

CASE LAW

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Update

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Apparent Agency

Roessler v. Novak

28 Fla. L. Weekly D2566 (Fla. 2d DCA 2003)

A genuine issue of material fact precluded summary judgment on the liability of a hospital for the negligence of its radiologist. There was evidence from which a jury could find that the hospital, through its actions, created the appearance that the radiologist was its agent. The hospital maintained a radiology department physically located on its grounds; the radiology P.A. was the exclusive provider of radiological services at the hospital; the doctor worked for the P.A. Neither the doctor nor the P.A. provided services outside the hospital. The doctor and the P.A. provided radiological services at the hospital 24 hours a day, 7 days a week. The plaintiff sought the hospital's services and was admitted through its emergency room. Once he was admitted, the hospital provided him with the services and providers it determined to be necessary, including radiological services through its radiology department. The hospital assigned the doctor to interpret the scans. The plaintiff accepted the physician provided by the hospital. See *Cuker v. Hillsborough County Hosp. Auth.*, 605 So.2d 998 (Fla. 2d DCA 1992); *Orlando Regional Medical Center v. Chmielewski*, 573 So.2d 876 (Fla. 5th DCA 1991); *Irving v. Doctors Hospital*, 415 So.2d 55 (Fla. 4th DCA 1982).

Arbitration

Algayer v. The Health Center of Panama City, Inc.

28 Fla. L. Weekly D2680 (Fla. 1st DCA 2003)

The trial court erroneously ordered the plaintiff to arbitrate without considering whether the defendant nursing home had

waived its right to arbitrate by participating in the litigation before the motion to compel arbitration was filed, and throughout the litigation. *Benedict v. Pensacola Motor Sales, Inc.*, 846 So.2d 1248 (Fla. 1st DCA 2003). The court also erred in failing to consider whether the arbitration agreement was either procedurally or substantively unconscionable, where the staff did not allow the plaintiff to read the documents but read them to her, and the plaintiff did not sign or initial the page containing provisions on mediation and arbitration, and the arbitration provision waived some of the plaintiff's rights. See *Gainesville Health Care Center, Inc. v. Weston*, 28 Fla. L. Weekly D2201 (Fla. 1st DCA 2003).

Attorney's Fees

Wendy's of N.E Florida, Inc. v. Vandergriff

28 Fla. L. Weekly D2664 (Fla. 1st DCA 2003)

Under *Colony Insurance Co. v. G. & E. Tires & Service, Inc.*, 777 So.2d 1034 (Fla. 1st DCA 2000), an insurer which defends under a reservation of rights is not entitled to recover from the insured its fees incurred in the underlying suit when it is determined that there was no duty to defend, unless the reservation of rights expressly provided for recovery of fees from the insured if the insurer prevailed, and the insured accepted the defense on those terms. In this case, because there was no mention of fees in the reservation of rights, the insurer was not entitled to fees.

Further, the insurer was not entitled to fees under §57.105. The court cautions that the statute must be applied carefully, only to deter frivolous pleadings and meritless filings. An award of fees is not always appropriate even when the action is dismissed or summary judgment has been granted. As the Third District has noted, some guidelines for when fees are appropriate include when the case is found to be (a) completely without merit in law and cannot be supported by a reasonable argument for the extension of the law; (b) contradicted by overwhelming evidence; (c) undertaken primarily to delay or prolong the resolution of the litigation or to harass or to maliciously injure another; or (d) asserting material factual statements that are false. *Visoly v. Sec. Pacific Credit Corp.*, 768 So.2d 482 (Fla. 3d DCA 2000). Although the 1999 amendments to §57.105 lowered the bar, "just how far it has been lowered is an open question requiring a case by case analysis."

The trial court abused its discretion in awarding §57.105 fees because a justiciable controversy existed as to whether the insured was insured by the insurer, and the insurer was defending the claim against the insured.

Lackey v. Bridgestone/Firestone, Inc.

