Legal Update

BELL & ROPER, P.A.

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LAW ENFORCEMENT – SEARCH OF INFORMATION STORED ON CELL PHONE

In *State v. Glasco*, 37 Fla. L. Weekly D1414 (Fla. 5th DCA 2012), the court held that a search of a suspect's cell phone, incident to a lawful arrest, is acceptable without a search warrant, consent or other legal justification.

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In *Glasco*, supra., the defendant was lawfully arrested at his home on felony drug charges. After the defendant was handcuffed, but before he arrived at the jail, police found a cell phone on the defendant's person. After the defendant arrived at the police station, the officers examined the phone and read the defendant's text messages. At the time they did so, the officers did not have a search warrant for the phone. In addition, the officers admitted that they had no probable cause to believe that any contraband would be found on the phone and that, at the time they searched the phone, they were not concerned that the defendant would erase its contents. *Cont. 2A*

THE BOUNDS OF THE RIGHT TO BEAR ARMS TESTED BEFORE THE ELEVENTH CIRCUIT COURT OF APPEALS

The Eleventh Circuit Court of Appeals recently considered the question of whether a Georgia law (known as the "Carry Law"), which bars the carrying of a firearm in certain locations, such as courthouses, jails, bars, and places of worship, violates the Free Exercise Clause of the First Amendment or the Second Amendment. Georgiacarry.org, Inc., et al., v. State of Ga., et al., 2012 WL 2947817 (11th Cir., July 20, 2012). The plaintiffs each alleged they regularly attend church, possess valid firearm carrying licenses, and wish to carry their guns while in church. The Carry Law does not penalize such licensed carriers if they approach "security or management personnel upon arrival… and notif[y] security or *Cont. 2B*

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The defendant moved to suppress the cell phone evidence, arguing that the police could not search the phone without a search warrant, consent, or at least probable cause to believe that relevant evidence would be found on the phone. The trial court agreed with this argument and suppressed the evidence. However, on appeal, the 5th DCA reversed that decision.

The 5th DCA held that when a suspect is lawfully arrested in a location other than a vehicle, police are allowed to seize and search a cell phone found on the suspect during the arrest. In those circumstances, the officers do not need a search warrant, consent, or any other justification for the search as it is a type of "search incident to a lawful arrest."

This decision is consistent with other Supreme Court cases which have held that officers, when making any lawful arrest, have the right to search any containers found on the arrestee. ("Search incident to a lawful arrest"). The court likened a cell phone to a briefcase or notebook, and the law is clear that those items can be examined without a warrant when they are found on a person who is lawfully arrested. The Supreme Court has recently placed some restrictions on searches of vehicles, but those do not apply in this case because the phone was found on the suspect's person while he was at home. This case does not address the issue of whether officers can search a cell phone incident to arrest if the person arrested was the occupant of a car. Also, the Florida Supreme Court is currently reviewing the issue of warrantless cell phone searches.

By: Michael J. Roper

2B

management personnel of the presence of the weapon… and explicitly follow[ ] the security or management personnel's direction for removing, securing, storing, or temporarily surrendering" the gun. But, the refusal to approach security or management personnel or to comply with their direction is a misdemeanor.

The plaintiffs sought a declaration that the Carry Law is unconstitutional on its face as it violates the First Amendment right to the free exercise of religion, and violates the Second Amendment right to bear arms. The District Court dismissed plaintiffs' amended complaint, finding the allegations were insufficient to state a valid claim that the law's place of worship provision is unconstitutional on its face or as applied.

In considering the appeal, the Eleventh Circuit was forced to consider an intersection of four basic concepts of American law: the freedom of religion; the right to bear arms; the government's right to pass reasonable laws to maintain public safety and order, and one's right to maintain dominion and control over his property.

The Eleventh Circuit first found that while plaintiffs' claims touched upon activities that might occur in a church, they failed to state a true "Free Exercise" claim. That is, they failed to allege the Carry Law in fact impacted any right to exercise their sincerely-held religious beliefs. Plaintiffs alleged they would "like to" carry handguns in church for protection, then leapt to the conclusion that the Carry Law interferes with their exercise of religion. But, the court found this desire to provide protection is a secular purpose, and not one encompassed under the Free Exercise clause.

