killed motorcyclist Michael Roberts (a 24 year-old father of two), while Tarone was on his way to a non-work related dinner. In 1997, Roberts' survivors filed suit against Smith Barney. Although Smith Barney did not provide their employees a cell phone, and there was no evidence Tarone was using his cell phone at the time of the accident, Tarone stated he was making "cold calls" for Smith Barney during the time of the incident. Based on employee testimony that Smith Barney encouraged "cold calls" on personal time, plaintiff alleged Smith Barney was liable. Specifically, plaintiff asserted the employer was liable for encouraging cell phone use without educating them on potential risks. Smith Barney, uncertain it could obtain a favorable verdict at trial, settled with plaintiff for $500,000.

Based on these and other similar cases, companies have taken action. Among the first, New York City Taxi and Limousine Commission, passed a complete ban on its drivers' cell phone use. Additionally, Exxon Mobil has implemented a cell phone use policy, which prohibits its employees from talking on the phone while driving company vehicles. It did so after it conducted its own study which found the braking reaction time of cell phone drivers to be three times longer than that of drunk drivers.

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Additionally, its study found cell phone drivers are as likely to rear-end the car ahead of them as drunk drivers. Other companies following suit include UPS, which does not provide its drivers phones and forbids employees from talking on their own cell phones while steering.

Although there have been no reported instances of a government entity implementing a similar policy, there does not appear to be any law or regulation which would prohibit one from doing so. There is no Florida law which prohibits a cell-phone use policy, and its only law vis-a-vis cell phone use is to require drivers who use a head set with a cell phone to use a head set which provides sound through one ear and allows surrounding sound to be heard with the other ear. This law does not address implementing a cell phone use policy. There appears to be no state or federal law which prohibits a private business or government entity from implementing a cell phone use policy.

For an entity considering a cell phone use policy, the following options may be considered:

* Ban cell phone use entirely
* Require an employee to pull off the road prior to using a cell phone
* Require a hands-free headset device
* Prohibit personal phone calls
* Inform clients of the cell phone policy
* Limit time allowed for cell phone use
* Require all employees to sign the cell phone use policy

Employers implementing a cell phone use policy should take the necessary steps to ensure it is followed. Worse than not having a policy, would be to have to convey to a jury an employer implemented a policy, but failed to enforce it.

Attorneys Fees for Assignee of Third-party Bad Faith Claim

by Mary Grace Dyleski

In **Allstate Insurance Company v. Regar, as assignee of Weaver,** 31 Fla. L. Weekly D2955 (November 29, 2006), the Second District Court of Appeal considered an award of $220,340.23 in attorney's fees to Regar, to whom Weaver had assigned her third party bad faith action. Allstate asserted two arguments, the most significant of which is that Regar was not entitled to fees pursuant to Section 627.428, Florida Statutes, because she was not the named or omnibus insured, or the named beneficiary.

Regar was injured in an automobile accident in which Weaver was driving her mother's vehicle. Regar's attorney sent a 30 day demand letter to Allstate for the $25,000.00 policy limits of bodily injury liability coverage available, advising that if Allstate tendered the limits, Regar would sign a release prepared by the attorney. Allstate requested copies of medical records, bills and the release, and on or about the 15th day, Allstate sent Regar's attorney a check for the policy limits and a letter with a standard form release, to which Regar's attorney responded that he considered Allstate's letter a rejection of his offer. Despite Allstate's hand delivery of a check for the policy limits with a revised release before the expiration of the 30 days in the original demand, Regar's attorney advised that Regar would no longer accept policy limits to resolve her claim.

After Allstate settled the tort action for $300,000.00, Weaver assigned to Regar her third-party bad faith claim. Regar filed suit, and after the parties settled the bad faith action, Regar moved for attorney's fees and received an award of more than $220,000.00, which included a 1.75 multiplier, which the Second DCA found to be within the trial court's discretion.

In its analysis, the Second DCA pointed out that third party bad faith actions are recognized in Florida because insurers have the power and authority to litigate or settle their insured's claims and owe them a duty of good faith and fair dealing in so doing. The Second DCA remarked that Weaver would have been entitled to fees had she prevailed in the bad faith action, and that attorney's fees are available to assignees of an insured's coverage in other types of disputes against insurers.

Although the Second DCA expressed its concern that a case involving $25,000.00 in policy limits had mushroomed into a $200,000.00 fee case over the wording of the release, and not any wrongdoing by the

New Associate Brings Immigration Law Practice to Bell & Roper, P.A

Esteban F. Scornik, Bell and Roper's newest associate, brings his immigration law background and experience to the firm. A native of Buenos Aires, Argentina, Mr. Scornik has assisted numerous individuals with immigration issues including temporary visa applications, petitions to obtain permanent legal status, citizenship applications and asylum claims. Mr. Scornik will also continue to concentrate his practice on insurance defense.

insurance company, the court ultimately rejected Allstate's argument, concluding that if the entire cause of action is assigned, then the assignee stands in the shoes of the insured and is entitled to all remedies to which the insured would otherwise be entitled, including attorney's fees.

