Legal Update
ROPER, P.A.
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CITY DID NOT DISCRIMINATE AGAINST SOBER LIVING HOME

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The United States Court of Appeals for the Eleventh Circuit held in *Sailboat Bend Sober Living, LLC v. City of Fort Lauderdale*, Case No. 20-13444, — F.4th —, 2022 WL 3702126 (11th Cir. 2022), that the City of Fort Lauderdale did not discriminate under the Fair Housing Act and Title II of the Americans with Disabilities Act against a for-profit sober living home through a zoning ordinance and code enforcement actions. Sailboat Bend operated a sober-living home for up to 11 people recovering from addition who would live together and support each other in their sobriety. Disagreement between Sailboat Bend and the City began when the City discovered Building Code violations and commenced enforcement actions against Sailboat Bend. Then, a Fire Inspector discovered several significant code violations. Based on use and occupancy of the home, the Fire Code required installation of an approved automatic sprinkler system, which the home lacked. Sailboat Bend requested reasonable accommodation, which the City did not grant, of essentially ignoring the Fire Code for the home. Sailboat Bend eventually satisfied the Building and Fire Code violations largely by reducing occupancy to only three tenants.

Then, the City passed a zoning ordinance that created an exception to the general prohibition on more than three unrelated people living together for group homes (termed "Community Residences") that serve residents with disabilities. Licensed Community Residences for shorter-duration leases were permitted within multifamily zoning districts with no conditions so long as the residence housed between four to ten residents and is located at least 1,000 feet from any other Community Residence, with possibility for exception to the distance requirement.

Sailboat Bend contended that the zoning ordinance facially discriminated against individuals with disabilities in violation of the FHA and ADA. The Eleventh Circuit disagreed, stating that the FHA and ADA are concerned only with negative treatment of

Cont'd 2

individuals with disabilities. Under the zoning ordinance, individuals with disabilities are treated better than a non-disabled comparator. Although the zoning ordinance placed requirements on individuals with disabilities, it only did so because the only category of people who may, under the zoning ordinance, live in Community Residences of more than three unrelated individuals are individuals with disabilities. Since Sailboat Bend did not show disparate treatment, the City was not required to demonstrate any justification for different treatment between disabled and non-disabled individuals.

Sailboat Bend's next claim was that without reasonable accommodation, it would have to raise rents beyond tenants' ability to pay in order to fund installation of an approved automatic sprinkler system. However, Sailboat Bend offered no evidence on summary judgment that the requested reasonable accommodation was necessary on account of any causal relationship between residents' disabilities and supposed inability to pay. Sailboat Bend's last claim was that the City intentionally discriminated against Sailboat Bend by deciding to enforce the Fire Code. The Eleventh Circuit affirmed summary judgment in favor of the City because Sailboat Bend offered no evidence that residents' disabilities played any role in the City's decision to enforce the Fire Code. The Court disagreed that the Fire Inspector's requirement that Sailboat Bend remove itself from the Florida Association of Recovery Residences' list of certified recovery residences indicated discrimination because removal from the list helped Sailboat Bend avoid further enforcement action.

Sailboat Bend may be helpful in resolving early some future cases of alleged disability discrimination. It also highlights the importance of carefully handling requests for reasonable accommodation and carefully creating zoning ordinances that may impact individuals with disabilities.

By: Frank M. Mari

SUDDEN MEDICAL EMERGENCY DEFENSE

The Sudden Medical Emergency Defense is typically seen in cases where a sudden loss of consciousness leads to car accident. It is an affirmative defense in cases where an individual, while operating a mode of transportation, has a sudden, unforeseen, and unforeseeable medical emergency which leads to an accident. If the criteria are met, it would result in no negligence being placed on the defendant, and possibly result in a summary judgment determination.

Florida courts have further explored the issue, stating: "As a general rule, the operator of an automobile, vessel or other mode of transportation who unexpectedly loses consciousness or becomes incapacitated is not chargeable with negligence as a result of his or her loss of control." *Feagle v. Purvis*, 891 So. 2d 1096 (Fla. 5th DCA 2004); *see also, Bridges v. Speer*, 79 So. 2d 679 (Fla. 1955) ("It is not even simple negligence if one has a sudden attack, loses control of his car and causes an accident if he had no premonition or warning."); *see also Abreu v. F.E. Dev. Recycling, Inc.*, 35 So. 3d 968 (Fla. 5th DCA 2010).

