Legal Update

ROPER, P.A.

January/February 2022

SUPREME COURT ISSUES RULINGS ON OSHA AND CMS WORKPLACE VACCINE MANDATES

This article provides an update regarding federal vaccine mandates for workers in light of the recent U.S. Supreme Court decisions. This topic was originally reported in the Roper, P.A. November/December 2021 Legal Update.

2707 E. Jefferson Street
Orlando, FL 32803
www.roperpa.com

On January 13, 2022, the Supreme Court issued two rulings addressing federal workplace vaccine mandates to be imposed by Occupational Health and Safety Administration (OSHA) and Centers for Medicare and Medicaid Services (CMS). The OSHA mandate applies to employers who employ more than 100 people, which is estimated to include over 84 million workers. The CMS mandate is more

Cont'd 2

MAKING PUBLIC RECORDS REQUESTS TO A REPRESENTED PARTY WHILE LITIGATION IS PENDING IS NOT ETHICAL

Although Chapter 119, Florida Statutes, also known as the Public Records Act, does not specifically prohibit an attorney from using the Act as a discovery tool, it is not ethical for an attorney to communicate directly with an adverse party when litigation is pending.

In *City of St. Petersburg v. Dorchester Holding, LLC,* Case No. 2D20-463, 2021 WL 4877782 (Fla. 2d DCA Oct. 20, 2021), after a breach of contract claim was filed against the City, Dorchester's counsel sent a public records request to the City Clerk pursuant to Chapter 119. Notably, the request was not sent to the City Attorney. A dispute subsequently arose regarding the amount being charged for the cost to review responsive records which ultimately resulted in an appeal to the Second District Court of Appeal.

In reviewing the factual background, the Second District found that Dorchester's counsel had been communicating directly with

Cont'd 4a

narrowly tailored; it only applies to healthcare facilities that participate in Medicare and Medicaid, covering an estimated 10 million healthcare workers. The specific requirements, exceptions, and penalties of each mandate are detailed in our November/December 2021 Legal Update.

With respect to the OSHA mandate, the Sixth Circuit previously removed a stay of the mandate in December 2021, allowing OSHA to proceed with enforcement. Challengers of the mandate filed an emergency petition with the Supreme Court to stay enforcement. The Supreme Court, in a 6 to 3 ruling, granted the emergency request and issued a stay of the mandate pending resolution of the underlying appeal at the Sixth Circuit. Justices Kagan, Sotomayor, and Breyer dissented.

In reaching its decision, the Court determined that the challengers of the OSHA mandate were "likely to succeed on the merits" of the underlying appeal. The Court agreed that OSHA exceeded its statutory authority by issuing the mandate, which acted as a "blunt instrument" and "made no distinction between industry or risk of exposure." The Court also distinguished COVID as being in the category of "day-to-day dangers that all face," such as crime and air pollution, as opposed to a workplace-specific risk for employees. The dissent argued that the purpose of OSHA is to ensure health and safety in the workplace and that COVID poses grave danger to workers of all industries. The underlying appeal remains pending with the Sixth Circuit at the time of this article.

The Court reached the opposite result with respect to the CMS mandate for healthcare facilities. Previously, two district courts issued injunctions prohibiting CMS from enforcing the mandate. The federal government filed an emergency petition to stay those injunctions pending the appeals. The Supreme Court, in a 5 to 4 decision, granted the federal government's petition to stay the injunction. Chief Justice Roberts and Justice Kavanaugh joined Justices Kagan, Sotomayor, and Breyer as the majority. Justices Thomas, Alito, Gorsuch, and Barrett dissented.

In reaching its opinion, the Court determined that the mandate is within the statutory authority of CMS and the decision to require vaccines was not arbitrary or capricious. The Court noted that healthcare workers around the country are ordinarily required to be vaccinated for other diseases, such as hepatitis B, influenza, and measles, mumps, and rubella. The dissent argues the mandate exceeds the authority of CMS and is overly broad.

