Case Law Update

April 2004

Barbara Green, P.A.
Attorney at Law
(305) 669-1994

Caselaw Update on the Internet

Issues of *Case Law Update* since January 1995 can be found at the new Case Law Update website. The hypertext versions you'll find there are searchable by any text string and you can download to disk or print any portions you desire for your personal use.

www.caselawupdate.com

Bifurcation

Sears v. Williams

2004 WL 626157 (Fla. 3d DCA 2004)

The trial court did not abuse its discretion in granting a new trial after a defense verdict in the liability phase of a bifurcated case. The dissent discloses that the jury sent out a note during its deliberations asking whether it had been established that the incident caused brain injury to the plaintiff child. The judge responded that that issue was not for the jury's consideration at that time and the only issue should be whether the defendant was negligent. The dissent argues that the bifurcation was not prejudicial to the plaintiff, but the majority affirms the grant of a new trial, based on the deferential abuse of discretion standard.

Damages – Inadequate

Deklyen v. Trucker's World, Inc.

29 Fla. L. Weekly D670 (Fla. 5th DCA 2004)

Where a jury returns an inconsistent verdict, the error is waived if no request is made to send the jury back to deliberate further before they are discharged. An inadequate verdict can be attacked for the first time in a post trial motion. There are a number of decisions attempting to make the distinction between an inconsistent verdict and one that is inadequate. Here, the court holds that, where the plaintiff sustained a fractured wrist, and the jury awarded the plaintiff past and future economic damages, including extensive medical expenses, and zero damages for either past or future pain and suffering, despite indisputable evidence that the plaintiff suffered at least some pain from her injury, and uncontroverted evidence that the pain continued and would continue well after the injury, the damage award was inadequate and a new trial on damages is required. See *Stevens v. Mount Vernon Fire ins. Co.*, 395 So.2d 1206 (Fla. 3d DCA 1981).

Damages - Punitive

Coral Cadillac v. Stephens

29 Fla. L. Weekly D539 (Fla. 4th DCA 2004)

Section 768.73, Florida Statutes (1995), limits punitive damages to three times the compensatory damages except where there is clear and convincing evidence to justify more. (The statute was subsequently amended to make it much more complicated). The statute applies to specific kinds of cases, including those involving "misconduct in commercial transactions." §768.73(1)(a). In this case, the plaintiff alleged the defendant, a car dealer falsely told him the car he was buying had never been in an accident. The court held that the transaction was a "consumer transaction," not a commercial transaction, and therefore the statutory limit on punitive damages did not apply. The court certified to the supreme court the question:

> Is the purchase and sale of an automobile at the retail level for the buyer's personal or household use a "commercial transaction" as defined by section 768.73, Florida Statutes (1995), thereby limiting punitive damages not to exceed three times the amount of compensatory damages?

Deceptive and Unfair Trade Practices

State of Florida, Office of Attorney General v. Wyndham International, Inc.

29 Fla. L. Weekly D489 (Fla. 1st DCA 2004)

Out of state defendant corporate officers could be subject to Florida jurisdiction and held personally liable for a deceptive and unfair trade practice of the corporation. The corporation imposed an energy surcharge on hotel rooms, in addition to the regular room rate. The Florida court had personal jurisdiction over them, where they were the primary participants in an unfair and deceptive trade practice aimed at Florida residents. Their actions affecting Florida were not random, fortuitous or attenuated, and they could reasonably anticipate being haled into a Florida court.

Impact Rule

Kennedy v. Byas
29 Fla. L. Weekly D564 (Fla. 1st DCA 2004)

Certifying conflict with the Third District's decisions in *Johnson v. Wander,* 592 So.2d 1225 (Fla. 3d DCA 1992) and *Knowles Animal Hospital, Inc. v. Wills*, 360 So.2d 37 (Fla. 3d DCA 1978), the 1st DCA holds that emotional distress damages are not recoverable in an action against a veterinarian for malpractice in the treatment of the plaintiff's pet.

Insurance – PIP

Diagnostic Services of South Florida v. State Farm
2004 WL 625778 (Fla. 3d DCA 2004)

Diagnostic Services of South Florida, a mobile diagnostic testing service that brings its equipment to doctors' offices to perform tests on patients, was not a "clinic" under former §456.0375 (repealed effective 3/1/04) and was not required to register under the statute. Therefore, State Farm was not entitled to withhold PIP payments. The PIP statutes are changing every legislative session, with new technical requirements that, in my opinion, may make PIP an inadequate alternative to the constitutional right of access to courts.