The court then turned to the question of whether the law infringed on the plaintiffs' Second Amendment right. The Second Amendment reads: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." As the Eleventh Circuit noted, the Supreme Court, recently, drastically, changed the impact of this amendment via District of Columbia v. Heller, 554 U.S. 570 (2008) and McDonald v. City of Chicago, 130 S.Ct. 3020 (2010). To summarize, the Heller court held for the first time that the Second Amendment "codified a pre-existing" individual right to keep and bear arms. Id. at 592. In so holding, the court struck down a prohibition on the possession of a handgun in one's home. The McDonald court made the "Second Amendment binding on the states and their subdivisions," via the Fourteenth Amendment due process clause. Id. at 3046.

In Georgiacarry.org, the plaintiffs alleged the Carry Law infringes on their right to keep and bear arms "by prohibiting them from possessing weapons in a place of worship." After noting various pleading deficiencies, the Eleventh Circuit found the counts asserted by plaintiffs asserted a "facial challenge." In so doing, as opposed to where an "as applied" challenge is asserted, the plaintiffs were required to show the Carry Law is unconstitutional as to all applications of the law in order to prevail. As the Eleventh Circuit noted, one common application of the Carry Law would be when a license holder wants to carry a firearm in church where management prohibits carrying. So, to state a facial challenge,

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therefore, the plaintiffs must have taken the position that the Second Amendment protects a right to bring a firearm on the private property of another against the wishes of the owner. Put another way, the court held the plaintiffs must have argues the individual right protected by the Second Amendment, in light of Heller and McDonald, trumps a private property owner's right to exclusively control who may enter the premises, and exclusively control the circumstances under which one is allowed to remain on the premises. In short, the court read Plaintiffs' claim to assume the following: management of a place of worship is likely to bar license holders from carrying an unsecured firearm on the premises; the license holders are unlikely to comply with management's instructions; management is likely to report such conduct to law enforcement; the license holders are likely to be arrested for their refusal to comply with management's instructions; and the arrest establishes a Second Amendment violation.

In considering this question, the court first noted that, as commanded by Heller, in passing on a Second Amendment claim the court must read the challenged law in light of the amendment's historical background. Heller at 592 ("We look to [the historical background of the Second Amendment] because it is always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.' "). After conducting a thorough review of the right to bear arms relative to activity on private property, the court rejected plaintiffs' implicit argument that the Second Amendment somehow abrogates the right of a private property owner to determine whether to allow firearms on the premises, and if so, under what circumstances. The Eleventh Circuit concluded the Second Amendment does not give an individual a right to carry a firearm on a church's premises against the owner's wishes because such right did not pre-exist the Second Amendment's adoption. Thus, the court found enforcing the Carry Law against a license holder who carries a firearm on private property against the owner's instructions would therefore be constitutional, and thus found the plaintiffs' facial challenge fails because the law is capable of numerous, constitutional, applications.

In reaching this ruling, the court found a church's right to forbid possession of firearms on its property is entirely consistent with the Second Amendment, and further found:

> Surely, given the [Supreme] Court's pronouncement that the Second Amendment merely "codified a pre-existing right," Plaintiffs cannot contend that the Second Amendment in any way abrogated the well established property law, tort law, and criminal law that embodies a private property owner's exclusive right to be king of his own castle. By codifying a pre-existing right, the Second Amendment did not expand, extend, or enlarge the individual right to bear arms at the expense of other fundamental rights; rather, the Second Amendment merely preserved the status quo of the right that existed at the time. Indeed, numerous colonial leaders, as well as scholars whose work influenced the Founding Fathers, embraced the concept that a man's (or woman's) right to control his (or her) own private property occupied a special role in American society and in our freedom. See William Tudor, Life of James Otis 66–67 (1823) (quoting a speech from 1761 given by James Otis, who stated that "one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle."); John Locke, Two Treatises on Government, 209–10 (1821) ("[Property] being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men.").