In sum, and as it currently stands today, OSHA is prohibited from enforcing the broader mandate that applies to all employers with more than 100 employees. CMS will begin enforcing the more narrowly tailored mandate for healthcare facilities that participate in Medicare and Medicaid. Following the Supreme Court rulings, CMS issued additional guidelines with enforcement timeframes that vary depending on the state. For Florida, for example, CMC requires facilities to meet 80% compliance with the mandate by January 27, 2022, with a full compliance deadline of March 28, 2022. Additional information, including the deadlines applicable to each state, can be found on CMS's website located at www.cms.gov.

By: Nicholas J. Mari

OUTDATED JURY INSTRUCTIONS ON TRANSITORY FOREIGN SUBSTANCES IN PREMISES LIABILITY ACTIONS

How outdated is the Florida standard jury instruction on premises liability? Technically, standard jury instruction 401.20(a), is more than ten (10) years overdue for a re-draft by the Committee. Yet, in *N. Lauderdale Supermarket, Inc. v. Puentes*, No. 4D20-1346, 2021 WL 6057953 (Fla. 4th DCA Dec. 22, 2021), Florida's Fourth District Court of Appeal only recently found instruction 401.20(a) legally incorrect when it comes to claims of transitory foreign substance at a business establishment.

On June 19, 2015, Puentes slipped and fell on a purportedly oily substance on the floor of Sedano's Supermarket. She brought a suit against Sedano's on the basis of premises liability, and more specifically the existence of a transitory foreign substance. In trial, the defense objected to the use of standard jury instruction 401.20(a) on the grounds that it was written in the disjunctive and did not require a finding of *actual or constructive notice* to the condition. The Defendant proposed an instruction consistent with Florida Statute 768.0755 which read "[w]hether the defendant negligently failed to correct a dangerous condition about [which] the defendant knew or should have known by the use of reasonable care [,] or failed to warn the claimant of a dangerous condition about which (defendant) ha[d] or should have had greater knowledge tha[n] that of the plaintiff . . ." Plaintiff disagreed with the proposed jury instruction as it deviated from the Florida standard jury instructions. The trial court agreed with the Plaintiff and read 401.20(a) at the end of the jury trial.

In 2010, Florida repealed and replaced Florida Statute § 769.0710 with § 768.0755. Notably, the new statute does not allow for liability based solely on the business establishment's general failure to maintain a premises. Per contra, the plaintiff must prove that the business establishment had actual or constructive notice of the dangerous condition before liability may be found. Nine (9) years later, in 2019, the Committee on Standard Civil Jury Instructions finally wrote a note in instruction 401.20(a) replacing the applicable statute and directing the parties to refer to the relevant case law for transitory foreign substances. Oddly, the Committee did not redraft the instruction; rather it stated the instruction "remained accurate for premises liability claims . . . that do not involve transitory foreign substances." Therefore, parties had scant direction for jury instructions when it came to transitory foreign substances.

The Fourth District found that instruction 401.20(a) was outdated, as it was written before 768.0755 was enacted. The instruction did "not account for the statute's requirement that an injured party in a slip and fall case 'must prove that the business establishment had actual or constructive knowledge of the dangerous condition.'" With the new statute, a jury cannot find liability in a transitory foreign substance case until it finds that the business establishment had actual or constructive notice. Furthermore, the burden falls directly on the injured party to prove the business establishment had notice of the condition and it should have been remedied. This decision is long overdue as it relates to transitory foreign substance in premises liability claims. Particularly because trial courts are hesitant to deviate from the

Cont'd 4b

4a

the City Clerk and that the City Attorney was unaware of the public records request until the City Clerk, not opposing counsel, advised that the request had been received. The Court noted the following:

