Case Law Update

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Attorneys Fees

Clampitt v. Britts
2005 WL 780390 (Fla. 2d DCA 2005)

The time for filing a motion for attorneys fees under Fla. R. Civ. P. 1.525 is not tolled by filing a motion for rehearing. The court also rejects the argument that the time for filing the motion was extended by the judgment's reservation of jurisdiction to address attorney's fees, and certifies conflict with *Fisher v. John Carter & Associates, Inc.*, 864 So.2d 493 (Fla. 4th DCA 2004), and *Saia Motor Freight Line, Inc. v. Reid*, 888 So.2d 102 (Fla. 3d DCA 2004).

Mercury Cas. Co. v. Flores
2005 WL 662631, 30 Fla. L. Weekly D793
(Fla. 3d DCA 2005)

The court holds that a multiplier may be applied to attorneys fees under §627.428 in a UM case, and certifies the question. Some courts have suggested that the Supreme Court's decision in *Sarkis v. Allstate*, 863 So.2d 210 (Fla. 2003), holding that there can be no multiplier under the offer of judgment statute, sub silentio overruled cases allowing a multiplier under §627.428, the insurance attorneys fees statute. The Third District notes that the Supreme Court does not generally overrule its precedents without expressly saying so, and that the Court allowed a multiplier in *Standard Guaranty Ins. Co. v. Quanstrom*, 555 So.2d 828 (Fla. 1990). The court holds that *Quanstrom* is still binding because *Sarkis* did not expressly overrule Quanstrom.

Class Actions

Fung v. Fla. Auto JUA
2005 WL 765198 (Fla. 3d DCA 2005)

In the first appeal of this case, *Fung v. Florida JUA*, 840 So.2d 1101 (Fla. 3d DCA 2002), the court held that the trial court could not sever the attorney's fees provision from a proposed class action settlement and approve the rest. Here, in a second appeal, the court holds that the trial court acted within its discretion in rejecting the entire settlement because the attorneys fees were too high.

Collateral Sources

Benton v. CSX Transp. Inc.
2005 WL 602424, 30 Fla. L. Weekly D749
(Fla. 4th DCA 2005)

In a negligence action against a railroad, the trial court should have excluded evidence that the plaintiff had received railroad benefits. The prejudice outweighs the probative value and is likely to affect the jury's determination of liability, not just damages. See *Gormley v. GTE Products*, 587 So.2d 455 (Fla. 1991)

Employment Discrimination

Jackson v. Worldwide Flight Services, Inc.,
2005 WL 713784, 30 Fla. L. Weekly D866
(Fla. 3d DCA 2005)

The plaintiff's premature filing of a discrimination lawsuit before the statutorily required 180 day period for investigation of his administrative complaint of discrimination was cured when the Florida Commission on Human relations subsequently issued a right to sue letter after his premature lawsuit was dismissed. The filing of his premature lawsuit did not divest the Commission of jurisdiction to issue a right to sue letter after the first civil action was dismissed. The trial court erroneously dismissed his subsequent civil action.

Estoppel

Grau v. Provident Life & Acc. Ins. Co.
2005 WL 713246, 30 Fla. L. Weekly D847
(Fla. 4th DCA 2005)

The principle of judicial estoppel means that "A claim or position successfully maintained in a former action or judicial proceeding bars a party from making a completely inconsistent claim or taking a clearly conflicting position in a subsequent action or judicial proceeding, to the prejudice of the adverse party, where the parties are the same in both actions, subject to the 'special fairness and policy considerations' exception to the mutuality of parties requirement. Where the plaintiff, in a prior bankruptcy proceeding, did not successfully maintain that he was not disabled, because the bankruptcy court did not rule on the disability issue, he was not estopped from claiming that he was disabled in subsequent action against his disability insurer. His prior statements that he was not disabled "are fodder for impeachment in a lawsuit seeking benefits under the policies, [but] the doctrine of judicial estoppel does not elevate mere prior inconsistent statements into a case busting equitable defense." Moreover, the disability insurers were not parties to the bankruptcy proceeding, and there is no special policy or fairness consideration that would make estoppel apply in their favor.

