Case Law Update

August 2005

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

Dangerous Instrumentality

The New Federal Aid to Highways Bill

The newly enacted Federal Aid Highways bill purports to eliminate vicarious liability for rental and lease agencies. However, the bill contains an exception for state financial responsibility laws. The bill states that:

> Nothing in this section supersedes the law of any State or political subdivision thereof– (1) imposing financial responsibility or insurance standards on the owner of a motor vehicle for the privilege of registering and operating a motor vehicle; or (2) imposing liability on business entities engaged in the trade or business of renting or leasing motor vehicles for failure to meet the financial responsibility or liability insurance requirements under State law.

I believe that the Florida rental car cap statute falls under this exception. It appears in Chapter 324, the financial responsibility chapter of the Florida Statutes. The court in *Fischer v. Alessandrini*, 30 Fla. L. Weekly D1680 (Fla. 2005) stated that the statute "is part of the Florida Financial Responsibility law." It contains minimum insurance requirements. If you are faced with this statute as an affirmative defense, be sure to plead in your reply that the exception to the statute applies.

Fischer v. Alessandrini

30 Fla. L. Weekly D1680 (Fla. 2d DCA 2005)

Pursuant to §324.021(9)(b)(3), Florida Statutes (1999), the trial court should have limited the amount of the judgment against the defendant. The court says the statute limits the financial liability of a motor vehicle owner when the owner is a "natural person" whose vehicle is involved in a collision while on loan to a permissive user.

The trial court had ruled that the defendant's truck was not a "motor vehicle" under the statute because §324.021(1), which defines "motor vehicle," states that it "shall not include any motor vehicle as defined in §627.732(1) when the owner of such vehicle has complied with the requirements of §§627.730-627.7405, inclusive, unless the provisions of §324.051 apply; and, in such case, the applicable proof of insurance provisions of §320.02 apply."

In trying to decipher that provision, the trial court concluded that because defendant's truck was a "motor vehicle" as defined in §627.732(1), and had complied with the §§627.730-7405, the No-Fault law, his truck was not a "motor vehicle" under the definition in §324.021(1). The court noted that the beginning of the definitions section of the statute says the definitions apply "except . . . where the context clearly indicates a different meaning." The court held that the context of §324.021(9)(b)(3) clearly indicated a different meaning; the legislature did not intend to exclude from the caps all motor vehicles that comply with the Florida No-Fault Law.

Discovery – Privilege Log

Century Business Credit Corp. v. Fitness Innovation & Technologies

30 Fla. L. Weekly D1568 (Fla. 4th DCA 2005)

Denying certiorari to review an order finding a waiver of privilege in regard to the production of documents because of failure to file a privilege log, the court clarifies *TIG Ins. Corp. Of America v. Johnson*, 799 So.2d 339 (Fla. 4th DCA 2001). TIG does not mean that failure to file a privilege log constitutes waiver as a matter of law; rather courts have discretion to find waiver for failure to file a proper privilege log as required under Rule 1.280(b)(5). Here, the court did not abuse its discretion where the petitioner filed the privilege log months late, and the court found the log to be "completely inadequate."

Fraud

Waldington v. Continental Medical Services
30 Fla. L. Weeky D1802 (Fla. 4th DCA 2005)

Although a promise to do something in the future ordinarily is not a basis for a cause of action for fraud, it can serve as a basis for a fraud claim "where the promise to perform a material matter in the future is made without any intention of performing, or made with the positive intention not to perform. The court reversed a summary judgment for the defendant. In addition, a corporate director, acting as a representative of his corporation, can be held personally liable for the fraud.