The court further noted an individual's right to bear arms as enshrined in the Second Amendment, whatever its full scope, certainly must be limited by the equally fundamental right of a private property owner to exercise exclusive dominion and control over its land. And, the court noted the Founding Fathers "placed the right to private property upon the highest of pedestals, standing side-by-side with the right to personal security that underscores the Second Amendment."

It is apparent to any observer of modern America that we are struggling with defining the bounds of the Second Amendment. Heller and McDonald have been largely interpreted as confirming, if not expanding, the right to bear arms to protect one's home and personal property. While Georgiacarry.org may be read by some to constrain the Second Amendment, the essence of the court's opinion is an affirmation of the right of a premises owner to control the activities which occur thereon. The court's opinion simply follows the elementary constitutional precept that "one's rights end where another's begin" (or, as the great Oliver Wendell Holmes said: "the right to swing my fist ends where the other man's nose begins.").

That said, the Eleventh Circuit clearly sidestepped the obvious question: Would the Carry Law validly bar the possession of a gun in a church which, absent the law, would allow firearms to be possessed during worship services? In typical fashion, the court provided little indication of how it might rule on this question, which must await another day.

By: Dale Scott

WORKERS COMPENSATION

Is That Workplace Fall Compensable?

A fall which merely occurs on the employer's premises while the employee is not actively engaged in employment related activities is generally not compensable. For example, injuries resulting from a fall caused by an idiopathic condition such as epilepsy, are not compensable. *Federal Electric Corp. v. Best*, 274 So.2d 886 (Fla.1973). To be compensable, an injury must "arise out of employment" in the sense of causation and be "in the course and scope of employment" in the sense of continuity of time, space, and circumstances. *Grenon v. City of Palm Harbor Fire Dist*., 634 So.2d 697, 699 (Fla. 1st DCA), *review denied*, 649 So.2d 233 (Fla.1994). There must be some showing that there was an increased risk of injury posed by the place of employment or a showing of a sufficiently stressful and unusual condition of employment.

In other words, injuries caused by idiopathic falls do not arise out of employment unless the employment in some way contributes to the risk personal to the claimant or aggravates the injury. *Foxworth v. Florida Industrial Commission*, 86 So.2d 147, 151 (Fla.1955); *Federal Electric Corp. v. Best*, 274 So.2d 886 (Fla.1973); *Southern Convalescent Home v. Wilson*, 285 So.2d 404 (Fla.1973); *Honeywell v. Scully*, 289 So.2d 393 (Fla.1974). Common examples of employment conditions increasing a risk to employees include a fall from heights or onto dangerous objects or a requirement that the employee use a motor vehicle during their working hours. Out of these cases has come the "increased hazard doctrine." As a result, a claimant must now make a specialized, fact-based showing that the employment created an increased risk or injury in order to succeed under the increased hazard doctrine.

However, in some cases, it is easier than one might think in order for an employee to meet this burden. In *Lovett v. Gore Newspapers*, the Florida Supreme Court upheld recovery for a worker who, while working an overtime shift, felt ill, and then fell to a "tiled concrete floor" aggravating a pre-existing back condition. 419 So.2d 306, 308 (Fla. 1982). The Court applied the special hazard doctrine and held the accident was compensable. Instrumental to the finding of compensability in this case was the fact that the employee "was required to work two hours beyond her normal eight-hour shift despite her protestations that she was not feeling well." This factor, combined with the fall to a concrete floor, led the Supreme Court to conclude, "[I]t cannot fairly be said that [the employee] would just as likely have sustained an injury such as the one that occurred if she had been in her own home." Subsequent cases have noted that the mere act of falling on a tiled concrete floor is not an increased hazard, but that factor, coupled with the employer's required overtime in *Lovett*, was sufficient for the injuries to be found compensable.

