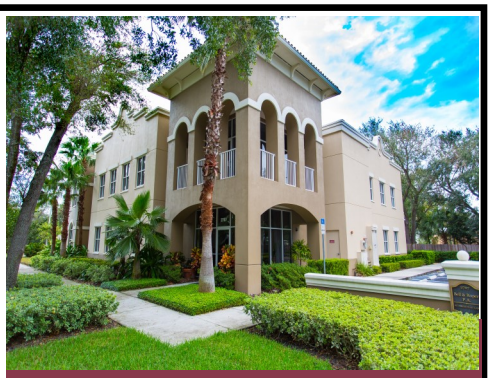
Legal Update

ROPER, P.A.

January/February, 2023

LIMITATIONS ON LIABILITY TO PERSONS WHO MAKE LAND AVAILABLE FOR PUBLIC USE



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With lawsuits becoming as commonplace as we see them, you might be double thinking whether you want to keep your area of land open to the public. Well Florida Statute § 375.251 is a great resource for private property owners who wish to make land on their property available for outdoor recreational purposes to the public at large.

What exactly is an outdoor recreational purpose? The Statute provides a wide range of activities which are included in the definition including: hunting; fishing; wildlife viewing; swimming; boating; camping; picnicking; hiking; pleasure driving; nature study; water skiing; motorcycling; visiting historical, archaeological, scenic, or scientific sites; and traversing or crossing for the purpose of

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FLORIDA'S NEW SIXTH DISTRICT COURT OF APPEAL PROVIDES CLEAN SLATE

Florida's newest appellate court, the Sixth District Court of Appeal, began formal operations on January 1, 2023. The court oversees trial courts in counties that were previously governed by the Second and Fifth Districts. The Sixth District now hears appeals in a geographic region covering Orange County south to Collier County. It is Florida's first new appellate court since the Fifth District was created in 1979.

One of the court's inaugural opinions, issued February 3, discussed its own precedent. It was unknown whether the Sixth would adopt the case law of the Second and Fifth Districts or, perhaps, some combination of the two depending on the county from which a case arose. Instead, the court decided, "the Sixth District Court of Appeal is not bound by the precedent of any of its sister courts, including the Second and Fifth District." In other words, unless a legal issue has been established by the Florida

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ingress and egress to and from, and access to and from, public lands or lands owned or leased by a state agency which are used for outdoor recreational purposes. Notably, the statute states that these activities are examples of outdoor recreational purposes and not an exhaustive list.

If you intend to make your land available for outdoor recreational activities as stated in the Statute, make sure you provide *written notice* to persons before or at the time they enter the land or area. You can also post notices of the statute conspicuously upon the premises. One limitation outlined in the statute is that it does not allow the owner of the property to charge for entry or use of the area for outdoor recreational purposes. There is also a limitation for revenue of concessions or special events on the property. Revenue incurred from concessions or special events must be used exclusively to maintain, manage, and improve the outdoor recreational area.

If you have an area that is currently open to the public for outdoor recreational activities make sure you read Florida Statute § 375.251 as you can save yourself (or adequately prepare yourself) for the eventual lawsuit. For any questions on how you can transform an area to comply with the terms of Florida Statute § 375.251, feel free to give me a call!

By: April H. Rembis

THE IMPORTANCE OF THE OPENING SESSION AT MEDIATION

The influence of eye contact and demeanor during the opening session grows when the parties appear virtually. During virtual mediation sessions, the participants are better able to focus on each other and do so simultaneously. There is less opportunity to hide a brief and unintended facial expression that would go unnoticed in a conference room. Whether or not you are providing the opening remarks, any perception that you are not paying attention to the other side or the mediator may be interpreted negatively and reduce the effectiveness of the mediation. While body language is not as recognizable in virtual mediations, many cues are still detectable. Be on guard that these do not derail your mediation before it begins.

Before the opening remarks, consider whether an apology of some sort is possible and may be helpful. Most times, even when provided generally and ambiguously, an apology will lower the claimant's defenses enough that they are better able to listen and evaluate. This is the goal of the opening remarks and mediation. While these should be persuasive and informative, they should not be so argumentative that the other parties react as though they just finished the first round of a boxing match, returning to their corners ready to come out swinging again. This only prolongs the mediation and many times results in a quick impasse.

