



FLORIDA SUPREME COURT RULES ON ENFORCEABILITY OF PRE-INJURY RELEASES

Pre-injury releases have long been used by Florida businesses as a means to avoid liability to their customers who are injured while participating in commercial activities offered by the business. Frequently, businesses offering inherently dangerous activities (such as ATV rides, horseback rides, and sky diving) require customers to release the business from potential liability before engaging in the activity. When minors are involved, usually a parent or guardian is required to sign the release. When it comes to minors, businesses will often require such pre-injury releases for more innocuous activities such as summer camps, youth groups, and club sports. While pre-injury releases are generally enforceable against adults in Florida, the same cannot be said as to minors. The District Courts in Florida have not seen eye to eye on this issue, with some jurisdictions finding these releases enforceable as to minors, and others finding them unenforceable.

In December of 2008, the Florida Supreme Court resolved the conflict among the District Courts concerning the enforceability of pre-injury releases on behalf of minor children and held that, "[a] parent does not have the authority to execute a pre-injury release on behalf of a minor child when the release involves participation in a commercial activity." *Kirton v. Fields*, 997 So. 2d 349 (Fla. 2008). The implications of the *Kirton* decision should be carefully considered by any Florida business relying on pre-injury releases to limit a commercial entity's liability from potential claims brought by a minor.

Among those most directly affected by *Kirton* are businesses that offer activities to minors which are inherently dangerous. Based on the prior conflict between the District Courts, many such businesses may incorrectly believe that such releases are still enforceable.

Commercial entities that have relied on pre-injury releases of minors in the past, now must re-evaluate whether their current insurance policies properly cover their potential increased liability. Consideration should also be given as to whether the appropriate safety equipment and staff training are implemented by the business. Likewise, insurance carriers who underwrite liability coverage for Florida businesses may also be affected to the extent that their calculated insurance premiums fail to consider the potential exposure without a valid pre-injury release. Even insurance agents should be cognizant of the *Kirton* decision when advising clients of their insurance needs.

While the *Kirton Court* limited its holding to pre-injury releases of minor children involved in the participation of commercial activities, the Court did state in a footnote that, "Our decision in this case should not be read as limiting our reasoning only to pre-injury releases involving commercial activity..." In so stating, the Court left the door open to the possibility that non-commercial entities which rely on pre-injury releases of minors may also be found to be unenforceable. As a result of *Kirton*, there promises to be continued litigation as to the delineation of what activities constitute commercial activities, and whether pre-injury releases of minors are unenforceable as to non-commercial activities as well.

MISSISSIPPI SUPREME COURT DECISION RULES FOR EMPLOYEES IN TOXICOLOGY SUIT

The Mississippi Supreme Court recently affirmed a judgment against a furniture manufacturer for battery and intentional infliction of emotional distress as a result of chemical exposure to its employees. In *Franklin Corp. v. Tedford*, No. 2007-CA-01454-SCT, 2009 WL 1015170 (Miss. Apr. 16, 2009), four employees were awarded damages ranging from \$75,000 to \$800,000, as a result of their exposure to the chemical propyl bromide ("1-BP"). The jury also awarded \$7.5 million in punitive damages which the trial court reduced to \$5 million in accordance with the limitations in Mississippi's punitive damages statute, which ties the amount to the net worth of the defendant.

The evidence, although conflicting, centered on the lack of ventilation during application of a glue containing the chemical at issue and its effects on the plaintiffs. The initial issue was whether the claims were precluded by the Workers' Compensation Act. An employer's payment of workers' compensation benefits is the exclusive remedy and an employee may not sue his or her employer in tort. The injury, however, must be "accidental" to be compensable under the Act, and earlier decisions had held "that some intentional torts are outside the scope of the exclusivity provision." As the court noted, "Mississippi is in concurrence with an overwhelming majority of states in requiring an 'actual intent to injure' the employee" for the injury to be considered intentional.

The plaintiffs wanted the Court to expand the rule regarding intentional torts to include actions which are "substantially certain" to cause injury to the employee, while the employer wanted the Court to overrule the decisions applying the actual intent exception. The Court opted for neither and concluded, "once again, that the Act is exclusive absent an actual intent to injure the employee." Because there were issues of fact as to that issue based on the evidence in this case, the Court held that plaintiffs' claims "were not precluded by the Act as a matter of law," so that the lower court's denial of the employer's summary judgment motion was proper.

The Court also rejected the employer's argument that the jury had been improperly instructed on the "substantially certain" standard espoused in two of the plaintiffs' jury instructions. Although the Court agreed that the inclusion of this language was "[w]ithout doubt ... erroneous," it found no reversible error in light of other instructions that contained the correct standard, i.e., that plaintiffs could only prevail if they proved that the defendant acted with an intent to cause injury.

