Legal Update

BELL & ROPER, P.A.

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USE OF DEPOSITION AT TRIAL WHEN DEPONENT DIES PRIOR TO CROSS-EXAMINATION

In *The Bank of Montreal and Harris v. The Estate of Jacques Antoine, et al,* 37 FLW D1133 (4th DCA, May 19, 2012) the Fourth District Court of Appeal determined that the Trial Court erred in excluding a party's deposition testimony where the deponent had died before a Co-Defendant could conduct cross-examination.

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Jacques Antoine was an employee of the Bank of Montreal. Over a number of years he embezzled thirteen million dollars from the Bank of Montreal and Harris Bank. The Bank of Montreal and Harris Bank filed a civil action against Jacques Antoine, his wife, and Bank of America, alleging fraud, constructive trust, attachment and garnishment. During discovery, Jacques Antoine's deposition was commenced. The deposition was terminated before Counsel for the co-defendants could conduct cross-examination as Jacques Antoine began having chest pains. Jacques Antoine subsequently expired.

Continued at 2a

CLAIM FOR ENTITLEMENT TO AN AWARD OF ATTORNEY'S FEES MUST BE PLEADED

In *Imseis v. Zaher*, 2012 WL 1110159, 1 (Fla. 2d DCA 2012), the Second District Court of Appeal reviewed an appeal by James Imseis regarding a final judgment entered by the trial court which denied him relief on causes of action for cancellation of a deed, ejectment, and equitable lien. Imseis also challenged the trial court's reservation of jurisdiction to determine entitlement to and an award of attorneys' fees. Imseis argued that no one pleaded for such relief in the underlying matter.

The district court stated that "a claim for attorneys' fees must be pleaded, whether based on contract or statute". Id. (citing *BMR Funding, LLC v. DDR Corp*., 67 So.3d 1137, 1140 (Fla. 2d DCA 2011). Additionally, a timely motion is

Continued at 2b

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2a

During his deposition, Jacques Antoine admitted that the source of the money in his account was embezzled. The Bank of Montreal and Harris Bank attempted to utilize Jacques Antoine's direct testimony at trial. The Co-Defendants objected, and the Trial Court excluded the deposition testimony on the basis that the co-defendants had not had an opportunity to cross-examine Jacques Antoine.

On appeal, the Fourth District Court of Appeal reversed. The Court's opinion cites a number of cases from other jurisdictions with similar circumstances. Other Courts that had previously addressed this issue determined that a partial deposition could still be utilized based on the analogy that "a half loaf of bread is better than no bread at all".

This is an interesting case concerning an extraordinary event. Claims professionals and trial lawyers should be mindful of the Fourth District's ruling and insure that depositions are completed as soon as possible.

By Michael Bell

2b

required. Fla. R. Civ. P. 1.525; *Barco v. Sch. Bd. of Pinellas County*, 975 So.2d 1116, 1124 n. 4 (Fla. 2008). The district court then reversed that portion of the final judgment reserving jurisdiction to determine and award attorneys' fees.

By Cindy Townsend

OFFERS OF JUDGMENT

Offers of judgment are meant to encourage settlement among litigants by punishing those that unreasonably refuse a fair offer and by rewarding those that make reasonable offers by providing them with the chance to recover attorney's fees and costs. If the trial court determines that the offer of settlement was unreasonably rejected, and resulted in unnecessary delay or in the increase of costs, and if the damages awarded by the jury are twenty-five (25%) percent less than that which was offered by the defendant to the plaintiff, or twenty-five (25%) percent more than that which the plaintiff demanded from the defendant, then the trial court may sanction the party that unreasonably rejected the offer. The court may award as sanctions an amount equal to the reasonable attorney's fees and costs incurred by the offering party after the offer was made. However, when there are multiple defendants, there are special considerations to make to ensure that the offer of judgment is valid against the plaintiff.

The Fifth District Court of Appeals recently decided the case of *Duplantis v. Brock Speciality Services, Ltd.* ,which is instructional. *Duplantis v. Brock Specialty Services*, 37 Fla. L. Weekly D1010 (Fla. 5th DCA 2012) In that case, Duplantis was injured when his vehicle was struck by a truck driven by Russo. The truck was owned by Donlen Trust, which leased it to Brock Enterprises Texas, LLC. Brock Enterprises assigned it to its wholly owned subsidiary, Brock Specialty Services, Ltd. Duplantis brought suit against Russo for negligence and against Donlen Trust and Brock Specialty as owners vicariously liable for Russo's negligent operation. In November, 2009, Brock Speciality served an offer of judgment upon Duplantis. While the offer of judgment was still open, Duplantis filed a second amended complaint by agreement of the parties and dropped the Donlen Trust as a party, and added Brock Enterprises as a defendant and alleged their liability was solely vicarious, based on the dangerous instrumentality doctrine and respondeat superior. Brock Specialty proposed to pay Duplantis $300,000.00 in settlement of any and all claims against it, but conditioned the settlement on execution of a release in favor of all named defendants, as well as their affiliates. A copy of the proposed release was attached to the offer and stated that it was being made pursuant to Florida Rule of Civil Procedure 1.442 and section 768.79, Florida Statutes.

