# Case Law Update

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## Arbitration

### *Fletcher v. Huntington Place Limited Partnership*
Case No. 5D06-580 (Fla. 5th DCA 3/26/2007)

The nursing home's form contract, which included an onerous arbitration provision, was contrary to public policy and unenforceable. The issue was controlled by the 5th DCA's decision in *SA-PG-Ocala, LLC v. Stokes*, 935 So. 2d 1242 (Fla. 5th DCA 2006). In *Stokes*, the court considered contractual language very similar to that found in the arbitration agreement at issue in this case. The *Stokes* court found that the inclusion of certain provisions in the Alternative Dispute Resolution Service Rules of Procedure for Arbitration of the American Health Lawyers Association ["AHLA"] were void as against public policy because they had the effect of superseding or dismantling the protections afforded patients by the Nursing Home Act. The court rejects the contrary decision of the First District in *Gainesville Health Center, Inc. v. Weston*, 857 So.2d 278 (Fla. 1st DCA 2003).

The court rejected the nursing home's argument that the objectionable provision could be severed pursuant to the contract's severability provision and arbitration could still be required: "Given the nature of the relationship between a nursing home and its patient, the courts ought to expect nursing homes to proffer form contracts that fully comply with Chapter 400, not to revise them when they are challenged to make them compliant. Otherwise, nursing homes have no incentive to proffer a fair form agreement."

In addition, the agreement was not signed by the patient and was not signed by the daughter in her capacity as her mother's representative. She signed it only pursuant to a provision in the agreement that "If someone controls funds or assets that can be used to pay the resident's charges and wants to receive financial notices, that person should sign as agent."

### *Bonati v. Clark*
Case No. 2D06-4089 (Fla. 2d DCA 3/23/2007)

The trial court erred in finding that the defendants waived arbitration. The defendants filed motions to dismiss the complaint and the amended complaint without raising the issue of arbitration. In their subsequent answer, they asserted arbitration as their first affirmative defense, and also demanded trial by jury of issues so triable. The court held that the filing of motions to dismiss does not waive arbitration, and that raising it as an affirmative defense along with a demand for jury trial was not a waiver. Nor was it inconsistent to assert arbitration as a defense and demand jury trial of issues triable to a jury; in fact, it was necessary to do so in order to avoid waiver of the right to jury trial of any issues the court determined were triable to a jury.

### *Coastal Systems Dev. Corp. v. Bunnell Foundation*
Case Nos. 3D06-1188 and 3D06-982
(Fla. 3d DCA 4/4/2007)

The trial court properly denied the defendant's motion to compel arbitration, because the defendant waived arbitration by failing to timely raise it and by several of the actions it took in the case. Waiver does not require proof of prejudice.

When ruling on a motion to compel arbitration, under both the Federal Arbitration Act and Florida's Arbitration Code, the trial court must decide: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived. The trial court correctly denied the defendant's motion to compel arbitration because the defendant waived that right. The defendant did not seek to compel arbitration in either its motion to dismiss and amended motion to dismiss and motion to stay proceedings pending mediation. It was not until two years into the litigation that the defendant moved to compel arbitration.

In addition, the defendant waived its right to arbitrate by actively participating in the lawsuit. A party who actively participates in a lawsuit waives the right to arbitration. Here, the defendant did not raise the right to arbitrate in its answer and affirmative defenses. Where a party defends on the merits by answering the complaint without demanding arbitration, a

waiver is deemed to have occurred.

The defendant also waived its right to arbitrate when it filed its counterclaim. Finally, the defendant proceeded with discovery, which also constitutes a waiver of its right to arbitrate.

## Attorneys Fees

### *Jay v. Trazenfeld*

Case No. 4D06-1711 (Fla. 4th DCA 4/4/2007)

In a legal malpractice retainer agreement, two attorneys agreed to represent the plaintiff. The agreement specified the percentage of the recovery that would constitute the contingency fee, but did not specify how it would be split. The attorneys had an oral agreement that one of them would serve as lead counsel. Subsequently, lead counsel added the other attorney as a defendant in the legal malpractice case; however, summary judgment was entered in favor of the defendant attorney and that ruling was affirmed on appeal. When a recovery was obtained against the remaining defendants, the lead attorney refused to pay the other attorney his share of the proceeds, maintaining that, because he had been fired from representing the plaintiffs, he was only entitled to quantum meruit.

