Legal Update

BELL ROPER LAW

March/April 2016

11th CIRCUIT EXPANDS POTENTIAL LIABILITY UNDER THE FAIR HOUSING ACT

2707 E. Jefferson Street
Orlando, FL 32803
www.bellroperlaw.com

Through a recently-issued and surprising decision, the United States Court of Appeals for the Eleventh Circuit has vastly expanded the scope of possible plaintiffs who may bring claims under the Fair Housing Act based upon alleged housing-related discrimination. In *City of Miami v. Bank of America Corp.*, 800 F.3d 1262 (11th Cir. 2015) (decided September 1, 2015), the Eleventh Circuit vastly expanded the scope of the FHA's term "aggrieved persons" who are eligible to bring claims under the FHA within all district courts in the Eleventh Circuit, which encompasses all federal courts in Florida, Georgia, and Alabama. In *City of Miami*, the City sued Bank of America ("BOA") (and other national banks separately on the same causes of action and theories) alleging that BOA targeted

Cont'd 2a

FIRST PARTY BAD FAITH

On February 25, 2016, the Florida Supreme Court issued its ruling in Fridman v. Safeco Ins. Co. The Supreme Court quashed a decision rendered by the Fifth District Court of Appeal. The Fifth District Court of Appeal's decision was analyzed in a previous edition of this Newsletter.

Adrian Fridman was insured under a policy issued by Safeco which provided uninsured motorist coverage with limits of $50,000.00. Safeco refused Fridman's policy limits' demand. Thereafter, Fridman filed a

Cont'd 2b

CONTACT A MEMBER OF THE FIRM

Michael M. Bell - mbell@bellroperlaw.com
Frank M. Mari - fmari@bellroperrlaw.com
David B. Blessing - dblessing@bellroperlaw.com
Michael J. Roper - mroper@bellroperlaw.com
Michael H. Bowling - mbowling@bellroperlaw.com
Dale A. Scott - dscott@bellroperlaw.com
Anna E. Engelman - aengelman@bellroperlaw.com
Sherry G. Sutphen - ssutphen@bellroperlaw.com
Christopher R. Fay - cfay@bellroperlaw.com
Joseph D. Tessitore - jtessitore@bellroperlaw.com
John M. Janousek— jjanousek@bellroperlaw.com
Dani S. Theobald - dthebald@bellroperlaw.com
Mai Le - mle@bellroperlaw.com
Cindy A. Townsend - ctownsend@bellroperlaw.com

2a

Black and Latino customers in Miami for predatory loans that carried more risk, steeper fees, and higher costs than those offered to identically situated white customers and created internal incentive structures that encouraged employees to provide these types of loans. The City alleged that by steering minorities toward these predatory loans, BOA caused minority-owned properties throughout Miami to fall into unnecessary or premature foreclosure, depriving the City of tax revenue and requiring it to spend more on municipal services, such as police, firefighters, trash and debris removal, to combat the resulting blight. The City asserted one claim under the FHA against BOA, maintaining that the City was an "aggrieved person" under the FHA as a result of BOA's allegedly unlawful and discriminatory lending practices.

Although the district court dismissed the City's FHA claim for lack of a sufficiently close causal connection, the appellate court held that the City had sufficiently alleged causation between BOA's discriminatory lending practices and the City's resulting harms. The court held that the harm alleged by the City had a "sufficiently close connection" to BOA's discriminatory lending practices. The Court specifically stated that the "zone of interests" (an "aggrieved person") under the FHA extends as broadly as permitted under Article III of the Constitution and therefore encompasses the City's claim. While the court conceded that certain other federal civil rights statutes (e.g. Title VII of the Civil Rights Act of 1964) are more limited, providing causes of action only to the direct victim of discrimination, the Eleventh Circuit held that the FHA is not so restricted. Following *City of Miami*, any party that sells housing, leases housing, manages housing, or provides lending related to a sale or lease of housing should take caution that facially-viable claims under the FHA can be made by individuals or entities that are not privy to the transaction or management relationship itself. With respect to governmental entities, the FHA is also notably distinct from many Florida-law tort claims in many respects, including but not necessarily limited to: (1) the FHA has no pre-suit written notice requirement, (2) compensatory damages under the FHA are *not* capped, and (3) a plaintiff prevailing on an FHA claim may be awarded reasonable attorney's fees and costs.