State Farm v. Universal Medical Center
29 Fla. L. Weekly D652 (Fla. 3d DCA 2004)

On rehearing, the 3rd DCA retreats from its position that a PIP carrier does not have to pay for treatments administered by medical assistants: "For the reasons that follow, we now hold that medical assistants are authorized to administer the physical modalities they performed for which State Farm is obligated to pay. This decision is consistent with legislative intent and the way in which physicians for the varying medical disciplines deliver health care and conduct their business in the State of Florida"

"Whether or not the physical therapy the medical assistants performed fell within the scope of the supervising physician's practice is a determination properly left for the respective licensing boards of medicine . . ."

Interest – Prejudgment

General Motors v. McGee
29 Fla. L. Weekly D654 (Fla. 4th DCA 2004)

In an earlier decision, the 4th DCA reversed an apportionment of fault to an improper *Fabre* defendant and remanded to the trial court for entry of judgment in the full amount. *General Motors v. McGee*, 837 So.2d 1010 (Fla. 4th DCA 2002) In this subsequent appeal, the court holds that the plaintiff is entitled to interest on the full amount from the date of the verdict, because Rule 9.340 requires that "If a judgment of reversal is entered that requires the entry of a money judgment on a verdict, the mandate shall be deemed to require such money judgment to be entered as of the date of the verdict."

The court rejects the defendants' argument that the award would be unfair or inequitable because the law changed while the first appeal was pending.

Medicaid

Maxson v. D.C.F.
2004 WL 625773 (Fla. 4th DCA 2004)

A trust that allowed the trustee to lend money to the grantor's estate in her sole discretion did not disqualify the recipient from medicaid benefits. The money was not "available" to the recipient. The court takes the unusual step of rejecting an administrative agency's interpretation of its own rules, which are usually entitled to great deference, because the agency's interpretation was contrary to the legislative intent and to federal medicaid regulations.

Med Mal – Limitations

Cora Health Services, Inc. v. Steinbronn
29 Fla. L. Weekly D568 (Fla. 5th DCA 2004)

Plaintiff served a notice of intent to a nursing home, stating that it was notice of intent to litigate under both Chapter 400 and Chapter 766, but also stating that plaintiff did not concede that Chapter 766 was applicable to a nursing home. Subsequently, Plaintiff served a notice of intent on a health care provider. The court held that the notice served on the nursing home was not a nullity even though the nursing home was not a health care provider under Chapter 766, and that each notice served to toll the statute of limitations.

The court commendably followed the policy of *Patry v. Capps*, 683 So.2d 9, 13 (Fla. 1994) that "when possible the pre-suit notice and screening statute should be construed in a manner that favors access to court." I think this is a good decision and a correct decision. However, until the Supreme Court has addressed this issue, it would be a good idea not to rely on this decision when planning when to file your lawsuit, in case any other DCA's may disagree. It appears that the 1st DCA does disagree about separate notices to separate potential defendants creating separate tolling periods.

Creel v. Danisi
29 Fla. L. Weekly D615 (Fla. 1st DCA 2004)

The good news in this case is that a letter, notifying the defendant of the plaintiff's claim and citing §766.203, constituted a notice of intent, even though it also contained other information at the end concerning a proposal for settlement. The letter tolled the statue of limitations for 90 days. The bad news is that a subsequent, additional notice of intent did not add additional tolling. This opinion appears to conflict with the 5th DCA's decision in *Cora Health*, above.

Med Mal – Presuit

Apostolico v. Orlando Regional Medical Center
2004 WL 587660 (Fla. 5th DCA 2004)

The court reversed the dismissal of a med mal action for inadequate compliance with presuit requirements, and held that a nurse was qualified to provide an affidavit on nursing standard of care and causation. "We conclude that a plain reading of §766.202(5) indicates that a nurse or any other medical professional, with appropriate experience or training, may, under the proper facts, be qualified to provide corroboration about medical causation for presuit purposes." The court properly construed the statute liberally to avoid unnecessary impediments to the right of access to courts.

Nursing Home – Arbitration

Five Points Healthcare, Ltd. v. Alberts
29 Fla. L. Weekly D495 (Fla. 1st DCA 2004)

This is another case upholding an arbitration clause in a nursing home case. The nursing home patient was severely burned when the nursing home staff negligently placed her in a tub of hot water. The court holds that the statutory claims must be arbitrated, pursuant to a contract provision requiring arbitration of "any controversy or claim arising out of or relating to the Agreement or the breach thereof."

The court cites *Seifert v. U.S. Home Corp.*, 750 So.2d 633 (Fla. 1999). *Seifert* held that a wrongful death claim against a home builder was not subject to arbitration under the sales contract in that case, because there was no showing that the parties intended to include such common law tort claims in the arbitration clause; the factual allegations in the complaint did not rely on the contract; and the dispute did not have a "significant relationship" to the contract even though it would not have existed "but for" the contract. My own reading of *Seifert* would not have required arbitration in this case. *Seifert* held that the mere fact that the dispute would not have arisen but for the existence of the contract and the consequent relationship between the parties is insufficient, by itself, to transform a dispute into one "arising out of or relating to" the agreement that would subject the dispute to arbitration.