The court held that, because their prior opinion upholding the summary judgment was tantamount to a finding that he was wrongfully fired, the fired attorney was entitled to his percentage share of the fee. *Rosenberg v. Levin*, 409 So.2d 1016 (Fla. 1982), applies only to the amount a fired attorney is entitled to receive from the client. Quantum meruit under that case does not apply to a dispute between attorneys as to how to split the agreed fee.

Because the fee agreement did not specify how the fee would be split between the attorneys, ordinarily the fired attorney would be entitled to half of the fee. However, because the attorney acknowledged that he was not lead counsel, but only secondarily responsible, he only claimed 25 percent of the fee under Rule 4-1.4(f)(D). The court commended him for his candor and held that he was entitled to the 25 percent.

## Costs

### *Wood v. Panton & Co. Realty*

Case No. 4D06-1347 (Fla. 4th DCA 3/21/2007)

Agreeing with the Third District's decision in *Ocean Club Cmty. Ass'n, Inc. v. Curtis*, 935 So. 2d 513, 517 (Fla. 3d DCA 2006), the Fourth District holds that computerized research charges such as Westlaw are not taxable costs. The court had reached the same conclusion in *Department of Transp. v. Skidmore*, 720 So.2d 1125, 1130 (Fla. 4th DCA 1998). The court rejects the argument that such charges fall under the supreme court's revision of the guidelines in 2006, directing the courts to reward "innovative technologies" which "minimizes costs." However, the attorney's time spent performing the research is still compensable when the party is entitled to attorneys' fees.

## Death of a Plaintiff – Substitution of Personal Representative

### *Metcalfe v. Lee,*

Case Nos. 4D05-4033 & 4D06-1582
(Fla. 4th. DCA 4/4/2007)

The plaintiff filed a medical malpractice action and then died of causes unrelated to the malpractice. The defendant served a suggestion of death on plaintiff's counsel. Pursuant to Rule 1.260, a motion for substitution must be "made" within 90 days from the suggestion of death. Plaintiff's counsel filed a motion for substitution stating that the estate was being set up and that appointment of a personal representative was being requested; the motion asked that the court substitute the personal representative as plaintiff. The defense declined to stipulate to substitution. Although a notice of hearing accompanied the motion, the motion was not heard before the expiration of 90 days from the suggestion of death. The defendant moved to dismiss for failure to complete the substitution before the 90 days expired, and because the personal representative had not yet been appointed.

The trial court granted the motion to dismiss and denied the plaintiff's motion to substitute, stating that the motion was not filed by anyone with standing. The trial court also denied a 1.540(b) motion to vacate the dismissal and allow substitution after the personal representative was appointed. The appeals from both orders were consolidated.

The court held that the plaintiff's attorney, as her representative, was authorized to file the motion for substitution, regardless of whether the personal representative had been appointed, and that there was no requirement that the motion be heard prior to the expiration of the 90 days. The motion was "made" when it was served along with a notice of hearing. Further, dismissal is improper because the rule is designed "precisely so that the process of substitution of a new party for a party who dies while litigation is pending will not cause otherwise meritorious actions to be lost." *Eusepi v. Magruder Eye Inst.*, 937 So. 2d 795, 798 (Fla. 5th DCA 2006).

## Limitations

### *Lee v. CSX Transp., Inc.*

Case No.2D06-1416 (Fla. 2d DCA 4/11/2007)

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), provides, in 42 U.S.C. §9568, that the statute of limitations on a "personal injury" case commences

to run on "the date the plaintiff knew (or reasonably should have known) that the personal injury ...[was] caused or contributed to by the hazardous substance or pollutant or contaminant concerned." § 9658(b)(4)(A). The "federally required commencement date" (FRCD) may be applied to an action "brought under State law for *personal injury* . . . which [is] caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility." § 9658(a)(1) (court's emphasis). The statute preempts state statutes of limitations providing an earlier commencement date. Construing the term "personal injury" narrowly, the court holds that this federal statute does not apply to actions for wrongful death.

