Legal Update

BELL & ROPER, P.A.

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REAR-END COLLISION
REBUTTABLE PRESUMPTION/COMPARATIVE NEGLIGENCE

Birge v. Charron, 37 FLW S735 (Fla. Nov. 21, 2012)

In *Birge v. Charron*, the Florida Supreme Court reviewed conflicting decisions from the Fifth and Fourth District Courts of Appeal regarding the interaction between comparative negligence and the presumption of negligence in a rear-end motor vehicle collision.

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

In *Birge*, Crystal Charron was injured when a motorcycle on which she was a passenger collided with a rear of a motor vehicle operated by Warren Birge. The trial court in Seminole County, Florida, granted summary judgment in favor of Birge based on its determination that Charron could not rebut the presumption of negligence imposed by Florida case law on the rear driver in rear-end motor vehicle collision cases.

On appeal, the Fifth District Court of Appeal reversed the trial court's

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EXPERT DISCOVERY: HOW MUCH IS TOO MUCH?

In many cases, a substantial amount of time and money is spent on expert witnesses. In a personal injury case, before a medical expert ever testifies at trial, discovery is conducted by the parties and oftentimes, the judge must get involved to ensure that an appropriate balancing act is struck between the privacy of non-party patients and the party's entitlement to the requested information. There are two significant issues which often arise: 1) when is a treating physician an expert subject to expert interrogatories; and 2) when does the nature of the relationship between a law firm and a treating physician raise the question of financial bias sufficient to warrant discovery from the law firm and discovery beyond that generally allowed from an expert.

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CONTACT A MEMBER OF THE FIRM

Michael M. Bell - mbell@bellroperlaw.com
Anna E. Engelman - aengelman@bellroperlaw.com
Michael J. Roper - mroper@bellroperlaw.com
Sherry G. Hopkins - shopkins@bellroperlaw.com
Michael H. Bowling - mbowling@bellroperlaw.com
Christopher R. Fay - cfay@bellroperlaw.com
Joseph D. Tessitore - jtessitore@bellroperlaw.com
Dani S. Theobald - dthebald@bellroperlaw.com
Dale A. Scott - dscott@bellroperlaw.com
Cindy A. Townsend - ctownsend@bellroperlaw.com
David B. Blessing - dblessing@bellroperlaw.com
Jennifer Killen - jkillen@bellroperlaw.com
Christian Anderson - canderson@bellroperlaw.com

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decision determining that Charron produced evidence from which a jury could determine Birge was negligent, or at least comparatively negligent. *Charron v. Birge,* 37 So.3d 292 (5th DCA 2010). The Fifth District certified a conflict between its decision in *Charron* and a decision of the Fourth District Court of Appeal, *Cevallos v. Rideout*, 18 So.3d 661 (4th DCA 2009).

The Supreme Court adopted the decision of the Fifth District Court of *Charron,* and rejected the Fourth District's decision in Cevallos. The Supreme Court determined that the presumption that the rear driver's negligence is the sole cause of a rear-end collision can be rebutted by the production of evidence from which a jury can conclude that the front driver was negligent. The Supreme Court rejected the Fourth District's decision in Cevallos, which concluded that the presumption of negligence that attaches to a rear driver in a rear-end collision case cannot be rebutted by the production of evidence of negligence on the part of the front driver.

The Supreme Court's decision in *Birge* favors the insurance industry. The decision enables defense counsel to rebut the presumption of negligence when defending a rear driver in a rear-end motor vehicle collision, typically cases where the front driver stopped suddenly or swerved into the path of the rear driver and caused the collision.

By: Michael M. Bell

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Generally, discovery aimed at producing evidence of a treating physician's bias is permissible. For purposes of uncovering bias, the court sees no real distinction between a treating physician witness (the so-called "hybrid witness") and retained experts. A defendant may discover from a plaintiff's treating physician the type of general financial bias information set out in Florida Rule of Civil Procedure 1.280(b)(5)(A)(iii) which includes information such as the scope of employment in the pending case and the compensation provided for those services, the expert's general litigation experience including the percentage of work performed for plaintiffs and defendants, the identity of other cases in which the expert has testified by deposition or at trial and an approximation of the portion of the expert's involvement as an expert witness which may be based on the number of hours, or percentage of earned income derived from serving as an expert witness.

