BELL & ROPER LEGAL UPDATE

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

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OFFER OF JUDGMENT INVALID WHERE BOTH MONETARY & NON-MONETARY CLAIMS ASSERTED
By: Michael J. Roper

In Winter Park Imports, Inc. v. JM Family Enterprises, 66 So. 3d 336 (5th DCA, 2011) the Court held that an offer of judgment, served in compliance with Rule 1.442, Fla. R. Civ. P. and Florida Statutes, section 768.79, is invalid where both monetary and non-monetary relief are sought in the action. In reaching this decision, the Court relied upon the existing precedent holding that an offer of judgment is not valid where the claim seeks only non-monetary relief and extended that rationale to cases in which both types of relief are sought. The 5th DCA stated in pertinent part; "The issue in this case is whether a party can serve an offer of judgment directed to a claim for which both monetary and injunctive remedies are requested. We conclude that section 768.79, does not authorize a party to serve an offer of judgment in this situation." Based upon this ruling the Court refused to enforce the sanctions provided for in the statute against Plaintiff, even though the defendant prevailed upon both the monetary and non-monetary claims. This ruling raises the specter of whether Plaintiffs will, in the future, uniformly include a claim for injunctive or declaratory relief in all suits filed, as a prophylactic measure against section 768.79, attorney fee sanctions.

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WHAT ALL GOVERNMENT EMPLOYEES SHOULD KNOW
By: Sherry Hopkins

The vast number of employees within a government agency makes it extremely difficult to know exactly what those employees are communicating to both lawyers and non-lawyers on a daily basis. Unfortunately, these communications could prove to be detrimental to the agency at a later date. It is time to be proactive rather than reactive.

Rule 4-4.2 of the Rules of Professional Conduct of The Florida Bar generally states that, in representing a client, a lawyer shall not communicate about a subject of representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. All government entities retain general counsel, either in-house or some other form of continuously employed attorney or firm. This representation is generally all-encompassing and establishes a known relationship for all transactions in which the agency's attorney would regularly provide advice. While Rule 4-4.2 is not designed to prohibit all communications on all subjects with a government agency's public officials or employees, merely because the agency has retained general counsel, it is the intent of Rule 4-4.2 to protect government agencies from a lawyer's seemingly innocent inquiry about the status of a matter.

According to Florida Ethics Opinion 09-1, matters in which a government agency is represented, whether it be a matter in litigation or a specific transactional or non-litigation matter, the opposing attorney must obtain consent from the agency attorney before communicating with a government agency's officers, directors, managers or employees who are directly involved in the matter or with any officials or employees whose acts or omissions related to the matter can be imputed to the governmental entity. Clear as mud – right?

Fortunately, Rule 4-4.3 of the Rules of Professional conduct of The Florida Bar requires that a lawyer identify himself or herself as a lawyer representing a client when dealing with an unrepresented person. As such, in order to avoid an opposing lawyer using the right to communicate directly with agency personnel as a vehicle to engage in improper investigative activities, it is imperative that government employees know, that when a lawyer identifies himself or herself and the nature of their representation, it is appropriate to tell the lawyer that they must speak to the agency's general counsel before any information can be provided. This is not always practical; however, if the matter is one in which the employee is unsure whether or not there should be cause for concern, they should always err on the side of allowing the agency's general counsel to be involved.

Although an opposing lawyer should always ask the government agency's general counsel if the officer or employee is represented in a particular matter before making any communication with the agency officer or employee, we don't live in a perfect world and this does not always happen. The old adage, the best defense is a good offense, rings true here. Most government employees would appreciate the protections afforded by Rule 4-4.2, if they only knew.

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FIRM WIN!
By: Gail Bradford

On November 22, 2011, Senior Judge Stephan P. Mickle of the United States District Court, Northern District of Florida, Gainesville Division, granted a Motion for Summary Judgment filed by Michael J. Roper and Gail C. Bradford on behalf of our client, Dixie County regarding due process violations alleged against it by Citizens State Bank. Citizens State Bank's claims arose from an $850,000.00, loan made in 2007, to the developer of a residential subdivision located in Dixie County. The loan was secured by a development bond of approximately $300,000.00, held in escrow by a former county attorney and unsold lots in the subdivision. The county attorney had accepted the bond money from the developer in 2005, when he was still serving as county attorney. However, by 2007, the attorney was no longer in service to the County. When the developer was unable to meet its obligations under the terms of the loan agreement, Citizens State Bank discovered that the bond money held by the former county attorney was not available. In addition, there were some discrepancies regarding whether the subdivision was a legally permissible use of land.

Citizens State Bank then filed suit against Dixie County in federal court alleging Fourteenth Amendment due process violations and a state law negligent retention claim against the County. The negligent retention claim was dismissed early on in the lawsuit as it was apparent that the former county attorney was no longer employed by the County. The due process claims were based on the "deliberate indifference" of county officials in allowing the former county attorney to accept and hold the bond and the County's actions in enforcing its land use provisions.