Judges

Vaughn v. Progressive Cas. Ins. Co.
30 Fla. L. Weekly D1822 (Fla. 5th DCA 2005)

The trial court's repeated criticism of plaintiff's counsel in front of the jury, such as accusations that he was improperly prolonging the case, and improper comments on the evidence, made a new trial necessary, even though the judge made similar comments about defense counsel. Where the trial court believes that counsel's conduct warrants rebuke, he must "attempt to do so in a manner that does not disfavor one party to the jury." Whenever possible, the court should admonish counsel outside the jury's presence. Moreover the trial court should not comment on the evidence. The jury regards the judge as a "fair, impartial and learned participant in the proceeding, and thus the expression of any opinion regarding the evidence or rebuke of counsel by the judge generally has great weight with them." This decision has a good collection of relevant case law. As a side note, I have been told that the plaintiff's attorney was **Racehorse Haynes**.

Med Mal – Experts

Torres v. Sullivan
30 Fla. L. Weekly D1612 (Fla. 2d DCA 2005)

The trial court improperly granted summary judgment for the defense by finding that the plaintiff's expert's testimony was not credible. The plaintiff's expert said that the defendant had a duty to ask the plaintiff whether there were problems with her first baby after delivery, before deciding to deliver her second baby vaginally, rather than performing a C-section. Although the defense tried to frame this issue in terms of the defendant's duty, arguing that duty is a question of law for the court, the court held that the defendant's argument "confuse[d] the question of whether a duty is owed with the question of what standard of care is required to satisfy that duty."

Med Mal Presuit

Largie v. Gregorian
30 Fla. L. Weekly D1694 (Fla. 3d DCA 2005)

The Third District construes the med mal presuit statute as requiring separate allegations as to each defendant in the presuit affidavit. The plaintiff's presuit affidavit named two doctors and described how they fell below the standard of care in failing to do a follow up after receiving certain test results. It did not mention a nurse, "either by name or job description," did not mention the standard of care applicable to a nurse practitioner or describe how the defendant nurse deviated from the standard. The plaintiff served the affidavit on the nurse, along with the two doctors. At a hearing on the nurse's motion for summary judgment for failure to comply with presuit investigation requirements, when asked to explain what had been done to investigate the plaintiffs' claim against the nurse, plaintiff's counsel pointed only to the affidavit.

Holding that the plaintiff did not satisfy presuit requirements with respect to the nurse, the Third District affirmed the summary judgment in favor of the nurse. The content of the notice of intent, which described the allegations against the nurse, did not cure the insufficiency of the affidavit as to the nurse. The nurse's response to the plaintiffs' notice of intent did not constitute a wavier of the requirement of the corroborating affidavit.

Dissenting, **Judge Cortinas** pointed out that "the medical malpractice statutory scheme must be interpreted liberally so as not unduly restrict a Florida citizen's constitutionally guaranteed access to courts," quoting *Kukral v. Mekras*, 679 So.2d 278, 284 (Fla. 1996); and that in *Maldonado v. EMSA Ltd.*, 645 So.2d 86, 89 (Fla. 3d DCA 1994), the Third District held that the notice and the affidavit, "taken together," must sufficiently indicate how the defendant deviated from the standard of care and must provide adequate information for the defendant to evaluate the merits of the claim." Taken together in this case, the dissent stated that the notice and affidavit adequately advised the nurse of how she breached the standard of care. The statute does not expressly require an individual affidavit of negligence against each defendant.

Note that the presuit affidavit is not required to specify every act of negligence of each practitioner. The Supreme Court has recognized that, as the case progresses through discovery, the plaintiff may well discovery different facts that will lead to different theories of liability. *Cohen v. Dauphinee*, 739 So.2d 68, 73 (Fla. 1999). This opinion should be construed only as requiring the affidavit to contain at least some specific allegation of negligence as to each individual defendant. It does not require the plaintiff to specify all theories of negligence against each defendant.

