

AN ADJUSTER, A DOG, AND A CUP OF COFFEE

There has been increased debate in worker's compensation circles recently whether the "personal comfort" doctrine continues to exist in Florida. The "personal comfort" doctrine stands for the proposition that employees remain within the course and scope of their employment while reasonably attending to their personal comfort during the workday (i.e., going to the bathroom, going to the break room for a soda, etc.). Generally speaking, employees injured while attending to their personal comfort are eligible for workers' compensation benefits. At least that was the thought until recently.



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DANGEROUS INSTRUMENTALITY AND NAKED LEGAL TITLE

In the recent the case of *Ramirez-Lucas by and through Kramer v. Hutchinson*, 276 So. 3d 841 (Fla. 4th DCA 2019), the Fourth District Court of Appeal held the owner of a motor vehicle is not vicariously liable for wrongful death under the Dangerous Instrumentality Doctrine pursuant to the "Beneficial Ownership Exception."

In May of 2015, minor decedent Gustavo Ramirez-Lucas was operating a bicycle when he was struck and killed by a motor vehicle operated by Andrew Hutchinson. At the time of the accident the car driven by Mr. Hutchinson was titled in the name of his father, John Hutchinson. The parents of the decedent minor brought a wrongful death suit against Andrew Hutchinson for negligent operation of a motor vehicle and against his father John for vicarious liability under Florida's Dangerous Instrumentality Doctrine. The trial court granted summary judgment in favor of John Hutchinson, finding that at the time of the accident he was only the "naked legal title" owner of the car and, therefore, was not vicariously liable for the death of the minor arising out of ownership of the vehicle.

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**“THANK YOU, SIR. MAY I HAVE ANOTHER?”:
MONITA SANCHEZ V. GEICO AND THE IMPORTANCE OF ASKING
THE TRIAL JUDGE FOR MORE STRIKES DURING JURY SELECTION**

Sanchez v. Geico Indemnity Company, No. 1D18-1338, 2019 WL 3282535 (Fla. 1st DCA July 22, 2019), concerns the importance of asking the judge for additional strikes if you disagree with the jury panel.

Sanchez sued GEICO for damages caused by a motor vehicle accident. Jury selection included two potential jurors with the last name “Johnson.” One Mr. Johnson was biased in favor of the plaintiff (“plaintiff-friendly Mr. Johnson”). The other Mr. Johnson was biased in favor of the defendant (“defense-friendly Mr. Johnson”).

During questioning, plaintiff-friendly Mr. Johnson stated he was “leaning toward the plaintiff” because he had a prior experience with suing his own insurance company and his fiancé had a pending case against GEICO. The defense-friendly Mr. Johnson said little other than that he had a bias in favor of GEICO.

After questioning, the attorneys for each side voiced their challenges for cause. Plaintiff successfully challenged defense-friendly Mr. Johnson off of the panel. However, GEICO did not make a cause challenge or a peremptory strike against plaintiff-friendly Mr. Johnson. Both sides agreed to the jury and the Judge excused the parties and the jurors for lunch.

After lunch, GEICO voiced its concern about plaintiff-friendly Mr. Johnson, stating it should have moved to strike plaintiff-friendly Mr. Johnson, but that it conflated him with defense-friendly Mr. Johnson. GEICO suggested the appropriate remedy was to replace plaintiff-friendly Mr. Johnson with the alternate, since the jury was not yet sworn. The Judge agreed to recall plaintiff-friendly Mr. Johnson for further inquiry; however, the Judge made it clear that GEICO had used all peremptory strikes and said: “I’m not going to back strike [plaintiff-friendly Mr. Johnson] unless it’s clear that he should be stricken for cause.”

Upon further inquiry, the plaintiff-friendly Mr. Johnson reiterated his negative experiences. He said that “if the evidence was 50/50, I probably lean toward the plaintiff.” The Judge found the plaintiff-friendly Mr. Johnson should be on the panel because during additional inquiry plaintiff-friendly Mr. Johnson *also* stated that, in the end, he could be fair and impartial. The trial proceeded. Counsel for GEICO continued to object to the panel and, on the second day of trial, the Judge took the issue under advisement.

The jury awarded the plaintiff \$2.5 million. Subsequently, the court entered an order granting a new trial. The plaintiff appealed.