We moved for summary judgment on behalf of the County, arguing in part that the right upon which Citizens State Bank's claims were based was not entitled to Fourteenth Amendment due process protection. The Due Process Clause protects only "fundamental" rights and the right asserted by the Bank was a right created by contract, pursuant to the loan agreement, and not a "fundamental" right. In addition, application and enforcement of land use regulations typically constitute an executive as opposed to a legislative act. Procedural due process rights may arise from the execution of an executive act; however, the Bank conceded that it was not pursuing a procedural due process claim. The Court concluded that the Bank's due process claim was not viable because the Bank had failed to establish the violation of a fundamental right and granted summary judgment on behalf of the County. See *Citizens State Bank v. Dixie County*, Case No. 1:10-CV-224-SPM/GRJ, 2011 WL 5855064 (N.D. Fla. Nov. 22, 2011.)

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TO SETTLE OR NOT TO SETTLE
By: Joe Tessitore

Typically, when negotiating settlement of a claim or lawsuit the acceptance of the settlement offer is contingent upon the execution of a general release. When presenting a claimant or plaintiff with a release, the claims adjustor or defense attorney must be extremely careful to insure that the release is in compliance with the terms of the offer. If there are any additional terms or provisions in the release, not contemplated by the settlement offer, courts will deem the defendant's release a counter-offer and not a settlement of the claim or lawsuit. Such a result can lead to the filing of a lawsuit or the continuance of a lawsuit where the adjustor or defense attorney thought the case had been settled.

This situation recently occurred in a case filed in Osceola County. The case of *Knowling v Manavoglu*, 36 Fla.L.Weekly D2227 (Fla. 5th DCA 2011), involved an automobile accident with a $10,000.00, liability policy through Allstate Indemnity Company (hereafter Allstate). Plaintiffs' counsel made a pre-suit demand for the available policy limits. The demand also included a provision that the plaintiffs would execute a "general BI release" on behalf of Allstate's insureds.

In response, Allstate tendered the BI policy limits of $10,000.00 and forwarded a proposed release resolving any and all claims arising out of the accident. As is typical in most BI releases, the release also included an indemnification provision requiring the plaintiffs to indemnify and hold Allstate, and its insureds, harmless from "any validly asserted lien, claim of lien or right of reimbursement or subrogation."

Approximately six months later plaintiffs' counsel returned the settlement check and notified Allstate that since they had failed to comply with the terms of the offer he would be filing suit. The lawsuit was filed, Allstate asserted the settlement as an affirmative defense, and both parties moved for summary judgment on the settlement issue. The judge ruled that there was a settlement reached by the parties and granted summary judgment in favor of Allstate and its insureds.

Plaintiffs appealed and the 5th DCA overturned the summary judgment. The 5th DCA held that the inclusion of the indemnification clause in the release was a new and additional term. Since the acceptance did not mirror the demand/offer from the plaintiff, Allstate's response was a counter-offer and not an acceptance of the plaintiffs' settlement demand. Plaintiffs subsequently rejected the counter-offer and were legally permitted to pursue their lawsuit against Allstate's insureds.

Claims adjustors and defense attorneys need to be cognizant when accepting a settlement offer, that includes execution of a general release, that they not include language in the proposed release which has not been specifically agreed to in the settlement offer. In the alternative, they can enter into additional negotiations with plaintiff's counsel before sending a release or they can elicit language from plaintiff's counsel that is acceptable to the plaintiff. However, they should

not assume that anything short of a plain BI release will be enforceable at a later date if subsequently rejected by the plaintiff.

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A ROSE BY ANY OTHER NAME: SUBSTITUTING PARTIES AFTER THE STATUTE OF LIMITATIONS HAS RUN
By: David Blessing

The Supreme Court of Florida, in *Cabot v. Clearwater Construction Company*, 89 So.2d 662 (Fla. 1956), set forth the general rule concerning whether an amendment changing a party after the running of the statute of limitations relates back to the original filing of a complaint. The court stated,

> [t]he general rule appears to be that whether an amendment of process or pleading changing the description of a party from a corporation to an individual or vice versa after the statute of limitations has run introduces a new party or new cause of action depends upon whether the misdescription is interpreted merely as a misnomer or defect in the characterization of the party or whether it is deemed an entire change of parties. If the former, the amendment relates back to the commencement of the action. If the latter, the amendment amounts to the institution of an entirely new action. *Cabot*, 89 So.2d at 663-64.

Thus, if an amendment merely changes the character or capacity of a party, the change will be considered a misnomer and will relate back to the original pleading. *Cabot*, 89 So.2d at 665. A misnomer will also occur if the amendment is a mere change in a party's description. *Cabot*, 89 So.2d at 664.