Offer of Judgment

McElroy v. Whittington
29 Fla. L. Weekly D654 (Fla. 4th DCA 2004)

Plaintiffs' offer of judgment was invalid and their motion for attorneys fees should have been denied where the offer did not apportion between claims of the injured minor and her mother individually. Defendant did not waive the issue by moving to strike the offer but then failing to set the motion for hearing before the offer expired. "[A]s long as the offeree makes the claim that the offer does not comply with the requirements of Rule 1.442 prior to the trial court's entry of the final judgment awarding costs and fees, the issue is preserved for appeal."

Vines v. Mathis
29 Fla. L. Weekly D496 (Fla. 1st DCA 2004)

Section 768.79(1) provides for an award of fees to a defendant who has made an offer "if the judgement is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer." The court rejects the argument that settlements from co-defendants should be considered in determining the plaintiff's net "judgment obtained," after a defense verdict, because the verdict was "no liability," not a judgment in favor of the plaintiff. The court describes as "dicta" the statement in *Florida Gas Transmission Co. v. Lauderdale Sand & Fill, Inc.*, 813 So.2d 1013 (Fla. 4th DCA 2002) that it is proper to include the amounts recovered by plaintiff in settlements from other defendants on the same claim.

Section 768.79(6) contains the following language: "For purposes of the determination required by paragraph (a), the term "judgment obtained" means the amount of the net judgment entered, plus any postoffer collateral source payments received or due as of the date of the judgment, plus any postoffer settlement amounts by which the verdict was reduced. For purposes of the determination required byparagraph (b), the term "judgment obtained" means the amount of the net judgment entered, plus any postoffer settlement amounts by which the verdict was reduced." The court says that the words "by which the verdict was reduced" mean that there has to be a verdict in favor of the plaintiff in order for the settlements to be added in.

New Trial

Poulsen v. Lenzi
2004 WL 626092 (Fla. 4th DCA 2004)

The operative date for the timeliness of a motion for new trial is the date it was served, not the date it was filed. Therefore, a motion was timely where it was served, but not filed, within the time required by Rule 1.530. However, my personal recommendation is to both serve and file the motion within the time set by the rule, so that you don't have to litigate this issue, which pops up from time to time.

Preemption

E.I. duPont De Nemours & Co. v. Aquamar S.A.
2004 WL 625761 (Fla. 4th DCA 2004)

A claim that Benlate destroyed the plaintiffs' crops on a theory of negligent distribution was really a negligent failure to warn claim preempted by FIFRA.

Privilege - Attorney-Client

Russ v. Trube
29 Fla. L. Weekly D656 (Fla. 4th DCA 2004)

A client's threat to kill his sister, made to his attorney during the course of a legal dispute with the sister, was not privileged because it was made at the end of the client's meeting with the attorney, as the client was leaving the office, and therefore was not intended as a disclosure by the client necessary or incident to obtaining informed legal advice.

Proposed Orders

Perlow v. Berg-Perlow
29 Fla. L. Weekly S130 (Fla. 2004)

In a decision that has implications beyond the family law context, the court holds that, because the lengthy proposed final judgment submitted by one of the parties was signed just hours after it was submitted, and the trial judge did not make any findings of fact or conclusions of law on the record, "there was an appearance that the trial judge did not independently make factual findings and legal conclusions.""While a trial judge may request a proposed final judgment from either or both parties, the opposing party must be given an opportunity to comment or object prior to entry of an order by the court." The court also says that the "better practice" is for the trial judge to make pronouncements on the record to give the parties guidance for preparing the proposed order.

Work Product

Bishop v. Polles
29 Fla. L. Weekly D551 (Fla. 2d DCA 2004)

An interrogatory that asked the plaintiff to disclose "all documents or exhibits that the Plaintiff or Plaintiff's attorneys might conceivably offer as evidence at trial" was overly broad under the Supreme Court's recent decision in *Northup v. Howard W.Acken, M.D., P.A.*, 29 Fla. L. Weekly S37 (Fla. 2004), in which the Court held that a party must disclose only those items that a party "reasonably expects or intends" to use at trial.

Carnival Cruise Lines v. Doe
29 Fla. L. Weekly D645 (Fla. 3d DCA 2004)

The defendant cruise line's disclosure of witness statements to the FBI was not voluntary, but was in response to a federal grand jury subpoena, and therefore disclosure to the FBI did not result in waiver of the work product privilege. Therefore, the cruise line was not required to produce witness statements to a cruise ship passenger who alleged that she had been raped on board the ship by members of the crew.