Evidence – Frye

Matos v. State
30 Fla. L. Weekly D859 (Fla. 4th DCA 2005)

The court rejects a *Frye* challenge to data from a vehicle's "black box" recorder. The device is generally called an "EDR" (Event Data Recorder), or, in General Motors vehicles, an "SDM" ("Sensing and Diagnostic Module"). The court held that *Frye* does not apply because the process of recording and downloading SDM data is not a novel technique or method. Even if *Frye* did apply, the state demonstrated that when used as a tool of automotive accident reconstruction, the SDM data is generally accepted in the relevant scientific field. Therefore, it is admissible.

Expert Witness Disclosure

Fittipaldi USA, Inc. v. Castroneves
2005 WL 714919, 30 Fla. L. Weekly D867
(Fla. 3d DCA 2005)

In an action involving race car management contracts (yes, that Fittipaldi and that Castroneves), the court held that a party's former attorney's testimony that a contract was "ill advised" and "poorly drafted" was expert testimony and that the attorney should have been disclosed as an expert witness, not just a fact witness. The court distinguishes this case from cases in which treating physicians are treated as fact witnesses, not expert witnesses. The treating physicians do not obtain their knowledge in anticipation of litigation; the attorney in this case, who advised one of the parties on whether he could terminate the contract, did. However, the opposing party was not prejudiced in this case, because the attorney had testified in deposition to the same effect as he testified at trial, so the court did not reverse. The court likely would have reversed if the appellant had been able to show surprise and prejudice. See *Binger v. King Pest Control*, 401 So.2d 310 (Fla. 1981).

Failure to Prosecute

Lucaya Beach Hotel Corp. v. MLT Management Corp.
2005 WL 714047, 30 Fla. L. Weekly D853
(Fla. 4th DCA 2005)

Dismissal for failure to prosecute can sometimes turn on a question of local practice. The law is generally established that where the parties are awaiting action from the court, it is improper to dismiss for failure to prosecute. Here, where the court's own procedure was for the court, not the parties, to set a hearing on a motion for summary judgment, and the last record activity was a motion for summary judgment, the parties were waiting for the court to set the hearing, and the case could not be dismissed for failure to prosecute. The ball was in the court's court.

Insurance – Bad Faith

Allstate Indem. Co. v. Ruiz
2005 WL 774838, 30 Fla. L. Weekly S219
(Fla. 2005)

Receding from its decision in *Kujawa v. Manhattan Nat'l Life Ins. Co.*, 541 So.2d 1168 (which gave the insurance company in a first party bad faith case work product immunity from discovery for its claims files), the court holds that "any distinction between first- and third-party bad faith actions with regard to discovery purposes is unjustified and without support under section 624.155 and creates an overly formalistic distinction between substantively identical claims. . . . The Legislature has clearly chosen to impose on insurance companies a duty to use good faith and fair dealing in processing and litigating the claims of their own insureds as insurers have had in dealing with third-party claims. Thus, there is no basis to apply different discovery rules to the substantively identical causes of action."

The court concluded "that the better rule is recognition of the Legislature's mandate that the insurer's good faith obligation to process claims establishes a similar relationship with the insured requiring fair dealing, as has arisen in the third-party context, thus making the claim processing type file material discoverable under a claim for first-party bad faith just as with third-party actions.

"[A]ll materials, including documents, memoranda, and letters, contained in the underlying claim and related litigation file, [including] material that was created up to and including the date of resolution of the underlying disputed matter and pertain in any way to coverage, benefits, liability, or damages, should also be produced in a first-party bad faith action. Further, all such materials prepared after the resolution of the underlying disputed matter and initiation of the bad faith action may be subject to production upon a showing of good cause or pursuant to an order of the court following an in-camera inspection."

This may be the one of the most significant first party bad faith decisions in a long time. I would not be surprised if efforts are already under way in the legislature to change it.

Insurance – Homeowners

Fayad v. Clarendon Nat. Ins. Co.
2005 WL 729172, 30 Fla. L. Weekly S203
(Fla. 2005)

An earth movement exclusion in a homeowners "all-risk" insurance policy excluded only earth movement caused by natural events. It did not exclude coverage for damages to the home caused by nearby blasting. An all-risk policy provides coverage for all fortuitous loss or damage, other than that resulting from willful misconduct or fraudulent acts, unless the policy expressly excludes the particular loss from coverage. "[A]bsent specific language in the policy to the contrary, an earth movement exclusion is limited to damage caused by natural phenomena." The policy " expressly defines the term 'earth movement' to mean 'earthquake, including land shock waves or tremors before, during or after a volcanic eruption; landslide; mine subsidence; mudflow; earth sinking, rising or shifting.' This definition limits the term 'earth movement' to the events enumerated in the exclusion. Blasting is not expressly listed as a causal event that precludes coverage for resulting damage." The court applies the general principle that coverage is construed broadly and exclusions are construed narrowly, and that ambiguities are resolved in favor of coverage. The court also applies the principle of *ejusdem generis*, the rule that, where general words follow an enumeration of specific words, the general words are limited to the same class or kind of things as those that are specifically mentioned.