Having a potentially broader impact is the Court's analysis of plaintiffs' expert testimony. Mississippi addresses the admission of expert testimony based on the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993). In addition to the requirement that an expert be qualified, the opinions expressed must also be relevant and reliable. In a toxic tort case, one of the considerations is the level of exposure that can cause injury as compared to the plaintiff's level of exposure.

Here, the Court recognized that "[t]he neurological impact of 1-BP on humans is a relatively new field of study," and even noted that the circuit court had stated it was "a field with limited reliable methodology." It was the employer's contention that because none of the four experts knew the exposure level at which injury to humans will occur nor the exposure levels experienced by the plaintiffs, that their testimony did not meet the requirements of admissibility. The Supreme Court, however, quoting from an Eight Circuit decision, noted as follows: "[T]he first several victims of a new toxic tort should not be barred from having their day in court simply because the medical literature, which will eventually show the connection between the victims' condition and the toxic substance, has not yet been completed."

The Supreme Court allowed the plaintiffs' expert testimony, finding that "the absence of data on the exact exposure level at which humans suffer neurologic injury ought not preclude the Plaintiffs' experts from testifying, when combined with Franklin Corporation's stipulation that 1-BP is a neurotoxin which can cause neurologic injury to humans and the testimony of its expert ... that exposure to 1-BP caused the neurologic injuries suffered by [two of the] Plaintiffs ..." The Court was also persuaded in part by the temporal connection between plaintiffs' exposure and symptoms, as well as the fact that, as testified to by one of the experts, "determining the exact lower level of 1-BP exposure which causes neurologic injury in humans is challenging given appropriate, ethical constraints." Specifically, the doctor had testified that "the underlying problem in determining the precise lower level of 1-BP exposure which causes neurologic damage in humans is that a physician cannot ethically 'put a bunch of people in a room ... expose them to glue and see what happens as a case series.'"

With all nine justices concurring in the decision, it will be interesting to see whether the pending motion for rehearing will result in any changes.

NON-COMPETE AGREEMENTS NOT ENFORCEABLE IN LOUISIANA UNLESS THEY STRICTLY COMPLY WITH STATUTE

Non-compete agreements are disfavored in Louisiana and will be enforced only if they strictly comply with all of the terms of the Louisiana non-compete law, Revised Statutes 23:921. The non-compete statute contains specific rules governing employers and employees, partners in a partnership, parties to a franchise, computer programmers, sellers of the good will of a business, corporations and their shareholders, and LLCs and their members, as well as a prohibition on non-compete agreements for automobile sales personnel. The general rule is that a person may enter into an agreement with an employer not to engage in a business similar to that of the employer and/or not to solicit customers of the employer, within specified parishes or municipalities, for a period not to exceed two years from the termination of employment.

An August 19, 2009 court decision serves as a reminder to employers that strict compliance with Louisiana law is necessary for a non-compete agreement to be enforced. In *Action Revenue Recovery, LLC v. Ebusiness Group, LLC*, the Second Circuit Court of Appeal refused to enforce either of two non-compete agreements against an employee who had quit and gone to work for the employer's competitor. The first agreement, which the employee had signed, stated that it would "apply to all parishes or counties" where the employer conducted business. The Court held this agreement unenforceable for failing to specifically name the "parish or parishes, municipality or municipalities" where the agreement would apply, as required by the statute. It was irrelevant that the employee had actual knowledge of the parishes and counties in which the employer conducted business. The second agreement, which was presented to the employee a few months later, did list the specific parishes where it was intended to apply. Unfortunately for the employer, the employee never signed the second agreement, so it, too, was invalid.

NEW FLORIDA RULES AIM TO IMPROVE THE JUDICIAL MANAGEMENT OF COMPLEX LITIGATION CASES

The Supreme Court of Florida recently adopted a new rule of civil procedure, Rule 1.201, to govern complex litigation. The Rule is designed to improve the judicial management of complex business litigation through uniform procedures for complicated matters. Aside from the differing case management procedures, complex matters are not treated differently from other litigation.

The Rule broadly defines "complex litigation" leaving its potential applicability open to a variety of cases. The Rule allows any party to move the court to declare the action complex, or the court can do so on its own motion. The Rule provides no subject matter limitation on the types of "complex" matters that qualify; however, it provides several enumerated "factors" for the trial court's consideration. These factors include the complexity of the case, the volume of potential pre-trial motions, the number of separately represented parties, the number of witnesses, the issues relating to documentary evidence, and the time, management, and coordination required to complete the matter.

Matters designated complex under the Rule must follow additional procedures. For example, the Rule requires counsel for all parties to meet after such designation to discuss specific case-related matters. Counsel are required to create a joint statement to the Court advising of their areas of agreement and dispute. The Rule also requires counsel, and clients, to attend an early case management conference. Pre-trial deadlines are established at this hearing. The Rule requires the Court to set a specific trial date within six to twenty-four months of the case management conference.

The Rule will provide Florida's trial courts with uniform complex litigation management procedures similar to those currently employed by other jurisdictions. It should serve as an effective judicial management tool for complex litigation matters.

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