BELL & ROPER LEGAL UPDATE

Survey of Insurance and Civil Rights Issues and Recent Court Decisions from Bell & Roper, P.A.

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FIFTH DISTRICT COURT OF APPEAL AFFIRMS TRIAL COURT'S ORDER DISMISSING THIRD PARTY COMPLAINT FOR CONTRIBUTION

In *Country Club Homes of Florida, Inc. vs. Flagler Fire & Rescue and Palm Bay Fire Department*, Case Nos. 5D-09-508; 5D09-3452, the appellant filed an appeal of the trial court's order of dismissal with prejudice entered in favor of Flagler Fire & Rescue. The underlying action commenced when Country Club filed and served a Third Party Complaint against Flagler Fire & Rescue alleging a claim for contribution arising out of a fire that began on August 7, 2002 and rekindled during the early morning of August 8, 2002.

Flagler Fire & Rescue filed a motion to dismiss the third party claim based on its entitlement to sovereign immunity for fire suppression and the same was scheduled for hearing on December 19, 2008. However, on December 18, 2008, Country Club served a notice of voluntary dismissal of the third party defendants without prejudice. At the December 19, 2008 hearing, the trial court was advised that Country Club had voluntarily dismissed its third party claims but determined that the third parties' respective motions to dismiss with prejudice should be granted.

Country Club then appealed the trial court's order on the basis that the court had been divested of jurisdiction once Country Club filed its notice of voluntary dismissal and thus, the subsequent final orders of dismissal were void as a matter of law.

On January 20, 2011, the Fifth District Court of Appeal heard oral argument on this issue. Firm member **Cindy A. Townsend**, on behalf of Flagler Fire & Rescue, successfully argued that the trial court correctly entered the order of dismissal with prejudice in favor of Flagler Fire & Rescue based on a recognized common law exception to Rule 1.420(a)(1), Florida Rules of Civil Procedure, where the defendant demonstrates serious prejudice, such as where it is entitled to receive affirmative relief or a hearing and disposition of the case on the merits, has acquired some substantial rights in the cause, or where dismissal is inequitable.

Ms. Townsend argued that Flagler Fire & Rescue demonstrated severe prejudice *vis a vis* its entitlement to receive affirmative relief or a hearing and disposition of the case on the merits because it was immune from suit pursuant to clearly established case law which states there is no duty, statutory or otherwise, imposed on a local governmental agency to extinguish fires before any property damages or personal injury occurs. It was asserted that the facts as alleged by Country Club could not, under any circumstances, establish a claim for negligence against Flagler Fire & Rescue which, in turn, meant that Flagler Fire & Rescue could not be found liable for contribution.

The Fifth District Court was persuaded by this argument and per curiam affirmed the trial court's dismissal of the third party claims.

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SHOULD A TRIAL COURT BE ALLOWED TO RESERVE JURISDICTION IN A FINAL JUDGMENT TO AWARD PREJUDGMENT INTEREST?

By Anna E. Engelman

On December 16, 2010, in *Westgate Miami Beach, Ltd. v. Newport Operating Corporation*, 35 Fla. L. Weekly S735 (Fla. Dec. 16, 2010), the Florida Supreme Court addressed the following question certified by the Third District Court of Appeal:

> SHOULD A TRIAL COURT BE ALLOWED TO RESERVE JURISDICTION IN A FINAL JUDGMENT TO AWARD PREJUDGMENT INTEREST?

This question arose after the Third District affirmed a lower court's ruling in *Westgate* finding that Westgate waived its entitlement to prejudgment interest. By way of background, Westgate prevailed at the trial level and was awarded damages. The trial court entered a final judgment in favor of Westgate, which provided that a separate order would be entered awarding prejudgment interest. The trial court determined that the issue of prejudgment interest would need to be heard in a later hearing, after the trial court determined the correct amount of damages. The hearing on that issue was delayed for unknown reasons.