28 Fla. L. Weekly D2306 (Fla. 3d DCA 2003)

Where a contingent fee contract contains one illegal provision, the remainder of the contract may be enforceable. The court distinguishes *Chandris, S.A. v. Yanakakis*, 668 So.2d 180 (Fla. 1995), because the attorney here was not seeking recovery under the infirm provision of the contract; in *Chandris*, the attorney was seeking to recover under a void contract, as one of the attorneys was not licensed to practice in Florida.

Civil Procedure

Amendments to the Florida Rules of Civil Procedure and Florida Rule of Appellate Procedure 9.110

28 Fla. L. Weekly S797 (Fla. 2003)

The Court has adopted a number of amendments to the rules. Here are the more significant ones:

Rule 1.070 is amended to provide that “When a motion for leave to amend with the attached proposed amended complaint is filed, the 120-day period for service of amended complaints on the new party or parties shall begin upon the entry of an order granting leave to amend.”

Rule 1.190(a) is amended to explicitly provide “If a party files a motion to amend a pleading, the party shall attach the proposed amended pleading to the motion.”

Rule 1.190 (f) now requires a motion for leave to amend to assert a claim for punitive damages to make a reasonable showing, by evidence in the record or evidence to be proffered by the claimant, that provides a reasonable basis for recovery of punitive damages. The motion to amend can be filed separately and before the supporting evidence or proffer, but both the motion and the proffer or evidence must be served 20 days before the hearing.

Rule 1.370 now limits requests for admissions to 30 requests, including subparts, unless the court permits more for good cause, or the parties agree.

Rule 1.380(c) now requires the court to make a ruling on a request for reimbursement of the costs of proving matters contained in a request for admissions; however, the committee note says that the court may defer ruling on the amount.

Rule 1.540 has been clarified so that a motion for relief from judgment must be “filed” within the prescribed time limits, not just “made” within the time limits.

Conflict of Laws

Sierra v. A Betterway Rent-A-Car, Inc.

28 Fla. L. Weekly D2643 (Fla. 3d DCA 2003)

Where defendant rented a car in Georgia to a driver who drove it in Florida and caused an accident injuring the plaintiff, Florida dangerous instrumentality law applied. Choice of law is determined on an issue by issue basis; the law of the state having the most significant relationship to the particular issue applies. Florida had the most significant relationship to the issue of vicarious liability. The defendant was part of a nationwide chain of car rental companies, was aware that its cars were driven in Florida and was aware that the particular car would be driven in Florida. There is a reasonable relationship between the defendants and Florida – the defendants hold out their vehicles for rental and they are used in Florida on many occasions.

Collateral Source

Velilla v. VIP Care Pavilion, Inc.

28 Fla. L. Weekly D2949 (Fla.4th DCA 2003)

The trial court erroneously admitted evidence that the plaintiff ALF resident was entitled to medicaid benefits, as well as evidence that the defendant’s nursing director advised the family to hire a private duty nurse and the family did not do it because they could not afford it. The evidence was not admissible to explain the family’s failure to obtain medical care because the family did obtain medical care – from the defendant. Cf. *Sossa v. Newman*, 647 So.2d 1018 (Fla. 4th DCA 1994) (evidence plaintiff could not afford further medical treatment admissible to respond to defendant’s accusations that plaintiff failed to obtain follow-up care).

Fabre - Setoff

D’Angelo v. Fitzmaurice

28 Fla. L. Weekly S840 (Fla. 2003)

Here’s another complication in determining setoffs in the post-*Fabre* world. If a settling defendant is not on the verdict form, the non-settling defendant is entitled to a setoff for the portion of the settlement attributable to economic damages. The portion is to be determined by the proportion of the verdict that is attributable to economic damages.

A little history: In *Wells v. Tallahassee Memorial Regional Med Center*, 659 So.2d 249 (Fla. 1995), the court held that, where the plaintiff has settled with one tortfeasor, the remaining defendant is entitled to a setoff for only that portion of the settlement attributable to economic damages. The proportions are to be determined by the proportions in the verdict of

economic vs. noneconomic damages, not by any apportionment done by the settling parties in the settlement. In *Nash v. Wells Fargo Guard Services*, 678 So.2d 1262 (Fla. 1996), the Supreme Court held that a defendant has the burden of pleading and proving the negligence of a *Fabre* defendant. In *Gouty v. Schnepel*, 785 So.2d 959 (Fla. 2001), the court held that “Where a defendant is found 100% liable for the plaintiff’s damages, the settling defendant *who is not found liable* cannot be considered a joint tortfeasor.”

