Legal Update

ROPER, P.A.

July/August, 2023

LETTERS OF PROTECTION – REQUIRED DISCLOSURES

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In a letter of protection, a healthcare provider agrees to obtain payment from any recovery the patient receives through a claim or lawsuit, rather than demanding immediate payment for treatment. *Carnival Corp. v. Jimenez*, 112 So.3d 513, 516-517 (Fla. 2nd DCA 2013). Under Florida caselaw, a letter of protection between a Plaintiff and a treating physician has always been relevant and admissible to show potential bias. More specifically, the existence of a letter of protection undeniably gives the treating physician a financial interest in the outcome of personal injury action. *Id.* Thus, "a jury is entitled to know the extent of the financial relationship between the party and the witness." *Allstate Ins. Co. v. Boecher*, 733 So.2d 993, 997 (Fla. 1999).

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IF WE WIN THE CASE, DO WE GET FEES?

Does a prevailing party automatically become entitled to attorney's fees under their proposal for settlement? The Florida Supreme Court recently found that Florida Statute § 768.79 does not automatically trigger attorney's fees to the prevailing party of a case.

In *Coates v. R.J. Reynolds Tobacco Co.*, the plaintiff served the defendant with two proposals for settlement under section 768.79. No. SC2021-0175 (Fla. 2023). The defendant did not accept either proposal. After a jury trial, plaintiff obtained a judgment with excessive punitive damages awarded. Defendant successfully appealed the punitive damages award. Nonetheless, Plaintiff moved for attorney's fees incurred based upon defendant's prior rejection of her proposals for settlement.

The legal question was whether plaintiff's failure to prevail at the appellate level precluded the collection of attorney's fees under section 768.79. The Court ultimately decided that Florida Statute 768.79 is not a prevailing party statute. Therefore, since the

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Typically, plaintiff's counsel is the conduit through which treatment and letters of protection are arranged. However, the Florida Supreme Court found that inquiring as to how the plaintiff found the physician and entered into the agreement were a violation of the attorney -client privilege. *Worley v. Central Florida Young Men's Christian Association, Inc.*, 228 So.3d 18, 20 (Fla. 2017). More specifically, the attorney-client privilege protected disclosure of whether the plaintiff's lawyer referred the plaintiff to a particular physician. *Id.* Moreover, documents pertaining to agreements between a law firm and treating physicians and the names of other clients who have been referred to the treating physician were also protected. *Id.* Thus, the permitted discovery of financial information between law firms and expert witnesses under *Boecher* was inapplicable to treating physicians retained by Plaintiff's counsel under *Worley*.

The Florida Legislature, through its most recent tort reform, has attempted to remedy these issues with the passage of §768.0427(3), Florida Statutes, *LETTERS OF PROTECTION; REQUIRED DISCLOSURES.* Under the new law, plaintiffs are required to disclose a copy of the letter of protection. All billings for the claimant's medical expenses must be itemized and to the "extent possible" properly coded; moreover, whether the claimant at the time medical treatment was rendered had health care coverage and the identity of that coverage must be disclosed.

The claimant must now also identify whether he or she was referred for treatment under a letter of protection and, if so, the identity of the person who made the referral. If the referral was made by claimant's attorney, disclosure is now permitted and evidence of that referral is admissible. Further, the financial relationship between a law firm and a medical provider, including the number of referrals, frequency and financial benefit obtained is now relevant to bias under the new statute.

The statute seeks to add more transparency in litigation regarding letters of protection. The statute effectively provides a means for juries to be given more information surrounding letters of protection and arrive at a better understanding of what a letter of protection does and who it benefits. As a result, juries will now hear testimony and see documents regarding the financial relationships created and will better understand the doctor's financial interest in the outcome.

There is no more attorney-client privilege in communications related to an attorney's referral of a client for treatment. Discovery regarding the financial relationship between a law firm and a medical service provider can be obtained. This discovery includes the number of referrals, frequency and financial benefit obtained. Thus, the medical provider's bias can be fully explored.

Importantly, the statute levels the playing field. Until its passage, plaintiff's counsel could address the bias of the defense medical expert, but there was very little defense counsel could do in showing the financial relationship or otherwise between plaintiff's counsel and the treating physician. Now a jury can be shown facts which will assist their determination of the credibility of plaintiff's "treating physician."