By: Frank M. Mari, Esquire

2b

Civil Remedy Notice. Safeco did not respond to Fridman's Civil Remedy Notice and Fridman filed a lawsuit against Safeco. Fridman also filed a Proposal for Settlement in the amount of $50,000.00.

Prior to trial, Safeco tendered a check to Fridman in the amount of $50,000.00, and filed a Motion for Confession of Judgment. The Trial Court denied Safeco's Motion for Confession of Judgment, determining that a trial was necessary to quantify Fridman's damages, so that Fridman could subsequently prosecute a bad faith action against Safeco for the amount the jury's verdict exceeded policy limits.

The case proceeded to trial and the jury determined Fridman's damages to be $1,000,000.00.

Safeco appealed the Trial Court's Final Judgment to the Fifth District Court of Appeal arguing that the Trial Court should have granted Safeco's Motion for Entry of Confession of Judgment. The Fifth District Court of Appeal agreed with Safeco. The Fifth District vacated the Judgment and directed the

Cont'd 3a

Trial Court to enter an Amended Final Judgment in the amount of $50,000.00 and delete any reference to the jury's verdict. The Fifth District further determined that it would be necessary for Fridman to file a bad faith action and have his damages quantified in that action rather than utilizing the amount the jury awarded Fridman in excess of policy limits.

Judge Sawaya of the Fifth District wrote a lengthy dissenting Opinion in which he reasoned that the Court's decision was contrary to the method utilized to quantify damages for the subsequent bad faith action. Judge Sawaya indicated that allowing the insurance carrier to confess judgment on the eve of trial unreasonably delayed the resolution of the insured's claim, as the insured would be required to re-litigate damages in a subsequent bad faith action. Judge Sawaya's dissenting Opinion indicated that the majority's opinion would likely result in abuse by insurers permitting the insurer to unreasonably delay its insured's recovery.

The Florida Supreme Court quashed the Fifth District Court of Appeal's Opinion. The Florida Supreme Court determined that an insured's damages must be quantified in the insured's underlying lawsuit. Once quantified, the insured could prosecute a bad faith action, which would only require a determination by the jury as to whether the insurer acted in bad faith. The Supreme Court cited Fla. Stat. § 624.155, which was enacted in 1982 and authorized a first party action for bad faith. Further, the Supreme Court appears to have adopted the reasoning in Judge Sawaya's dissent, recognizing the potential for insurer abuse if the insured was required to litigate the issue of damages in two separate lawsuits.

By: Michael M. Bell, Esquire

BAD INSURANCE COMPANY: AN APPEALING ARGUMENT

Everything in moderation. Well, at least in uninsured/underinsured motorist cases. In an effort to avoid the time and expense of trying the case again, the trial court and plaintiff's counsel should have abided by that old adage in *State Farm v. Gold*, 41 Fla. L. Weekly D257 (Fla. 4th DCA January 27, 2016). There, the appellate court felt that the combined effect of the trial court's jury instruction (with a focus on insurance company responsibility) and counsel's argument was a bit too much for the defendant insurance company to withstand. The carrier had preserved the issue by objecting. Counsel was admittedly (on appeal) using improper argument bolstered by improper visual aids in a case that was about the plaintiff's damages, not about the insurance carrier's conduct. This was a UM case, after all. It was not a case about the insurance carrier's obligations to its insured, but was a case about the determination of damages suffered by its insured. The appellate court felt that there was no place for argument and visual aids that included that the plaintiff had purchased UM coverage so that the trial would not happen, that the carried denied the claim with the plaintiff facing a stack of medical bills, that the plaintiff was carrying a debt, that the carrier refused to take responsibility for the debt and promised to pay the medical bills (presumably via the mere issuance of a policy), that the carrier up to that minute had not accepted responsibility and would not do so until forced by the jury, and that the plaintiff had done the right thing, but had the carrier? This was too much, the cumulative effect may have contributed to the verdict, and the defendant insurance carrier was unfairly prejudiced. The case was sent back to the trial court for a new trial.