Insurance – PIP

Warren v. State Farm Mut. Auto. Ins. Co.
2005 WL 729173, 30 Fla. L. Weekly S197
(Fla. 2005)

The amendments to the PIP statute in 1999 included a requirement in §627.736(5)(b) that providers of non-emergency services and medical services not provided in and billed by a hospital submit a statement of charges to the PIP carrier within 30 days of provision of services, as determined by the postmark on the statement. The court holds that this requirement does not violate due process, equal protection or the right of access to courts. It "bears a reasonable relationship to a permissible legislative objective and is not discriminatory, arbitrary or oppressive." It imposes a "reasonable condition precedent" to filing a claim.

In a concurring opinion, **Justice Pariente**, with **Justice Anstead** concurring, suggests that "there may be circumstances in which this statute results in an unconstitutional denial of access to the courts as applied." An example might be where the provider fails to meet the time limit through no fault of his or her own, such as error by the patient. These kinds of situations are raised in **Justice Lewis**'s dissent, in which he is joined by **Justice Quince**.

Legal Malpractice

Cowan Liebowitz & Latman, P.C. v. Kaplan
2005 WL 610162, 30 Fla. L. Weekly S155
(Fla. 2005)

The general rule is that a legal malpractice cause of action may not be assigned. However, here the court recognizes an exception for a claim against attorneys who had prepared private placement memoranda for the sale of corporate shares, knowing that they would be distributed to the public and that potential investors would rely on them. The attorneys owed a duty to the public, so the usual concerns about confidentiality that generally preclude assignment did not apply. Those concerns are still valid in most cases. They include restricting the availability of competent legal services, embarrassing the attorney-client relationship and imperiling the sanctity of the highly confidential and fiduciary relationship existing between attorney and client.

Med Mal – Limitations

Best v. Lakeland Regional Medical Center, Inc.
2005 WL 735000, 30 Fla. L. Weekly D879
(Fla. 2d DCA 2005)

The plaintiff's claim for a radiation burn caused by a hospital's x-ray equipment was a claim for medical negligence to which the medical malpractice statute of limitations applied, not for "ordinary negligence," even though he alleged failure to maintain and calibrate the x-ray machine. The burn initially manifested itself as minor blisters that went away shortly after his hospitalization; years later the area became inflamed and larger, and would not go away. It was finally diagnosed as a radiation burn. The claim was barred by the statute of limitations and statute of repose, even though his cause of action was extinguished before he knew of his injury. See *Kush v. Lloyd*, 616 So.2d 415 (Fla. 1992).

Negligence – Duty

Breaux v. City of Miami Beach
2005 WL 673549, 30 Fla. L. Weekly S219
(Fla. 2005)

A city operating a public swimming area on a beach had an operational level duty of care to warn the public of any dangerous conditions of which it knew or should have known, including rip currents, and was not immune from a wrongful death claim for failure to warn. Whether the city knew or should have known of the rip currents is a question of fact for the jury.

Goldberg v. Florida Power & Light Co.
2005 WL 774823, 30 Fla. L. Weekly S224
(Fla. 2005)

In a non-emergency situation, where FPL chose a method of repairing a downed power line that rendered a nearby traffic light inoperable, FPL owed a duty to warn affected motorists of the danger created and posed by the inoperable traffic signal. The evidence presented at trial indicated that to satisfy a reasonable standard of care would have required FPL to notify the police department, place road flares, direct traffic, or take some other precautions reasonably necessary to alert and protect the safety of passing motorists. Having performed none of even these elementary precautionary measures, FPL breached its duty.