Duplantis did not respond, and the offer was deemed to have been rejected. The case proceeded to jury trial and a verdict was rendered in favor of Duplantis for $18,400.00, after apportionment of fault. Judgment was entered against Russo, Brock Enterprises and Brock Specialty, jointly and severally. Russo, Brock Enterprises and Brock Speciality then moved for an award of

Continued at 3a

fees and costs based on the offer of judgment. The trial court granted the motion and awarded Brock Specialty attorney's fees of $80,816.16. Duplantis appealed and argued that the offer of judgment made by Brock Specialty was invalid because it was a joint proposal that failed to state the amount and terms attributable to each defendant, as required by Florida Rule of Civil Procedure 1.442 (2009). The Supreme Court has previously held that an offer of judgment must apportion the offer among the parties, even when one party's liability is purely vicarious. *Lamb v. Matetschk*, 906 So. 2d 1037, 1042 (Fla. 2005). Where the liability of one defendant is based on vicarious liability and the issue of vicarious liability is undisputed, apportionment of the offer between the active tortfeasor and the vicarious tortfeasor is problematic because the liability of both defendants is not apportioned but is coextensive. *Id.* at 1044.

The offer of judgment made in *Duplantis* is distinguishable because vicarious liability was contested by the offeror. Therefore, the Court held that under those circumstances, Duplantis was entitled to separate offers from each defendant, which would have permitted him to independently and intelligently assess and evaluate each offer. It should be noted that effective January 1, 2011, Florida Rule of Civil Procedure 1.442 was amended to provide that "when a party is alleged to be solely and vicariously, constructively, derivatively, or technically liable, whether by operation of law or by contract, a joint proposal made by or served on such a party need not state the apportionment or contribution as to that party." However, the 2011 amendment is not applicable to the *Duplantis* case because the offer of judgment therein was made in 2009 and was conditioned upon the dismissal of a defendant who was not an offeror. The proposal should conform with the Statute and Rule in effect for the year in which the cause of action accrued.

By Jennifer P. Killen

ATTORNEY'S FEES/CONTINGENT FEE MULTIPLIER

In *USAA Casualty Insurance Company v. Prime Care Chiropractic Center*, 37 FLW D1107(2nd DCA, May 9, 2012) the Second District Court of Appeal reversed the Trial Court's ruling awarding a multiplier as a multiplier was not supported by competent, substantial evidence.

Prime Care, as assignee of its patient, Mrs. Woodard, filed suit against USAA for failure to pay the full amount for medical services provided. USAA initially disputed the claim, but eventually confessed judgment by paying the claim in full, plus interest.

As payment in full constituted a confession of judgment, Prime Care was entitled to an a reasonable attorney's fee. At the fee hearing, Prime Care's principal testified that he had contacted three law firms in Polk County, but none would handle his case. Prime Care finally obtained Counsel on referral from the Florida Chiropractic Association. Based on this testimony the Trial Court determined that a contingent fee multiplier of 2 was appropriate.

On appeal, the Second District Court of Appeal reversed. The Court found that neither Prime Care or its expert provided sufficient evidence to support the broad assertion that Prime Care had difficulty retaining Counsel without the potential of a contingent fee multiplier.

While most County Court Judges awarded contingent fee multipliers when PIP litigation was at its zenith, few Courts have awarded contingent fee multipliers since the Fifth District Court of Appeal pronouncement in *Progressive v. Schultz*, 948 So. 2nd 1027 (Fla. 5th DCA 2007).

By: Michael Bell

CONGRATULATIONS

DALE SCOTT

The firm is proud to announce that Dale Scott has been named partner. Mr. Scott has been with the firm since 2006. He received his B.S. in Business Administration (economics) from the University of Florida in 1999, and his J.D. from the Florida State University College of Law in 2002. While attending law school, Mr. Scott was a member of his school's National Trial Advocacy Team, and attended its Summer Program in Law at Oxford University. He is a member of the Florida and Texas Bars, is admitted to practice before the United States District Courts of the Northern, Middle and Southern Districts of Florida, the Eleventh Circuit Court of Appeals, the United States Supreme Court, and is a member of the American Bar Association and the Defense Research Institute. He is also the co-author of "Arrgh! Hollywood Targets Internet Piracy (2004)," published in the University of Richmond School of Law's Journal of Law & Technology. Mr. Scott practices civil litigation in federal and state court, including civil rights, public entity, employment and commercial law. Congratulations Dale Scott!

If you are interested in being added to our newsletter e-mail list, or if you wish to be taken off of this list, please contact Shannon Berry at sberry@bellroperlaw.com.

Questions, comments or suggestions regarding our newsletter, please let us know your thoughts by contacting Sherry Hopkins at shopkins@bellroperlaw.com.