Developing and Maintaining A Document Retention Policy Under Rule 26 of the Federal Rules of Civil Procedure

By Ernest "Skip" H. Kohlmyer, III

The recent amendments to Rule 26 of the Federal Rules of Civil Procedure governing the protection of "electronic documents" subject to "E-Discovery" has prompted defense, corporate and in-house lawyers to create and implement specific procedures and policies for their clients. It is becoming a recognized practice by plaintiff's lawyers to specifically request documents in electronic format in order to either obtain excessive and potentially revealing discovery or to create additional causes of action or sanctions for the intentional or accidental deletion or destruction of this information.

The first step in protecting against sanctions and/or claims of spoliation of evidence is to create and maintain a written document retention policy. It is recommended that this document retention policy be actively enforced and regularly audited to ensure compliance. A part of this policy is the fundamental decision of how long should the client keep information. It is generally not required that the defendant keep every shred of paper, every e-mail or electronic document indefinitely. However, it is widely held that in cases where a litigation hold or specific laws or regulations are not governing the retention, the business should keep electronic information as long as necessary for the business purpose.

A corporation or business entity should consult with its legal counsel to develop or modify its document retention policy to ensure that its industry practices are consistent with the state and federal laws governing the maintenance of electronic documentation. Several factors may come in to play in reviewing your documentation retention policy. Medical information, including protected health information (PHI), will likely be governed by the entity's HIPAA procedures or client guidelines. Second, governmental entities may be required under state public records law or regulations to maintain such records. Corporate clients may be required to maintain documentation pursuant to an industry regulation or client contractual agreement. It is likely that corporate retention policies may need modification to account for threatened or pending litigation which will extend the period of retention to match the length of the pendency of that particular lawsuit.

An efficient document retention policy can aid in-house counsel's efforts to identify, locate, protect, and produce commonly requested documents. Therefore, a client can effectively protect discoverable and relevant documentation and avoid costly monetary and/or non-monetary sanctions. The document retention policy should clearly identify the records custodian of each set of documents as well as identify the type and location of the computer hardware and software which stores and maintains such electronic information. The recent amendment to Rule 26 now places an obligation upon counsel to become familiar with their client's IT systems in an effort to aid in the identification and protection of electronically stored data that may be subject to an eventual discovery request. More importantly to defense lawyers, a comprehensive retention policy would allow the client to utilize Rule 26's "safe harbor" provision should relevant documentation become lost or destroyed. A client is protected from sanctions if the client can demonstrate that such information was destroyed or purged as a result of the routine, good faith operation of an electronic information system.

If your organization is subject to litigation in federal court, it is recommended that you have your document retention policy reviewed by counsel to ensure that your organization's interests are protected from sanctions under the revised electronic discovery rules.

Legal Forum

Michael J. Roper recently spoke on TASER use at the Public Risk Management of Florida's Law Enforcement Liability Seminar.

Employment Discrimination – Comparative Qualifications

by Kara D. Rogers

In failure to promote cases, a plaintiff may assert that the nondiscriminatory reasons proffered by the employer are pretextual and that his/her qualifications were superior to other non-minority applicants for the position. Until recently in the Eleventh Circuit, the plaintiff would have to show that "the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face." This changed when the United States Supreme Court decided **Ash v. Tyson Foods, Inc.** in February 2006.

In Ash, the Supreme Court opined that this standard, as originally set forth in Cooper v. Southern Co., 390 F.3d 695, 731 (11th Cir. 2004), and utilized by the Eleventh

Circuit in Ash, is "unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications." The Supreme Court delineated other standards utilized by other Federal courts, including a standard also utilized by the Eleventh Circuit in Cooper: "disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question." See, Cooper, supra, at 732. This standard was also adopted in the more recent Eleventh Circuit decision in Higgins v. Tyson Foods, Inc., 196 Fed. App. 781 (11th Cir. 2006).

Practical Effect: The standard utilized by the Eleventh Circuit in failure to promote or failure to hire claims is now: disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question. The prior "slap you in the face" standard will no longer be utilized.

Upcoming Events

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

Michael J. Roper will also be speaking on "Governmental Liability for Road Defects" at the Florida PRIMA Conference being held October 15-18, 2008.

Ernest (Skip) H. Kohlmyer, III will be speaking at the ACA/MAP "Best in the Field" Conference being held July 26-28, 2007 at the Hyatt Regency Chicago in Chicago, Illinois.

THE INFORMATION PRINTED IN THIS NEWSLETTER SHOULD NOT BE CONSIDERED LEGAL ADVICE, PLEASE CONSULT AN ATTORNEY TO DISCUSS SPECIFIC CIRCUMSTANCES.

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