By: David B. Blessing, Esquire

THE TRIALS AND TRIBULATIONS OF OBTAINING A SUMMARY JUDGMENT OR DIRECTED VERDICT IN TRIP AND FALL CASES

The defense of Trip and Fall cases in Florida can be one of the most frustrating legal areas for adjustors and defense attorneys. Generally, most Judges are loath to grant summary judgments and deny plaintiffs their opportunity to present their case to a jury. However, one would think that in the area of Trip and Falls, the granting of summary judgments would be common and more easily obtained, especially in cases where the plaintiff has no idea what caused them to fall, and relies on speculation post fall to bootstrap their legal claim. However, that assumption would be incorrect. Two recent cases before the 3rd and 4th District Courts of Appeal reflect the nuances of trip and fall law presently.

In *Perez-Rios v. The Graham Companies*, 2016 WL 231912 (Fla. 3rd DCA 2016), the 4th DCA granted summary judgment for the defendant where the plaintiff tripped and fell on a 4 inch step. The court found through photographs of the step that the step in question was plainly visible, that there was no obvious defect in the step, that there was no foreign substance visible on the step, that there wasn't any uneven wear and tear on the step, that the lighting was adequate, or that the step was not wet or slippery. The plaintiff could not specifically identify what caused her to fall or why the step was "defective." Plaintiff only submitted photos of the steps, but failed to submit any expert evidence that the step was defective in any way, such as the lighting was inadequate. The court finding no defective condition related to the step granted summary judgment for the defendant.

However, in *Christakis v. Tivoli Terrace, LLC*, 181 So.3d 579 (Fla. 4th DCA 2016), the court overturned a directed verdict for the defendant where the plaintiff could not identify what caused her to fall, but she did present expert evidence and photos showing the steps were in disrepair. At deposition and at trial the plaintiff could not say what caused her to fall. However, the court found the photos of the steps in question clearly showed they were in disrepair. The court held that the photos created a factual dispute that could only be resolved by the jury.

Florida law traditionally has not permitted a plaintiff to stack an inference upon an inference in order to create the evidence needed to place potential liability on a defendant. In the *Christakis* case the plaintiff clearly did not know what caused her to fall. From a defense perspective, if a plaintiff does not know the cause of their fall, it would be mere speculation that the step that was in disrepair caused the fall. This creates a potential for a plaintiff post fall to look around and speculate what might have caused their fall, and then place this theory before the jury. Although this may be their best hunch or their best guess, it is an inference they have arrived at after the event, but not direct evidence of the cause of the fall.

The plaintiff's speculation or hunch as to the cause of their fall is no more valid than a defendant's speculation as to the cause of their fall. For example, the plaintiff could have not been looking down and tripped over something on the ground. The plaintiff could have lost their balance and fallen. Likewise, they could have had a defective shoe or they could have been distracted and fell. Since the defendant is typically not present at the time of the fall there is no way for the defendant to preserve evidence of potential other causes.

Under Florida law the plaintiff has the burden to show a jury by the preponderance of the evidence

Cont'd 5a

5a

that there was a defective condition that actually caused the fall and the law does not permit speculation as to the cause of the fall. However, the *Christakis* court and other Florida courts have held that the plaintiff is not stacking inferences and is not speculating because they presented photos showing the steps were defective. The fact that the steps were defective alone could be the basis for the jury to conclude that they were the cause of the fall. Therefore, the directed verdict for the defendant in *Christakis* was overturned.

In both cases above the plaintiffs did not know what caused them to fall. However, that will not necessarily preclude them from presenting their case to a jury if they present any evidence of a defective condition at or near the location of their fall. Mere proximity alone appears to sufficient to create a factual dispute prohibiting entry of summary judgment or entry of a directed verdict. This essentially permits plaintiffs to create their theory of liability after the fact, specifically when they don't know why they fell, and could have fallen for many reasons unrelated to the condition of the property.