Counsel and the court seemed to agree that because the trial court found that Westgate was entitled to prejudgment interest (though not yet calculated), the final judgment was a final order which could be appealed, even before any order was entered regarding prejudgment interest. Therefore, both parties filed separate appeals. After a successful appeal, Westgate again requested the trial court assess prejudgment interest. For the first time, Newport argued, pursuant to the Florida Supreme Court's precedent in *McGurn v. Scott*, that the trial court lost

jurisdiction because Westgate waived it when it filed the appeal. The trial court apologetically agreed, presumably unaware of *McGurn* prior to this point, and ruled that Westgate waived its right to prejudgment interest. Westgate appealed the issue, and the Third District affirmed, but certified the question as one of great public importance to the Florida Supreme Court.

In reviewing the issue, the Court was required to analyze its previous decision in *McGurn*, wherein it considered whether a trial court may issue a final appealable order while reserving jurisdiction to award prejudgment interest. In that case, the trial court awarded damages to Scott and reserved jurisdiction to award appropriate attorney's fees, costs, and prejudgment interest upon motion by the parties. McGurn filed an appeal, at which time Scott requested the appellate court relinquish jurisdiction to the trial court to determine prejudgment interest. The appellate court dismissed the appeal as premature finding that a final order was required before an appeal, and the court did not believe an order that reserved jurisdiction to award prejudgment interest was considered a final order. The issue came before the Florida Supreme Court.

The Court first determined that an order is final when there is no judicial labor to be done except the execution of a judgment. The Court noted that the reservation of jurisdiction to award attorney's fees and costs does not affect the finality of an underlying judgment for appeal purposes. Although McGurn attempted to argue that prejudgment interest should be treated similarly, the Court instead determined that prejudgment interest is another element of damages and is thus related to the cause at issue. By reserving jurisdiction to determine prejudgment interest, the Court found that the trial court failed to dispose of all material issues and controversy and the order was not final. Despite this finding, the Court did not agree that the appeal was premature and should have been dismissed. Rather, the Court found that if a trial court improperly renders a judgment that appears to be a final judgment, as it believed was the case in *McGurn*, the order will be deemed to be a final judgment and be immediately appealable. Once appealed, the trial court loses jurisdiction to award prejudgment interest.

Although mindful of its obligation to follow precedent, the Court stated that such an obligation should yield when an established rule of law proves to be an unacceptable and unworkable practice as here. Indeed, the *McGurn* ruling has effectively resulted in an inadvertent waiver of the right to prejudgment interest in at least six cases. Although not pervasive, the Court recognized that such instances indicate a problem caused by the *McGurn* ruling.

Upon reconsideration, the Court receded from its decision in *McGurn* to an extent, and answered yes to the certified question above. The Court held that an appeal from a final judgment will *not* divest the trial court of jurisdiction to award prejudgment interest. It found that prejudgment interest is more akin to attorneys' fees and costs rather than other elements of damages—a point *McGurn* raised to the Court in the original case. The trial court may award prejudgment interest in a separate order which is separately appealable. Notably, the Court did *not* recede from its entire *McGurn* holding. A final judgment that authorizes execution but reserves jurisdiction to award prejudgment is still final for appellate purposes.

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FIFTH DISTRICT COURT OF APPEALS UPHOLDS THE VALIDITY OF AN ANTIQUE AUTO POLICY

On February 8, 2011, the Fifth District Court of Appeal issued a citation opinion affirming the Trial Court's Order Granting Final Summary Judgment in favor of Metropolitan Insurance Company.

Gregory Allen was injured in an automobile accident that occurred on December 20, 2007, while operating a scooter he owned insured under a policy issued by GEICO. Allen also owned two other vehicles insured under a policy issued by Progressive. Lastly, Allen owned a 1975 Ford Mustang insured under an Antique Automobile Policy issued by Metropolitan.

Allen made no claim against GEICO for UM benefits as he had rejected UM coverage. Allen collected policy limits of the uninsured motorist coverage under the Progressive policy which insured his "daily drivers". Allen presented a claim for uninsured motorist benefits to Metropolitan, who denied same as its antique automobile insurance policy excluded UM benefits when the insured was occupying any vehicle other than the insured antique vehicle.