## Medical Malpractice – Duty

### *Torres v. Sarasota County Public Hosp. Bd.,*
No. 2D04-1634, 2007 WL 1094346, (Fla. 2d DCA 4/13/2007)

In a case of first impression in Florida, the Second District holds that, under the circumstances of the case, the defendant doctor owed a duty to the child of his patient even though the child was not yet conceived at the time of the alleged negligence.

The plaintiff alleged that the defendant doctor, the obstetrician who delivered the plaintiff's older sister, had a duty to notify his mother that the older sister had suffered an Erb's Palsy because of birth trauma and that the mother should provide this information to future health care providers. The complaint alleged that the defendant doctor failed to do any of these things and that had he done them, a reasonable obstetrician under the same circumstances would have had this information and as a result would have performed or ordered a Caesarean section to deliver the plaintiff instead of attempting to deliver him vaginally, resulting in the plaintiff's injury. The standard of care, which experts testified required the doctor to communicate this information, "clearly contemplates that the information will be useful in future deliveries to avoid complications that occurred in the past and that might harm the mother or future children."

The court found it significant that the standard of care did not impose any duty toward the child that was different from the duty toward the mother. Further, "the primary concern is the child," and "Where the injury or deformity is caused by the fault of another, fairness dictates that the financial needs of such child should be borne by the tortfeasor rather than the taxpayer." The court also relied on *Pate v. Threlkell*, 661 So.2d 278 (Fla. 1995), which recognized that a doctor may have a duty to someone who is not his patient under limited circumstances. The court states that Pate "tied the existence of a duty to the nature of the standard of care the physician owed to the patient."

## Patients' Right to Know

### *Wellner v. East Pasco Medical Center, Inc.*
Case No. 2D05-2079 (Fla. 2d DCA 3/23/2007)

The plaintiff's case was scheduled to go to trial beginning November 15, 2004. The discovery cutoff was November 2, and the pretrial conference was November 3. In the election on November 2, the people voted to pass Art. 10, §25, the Patient's Right to Know amendment, allowing access to prior medical incidents. The plaintiff did not raise the issue at the pretrial conference the next day, and did not file a motion to reopen discovery. Instead, five days later, he served additional discovery and filed a motion to shorten time or in the alternative for continuance. Declining to rule on whether the amendment was self-executing, the court held that the plaintiff waived the issue by failing to raise it at the pretrial conference the day after the election, or in the months preceding the election.

The court noted that there are three cases presently pending in the Florida Supreme Court on the issue of whether the amendment is self-executing: *Notami Hosp. of Fla., Inc. v. Bowen,* 927 So. 2d 139 (Fla. 1st DCA 2006); *Fla. Hosp. Waterman, Inc. v. Buster*, 932 So. 2d 344 (Fla. 5th DCA), review granted, 926 So. 2d 1269 (Fla. 2006); *N. Broward Hosp. Dist. v. Kroll*, 940 So. 2d 1281 (Fla. 4th DCA 2006). They are pending before the Supreme Court in case nos. SC06-912, SC06-688, and SC06-2425, respectively.

## Punitive Damages

### *Espirito Santo Bank v. Rego*
Case No. 3D06-2156 (Fla. 3d DCA 4/11/2007)

Where the plaintiff pled a claim for fraud in the inducement but did not proffer evidence to support it, the trial court erred in allowing the plaintiff leave to amend to plead punitive damages. The court says that *Perlman v. Prudential Ins. Co.*, 686 So.2d 1378 (Fla. 3d DCA 1997) stands for the proposition that, because a claim for fraudulent inducement contains an intentionality element, when a party has presented sufficient facts in support of a fraudulent inducement claim that would entitle him to an award of compensatory damages, he has also presented sufficient facts that would support a request for punitive damages. It does not mean that merely pleading a fraud claim relieves a party of the obligation to proffer evidence in support of it under §768.72, Fla. Stat.