In addition, the drivers' negligence in entering an uncontrolled intersection does not always, as a matter of law, constitute an intervening superseding cause; rather, this is a question for the jury. "[T]he failure of a motorist to stop at the intersection of 67th and 120th was not 'so bizarre, unusual or outside the realm of ... reasonably foreseeable' behavior to relieve FPL of liability for deactivating the traffic signal without taking any precautions whatsoever to warn oncoming motorists."

Offer of Judgment

Hess v. Walton
2005 WL 597019, 30 Fla. L. Weekly D731
(Fla. 2d DCA 2005)

In a medical malpractice case, where the plaintiff sued a surgeon, and the surgeon's employer for vicarious liability, and had made separate, unequal offers of judgment to the defendant surgeon and the surgeon's employer, the plaintiff was entitled to fees under the offer of judgment statute, where the plaintiff's judgment against the employer was at least 25 percent greater than the patient's offer to the employer. The court recognizes that the plaintiff may have good faith, "logical, strategic reason to make such differentiated offers. It forces one defendant to settle. The plaintiff obtains money that can be used to further prosecute the lawsuit or which can be safeguarded from the risk of a future judgment if the defendants obtain the right to a judgment for their fees. The plaintiff can eliminate the defendant for whom the jury may have sympathy, or the defendant who may be on the brink of bankruptcy. If more than one lawyer is involved, the plaintiff can remove the defendant with the best lawyer." The court finds all of these considerations legitimate.

Punitive Damages

Estate of Despain v. Avante Group, Inc.
2005 WL 672090, 30 Fla. L. Weekly D813
(Fla. 5th DCA 2005)

An evidentiary hearing is "neither contemplated nor mandated" by the punitive damages statute, §768.72, to determine whether a reasonable basis has been established to plead punitive damages. All that is required is a proffer. Here, the proffer that the nursing home employees knew the decedent was at risk for weight loss, malnutrition, dehydration and choking, but failed to monitor her food or fluid intake, overmedicated her, failed to prevent a recurrence of aspiration pneumonia, failed to notice her difficulty in chewing and eating, and failed to develop a care plan, were sufficient to support a claim for punitive damages. The evidence that the nursing home was understaffed, contributing to the inability to provide proper care, and that numerous records of the decedent's care were incomplete, missing or fabricated, supported a claim for punitive damages against the corporations operating the nursing home.

Recusal

Cusimano v. Fred Florio & Kinemed, Inc.
2005 WL 602930, 30 Fla. L. Weekly D760
(Fla. 4th DCA 2005)

A trial judge recused himself, and subsequently was reassigned to the case. The court held that, even though neither party objected, the judgment he entered had to be reversed. Once a trial judge recuses himself, he cannot take any more action in the case. All of his orders following his recusal are void.

Summary Judgment

Verdino v. Charcoal Pit, Inc.
2005 WL 602440, 30 Fla. L. Weekly D745
(Fla. 4th DCA 2005)

The plaintiffs' failure to attach supporting materials to their expert's affidavit in opposition to summary judgment was a technical error. It was cured when the plaintiffs moved for rehearing and filed the materials that had inadvertently been omitted. The trial court should have granted the rehearing because the materials raised genuine issues of material fact. *Holl v. Talcott*, 191 So.2d 40 (Fla. 1966) is still good law and requires trial courts to liberally give opportunities to provide materials in opposition to summary judgment.

Venue

Platt v. Health Management Assoc. of Delaware
2005 WL 782813 (Fla. 2d DCA 2005)

A motion for change of venue must be accompanied by sworn proof, such as an affidavit. It is error to grant a motion for change of venue that is not accompanied by such proof.

Tip Top Enterprises, Inc. v. Summit Consulting, Inc.
2005 WL 766975 (Fla. 3d DCA 2005)

A defendant who does not raise a venue objection in a motion to dismiss or an answer, but later files a motion for change of venue, waives its venue objection.

Workers Comp Immunity

Lluch v. American Airlines, Inc.
2005 WL 602387, 30 Fla. L. Weekly D751
(Fla. 3d DCA 2005)

Under §440.11 of the worker's compensation statute, an employer may not be immune from suit in a negligence action by an employee where the negligent employee and the injured employee were assigned primarily to "unrelated works." Here, the court held that there was a genuine issue of material fact as to whether a janitor and an employee driving a luggage cart were assigned to "unrelated works." See T*aylor v. School Board of Brevard County*, 888 So.2d 1 (Fla. 2004).