By: Joseph D. Tessitore, Esquire

CIVIL RIGHTS-EMPLOYMENT DISCRIMINATION-FLORIDA CIVIL RIGHTS ACT (FCRA)

In *Cimino v. American Airlines, Inc*., 2016 WL 23151141 (Fla. 4th DCA 2016) the appellate court recognized, as a matter of first impression in Florida, that a personal representative has the right to initiate a Charge of Discrimination ("Charge") under the FCRA on behalf of a deceased former employee. The pertinent facts reveal that Michael Cimino ("Cimino"), a non-Hispanic who was an employee of American Airlines, alleged that he had been subjected to a long series of discriminatory treatment, which eventually led to his discharge from his employment. A few days after he was discharged, he committed suicide. His surviving spouse/personal representative then filed a Charge with the EEOC and Florida Commission on Human Relations ("FCHR") alleging that American Airlines had engaged in discrimination against Cimino, in violation of the FCRA. The complaint was referred to the FCHR which then dismissed the Charge, finding that it lacked authority to investigate the complaint since the complaint had not been initiated prior to Cimino's death. That decision by the FCHR was then appealed to the 4th DCA.

The appellate court recognized that the FCRA is modeled after Title VII of the Civil Rights Act of 1964 and is therefore usually construed in conformity with that federal statute. The court also recognized that several federal courts have interpreted Title VII to prohibit a personal representative from initiating a complaint for discrimination, after the aggrieved employee's death. *See, e.g., Wright ex rel. Wright v. United States*, 914 F. Supp. 2d 837 (S. D. Miss. 2012). (*See footnote below).

Nonetheless, the court noted that federal decisions interpreting Title VII are only persuasive authority in interpreting the Florida statute. In this instance, the court relied primarily upon the definitions contained in the FCRA, particularly the fact that the FCRA provides that a "person aggrieved" may file a complaint and, further that the definition of "person" includes a "legal representative".

Cont'd 6a

6a

Accordingly, it held that, "Giving the FCRA its plain and obvious meaning, a personal representative can initiate an FCRA complaint alleging discrimination on behalf of the deceased former employee". The court therefore reversed the FCHR's dismissal of the Charge.

*Notably, federal courts have previously recognized that a personal representative of a deceased former employee can be substituted as plaintiff if the deceased employee initiated the EEOC complaint prior to death. *See, e.g., Pueschel v. Veneman*, 185 F. Supp. 2d 566,571 (D. Md. 2002).

By: Michael J. Roper, Esquire

FIRM SUCCESS!

DISABILITY DISCRIMINATION

The Villages Center Community Development District and Sumter Landing Community Development District were recently awarded final summary judgment in an action brought against it by 32 hearing impaired residents. The Plaintiffs, who were represented by out of state counsel specializing in the representation of the hearing impaired in civil rights lawsuits, asserted that the Districts were obligated under Federal law to provide hearing impaired residents with sign language interpreters so that they could participate in any and all of the Districts' more than 2000 volunteer clubs. The Districts, who were represented by Michael Bowling and Michael Roper, were granted summary judgment in a 105 page Order from District Judge Howard of the United States District Court for the Middle District of Florida. District Judge Howard, in a case of first impression, agreed with the Districts' arguments that it was not obligated under the Americans with Disabilities Act, the Rehabilitation Act, or the Fair Housing Act to provide sign language interpreters for hearing impaired residents who wished to participate in volunteer club activities. The Court rejected the Plaintiffs' contention that these volunteer clubs were programs or instrumentalities of the Districts, or that the provision of interpreter services for volunteer club activities was a service associated with home ownership in the Villages.

LAND USE

On March 16, 2016, the Circuit Court in and for Brevard County dismissed with prejudice the amended complaint filed in *Waters Mark Development Enterprises, LC, v. Brevard County*, Case. No. 05-2014-CA-041947. The County in the action is being defended by firm attorneys Michael Roper and Dale Scott. The lawsuit arose from Waters Mark's desire to build a residential development on 97.17 acres of property located on the Indian River in Merritt Island. Waters Mark bought the property in 2006. At the time, the County's Comprehensive Plan permitted development on the property at a density of 1 unit per 1 acre. On July 21, 2009, the County amended the Comprehensive Plan, thereby changing the density allowance in the area to 1 unit per 2.5 acres.