The dissent argues that the appellate court went beyond the limits of certiorari review permissible under *Globe Newspaper Co. v. King*, 658 So. 2d 518 (Fla. 1995), in which the Florida Supreme Court held that certiorari review is not a vehicle by which to review the trial court's "determination of the sufficiency of the evidentiary showing under the statutory

procedure." Id. at 520. Globe Newspapers allows the appellate court to review only whether the trial court followed the proper procedures under Rule 768.72, not whether the evidence was sufficient. The majority says that it did not review the sufficiency of the evidence, but reviewed the trial court's procedural error in finding that the evidence was not sufficient for punitive damages but allowing the amendment anyway because of its misinterpretation of the *Perlman* case. The dissent argues that the trial court did not do that.

We may not have seen the last of this case.

## Real Party in Interest

### *Nationwide Terminals, Inc. v. M.C. Construction Group, Inc.*

Case No. 3D06-586 (Fla. 3d DCA 4/11/2007)

A party which is suing in a representative capacity on behalf of the real party in interest is not an "opposing party" under Rule 1.170 against which a counterclaim can be filed in its individual capacity.

## Recusal

### *Rodriguez v. Fernwoods Condo. Assoc. No. 2*

Case No. 3D06-867 (Fla. 3d DCA 4/11/2007)

An order entered simultaneously with an order of recusal is void and has no effect unless it is merely the reduction to writing of an order pronounced orally prior to recusal.

## Release

### *Banks v. Orlando Regional Healthcare*

Case No. 5D05-4253 (Fla. 5th DCA 4/5/2007)

The parents and children were involved in a car crash. They settled with the driver of the other car, and the probate court approved the settlement. However, the release was not submitted to the probate court for approval, and the court did not approve the terms of the release. The release failed to specifically preserve the claims against subsequent tortfeasors, as required by *Rucks v. Pushman*, 541 So.2d 673 (Fla. 1989) in order to preserve such claims. The plaintiffs brought medical negligence claims against subsequent health care providers, and the health care providers sought summary judgment. The plaintiffs went back to the probate court and obtained from the probate judge an order reforming the release to specifically preserve the claims. The court held that the probate court properly reformed the release, and that the health care providers were not entitled to summary judgment based on the release.

The health care providers were not entitled to notice of the probate court hearing because they were not "interested persons" under §731.201(21) of the probate code. The purpose of the hearing was approval of the settlement for the protection of the minor, not for the protection of the health care providers.

## Sealing Records

### *In Re: Amendments to Florida Rule of Judicial Administration 2.420—Sealing of Court Records and Dockets*

Case No. SC06-2136 (Fla. 4/5/2007)

The Supreme Court has adopted, on an emergency basis, interim amendments to Rule 2.420 regarding the sealing of court records, in order to protect the public's constitutional right of access to court records. There is a narrow category of cases that are automatically protected by state or federal law, such as juvenile court dependency records. Other than those kinds of cases, the following provisions, summarized by the court, will apply in noncriminal cases:

1. A request to make court records in noncriminal cases confidential must be made by written motion.

2. A public hearing must be held on any contested sealing motion and may be held on certain uncontested sealing motions.

3. A sealing order issued by a court must state with specificity the grounds for sealing and the findings of the court that justify sealing.

4. All sealing orders must be published to the public.

5. A nonparty may file a motion to vacate a sealing order.

6. A public hearing must be held on any contested motion to vacate a sealing order and may be held on certain uncontested motions to vacate.

7. A court may impose sanctions on any party who files a sealing motion without a good-faith basis and without a sound factual and legal basis.

8.[B]y mandating that the case number, docket number, or other identifying number of a case cannot be made confidential, the removal from public view of all information acknowledging the existence of a case is expressly not allowed.

In addition, the court requests the appropriate committees to work to develop rules applicable to criminal court cases and appellate court cases.

## Service of Process

### *Portfolio Recovery Assoc. L.L.C. v. Gonzalez*
Case No. 3D06-1489 (Fla. 3d DCA 3/28/2007)

The trial court properly quashed service of process. The complaint was served on a woman who was the mother of one defendant and the mother-in-law of the other defendant, at an address at which the defendants had not lived for five years. The defendants' actual receipt of the complaint does not change the outcome.