Bailey v. Fla. Dept. Of Corrections
30 Fla. L. Weekly D1618 (Fla. 4th DCA 2005)

It was error to dismiss the plaintiff's complaint for failure to comply with med mal presuit requirements where all treatment provided to the plaintiff, a prisoner, was provided through the Department of Corrections, and the Department refused to release his medical records. Absent an evidentiary hearing, the court accepted the plaintiff's contention that, under §768.28(10)(a), the health care providers and employees, who contracted as agents of the Department to provide health care to inmates, are treated as agents of the state; the defendants did not point to anyone else to whom the plaintiff could have directed his request, other than the Department. The court reversed without prejudice to the parties requesting an evidentiary hearing to show that there were separate medical records and that a request to the Department was not sufficient.

Paley v. Badewattemaraj
30 Fla. L. Weekly D1620 (Fla. 4th DCA 2005)

Section 766.203, Florida Statutes (2003) requires a doctor providing a presuit affidavit against emergency room physicians to have had "substantial professional experience within the preceding five years while assigned to provide emergency medical services in a hospital emergency department." The court holds that an affidavit from an ob-gyn who stated he had been called to emergency rooms to deal with emergency medical situations involving obstetrical patients and in those situations had worked in conjunction with ER doctors, was not sufficient. Section 766.202(6), enacted in 2003, has eliminated the distinction between an expert for presuit purposes and an expert testifying at trial. The court holds that the statute is procedural and applies even though the incident occurred prior to the effective date of the statute. The court does not address whether the presuit was conducted before or after the amendments. This is significant, in my opinion. An affidavit provided before the statute was amended should not be held to the standard of the subsequent statutory amendment. I don't think this case holds otherwise.

Premises Liability

Sherwood v. Quietwater Entertainment, Inc.
30 Fla. L. Weekly D1649 (Fla. 1st DCA 2005)

Premises liability is usually based on the right to control the premises. Usually, but not always, the lessee controls the premises. However, in some cases, the lessor controls it, and in some cases, the control is jointly held by the lessor and the lessee; in such cases, both can be liable for an injury to someone on the premises.

Plaintiff was injured in an altercation at a festival sponsored by the defendant. The festival celebrated a particular alcoholic drink. The defendant leased the public parking lot premises from the Santa Rosa Island Authorities under a "temporary use agreement." The lease required the defendant to be responsible for additional security personnel prescribed by the sheriff's department.

The court reversed a summary judgment in favor of the defendant lessee, the festival sponsor. The festival was based on "drinking and revelry" and had a history of fights and unruly conduct. The court held that "a lessee of a parking lot owes a concurrent duty with its lessor to provide a reasonably safe premises as a specific part of the zone of risk consideration." Whether the lessee controlled the parking lot under the temporary lease agreement and therefore owed a duty of care to the plaintiff is a question of fact that cannot be resolved on summary judgment. The court distinguishes *Publix Super Markets, Inc. v. Jeffery*, 650 so.2d 122 (Fla. 3d DCA 1995) and *Federated Dept. Stores, Inc. v. Doe*, 454 So.2d 10 (Fla. 3d DCA 1984), pointing out that neither case involved the risk factor present here, and that the parking lots in *Publix* and *Federated* were for general use of mall customers, not for a festival that historically produced a large crowd and unruly conduct; and that there was no issue of joint control in those cases.

Offer of Judgment - Proposal for Settlement

Event Services America, Inc. v. Ragusa
2005 WL 1875705 (Fla. 3d DCA 2005)

The trial court properly refused to award fees to a defendant under a nominal proposal for settlement, even though there was a defense verdict in the case. Both the statute, §768.79, and the rule, 1.442, contain a good faith requirement " that the offeror have some reasonable foundation on which to base an offer." *Schmidt v. Fortner,* 629 So.2d 1036, 1039 (Fla. 4th DCA 1993). "A reasonable basis for a nominal offer exists only where "the undisputed record strongly indicate[s] that [the defendant] had no exposure" in the case. *Peoples Gas Sys., Inc. v. Acme Gas Corp*., 689 So.2d 292, 300 (Fla. 3d DCA 1997). Therefore, a nominal offer should be stricken unless the offeror had a reasonable basis to conclude that its exposure was nominal. *Dep't of Highway Safety and Motor Vehicles, Florida Highway Patrol, v. Weinstein*, 747 So.2d 1019 (Fla. 3d DCA 2000).