We have established that a fall which occurs on the employer's premises while the employee is not actively engaged in employment related activities is generally not compensable. However, what if the employee is on their way to or from work when they are injured? The "going and coming rule" provides that injuries sustained by an employee going to or coming from work are not compensable. However, as with most rules, there are always exceptions. Under the "premises rule" exception, an injury sustained by an employee with fixed hours and a fixed place of work who is injured while going to or coming from work is in the course of employment for workers' compensation purposes if the injury occurred on the employer's premises. *Bureau, Inc. v. Alvarez*, 654 So. 2d 1024 (Fla. 1st DCA 1995).

An injury is deemed to have occurred in the "course and scope of employment" under the premises rule, if it is sustained by the worker while on the employer's premises while preparing to begin the day's work or while doing other acts which are preparatory or incidental to performance of his or her duties, and which are reasonably necessary for such purpose. *Vigliotti v. K-mart Corp*., 680 So. 2d 466 (Fla. 1st DCA 1996) citing *Doctor's Business Serv., Inc. v. Clark*, 498 So.2d 659, 662 (Fla. 1st DCA 1986), *review denied*, 506 So.2d 1041 (Fla.1987); *accord Security Bureau, Inc. v. Alvarez*, 654 So.2d 1024, 1025 (Fla. 1st DCA 1995). In *Viglotti*, the employee she slipped on something on the floor as she was walking toward the front of the store on her way out, and the court held that she satisfied first element of the "arising out of" statutory definition, i.e., she was performing work in the course and scope of employment at time of the accident or injury. Therefore, a fall which occurs on the employer's premises before or after an employee clocks out could be compensable.

As you can see, many factors come into play when there is a fall at the workplace. Unfortunately, there is no hard and fast rule which may be applied across the board since each case is very fact specific. I am happy to assist you in these inquiries and investigations whenever the need arises.

By: Jennifer Killen

Premises Liability: Common Sense Prevails

The firm recently obtained final summary judgment in favor of its client in *Thomas Martin v. Sun Kool Air Conditioning, Inc., et al.*, a premises liability case. Mr. Martin, while employed by the defendant, Tim Miller Vinyl Siding, Inc., fell through a skylight on a building occupied by Sun Kool and owned by another defendant. Mr. Martin survived the fall. Miller had been hired by Sun Kool to perform roofing work on the subject building. The work generally consisted of the installation of metal roofing panels over the existing roof and the removal of existing skylights and installation of new skylights.

The plaintiff alleged that Sun Kool owed and breached the following duties to Mr. Martin: (a) to maintain the premises in a reasonably safe condition; (2) to correct dangerous conditions on the premises; (3) to warn of dangerous conditions on the premises by providing adequate signage or barricades; and (4) to provide a reasonably safe place to work.

The issue was whether Sun Kool owed a duty to Mr. Martin, an employee of an independent contractor (Miller), while performing work that the independent contractor was hired to perform, which work included skylights. The issue of duty is one of law for the court to decide; it is not a factual issue for a jury.

The general rule is that one who hires an independent contractor is not liable for injuries sustained by that contractor's employees in performing their work. (Citations, for the most part, and quotation marks have been omitted for ease of reading and brevity.) There are exceptions to this general rule.

The first exception is if the property owner has been actively participating in the work to the extent that the owner directly influences the manner in which the work is performed. An owner can perform a number of activities and still not expose himself to liability, if the activities were not directed at manner and method of work. Further, there must be an extensive amount of control. An owner cannot be held liable when the owner is a passive non-participant, exercising no direct control over the project.

The second exception is if the owner has acted negligently in creating or approving the dangerous condition that resulted in the employee's injury. If this second exception is applicable, and the condition is a latent condition of which the owner has actual or constructive knowledge, then the owner has a duty to warn. This duty to warn depends upon whether the dangerous condition was known to the owner but unknown to the independent contractor. The duty to warn is satisfied if the owner provides warning to the supervisor for the independent contractor. The following inquiry may be used to establish owner liability under the second exception: (1) Is the alleged dangerous condition patent or latent; (2) If latent, did the owner have actual or constructive knowledge of the condition; and (3) were the independent contractor's employees without actual or constructive knowledge of the condition.