By: Jeffrey A. Carter

LANDOWNER PREVAILS IN PREMISES LIABILITY CLAIM BASED ON DEPRESSION IN A RAISED LANDSCAPED AREA OF PARKING LOT

The Second District Court of Appeal ("DCA") recently affirmed a final summary judgment entered in favor of Simon Capital GP ("Simon"), a mall operator, arising from a negligence claim that appellant, Stephanie Pio, injured herself when she stepped in a concealed hole or depression in a grass bed in a raised landscaped area of the parking lot of Macy's at Tyrone Square Mall in St. Petersburg. Pio sued both Simon and the landscaping company.

The landscaped area at issue runs along a sidewalk that leads from the mall's grand entrance down to the public sidewalk on the main boulevard surrounding the mall. The landscaped area separates the parking spaces from the sidewalk. Pio parked perpendicular to the landscaped area, stepped over the curb onto the landscaped area, and walked through the grass to reach the sidewalk. The landscaped area consists of grass, trees, mulch, shrubs, and landscape lighting near the grass bed where Pio was injured.

Pio alleged that a palm tree had been removed from the area and that the hole created by the removal had not been properly filled. She argued that the defendants failed to maintain the premises in a reasonably safe condition, failed to warn Pio about dangerous conditions of which they knew or should have known, and failed to act reasonably under the facts and circumstances. The defendants filed separate motions for summary judgment, arguing that they did not have a duty to warn of the open and obvious condition in a landscaped area. The trial court agreed and granted separate summary judgments in favor of the defendants.

In its order granting summary judgment in favor of Simon, the trial court recognized that while an invitee is owed a duty to be warned of dangerous conditions which are, or should be, known to an owner and which are unknown to an invitee, landscaping features are generally found not to constitute dangerous conditions as a matter of law. The trial court further determined there was no evidence that there was continuous and obvious use of the landscaped area as a pedestrian shortcut, and that there was no need for a shortcut path because the landscaped area was surrounded by a parking lot and sidewalk on all sides.

On appeal, the Second DCA noted that "Landscaping features are generally found not to constitute a dangerous condition as a matter of law." It further noted that a number of cases have held that a landowner has no liability for falls which occur when invitees walk on surfaces not designed for walking, such as planting beds. Ultimately, the Second DCA determined that the trial court properly entered summary judgment in favor of Simon because, as a matter of law, the landscaped area was not a dangerous condition and the undisputed evidence showed that the depression in the grass which allegedly caused Pio's injury was in a landscaped area, set apart from the parking lot by a raised curb. Additionally, there was no evidence that the grass bed had become a well-trampled footpath or that the grass bed had been in continuous and obvious use as a pedestrian shortcut such that Simon was put on constructive notice of the condition. Finally, the Second DCA rejected Pio's argument that Simon was vicariously liable for the condition that its landscaping company created since there was no evidence that a dangerous condition existed. Accordingly, summary judgment was affirmed.

By: Cindy A. Townsend

NO MORE TIK TOK
FOR FLORIDA GOVERNMENT

The 2023 session of the Legislature included a bill signed into law that effectively bans the TikTok App from being used on government-issued devices. Though the text of the new statue does not specifically mention TikTok, the App is included in Governor DeSantis's press release referring to the new law and related legislation.

New Florida Statutes, Section 112.22, went into effect on July 1, 2023, and provides in pertinent part as follows:

(2)(a) A public employer shall do all of the following:

1. Block all prohibited applications from public access on any network and virtual private network that it owns, operates, or maintains.

2. Restrict access to any prohibited application on a government-issued device.

3. Retain the ability to remotely wipe and uninstall any prohibited application form of government-issued device that is believed to have been adversely impacted, either intentionally or unintentionally, by a prohibited application.

(b) A person, including an employee or officer of a public employer, may not download or access any prohibited application on any government-issued device.

1. This paragraph does not apply to a law enforcement officer as defined in s. 943.10(1) if the use of the prohibited application is necessary to protect the public safety or conduct an investigation within the scope of his or her employment.

2. A public employer may request a waiver from the department to allow designated employees or officers to download or access a prohibited application on a government-issued device.