However, to establish the defense of sudden and unexpected loss of capacity or consciousness, the defendant must prove the following:

1. The defendant suffered a loss of consciousness or capacity. *Bridges v. Speer; Wilson v. The Krystal Co.*, 844 So. 2d 827 (Fla. 5th DCA 2003);

2. The loss of consciousness or capacity occurred before the defendant's purportedly negligent conduct. *Malcolm v. Patrick*, 147 So. 2d 188 (Fla. 2d DCA 1962);

3. The loss of consciousness was sudden. *Baker v. Hausman*, 68 So. 2d 572, 573 (Fla. 1953); and

4. The loss of consciousness or capacity was neither foreseen, nor foreseeable. *Wingate v. United Servs. Auto Assoc.,* 480 So. 2d 665 (Fla. 5th DCA 1985).

This defense requires some pre-suit work up to successfully evaluate. First, we should obtain the client's medical records to show no prior medical history of loss of consciousness or capacity. The next practice consideration is to determine whether there was any warning by medical doctors of side effects to new prescriptions, warning due to recent medical treatment or surgeries, and or a client's pre-existing medical condition that would place the client on notice of the possibility of loss of consciousness or adverse medical events suddenly occurring.

Some common conditions to look for are a history of strokes, heart problems, blood pressure issues, epilepsy, seizure disorders, transient ischemic attacks, or other issues causing fainting spells when determining the validity of this defense.

If it is established, factually, that our defendant did in fact have a sudden, unforeseen and unforeseeable stroke, it is a viable, strong, and complete defense to liability. We would need

Cont'd 4

testimony from the doctors involved to establish that our driver did in fact suffer from an incapacitating loss of consciousness and that he did not have prior knowledge of the potential for such an event to occur.

If a defendant asserts this defense, it opens up the medical history to be examined by the plaintiff, which may result in other theories of liability, especially if they have a foreseeable medical condition or has medications or alcohol that could impair their ability to operate the mode of transportation. However, this defense can result in an absolute bar to liability under the right factual scenarios; however, extra work needs to be conducted to ensure the strength of the defense and whether it should be asserted.

By: Eric R. Arckey

FIRM SUCCESS

Summary Judgment—Duty to Warn and Orange Cones

Attorney Joseph Tessitore recently obtained summary judgment on behalf of a client in a trip and fall case. The client is a well-known retail establishment with outlets throughout central Florida. Plaintiff is a 66-year-old female that had gone to the outlet to shop with her daughter and two teenage grandchildren. The store had an air conditioning failure and had placed a couple of large, industrial-sized fans on the store floor in order to try and move air through the store to keep the temperature inside cooler until the air conditioning unit was repaired. To prevent people from inadvertently walking into the fans, the client placed large 3-foot-high orange warning cones near the fans to warn shoppers of the existence of the fans. Plaintiff was not paying attention and walked directly over one of the 3-foot orange warning cones and tripped and fell. The Plaintiff subsequently had three surgeries and incurred $87,000 in medical bills, all under Letters of Protection. Plaintiff and her counsel (an attorney from Morgan and Morgan) made outrageously high settlement demands and as a result, the parties were not able to resolve the case.

Therefore, we moved for summary judgment on behalf of the client, asserting no duty existed to warn of the cone as it was an open and obvious condition. Additionally, the cone itself is not a dangerous condition and it is, instead, intended to warn of a dangerous condition. Opposing counsel asserted Defendant owed a duty to warn the Plaintiff of the existence of the cone, such as placement of a sign on the wall or a sign on the cone itself, letting shoppers know cones were out on the floor that day. It is interesting to note that at their depositions, the Plaintiff's daughter and her two grandchildren admitted they all saw the cone as they entered the store. Upon falling, the two granddaughters asked the Plaintiff if she had seen the cone and Plaintiff told them she had not.

The Judge agreed that no warning was warranted and that the cone itself was not a dangerous condition. The court granted our motion and entered an order granting summary judgment in favor of the client on September 9, 2022.

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