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Appellate Decision

The First District Court of Appeal affirmed the trial court's order granting GEICO a new trial. Under Florida law, simply because a potential juror says he can be fair and impartial does not make it true, especially after he makes his bias clear:

we find it difficult, if not impossible, to understand the reasoning which leads to the conclusion that a person stands free of bias or prejudice who having voluntarily and emphatically asserted its existence in his mind, in the next moment under skillful questioning declares his freedom from its influence. By what sort of principle is it to be determined that the last statement of the man is the better and more worthy of belief than the former?

Johnson v. Reynolds, 454 So. 793, 796 (Fla. 1929).

The First District also rejected the plaintiff's argument that GEICO failed to preserve the issue by failing to request from the trial court additional peremptory strikes. It explained that despite being late, GEICO put the trial court on notice of its objection because it objected prior to the jury being sworn. Further, when the trial Judge specifically stated that the court would not "back strike" the juror at issue, the court effectively removed any opportunity for GEICO to request additional peremptory strikes.

Based on this ruling, practitioners should be aware of the implications of a potential juror's bias. Specifically, that a potential juror attempts to rehabilitate his/her prior statements of bias by claiming to be fair and impartial does necessarily mean that such rehabilitation is successful. Additionally, this case stands as a reminder for practitioners to clearly state on the record any requests for additional peremptory challenges. Failure to do so may waive the issue on appeal.

By: Braulio M. Rodriguez

In the case of *Sedgwick v. Valcourt-Williams*, 271 So. 3d 1133 (Fla. 1st DCA 2019), the First District Court of Appeal issued an *en banc* decision (by a 12-2 vote) reversing the Judge of Compensation Claims' ("JCC's) award of workers' compensation benefits in a case where the claimant was injured while getting a cup of coffee. The facts of the case are worth reviewing.

The claimant, coincidentally, was a workers' compensation adjuster working for the Lake Mary office of Sedgwick. However, she lived in Arizona and worked from home, with the permission of her employer. On the day in question, she had been working for three (3) hours when she decided to go to her kitchen for a cup of coffee. As she reached to get a cup, she tripped over her dog and fell to the ground, injuring her knee, hip, and shoulder. Sedgwick denied the claim on the basis that the injuries did not arise out of her employment. The JCC disagreed and found the accident compensable. Sedgwick appealed. (As an aside, the claimant reached out to defense counsel for a compensability opinion regarding the facts of her claim, without telling the attorney that it was her own personal situation, and received an opinion that the claim was compensable).

The First District disagreed with the JCC, finding that "the risk did not arise out of the employment" and reversing the award of benefits. The appellate court focused on the question of whether the injured worker's place of employment, be it at home or in the employer's office, exposed her to conditions that substantially contributed to the risk of injury. The Court reiterated that employers must provide workers' compensation benefits when employees sustain injuries from accidents "arising out of work performed in the course and the scope of employment."

Here, the parties actually agreed that the accident occurred in the course and scope of employment – that is, the injury was during work hours, in a place the claimant would normally be during work hours, and during a permissible comfort break. However, the Court focused on the language that an accident or injury is compensable only if it was one "arising out of" the employment. The Court defined "arising out of" as requiring that the risk that causes the accident and any resultant injuries be work-related. Per the First District, an accident is compensable only if the employment necessarily exposes the employee to "conditions that would substantially contribute to the risk of injury and to which the claimant would not normally be exposed during his nonemployment life." *Id.* at 1135 (citing *Acker v. Charles R. Burklew Construction*, 654 So. 2d 1211, 1212 (Fla. 1st DCA 1995)). Without occupational causation – defined by the Court as a risk not existent in the claimant's non-employment life – the accident is not compensable. In this case, the risk of the claimant tripping over her own dog at home was a risk she would have faced whether working or not and did not arise out of her employment. As a result, the appellate court found that the accident was not compensable.

The decision elicited two strongly worded dissents. Both Judge Bilbrey and Judge Makar voiced their concerns that the Court was effectively gutting the personal comfort doctrine.

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Judge Bilbrey noted: “*Since most employees walk, whether on or off the job, under the majority’s view no workplace slip and fall would be compensable. Since all humans must eat, drink, and excrete, whether on the job or off, any break from an employee’s occupation for personal comfort would not be compensable.*” *Id.* at 1147.

Judge Bilbrey may be overstating things a bit – writing for the majority, Judge Winsor pointed out that the comfort doctrine was still applicable to suitable workplace accidents. The *Sedgwick* decision may have limited applicability to accidents which occur in a traditional office environment. In such cases, the risk causing the accident would almost always be work related, since that risk (tripping over a box, slipping on a wet floor, etc.) existed at the employer’s place of business (rather than at the claimant’s home), and the claimant could argue that that no such exposure exists in his/her non-employment life. But with the growing popularity of work at home arrangements, the decision should be kept in mind whenever presented with a case involving a “work from home” arrangement.