In *Cabot*, the defendant was named as "Clearwater Construction Company, a corporation organized and existing under the laws of the State of Florida." However, it turned out that the defendant was not a corporation, but merely a sole proprietorship doing business as Clearwater Construction Company. The court found that the words "a corporation organized and existing under the laws of the State of Florida" were merely descriptive and, therefore, a misnomer occurred. Similarly, in *B & H Sales, Inc. v. Fusco Corporation*, 342 So.2d 105 (Fla. 2d DCA 1977), the defendant was sued as "Sunshine Associates, Inc." However, it was later discovered that Fusco Corporation was doing business as Sunshine Associates, Inc. The Court found that a mere misnomer occurred and, thus, the amendment related back to the filing of the original complaint. Also, in *Haines v. Leonard L. Farber Company*, 199 So.2d 311 (Fla. 2d DCA 1967), the plaintiff was originally named as "Leonard L. Farber" and was subsequently allowed to amend the complaint to name "Leonard L. Farber Company, Inc., a New York Corporation." Leonard Farber was the president and sole stock holder of the corporation. The court found that

the amendment was a mere change in the description of the plaintiff and, therefore, amounted to a mere misnomer.

Therefore, where the proper party is before the court, but is misdescribed in some manner, an amendment will be allowed to cure a misnomer. However, if an amendment introduces a new party or creates an entire change of the parties, the substitution will not relate back to the original pleading. *Cabot v. Clearwater Construction Co*., 89 So.2d 662 (Fla. 1956).

In *Golconda Corporation v. Newton*, 336 So.2d 433 (Fla. 1st DCA 1976), the following events took place in the following order: (1) The manufacturer dissolved and consolidated with a second entity thereby creating a third entity; (2) The third entity then merged into a fourth entity; (3) The plaintiff was injured; (4) The plaintiff brought an action against the manufacturer; and (5) After the statute of limitations had run, the complaint was amended to name the merged entity. The court essentially distinguished *Cabot* by stating that *Cabot* involved a case where the correct party had been served because it was solely owned, and by his participation in the case had notice of the proceedings against him. The *Golconda* court was saying the correct party was not originally before the court.

In addition, in *Gould v. Brick*, 358 F.2d 437 (5th Cir. 1966) (applying Florida law), the defendants were sued as trustees of a dissolved Florida corporation. The court found that the action was not one against the corporation but was against the trustees. Thus, a dissolved corporation and a trustee of that dissolved corporation are separate parties and one cannot be considered a misdescription of the other.

Furthermore, in *Gray v. Executive Drywall, Inc.*, 520 So.2d 619 (Fla. 2d DCA 1988), review denied, 529 So. 2d 694 (Fla. 1988), the court concluded that just because two corporations share some characteristics does not mean that one corporation can be added to the action after the statute of limitations has run. As a result, there was no misnomer when the two entities had "some common ownership of stock, common representation of each at the job site where the alleged personal injury occurred, each occupying the same office building (but in different offices), the fact that the same person signed the contracts of each to do work at the job site, the use by both corporations of a common attorney, and both corporations having the same insurance carrier." *Gray*, 520 So.2d at 620. The court stated that the result does not change even though the added defendant had knowledge of the suit prior to the statute of limitations expiring and knew or should have known that it could have been added as an additional defendant. The court stated that "[t]here is no obligation to advise plaintiff who to sue." *Gray*, 520 So.2d at 621.

However, if a defendant in some manner deceives, misleads, or lulls a plaintiff into believing that it has sued the correct party until the statute of limitations has run, a court will most likely find that an amendment relates back. In *B & H Sales, Inc. v. Fusco Corporation*, 342 So.2d 105 (Fla. 2d DCA 1977), the court found that where the defendant filed defensive pleadings and responses in the name of the misnamed entity, which documents contained indications that the correct entity was sued, the amendment of the complaint amounted to no more than a correction of a misnomer and, therefore, related back to the original pleadings. Similarly, in *Argenbright v. J.M. Fields, Co*., 196 So.2d 190 (Fla. 3d DCA 1967), cert. denied,

201 So. 2d 895 (Fla. 1967), the court found that the defendant lulled the plaintiff into believing that he sued the correct party until after the statute of limitations had expired and then filed a motion for summary judgment indicating that the wrong party had been sued. The court found that because the defendant had notice from the beginning of the suit, and acted in the manner that it did, it would be unfair to not allow the amendment to relate back.

As the old bard, William Shakespeare, wrote in Romeo and Juliet, "What's in a name? that which we call a rose by any other name would smell as sweet." In other words, the name does not matter, only what it is matters.

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OUR EFFORTS IN THE COMMUNITY

Thanks to Anna Engelman and her fundraising and shopping efforts, the firm was able to adopt eight children this year from the Angel Tree and provide them with new clothes and toys for Christmas.

WE ARE UNDER CONSTRUCTION

Keep an eye out for our next Legal Update to have a different look. We will still be providing the same important updates and information, the format will just be changed.

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