> Although there appears to be no prohibition against using the Act [Chapter 119] as a discovery device, thereby circumventing the rules of civil procedure regarding discovery, this does not provide an attorney who represents a party in pending litigation with carte blanche to directly contact a represented opposing party. *See* R. Regulating Fla. Bar 4-4.2; Fla. Bar Ethics Opinion 09-1 (concluding that a lawyer may not communicate with government officers, directors, or employees who are directly involved or whose acts can be imputed to the government entity in a represented matter); *see also* Robert D. Pelz, *Use of the Florida Public Records Act as a Discovery Tool in Tort and Administrative Litigation Against the State*, 39 U. Miami L. Rev. 291, 303 (1985) ("It is axiomatic that when litigation is pending the attorney for one party may not ethically communicate directly with the adverse party, but instead must communicate through the adverse party's attorney. Accordingly, the proper course under such circumstances should require that the public records requests be submitted to the agency's attorney, rather than through the agency's records custodian. This procedure would also prevent uninformed agency personnel from producing records which the attorney might intend to invoke a valid claim of exemption.").

The Second District also noted that since the City Clerk informed the City Attorney of the public records request on the same day the request was filed, no harm had been done. Nevertheless, the better practice would have been to submit the public records request via the City Attorney. *See id.* at *4 n.2.

By: Cindy A. Townsend

4b

standard jury instructions, without clear case law allowing the departure of the instruction. Plaintiffs can now be held to the burden imposed by Florida Statute 768.0755, in order to find liability on business owners.

By: April H. Rembis

FLORIDA SUPREME COURT EXPANDS RULE ON INTERLOCUTORY APPEALS FOR ORDERS ALLOWING CLAIMS FOR PUNITIVE DAMAGES

In January 2022, the Florida Supreme Court adopted a proposed amendment to Florida Rule of Appellate Procedure 9.130, thereby adding a new subdivision (a)(3)(G), which authorizes an interlocutory appeal (an appeal of a nonfinal order) of a trial court order that grants or denies a motion for leave to amend a pleading to assert a claim for punitive damages. The amendment shall take effect on April 1, 2022.

This represents a break from the long-established status of the law, which provided that where such a motion for leave to amend is granted or denied, an aggrieved party would be required to wait until the end of *the entire case* to appeal the ruling. The only other remedy for challenging such orders would be through a petition for a writ of certiorari. However, as a practical matter, the extremely high standards required to obtain certiorari meant that erroneous orders allowing punitive damages could seldom be reviewed until after trial. But by that point, the harm of a punitive claim had usually been done.

In typical civil cases, legal damages are intended to compensate a plaintiff for harm suffered due to the errant conduct of another. For example, a negligent driver is obligated to pay for the injuries suffered by the person they hit, metaphorically bringing the scales back to even. Punitive damages, on the other hand, are intended both to punish wrongful conduct and to deter others from repeating such conduct. They are therefore reserved to address egregious behavior such as intentionally caused harm. But some Florida judges have allowed punitive claims to proceed for such banal negligence as texting while driving.

Additionally, punitive damages are almost never covered under general liability policies. And employees are generally considered "outside the scope of employment" if they are found to have acted punitively, potentially defeating respondent superior liability for the employer. Thus, punitive claims often cause rifts among otherwise aligned defendants and their carriers. This can lead to conflicts of interest that may necessitate the retention of independent counsel.

The decision to adopt the amendment was split 6-1, with Justice Jorge Larbaga dissenting. Justice Larbaga's written dissent highlights the concerns raised on each side prior to the amendment's adoption. The primary consideration for the majority's decision was to protect the privacy of a defendant's financial worth. Once a court allows a claim for punitive damages, a plaintiff may conduct discovery as to a defendant's financial worth, which contains sensitive and confidential information. Justice Larbaga rejected this consideration, stating that a confidentiality order could be entered by the disclosing party. He further raised concerns that such an appeal would delay proceedings and increase the cost of litigation. He notes that according to a 50-state survey in 2018, no state has a similar rule.