The trial court did not abuse its discretion in striking the proposal because the Plaintiffs' claim had merit and, based on eyewitness accounts, it appeared, at the time the offers were made, that the defendant had at least some potential exposure. In fact, this particular defendant was the only defendant exonerated by the jury in this case involving a malfunctioning, overcrowded escalator. There was disputed eyewitness testimony that this defendant failed to regulate the crowd, allowed the escalator to become overcrowded, and failed to turn off the escalator quickly enough.

The court also finds support for the trial court's ruling in the fact that the plaintiff's claim survived summary judgment.

Palm Beach Polo Holdings, Inc. v. The Village of Wellington
30 Fla. L. Weekly D1626 (Fla. 4th DCA 2005)

The defendants' offer of judgment was invalid where it was conditioned on a general release of all claims "including but not limited to . . . items of damage or loss which were brought or not brought in this lawsuit. . . ." The court held that the release could reasonably be read to extinguish claims besides those related to the pending case, and multiple lawsuits were pending between the parties at the time. See *Nicols v. State Farm Mutual*, 851 So.2d 742 (Fla. 5th DCA 2003).

1 Nation Technology Corp. v. A1 Teletronics, Inc.
30 Fla. L. Weekly D1549 (Fla. 2d DCA 2005)

The court reversed a denial of attorneys fees pursuant to an offer of judgment that stated it was to "resolve all claims" and that all claims would be dismissed if the offer were accepted. The court rejected the argument that the offer failed to deal with their claim for injunctive relief. The claim for injunctive relief was what the case was about, and under the terms of the offer, it would have been dismissed if the offer were accepted. The offer read as a whole was sufficiently specific and clearly encompassed the resolution of the injunction claim, because it was an offer to settle all claims, which necessarily included the claim for injunction.

Norris v. Treadwell
30 Fla. L. Weekly D1579 (Fla. 1st DCA 2005)

Rule 1.525 requires a motion for attorneys fees under the offer of judgment rule to be filed "within 30 days after filing of the judgment." The court held that a motion for fees filed after the verdict but before the judgment was timely under the rule. The purpose of the rule "is fully accomplished by an interpretation that establishes the latest point at which a prevailing party may serve a motion for fees and costs."

Products Liability

Kohler Co. v. Marcotte
30 Fla. L. Weekly D1743 (Fla. 3d DCA 2005)

Adopting a provision of the Third Restatement of Torts, the court holds that a manufacturer, seller or distributor of a component part of a product is liable only under limited circumstances: (a) when the component itself is defective or (b) when the component seller substantially participates in the integration of the component into the design of the product and the integration of the component causes the product to be defective and the defect causes the harm. In addition, the court holds that the component manufacturer had no duty to warn the manufacturer of the completed product, because the danger was obvious. It only became a hidden danger as a result of its integration into the finished product. The court cites *Scheman-Gonzalez v. Saber Mfg Co.*, 816 So.2d 1133 (Fla. 4th DCA 2002). For comment on that case, see the May, 2002 Caselaw Update.

Years ago, a very wise trial judge, who is now retired, warned us at a DCTLA meeting that the Third Restatement had been influenced by lobbying and was not always an accurate statement of what the law is – which is what the Restatement is supposed to be. It is important to carefully scrutinize any argument that relies on the Third Restatement to make sure that it is an accurate statement of what the law really is.

