BLR NEWSLETTER

Survey of Insurance and Civil Rights Issues and Recent Court Decisions from Bell, Leeper & Roper

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INVASION OF PRIVACY - SEXUALLY UNWELCOME CONDUCT

By Michael H. Bowling

In the case of **Allstate Insurance Company v. Ginsberg**, 28 Fla. L. Weekly, S710 (Fla. September 18, 2003), the Florida Supreme Court answered a question certified to it by the United States Court of Appeals for the Eleventh Circuit. This question was whether pleadings of unwelcome sexual conduct, including touching in a sexual manner and sexually offensive comments state a cause of action for the Florida common law tort of invasion of privacy. The Florida Supreme Court answered the question in the negative. The Florida Supreme Court reasoned that the focus of the tort of invasion of privacy addressed a disclosure of information about a person for "public gaze." Though the tort of invasion of privacy includes an analysis of the plaintiff's reasonable expectation of privacy, it held that such expectation of privacy does not refer to a body part. According to the Florida Supreme Court, the tort of invasion of privacy was not intended to duplicate some other tort, rather, it is to be restricted in focus to the right of a private person to be free from public gaze.

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DISMISSAL NOT WARRANTED FOR DISCREPANCY BETWEEN TESTIMONY AND SURVEILLANCE

By Douglas J. Petro

In **Amato v. Intindola and City of Hallandale**, 28 Fla. L. Weekly D.2125 (4th DCA September 19, 2003), the Fourth District Court of Appeal held that the trial court's dismissal with prejudice of Amato's complaint was too severe a sanction when he was caught on surveillance videotape performing activities he testified at deposition that he was unable to perform, or could perform only with pain.

Prior to his deposition, the 76-year old Amato was videotaped performing a variety of activities, including working on his truck, crawling underneath the vehicle, changing a tire, climbing a ladder to his roof and lifting equipment to his roof to clean his gutters. At his deposition, Plaintiff testified that the accident had caused a recurrence of back problems from an earlier spinal surgery, as well as knee problems which caused him to walk carefully. As to physical limitations related to the accident, Plaintiff testified that he could not go up or down stairs without pain, could not lift excessive weight, could make only simple repairs to his car and could not get under his car or change a tire.

Based on the apparent contradictions between Amato's deposition testimony and what had been captured on videotape, the City of Hallandale filed a motion to dismiss, alleging that Amato "deceitfully utilize[d] the legal system by misrepresenting the scope and extent of his injuries." The trial court held an evidentiary hearing to give Amato a chance to explain the apparent contradiction, wherein he stated that he had not lifted the tire when putting it back on the wheel and he had experienced pain when he went up and down the ladder twice to clean the gutters. The trial court concluded that "the deposition testimony was nothing short of an attempt to

perpetrate fraud on the court" and dismissed the case with prejudice.

On appeal, the Fourth District adopted the analysis of the Second District Court of Appeal in **Jacob v. Henderson**, 840 So.2d 1167 (Fla. 2d DCA 2003), which found that dismissal of an action was within the exercise of sound judicial discretion when a plaintiff has perpetrated a fraud on the court. After reviewing the deposition testimony and videotape evidence of that plaintiff, the Second District in **Jacob** found no clear and convincing evidence that the plaintiff had "sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability to impartially adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense." Reversing the trial court's dismissal of that plaintiff's case as too severe a sanction, the Second District noted that the discrepancy between the videotape and the testimony should have been submitted to the jury to determine the truth or falsity of the claims.

In its analysis, the Fourth District in **Amato** acknowledged that dismissal was an appropriate sanction for the following examples of knowing deception intended to prevent the defense from discovery essential to defending the claim: where a plaintiff gave false answers regarding names, addresses and prior injuries, thus preventing the defendants from conducting their investigation and defending their claim; where a plaintiff had lied about his educational background, a matter critical to the damages claim; where a plaintiff lied about prior injuries and treatment. While a surveillance tape may show discrepancies that affect a jury's view of the case, the Fourth District concluded in **Amato** that the discrepancies in front of it were not sufficient to merit a dismissal with prejudice.