Allen filed a declaratory action in the Circuit Court in and for Orange County, Florida. Allen took the position that the uninsured motorist exclusion contained within the Metropolitan policy violated *Mullis v. State Farm Met Auto Ins. Co.*, 252 So.2d 229 (Fla. 1971). Metropolitan countered by arguing that the UM statute was never intended to mandate Class I "family-style" benefits under an antique automobile policy, relying on *Martin v. St. Paul Fire & Marine Ins.Co.*, 670 So.2d 997 (Fla. 2^{d} DCA 1996). Since the *Martin* decision, no appellate court in Florida had addressed the issue pending in *Allen*.

The Fifth District Court of Appeal's decision is a favorable decision for the insurance industry. The citation opinion indicates that the Fifth District relied on *Martin* in affirming the Trial Court's Order Granting Final Summary Judgment to Metropolitan.

Congratulations to firm members **Michael M. Bell** and **Mary J. Walter**, who represented Metropolitan Insurance Company.

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LIMITS ON DISCOVERY ACTIVITIES RELATED TO QUASI-JUDICIAL PROCEEDINGS

By Dale A. Scott

The Third District Court of Appeal recently clarified and confirmed that, as a matter of course, a party to a quasi-judicial proceeding (such as a code enforcement proceeding) is not

entitled to conduct discovery activities related to such proceeding. In *City of Key West, Tree Commission v. Radim Havlicek, et al*., 2011 WL 904578 (Fla. 3rd DCA, March 16, 2011), after the City of Key West Tree Commission found the respondent Mr. Havlicek violated tree protection code provisions, the City referred him to a special magistrate for the assessment of fines. Havlicek then served deposition *subpoenas* upon three Commission members, which ostensibly commanded them to appear for depositions. The City then filed a motion for protective order with the magistrate, and the magistrate granted the motion. Ultimately, Havlicek appealed the magistrate's ruling to the Monroe County Circuit Court via a petition for writ of *certiorari*. The court granted the petition and ordered that Havlicek could take the depositions.

On appeal, the Third District first considered the City's argument that the lower court's ruling conflicted with § 286.0115(1)(c)(3), *Fla. Stat.* This statute provides that local public officials "may conduct investigations and site visits and may receive expert opinions regarding quasi-judicial action pending before them", and such "activities shall not be presumed prejudicial to the action if the existence of the investigation, site visit, or expert opinion is made a part of the record before final action in the matter." The Third District found that, under the statute, the Commissioners could not be considered witnesses, and thus depositions were inappropriate.

Additionally, the Third District found that as Florida Rule of Civil Procedure 1.280(b)(1) establishes the right of parties to obtain discovery in matters litigated *before the Circuit Court*, and as this proceeding was a code enforcement matter before a magistrate, there was no legal authority for the depositions. Moreover, Chapter 162, *Fla. Stat.*, which controls code enforcement matters, contains no provisions allowing discovery. Finally, the Third District noted the City Code section at issue provided that magistrate proceedings are to be conducted *de novo*. That is, the magistrate could consider only the record *presented to the Commission*. Thus, it would be further inappropriate for the magistrate to allow any additional depositions after the Commission completed its review, as the magistrate could not consider the same.

This Third District ruling is important for municipalities, counties, and other governmental bodies which conduct quasi-judicial proceedings. When targeting administrative acts of governmental entities, parties to quasi-judicial proceedings often seek to slow the proceedings, make them more complex or expensive than necessary, or to otherwise harass the entity to compel it to yield to the party's wishes. But, the Third District has clarified that a party to a quasi-judicial proceeding *may not* utilize the discovery rules and methods, as provided in the Florida Rules of Civil Procedure, relative to the same--they apply to matters litigated before Circuit Court. Of course, a municipal or county code could provide that parties may conduct discovery relative to quasi-judicial proceedings. But, such a right does not exist as a matter of course, nor is it provided under Chapters 162 or 268, *Fla. Stat.*

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