Trial

Garcia v. Lincare, Inc.
30 Fla. L. Weekly D1837 (Fla. 5th DCA 2005)

A case is at issue under Rule 1.440 and ready to be set for trial when the pleadings are closed. A trial judge may not refuse to set a trial date on the grounds that discovery is not complete. The court does have discretion to determine what date is chosen for the trial and may consider issues such as discovery completion, availability of witnesses and counsel, and the court's own schedule. The court also has discretion to grant continuances upon a proper showing. But the court cannot refuse to act on the notice for trial within a reasonable time. Here, the court granted a writ of mandamus. The court also approved the procedure of some trial courts of setting a case management conference during which a disclosure and discovery schedule are incorporated into an order that fixes a trial date.

Whistleblowers

McBride v. Gemini Air Cargo, Inc.
30 Fla. L. Weekly D1623 (Fla. 3d DCA 2005)

The Florida Whistleblower act was not preempted by the federal Airline Deregulation Act and the Whistleblower Protection Program. The plaintiffs witnessed an uncertified vendor install a new engine into their employer's airplane, informed another employee, who reported it to the president of the company, and eventually reported it to the FAA and were fired. The court rejected the preemption argument and allowed their claims under the Florida act to proceed.

Wrongful Death – Costs

Beseau v. Bhalani
30 Fla. L. Weekly D1590 (Fla. 5th DCA 2005)

In a wrongful death action, costs and fees cannot be assessed personally against the personal representative, but only against her in her representative capacity. Although the personal representative "individually" was named in the complaint's caption, the body of the complaint made clear that her claims were made solely as personal representative of the estate. The body of the complaint, not the caption, determines who is a party. Because she was never a party to the proceeding, the entry of judgments against her for fees and costs was fundamental error.

Wrongful Death – Damages

Miami-Dade County v. Merker
30 Fla. L. Weekly D1570 (Fla. 3d DCA 1570)

A new trial on damages on the claim of the surviving spouse was required, where the jury found the defendant 100 percent negligent but awarded only medical expenses, and no damages to the surviving spouse for his loss of consortium, and the evidence of the love and affection between the survivor and the deceased was undisputed.

Wrongful Death – Settlement

Brunson v. McKay
30 Fla. L. Weekly D1724 (Fla. 2d DCA 2005)

Section 768.25 of the Wrongful Death Ac governs the settlement of wrongful death claims for which an action is pending at the time of settlement. It provides, "While an action under this act is pending, no settlement as to amount or apportionment among the beneficiaries which is objected to by any survivor or which affects a survivor who is a minor or an incompetent shall be effective unless approved by the court." The court construes this section as allowing survivors to object to a settlement even if they are not survivors who have a claim under the wrongful death act.

The court also holds that an order approving a settlement is an appealable final order.

Wrongful Death – Undocumented Immigrants

Enterprise Leasing Co. v. Sosa
30 Fla. L. Weekly D1747 (Fla. 3d DCA 2005)

There is no exception or exclusion in the wrongful death act for a decedent, his estate or survivors based on the legal status of the decedent or beneficiaries. The trial court properly refused to strike the plaintiff's claim for net accumulations, services and support. The intent of the wrongful death statute is "to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrongdoer." §768.17, Florida Statutes. That intent "would be frustrated if we were to allow the wrongdoer here to escape liability merely on the fortuitous legal status of the decedent."

The trial court properly allowed the plaintiff's expert witness to base his opinion on net accumulations, services and support on census statistics and other statistical data, and on the testimony of various witnesses.

A Personal Note – Care Packages for Soldiers in Iraq

Regardless of how you feel about the war in Iraq, you can help make things a little better for the men and women serving over there. The son of one of my friends is stationed at Camp Cobra. He will be coming home soon, but many will be staying. Small items can make things more comfortable for them, such as socks, wet wipes, eye drops, magazines and cookies. You can send a care package to the soldiers at Camp Cobra. Put a letter inside box addressed to "All Engineers 386 CAT" (I've been led to believe there are about 50 of them). Then address the box to their commander: Lt. Perrarra, 386 CAT, Camp Cobra FOB, APO AE 09374. My neighborhood Pack & Ship had the forms you need to fill out and was able to box the care package appropriately.