In 2012, Waters Mark submitted an application to develop the property at a density of 84 residences on

Cont'd 7a

7a

the 97.17 acres. The County denied the application, as it was inconsistent with the amended Comp Plan, which would allow roughly 38 residences. On October 23, 2013, Waters Mark submitted a pre-suit demand letter under the Bert J. Harris Jr. Private Property Rights Protection Act, § 70.001, *Fla. Stat.* Waters Mark claimed $2,550,000 in damages caused by the Comp Plan amendment. The County declined Waters Mark's demand. On September 12, 2014, Waters Mark sued the County under the Harris Act, seeking damages and attorney's fees.

The County moved to dismiss the complaint, and the amended complaint. The County argued the claim was time barred since the Harris Act requires that an aggrieved landowner submit a pre-suit demand letter within one year after the action which allegedly, inordinately burdened the property. The targeted action here was the Comp Plan amendment. As noted, in 2012, Waters Mark submitted an application to develop at the pre-amendment density allowance. But, it was not until October 23, 2013, that Waters Mark's submitted its pre-suit letter.

The County's motions required the Court to decide, under the facts of this case, when the one-year clock begins for the submission of the pre-suit demand letter. Generally, the clock begins once the new regulation is applied to the property in question. However, where the impact of the new regulation is readily ascertainable (such as a clear change in density allowance), the clock starts *upon the enactment of* the regulation. Waters Mark argued the impact of the Comp Plan amendment was not readily ascertainable. The Court disagreed. Waters Mark also attempted to rely on a 2011 amendment to the Harris Act, which provides that the one year clock will not be deemed to begin until the new regulation is applied, and notice is provided by mail to the affected property owner of the change. Waters Mark claimed the County never provided notice of the Comp Plan amendment (a claim the County contested). Waters Mark argued the 2011 Harris Act amendment should apply retroactively, since the amendment clarified the statute (if an amendment "clarifies" to a statue, it will generally apply retroactively). We disagreed, and argued the 2011 amendment could not be deemed a clarification due to the passage of time between the initial enactment of the Harris Act in 1995, and the amendment in 2011. The Court agreed with our position, found that the 2011 amendment applies prospectively, and dismissed the complaint and the lawsuit with prejudice. We congratulate the County on this dismissal.

It is unclear whether Waters Mark will appeal the ruling, but an appeal would not be surprising considering the amount of claimed damages. However, as the Court's ruling is based on long-standing Supreme Court precedent, we expect the ruling will withstand any challenges on appeal. The lesson to be learned from this case—one which might apply equally to plaintiffs or defendants in Harris Act cases—is the importance of complying with the strict requirements found in § 70.001, both in terms of actions to be taken to perfect the right to pursue a Harris Act claim (or as to defenses), and the various deadlines to be met.

WELCOME TO THE FIRM

Bell Roper Law would like to announce that
Mai M. Le, Esquire, and John M. Janousek, Esquire,
have become associated with the firm.

FIRM NEWS

Bell Roper Law will be participating in the 2016 Insurance of America Corporate 5K, on Thursday, April 7, 2016, beginning at 5:30p.m. Please join us for refreshments and BBQ, catered by 4Rivers, before, during and/or after the race. Our tent is located near Panera Bread which is located on the corner of E. Robinson Street and N. Eola Drive. Hope to see you there!

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 Krysta Reed at kreed@bellroperlaw.com.

Questions, comments or suggestions regarding our newsletter, please let us know your thoughts by contacting Cindy Townsend at ctownsend@bellroperlaw.com

THE INFORMATION PRINTED IN THIS NEWSLETTER IS FACT BASED, CASE SPECIFIC INFORMATION AND SHOULD NOT, UNDER ANY CIRCUMSTANCES, BE CONSIDERED SPECIFIC LEGAL ADVICE REGARDING A PARTICULAR MATTER OR SUBJECT. PLEASE CONSULT YOUR ATTORNEY OR CONTACT A MEMBER OF OUR FIRM IF YOU WOULD LIKE TO DISCUSS SPECIFIC CIRCUMSTANCES AND THE LAW RELATED TO SAME.