### *Mecca Multimedia, Inc. v. Kursbard*
Case No. 3D06-2255 (Fla. 3d DCA 4/11/2007)

Although there was evidence that the defendant's registered agent was avoiding service by concealing his whereabouts, the court held that substituted service of process under §48.181 had to be quashed because the complaint did not allege those facts. It is not enough to just prove concealment; the complaint must be amended to allege concealment as well.

## Statutes – Retroactivity

### *Daimler-Chrysler Corp. v. Hurst*
Case No. 3D06-2593 (Fla. 3d DCA 2/7/2007)

The "Asbestos and Silica Fairness Compensation Act," §774.201-209, Florida Statutes, has an effective date of July 1, 2005. Section 774.204(3) of the Act provides that "[a] person who is a smoker may not file or maintain a civil action alleging an asbestos claim which is based upon cancer of the lung, larynx, pharynx, or esophagus in the absence of a prima facie showing that includes all of the following requirements: . . . ." The prima facie showing required includes evidence from a board certified specialist that asbestos was a "substantial contributing factor" in causing plaintiff's illness; that at least 10 years elapsed between the date of first exposure to asbestos and the diagnosis of cancer; particular radiologic or tomographic findings; and substantial occupational exposure to asbestos.

The statute states that it applies to any action in which trial has not commenced as of the statute's effective date. The court held that the statute's requirements could constitutionally be applied to a cause of action that was already pending on the effective date of the Act.

The application of the statute to the plaintiff's claim did not deprive her of a substantive vested right in her common law asbestos claim. The court characterizes the plaintiff's interest in the claim as only an "expectancy," not a "vested right." The court cited a number of federal cases on what constitutes a vested right, and distinguished Florida cases such as *Forbes Pioneer Boat Line v. Bd. of Comm'rs of Everglades Drainage Dist.*, 258 U.S. 338, 339 (1922)(holding that the "legislature [could not] take away from a private party a right to recover money that is due when the [legislative] act is passed"); *State, Dep't of Transp. v. Knowles*, 402 So. 2d 1155 (Fla. 1981)(holding that a statute granting state employees immunity from tort liability for negligent acts in the course of their employment could not constitutionally be applied to defeat a judgment against an employee that was obtained prior to the effective date of the statute); *City of Sanford v. McClelland*, 163 So. 513 (1935)(holding that a vested right under a judgment levy could not be abrogated by a subsequently enacted statute).

The court also held that the statute is procedural, not substantive, because it affects only the plaintiff's burden of proof and the timing of when the plaintiff must present evidence that asbestos substantially contributed to the alleged injury.

### *Flowserve Corp. v. Bonilla*
Case No. 3D06-2201 (Fla. 3d DCA 4/4/2007)

The Asbestos and Silica Compensation Fairness Act, §§ 744.201-209, Fla. Stat. (2005), was not unconstitutionally applied retroactively to respondents' asbestosis claims, which were pending on the July 1, 2005, effective date of the Act.

## Warranties

### *American Honda Motor Co., Inc. v. Cesarani*
Case No. SC-05-1907 (Fla. 4/12/2007)

The long term lessee of a motor vehicle can maintain a cause of action for breach of warranty under the federal Magnuson-Moss Warranty Act.

## Whistleblower – Qui Tam

### *Rockwell Int'l Corp. v. U.S.*
2007 WL 895257 (March 27, 2007)

Any private citizen may bring an action to enforce the False Claims Act, 31 U.S.C. §§ 3729-3733, unless the information on which his allegations are based is already in the public domain. Even if the information is publicly available, however, the citizen may still sue if he was an "original source" of that information. In a heavy blow for whistleblowers, the Supreme Court held that, in a qui tam (whistleblower) action brought by a private person under the False Claims Act, 31 U.S.C. §3730, the court has no jurisdiction unless the person was an "original source" of the information, even if the government chooses to exercise its right to take over the case. The statute allows for actions either by the government or by a private person, but an action by a private person must be brought by an original source of the information. The court held that the plaintiff in this case was not an original source, and that the fact that the government chose to take over the case did not convert the case into one brought by the government.