However, it has also been recognized that there is an exception to the landowner's duty to maintain the premises in a reasonably safe condition regarding independent contractors hired for hazardous work where the hazard is incidental to or part of the work. An owner has no duty to make the premises safe for employees of an independent contractor when the contractor is to perform a specific task in respect to a known hazard that is incidental to or part of the work itself. Thus, the second exception is better applied to a hazard that is not incidental to or part of the work itself.

In our case, the plaintiff conceded at the hearing that the first exception did not apply. Therefore, the second exception and the fact that the known hazard (the skylights) was incidental to the work became the points of contention. We had the good fortune of a recent decision that was not yet final at the time the motion was filed, but was final by the time of the hearing: *Strickland v. Timco Aviation Services*, 66 So.3d 102 (Fla. 1st DCA 2011). There, the plaintiff was an employee of an independent contractor hired to pressure wash a roof and to perform skylight maintenance. The employee fell through a skylight. The *Strickland* court went through the exceptions and concluded that the second exception was not satisfied as the dangers were known or could have been discovered. For us and the court, it was on point application of the law to the facts.

As in *Strickland,* it was alleged in our case that the skylights were the same or similar in color and appearance as the roof. The *Strickland* court felt that any difficulty in locating the skylights was insufficient to impose a duty as the independent contractor was on notice that the skylights were part of the work. Further, in both cases the plaintiff was warned not to step on the skylights. The plaintiff attempted through case law to distinguish the *Strickland* decision. After lengthy argument, the court granted final summary judgment in our client's favor.

By: David Blessing

CHEATERS SOMETIMES PROSPER BUT NOT ON ALL THEIR CLAIMS

In an appeal from a judgment in excess of $2 million, the 5th DCA, in *Health First, Inc. and David S. Ori v. Cataldo* 37 Fla. L. Weekly D1551 (Fla. 5th DCA 2012) confirms that a Plaintiff may, at any time, withdraw a damage claim and prevent cross-examination by the Defense about that claim and any alleged false statements about it.

Ms. Cataldo was rear-ended at a slow speed by a pick-up truck owned by Health First. Health First admitted liability and the case proceeded to trial on damages. Ms. Cataldo's primary injury claim was brain damage. She also claimed a neck injury with resulting three level fusion surgery, an elbow injury and depression. On the eve of trial, Cataldo dropped her brain injury claim. The Defense moved to continue trial due to the late and significant alteration in the claims. Their reasons also included the courts refusal to permit impeachment of Cataldo on issues regarding fabrication and exaggeration of her brain injury which was intertwined throughout the records of her remaining claims. The trial court denied the motion and the trial proceeded as scheduled.

In affirming the lower court's ruling, the 5th DCA summarized the case law in Florida by stating: "once the claim for damages was dropped, evidence that Cataldo allegedly misrepresented her head and dental injuries generally is inadmissible because it constitutes impeachment on a collateral issue. Accordingly, because the evidence that Defendant sought to introduce had no tendency to prove what it was offered for - that Cataldo had exaggerated or fabricated her claims - the trial court did not abuse its discretion in excluding the evidence."

This case highlights the caution required when approaching trial of a multiple claim personal injury case where strong impeachment material is available on only one of the injuries. In this situation one cannot forget that Plaintiff may withdraw a problematic claim and prevent the Defense from bringing it up in trial through cross-examination or otherwise. Catching a Plaintiff in an exaggeration or fabrication does not necessarily mean such information is available for use at trial. Strategically, the choice may come down to a question of whether to move forward with a motion to dismiss for fraud upon the court, if the falsehoods reach that level, or whether to take the chance Plaintiff will not dismiss the claim at trial. Failure of the court to grant dismissal for fraud will likely result in Plaintiff dismissing the problematic claim rather than allowing cross-examination and credibility damaging impeachment at trial. The moral appears to be; cheaters may sometimes prosper but not on all their claims.

By: Chris Fay

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