The Fourth District Court of Appeal has recently tackled the issue of determining what type of discovery is permissible from a treating physician who entered into a letter of protection with the plaintiff's attorney. Essentially, if a discovery request is narrowly tailored and does not unduly intrude into the physician's private financial affairs, the information may be obtained. Katzman M.D. v. Rediron Fabrication, Inc., 76 So. 2d 1060 (Fla. 4th DCA 2011) review dismissed 88 So. 3d 149 (Fla. 2012). However, when a lawyer refers a patient to a doctor in anticipation of litigation, the doctor has injected himself into the litigation. In other words, the doctor, as a treating physician and expert witness, has a stake in the outcome of the litigation not because of the letter of protection, but because of the referral by the lawyer. Therefore, it is the direct referral by the lawyer that creates a circumstance that would allow the defendant to explore possible bias on the part of the doctor.

In Katzman M.D. v. Ranja Corp., the court pointed out several factors which should be weighed in determining whether the requested discovery is permissible: 1) whether the plaintiff was referred to the physician by another physician or their attorney; 2) how many surgical procedures were performed by the physician; 3) undue burden on non-parties; and 4) whether documents are being requested that do not exist,

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since an expert witness may not be compelled to compile or produce non-existent documents. Ranja Corp., 90 So. 2d 873 (Fla. 4th DCA 2012).

In a very recent opinion released by the Fourth District Court of Appeal, Geico sought to depose a law firm's office manager to obtain information relating to the nature and extent of the relationship between the law firm and the treating physician. Steinger, Iscoe & Greene P.A. v. Geico Insurance Co., 2012 WL 5870041 (Fla. 4th DCA 2012). In addition, Geico propounded discovery requests which sought all records of payments by the firm to four different medical providers, all letters of protection to those providers, all phone records by the firm to the four medical providers, and all deposition and trial transcripts of those individuals or entities in the firm's possession. The court held that where there is a preliminary showing that the plaintiff was referred to a doctor by a lawyer or vice versa, the defendant is entitled to discover information regarding the extent of the relationship between the law firm and the doctor.

Normally, discovery seeking to establish that a referral has occurred should first be sought from the party, the treating doctor or other witnesses – not the party's legal counsel. However, once there is evidence that a referral relationship exists, discovery from the law firm may be permissible so long as appropriate safeguards are implemented to protect the privacy rights of former patients and clients. Therefore, were the discovery sought is directed to a party about the extent of that party's relationship with a particular expert, the balance of interests shifts in favor of allowing the discovery.

By: Jennifer P. Killen

TEMPORARY GOVERNMENT INDUCED FLOODING NOT AUTOMATICALLY EXEMPT FROM TAKINGS CLAUSE ANALYSIS

Arkansas Game & Fish Commission v. United States, No. 11-579, Argued October 3, 2012 -Decided December 4, 2012

Petitioner, the Arkansas Game & Fish Commission, challenged a 2–1 decision rendered by the U.S. Court of Appeals for the Federal Circuit denying just compensation for the repeated flooding of state-owned property over a period of six years. *Arkansas Game & Fish Comm'n v. United States*, 637 F.3d 1366 (Fed. Cir. 2011). At issue: whether the Army Corps' practice of periodic releasing of dammed water which caused episodic, temporary flooding of a state-owned wildlife management area is a Fifth Amendment taking.

Over the years, the Supreme Court has rendered decisions in a number of significant takings cases involving flooding, repealing the term "permanent" without any further analysis. Modern takings cases decided by the Supreme Court, although not in the context of flooding, suggest a more relaxed view of "permanent" and "inevitably recurring," that could be applied in the flooding decisions. Specifically, the Court in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), held that a temporary regulatory taking requires payment of just compensation.

More recently, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), the Court allowed the government some breathing room or "normal delays" in land-use decision making, but nevertheless stood firmly behind the notion that temporary takings are compensable. It is against this recent backdrop that the Arkansas Game & Fish Commission asked the Court to decide if the Federal government must pay just compensation for flooding of state-owned land resulting from releases of

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water for six consecutive years. In rendering its decision, the Supreme Court did not change its trend, but simply clarified that government induced flooding, temporary in duration, gains no automatic exemption from Takings Clause Inspection.

The Court found that temporary physical invasions should be assessed by case-specific factual inquiry when determining the existence of a compensable taking and that its past decisions have recognized the following factors:

> time of the interference;
> degree to which the invasion is intended;
> whether the interference was the foreseeable result of an authorized government action; and
> the severity of the interference

The Court remanded the case due to the fact that the Federal Circuit rested its decision entirely on the temporary duration of the flooding and did not consider the aforementioned relevant factors.

Justice Ginsburg concluded the opinion by quoting a 1922 opinion of the high court:

> "While a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove [a taking]. Every successive trespass adds to the force of the evidence."

By: Sherry G. Hopkins

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