In addition, the new statute directs the Department of Management Services (DMS) to create a list of prohibited applications that meet the following criteria:

1. Any Internet application that is created, maintained, or owned by a foreign principal and that participates in activities that include, but are not limited to:
   a. Collections keystrokes or sensitive personal, financial, proprietary, or other business data;
   b. Compromising e-mail and acting as a vector for ransomware deployment;
   c. Conducting cyber-espionage against a public employer;
   d. Conducting surveillance and tracking of individual users; or
   e. Using algorithmic modifications to conduct disinformation or misinformation campaigns; or

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2. Any Internet application the department deems to present a security risk in the form of unauthorized access to or temporary unavailability of the public employer's records, digital assets, systems, networks, servers, or information. *See* Florida Statutes, Section 112.22(1)(f).

Presumably, since the Governor's press release mentioned TikTok, that application will fall within these criteria; however, other applications may end up on the list that DMS eventually produces. Any application that is included on the DMS list cannot be used on a "**governmental-issued device**," which is defined broadly to include devices issued by a "public employer." *See* Florida Statutes, Section 112.22(1)(e). A "**public employer**" is similarly defined broadly to refer to any agency or branch of state government. *See* Florida Statutes, Section 112.22(1)(g).

The practical result of this statute is that any device (computer, cell phone, tablet, etc.) that is issued to an employee by an agency or branch of state government cannot be used to access TikTok or any other application prohibited by DMS.

If you have any questions regarding the new law, you should contact your general counsel or feel free to contact our office directly.

By: Sherry G. Sutphen
~ City Attorney, City of Mount Dora
~ County Attorney, Highlands County
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plaintiff obtained a judgment that was at least 25% greater than the proposal for settlement she was entitled to reasonable attorney's fees under Florida Statute § 768.79. This case is an important reminder on the importance of filing good faith proposals for settlement which could lead the court to grant reasonable attorney's fees in your case.

By: April H. Rembis

FIRM SUCCESS

Defeat of Petition for Writ of Certiorari

Frank Mari recently defeated a petition for writ of certiorari filed against one of the firm's community development district clients. A district resident sought certiorari review in circuit court to challenge the district's one-year suspension of the resident's amenity privileges for violation of the district's rules. The circuit court agreed that the district did not depart from the essential requirements of law, provided adequate notice to the resident, and held a constitutionally fair hearing. The resident has since foregone possible second-tier certiorari review. The case was *Citro v. Arlington Ridge Community Development District*, Circuit Court of the Fifth Judicial Circuit, in and for Lake County, Florida, case number 35-2022-CA-002254-A. The firm is delighted to provide our client with this favorable outcome.

Summary Judgment in Officer-Involved Shooting Lawsuit

Frank Mari recently obtained summary judgment for all of the firm's clients in a lawsuit arising out of a law-enforcement-involved shooting. The plaintiff sued a city and four of its police officers over a wellness check that ended with an officer shooting the plaintiff. The plaintiff and defendants sharply disputed whether, immediately prior to the shooting, the plaintiff raised and pointed a handgun at the officers. No body-worn camera video was available, but the firm was able to obtain and present to the court recordings of telephone calls plaintiff placed from jail in which she admitted raising and pointing a handgun at the officers. Even though the plaintiff was able to convince a jury in her criminal case that she was not guilty of any of the charged offenses, we were successful in defeating on summary judgment her civil claims for excessive force, battery, assault, failure to intervene, unlawful seizure, and negligence. Prior to the court granting summary judgment, we were also successful in having the court exclude all testimony from the plaintiff's supposed expert witness. The case is *Sapp v. City of Winter Park*, United States District Court for the Middle District of Florida case number 6:21-cv-01515-PGB-DCI. The firm is delighted to provide our clients with this favorable outcome. We would be happy to discuss any matter involving alleged police misconduct.

FIRM NEWS

The firm is pleased to announce that Jennifer Barron and Eric Arckey have become partners in the firm. Both have proven themselves to be talented litigators and dedicated advocates for the firm's clients and have made significant contributions to the practice, during their tenure with the firm. We are confident that they will continue to be integral to the continued growth and success of the firm for many years to come. Please join us in congratulating them on this important step in their legal careers.

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