As defense counsel, we often are presented with situations similar to those presented in **Amato**. Although a discrepancy between testimony and actions caught in surveillance videotape may not rise to the level of warranting dismissal as a sanction, such a discrepancy still may prove useful in effecting a more reasonable settlement at mediation, or demonstrating to a jury that the plaintiff may be exaggerating the extent of his or her injuries. Notably, the **Amato** court acknowledges that dismissal remains an appropriate sanction for affirmative acts intended to prevent the defense from discovery essential to defending the claim.

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ATTORNEY'S FEES - TIMELINESS

By Mary Grace Dyleski

In **Graef v. Dames & Moore Group, Inc.,** 28 Fla. L. Weekly D2147 (2nd DCA, September 10, 2003), the Second DCA considered the delay in Defendants' filing of a motion for attorney's fees pursuant to Section 57.105 of Florida Statutes subsequent to an entry of summary judgment in Defendant's favor.

The Court determined that the date summary judgment was entered (June 9, 1999) marked the beginning of the post judgment proceedings between the parties. 555 days later, on December 15, 2000, Defendants filed a motion for attorney's fees pursuant to Section 57.105, Florida Statutes on the ground that the Plaintiff's Complaint was frivolous and lacked justiciable issues of law or fact. The Defendants argued that the appropriate date for measuring the delay was the date on which the trial court entered "summary final judgment" (June 6, 2000).

The court pointed out that on June 21, 2000, the Defendants filed a motion for attorney's fee pursuant to Florida Statute Section 768.79 but did not include a claim for attorney's fees pursuant to Section 57.105. The court concluded that June 9, 1999, the date the Motion for Summary Judgment was first granted, was the date from which the delay would be measured, as the order granting Summary Judgment was sufficiently final to constitute entry of final judgment for purposes of subsequent litigation.

After determining that 555 days was the length of the delay the court analyzed the factors in determining reasonableness of delay under the

circumstances, including danger of unfair surprise or prejudice to the party against whom fees are sought, the existence of the special or extenuating circumstances justifying the delay, pendency of an appeal, the actual length of the delay and policy considerations.

The court determined that the 18 ½ months delay resulted in unfair surprise to the Plaintiff. The court concluded that although the Plaintiff failed to demonstrate actual prejudice, the patent unreasonableness of the Defendant's delay in filing the motion outweighed the lack of demonstrative prejudice. The court further concluded that in this case the pendency of the appeal did not weigh in favor of the Defendants' delay as the delay after the conclusion of the appeal was not reasonable. In conclusion, the court stated that the Defendants' lengthy delay did not serve the purpose of Section 57.105 Florida Statutes nor the requirement for filing postjudgment motions for fees within a reasonable time.

The holding in this case suggests that postjudgment motions for fees should be filed soon after the court enters an Order that is sufficiently final for purposes of postjudgment litigation.

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PUBLIC RECORDS - PERSONAL E-MAILS

By Michael J. Roper

The decision made in the consolidated cases of **State of Florida v. City of Clearwater, Times Publishing Co. v. City of Clearwater**, 28 Fla. L. Weekly, S682 (Fla. September 11, 2003), resolves a nagging question as to whether e-mails transmitted or received by public employees through a government owned computer system constitute public records. The Florida Supreme Court has held that such e-mails are not made or received pursuant to law or ordinance, or created or received in connection with or the transaction of official business. Thus, such e-mails do not fall within the definition of "public records" set forth in Fla. Stat. §119.011(1).

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SOVEREIGN IMMUNITY

By Joseph A. Tsombanidis

In **Thomas Pritchett v. City of Homestead**, 28 Fla. L. Weekly D2261 (October 1, 2003), the Appellant, a City of Homestead policeman, was investigated by the City's Police Department Internal Affairs Division for possible wrongdoing in connection with his documentation of narcotics investigations. The City forwarded the matter to the State Attorney's office, which in turn found that the matter should be handled administratively. Accordingly, the State Attorney's office returned the file to the City. The City issued a written reprimand to the Appellant and he subsequently sued the City for negligent supervision of the investigation.

The 3rd DCA affirmed the trial court's decision and recognized that the negligent conduct of police investigations does not give rise to the cause of action asserted by the Appellant because the duty to protect citizens and enforce the law is one owed generally to the public. The court cited to several decisions of Appellate Courts and stated that the duty to enforce laws and protect public safety does not create a legal duty of care to a person who is the subject of a criminal investigation.

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The less people know about how sausages and laws are made, the better they'll sleep at night.

- Otto Von Bismarck

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