Cont'd 6

The adoption of this new subdivision represents a further expansion of the rule on interlocutory appeals. It should be noted, in the governmental context, in 2020, the Supreme Court adopted a new provision in rule 9.130 which allows an interlocutory appeal of rulings on motions which assert entitlement to sovereign immunity. This newest amendment does not change Florida's sovereign immunity law or the potential for interlocutory appeals as to rulings on motions which assert sovereign immunity. And, Florida's limited sovereign immunity waiver still does *not* permit the recovery of punitive damages against government entities in typical state law tort actions. But punitive damages may potentially be available against a governmental officer, employee, or agent as to acts "committed while acting outside the course and scope of her or his employment or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property." § 768.28(9)(a), Fla. Stat. In those cases, the amendment to rule 9.130 could affect the proceedings and provide an avenue for the officer, employee, or agent to seek interlocutory review by an appellate court if he or she is targeted for punitive damages.

Given the above, the recent amendment is a welcome development for civil defendants throughout the state. Now, when a motion to amend a complaint to assert punitive damages is granted, the defendant has a right to have that decision reviewed by a three-judge panel of the appropriate appellate court. As with any Rule 9.130 appeal, parties have thirty days from the date of the order to file an appeal. Given this limited timeframe (which cannot be extended), we would recommend promptly consulting appellate counsel whenever punitive damages are allowed to evaluate the potential benefits of an appeal.

By: Anna E. Engelman &
Derek J. Angell

FIRM SUCCESS

Closing out a productive and fruitful year for our clients, Chris Fay and April Rembis, were successful in obtaining a defense verdict for Brevard County. Lennon Winebrenner vs. Brevard County involved a motor vehicle accident between Mr. Winebrenner's Volkswagen Passat and one of Brevard County's Space Coast Area Transit buses. The accident occurred while he attempted to maneuver around the bus as it was departing a stop. Mr. Winebrenner claimed various permanent injuries including herniations at multiple levels in his cervical, thoracic and lumbar spine. He also claimed this accident ruined his professional basketball career. The jury deliberated for 13 minutes before returning their verdict finding there was no negligence on behalf of Brevard County's bus driver which caused or contributed to plaintiff's injuries. We were delighted to provide Brevard County with this successful jury trial result and appreciate the its commitment to assisting us in doing so.

CONTACT A MEMBER OF THE FIRM

Michael J. Roper - mroper@roperpa.com

Joseph D. Tessitore - jtessitore@roperpa.com

Dale A. Scott - dscott@roperpa.com

Christopher R. Fay - cfay@roperpa.com

Cindy A. Townsend - ctownsend@roperpa.com

Anna E. Engelman - aengelman@roperpa.com

Sherry G. Sutphen - ssutphen@roperpa.com

David B. Blessing - dblessing@roperpa.com

Frank M. Mari - fmari@roperpa.com

Derek J. Angell - dangell@roperpa.com

Jack E. Holt - jholt@roperpa.com

John M. Janousek - jjanousek@roperpa.com

Jennifer C. Barron - jbarron@roperpa.com

Nicholas J. Mari - nmari@roperpa.com

April H. Rembis - arembis@roperpa.com

Brandon A. Montville - bmontville@roperpa.com

Teri A. Bussey - tbussey@roperpa.com

Eric R. Arckey - earckey@roperpa.com

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@roperpa.com.

Questions, comments or suggestions regarding our newsletter, please let us know your thoughts by contacting John Janousek at jjanousek@roperpa.com

THE INFORMATION PRINTED IN THIS NEWSLETTER IS FACT BASED, CASE SPECIFIC INFORMATION AND SHOULD NOT, UNDER ANY CIRCUMSTANCES, BE CONSIDERED SPECIFIC LEGAL ADVICE REGARDING A PARTICULAR MATTER OR SUBJECT. PLEASE CONSULT YOUR ATTORNEY OR CONTACT A MEMBER OF OUR FIRM IF YOU WOULD LIKE TO DISCUSS SPECIFIC CIRCUMSTANCES AND THE LAW RELATED TO SAME.