A truism among mediators is that you can rarely settle a case during the opening but you can certainly impasse one. Eye contact and demeanor should remain neutral, attentive, and respectful especially during your opening presentation. Of course, once the opening session is complete and we are hidden from the other participants, we are free to display your favorite jaded expressions.

By: Christopher R. Fay

Supreme Court, the Sixth District is free to disagree with any other court in the state.

Amazingly, the case itself involved a conflict of law precisely between the Second and Fifth District regarding the sufficiency of evidence to support a claim for attorney's fees. After deciding that it was not bound by either court, the Sixth held, "in the absence of a Florida Supreme Court decision on point, our consideration of [the issue] is analyzed by returning to first principles." It ultimately agreed with the rationale of the Fifth District and certified conflict with the line of cases from the Second District. The case is styled *CED Capital Holdings 2000 EB, LLC v. CTCW-Berkshire Club, LLC*, Case No. 6D23-1136.

The significance of the holding is that virtually any court-made legal issue is fair game for revisitation in the Sixth District. In Florida, a decision from a district court of appeal court is binding on all trial courts regardless of geography. But once at the appellate level, a court is only bound by the Supreme Court and its own precedent. The decisions of "sister" appellate courts are merely persuasive, meaning that the courts can disagree on the same question of law. Where a conflict is "certified," as it was in *CED Capital*, the Supreme Court has the discretion to accept jurisdiction and resolve it. The Supreme Court binds all other courts in the state.

Challenging adverse court-made rules is therefore worth considering in the Sixth District, especially with respect to more recent legal developments that may not be well established. Of course, entrenched legal principles will not be subject to reasonable debate, but it will be important to keep an open mind with even some decades-old holdings. And where a conflict is certified, the post-DeSantis Supreme Court has repeatedly demonstrated a judicially conservative approach. Moreover, six of the Sixth District's nine judges are themselves DeSantis appointees. The current conditions therefore present an excellent opportunity to create law beneficial to the defense bar and their clients.

By: Derek J. Angell

FEDERAL JUDGE RULES ON STATE ATTORNEY'S LAWSUIT AGAINST GOVERNOR RON DESANTIS

On January 20, 2023, United States District Judge, Robert Hinkle, issued an order regarding Andrew Warren's lawsuit against the Governor alleging his suspension violated the Florida Constitution and the First Amendment of the United States Constitution.

Governor DeSantis suspended Warren by executive order on August 4, 2022, on the basis that Warren had blanket policies not to prosecute certain kinds of cases. Warren challenged the suspension by filing a lawsuit seeking declaratory and injunctive relief. The preliminary injunction motion was denied without reaching the merits, and the state law claim for injunctive relief was dismissed because the Eleventh Amendment to the Constitution bars any claim for injunctive relief based on state law against a state or against a state officer. The First Amendment claim moved forward and a bench trial was later conducted before Judge Hinkle.

Warren's principal claim was that statements made by a left-leaning organization, Fair and Just Prosecution ("FJP"), regarding transgender and abortion and his joinder in those statements were the motivating factors for his suspension. He further claimed those statements were protected by the First Amendment. He also relied on the First Amendment for protection of his political views and his association with the Democratic Party. While Warren did not make the statements, he did endorse the same which Governor DeSantis asserted showed that Warren would not comply with his oath of office.

Judge Hinkle determined that Warren's joining in the statements made by the FJP constituted protected activity because they were political statements that Warren subscribed to individually and with which he generally agreed. Further, the statements were not made within the course and scope of his duties as a State Attorney. Judge Hinkle also determined that Warren's suspension constituted an adverse action and that the transgender and abortion statements were substantial and motivating factors in the decision to suspend Warren. As such, he determined that Warren had established a prima facie case of First Amendment retaliation.

Judge Hinkle also determined the Governor would have made the same decision, even without considering the protected activity, as he was also able to articulate other unprotected reasons for the suspension decision. Judge Hingle further determined that the First Amendment violations were not essential to the outcome and therefore, did not entitle Warren to any relief. While he found that Warren's suspension violated the Florida Constitution, the Eleventh Amendment prohibits a federal court from awarding declaratory or injunctive relief against a state official based only on a violation of state law. Accordingly, Warren's , state law claim was dismissed without prejudice based on the Eleventh Amendment. Warren's First Amendment claim was dismissed on the merits with prejudice.