There could be more to come. The case has been appealed to the Florida Supreme Court and we likely have not heard the last of this case.

By: Christopher W. Hoeg

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Approximately five months before the accident, John Hutchinson had sold the vehicle in question to his son for \$2,500.

The son took possession of the vehicle, along with the keys, the owner’s manual, and the registration. On the same date, the father signed over the title to his son and had the vehicle removed from his insurance. After that date, the father did not use and never exercised any control over the vehicle. The son never took the title to the DMV to have the title transferred and the father never notified DMV of the sale as required by Florida statute. As a result, the vehicle was still titled under the father’s name at the time of the accident.

The court held that Florida law recognizes a very narrow exception to the Dangerous Instrumentality Doctrine called the “*Beneficial Ownership Exception*.” Where the evidence clearly shows that a titled owner has transferred their beneficial ownership interest in a vehicle to another, prior to an accident, and merely held “naked legal title” under a faulty incomplete transfer, the titled owner is not vicarious liable for the negligence of the driver under the Dangerous Instrumentality Doctrine.

By: Joseph D. Tessitore

CONFIDENTIAL MEDIATION COMMUNICATIONS IN SHADE MEETING TRANSCRIPTS

Florida's Fourth District Court of Appeal recently decided *Everglades Law Center, Inc. v. South Florida Water Management District*, No. 4D18-1220, 2019 WL 4458737 (Fla. 4th DCA Sept. 18, 2019), which resolved an important public records issue of first impression. The South Florida Water Management District ("SFWMD") became involved in a contract lawsuit over a partnership for an environmental project. SFWMD later mediated the case, reached a mediation settlement agreement, conducted a "shade meeting" to consider the mediation settlement agreement, and then formally approved the settlement agreement. During the shade meeting, SFWMD's attorney and board members discussed communications made during mediation that were not reflected in the written mediation settlement agreement. Everglades Law Center, Inc. ("ELC") made a public records request for SFWMD's shade meeting transcript. SFWMD then filed an action for a declaratory judgment stating that SFWMD was not required to release the transcript of the shade meeting. ELC counterclaimed for a writ of mandamus requiring release of the full shade meeting transcript. The issue on appeal was whether SFWMD must release a full, unredacted copy of the shade meeting transcript despite the transcript containing record of confidential mediation communications not included in the written mediation settlement agreement. The Fourth District held that mediation communications (unless reflected in the written settlement agreement) disclosed by a government attorney during a shade meeting must be redacted from the transcript of the shade meeting when the transcript becomes public records (*i.e.*, upon conclusion of the litigation). However, the Fourth District remanded the case so that the trial court could conduct an *in camera* review of the transcript and determine whether the exemption to the public records laws for mediation communications applies. Additional appellate proceedings are possible in *Everglades Law Center*. We will continue monitoring the case and provide an update on any important developments. In light of *Everglades Law Center*, governmental entities should carefully review transcripts of shade meetings for confidential mediation communications before releasing those transcripts in response to public records requests.

By: Frank M. Mari

FIRM SUCCESS

SUMMARY JUDGMENT GRANTED IN FAVOR OF FIRM CLIENT, ELEVENTH CIRCUIT AFFIRMS

Bell & Roper, P.A. attorney Frank M. Mari represented a community development district that was sued by a former management contractor and the contractor's president, individually. The CDD terminated the contractor for numerous performance-related issues. The contractor and its president each claimed that the termination was retaliation in violation of 42 U.S.C. § 1981, First Amendment retaliation, and violated Florida's Sunshine Law. Senior United States District Judge Henry Lee Adams, Jr., of the United States District Court for the Middle District of Florida dismissed all of the contractor's president's claims. Judge Adams also dismissed the contractor's claims for First Amendment retaliation and violation of Florida's Sunshine Law. Judge Adams later granted summary judgment in favor of the CDD on the contractor's § 1981 retaliation claim, holding that the contractor did not engage in any protected activity under § 1981 and even if the contractor had done so, the CDD demonstrated legitimate, non-retaliatory reasons for terminating the contractor, which the contractor failed to show were pretext for unlawful retaliation. The contractor appealed the summary judgment to the United States Court of Appeals for the Eleventh Circuit, which affirmed summary judgment in favor of the CDD.

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