By: Cindy A. Townsend

FIRM SUCCESS

Reversal of Denied Motion to Transfer Venue

Attorneys Derek Angell and Joe Tessitore recently obtained a reversal from a denied motion to transfer a wrongful death case from Miami-Dade County to Volusia. According to the complaint, the Decedent, a twenty-year-old, spent ten days in the Volusia County Jail following a violation of probation. He had a history of psychiatric issues, and Plaintiff claims that he was not properly medicated during his incarceration. Within weeks of his release, the Decedent died of an apparent suicide by overdose. His estate sued Armor Correctional Health, the private entity that operated the jail, and SMA Behavioral Health Services, a subcontractor of Armor that provided medical services.

The Estate filed suit in Miami-Dade because Armor was incorporated there and maintained its corporate headquarters there. The trial court denied the defendants' motions to transfer to Volusia. It accepted the plaintiff's argument that corporate policies that led to the alleged failures in Volusia were promulgated in Miami and therefore served as a sufficient basis for venue. The case law was generally clear that the serendipitous location of a "corporate office" was insufficient to prevent such a transfer, but it was not so clear where the office was also the corporation's headquarters.

The Third District Court of Appeal reversed the trial court and ordered that the case be transferred to Volusia. It held, "Given that most, if not all, of the critical events occurred and most, if not all, of the fact witnesses reside in or near Volusia County, the location of Armor's corporate headquarters in Miami-Dade County does not negate Volusia County as the more appropriate forum." Similarly, the decision recognized that "virtually all of the incidents at issue occurred and virtually all of the fact witnesses reside in Volusia County."

The case should therefore make it more difficult for plaintiffs to choose an illogical-but-advantageous location for litigation. The "virtually all" and "most, if not all" language makes it clear that a single connection to the chosen forum cannot control. The case is *SMA Behavioral Health Services, Inc. v. Loewinger*, Case No. 3D21-2296.

FIRM SUCCESS

Motion for Summary Judgment Granted for Failure to Provide Proper and Timely Notice of Claim

Attorney Jennifer Barron obtained summary judgment on behalf of the Sheriff of Osceola County, successfully arguing that the plaintiff failed to comply with the requirement of presenting timely written notice of his claim to the Sheriff. The case arose from a vehicle accident that occurred in October of 2018 from which the plaintiff claimed injuries. Under section 768.28(6), Florida Statutes, the plaintiff was required to provide written notice of his claim to the Sheriff and the Florida Department of Financial Services (DFS) within three years of the date of incident. The attorney for the plaintiff sent a letter in March of 2021 about the plaintiff's claim, but that letter was addressed to the "County of Osceola" and mailed to the county's offices. The plaintiff never sent a notice of claim to the Sheriff directly. In granting the motion, the Court found that the plaintiff's non-compliance with the notice requirement was undisputed. Importantly, the plaintiff did not file a response or any counter evidence to the summary judgment motion to prove proper notice had ever been given. The plaintiff also failed to timely respond to the Sheriff's Request for Admissions related to the notice issue which meant those requests were deemed admitted, and the plaintiff did not ask the court for relief from the admissions. Additionally, the court held that the letter directed to the county was legally insufficient to give notice to the Sheriff as the two entities are separate. In other words, the notice requirements are strictly construed. The claim was against the Sheriff and the letter must be sent to the Sheriff—not to the county in which the Sheriff operates. As more than three years had passed since the incident, it was not possible for the plaintiff to comply with the statutory notice requirements. The lack of notice was a defect fatal to the case and therefore, the case was dismissed with prejudice.

School Board Prevails in Discrimination and Retaliation Claim

A former middle school teacher filed a Complaint of Discrimination with the Florida Commission on Human Relations alleging that his students discriminated and harassed him based on his sexual orientation. He further alleged that the School Board failed to take any remedial action against the students after he complained to Administration. He contends the School Board's decision not to renew his contract for the following school year constituted unlawful retaliation based on his reporting the alleged discrimination and harassment.

Cindy A. Townsend defended the School Board in this matter and successfully argued there was no causal connection between the alleged harassment by his students and the School Board's decision not to renew his contract. Additionally, there was no evidence that the School Board was aware of any specific comments, actions or behaviors by the students related to the teacher's sexual orientation when it made its decision. Ms. Townsend also successfully defended the retaliation claim by establishing there were legitimate non-retaliatory reasons to support all actions taken with respect to the teacher's employment. The FCHR investigated the teacher's claims and determined there was no reasonable cause to believe that any unlawful employment practices had occurred.

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