Now, the court has modified its holding in *Gouty*. The court explains that, what it meant to say in *Gouty* was “the settling defendant who is *found not liable* cannot be considered a joint tortfeasor. A defendant who is “not found liable” can be one whose liability was not considered by a jury, but a defendant may only be “found not liable” after a verdict. Therefore, where the settling defendant is not on the verdict form at all, there is a setoff. However, the setoff is only for economic damages, not for noneconomic damages. As in *Wells*, the proportions should be determined by the proportions of economic and noneconomic damages in the verdict.

Here are two questions I believe still may require clarification, which the court’s decision did not address. First, even though the court talks only about verdicts, I think it is pretty clear from the underlying reasoning of this decision that if there has been a summary judgment on the *Fabre* defense, the *Fabre* defendant has been “found not liable” and there should be no setoff. Second, where the non-settling defendant was vicariously liable for the negligence of the settling defendant, at least one case holds that there is a setoff for the full amount. *J.R. Brooks & Son v. Quiroz*, 707 So.2d 861 (Fla. 3d DCA 1998). It is not clear whether this holding will still be valid.

Jurisdiction – Longarm

Sierra v. A Betterway Rent-A-Car, Inc.

28 Fla. L. Weekly D2643 (Fla. 3d DCA 2003)

Where the defendant was part of a nationwide system of car rental companies that rented cars all over the country, including Florida, and knew that its car would be driven in Florida, it was foreseeable that defendant’s vehicles would be driven in Florida and involved in accidents here. Therefore, it was reasonable for Florida to exercise personal jurisdiction over the defendant.

Med Mal – Expert

Loadholtz v. Andrews

28 Fla. L. Weekly D2386 (Fla. 1st DCA 2003)

A doctor who was board certified in general surgery could testify against a doctor who was board-certified in obstetrics and gynecology, where the expert actively practiced medicine during the five years preceding the allegedly tortious conduct,

and during that period diagnosed, evaluated and referred for surgery conditions like those the plaintiff suffered. The trial court erroneously excluded the expert on the grounds that he was not board certified in the same specialty and did not practice in the same specialty. The 2003 amendments to the med mal statute did not apply because the notice of intent was mailed before September 15, 2003; therefore, the court did not have to address the issue of retroactivity.

Med Mal – Notice of Intent

Goldfarb v. Urciuoli

28 Fla. L. Weekly D2545 (Fla. 1st DCA 2003)

Service of a notice of intent on the defendant physician assistant’s former employer was not sufficient where the defendant was employed there at the time of the negligence but not at the time the notice was served. Rule 1.650(b)(1) provides that a notice of intent “received by any prospective defendant [operates] as notice to the person and any other prospective defendant who bears a legal relationship to the prospective defendant receiving the notice.” But the physician’s assistant was no longer in a legal relationship with his employer at the time the employer received the notice.

NICA

All Children’s Hospital, Inc. v. Department of Administrative Hearings

28 Fla. L. Weekly D2507 (Fla. 2d DCA 2003)

A difficult issue making its way through the courts is the scope of the jurisdiction of an administrative law judge in a NICA case to determine issues such as whether the plaintiff was given the notice required by the NICA statute before the doctor can claim NICA immunity. The problem is compounded by the repeated amendment of the statute. Disagreeing with *O’Leary v. Fla. Birth-Related Neurological Injury Comp. Ass’n*, 757 So.2d 624 (Fla. 5th DCA 2000), *Behan v. Florida Birth Related Neurological Injury Compensation Ass’n*, 664 So.2d 1173 (Fla. 4th DCA 1995), and *University of Miami v. M.A.*, 793 So.2d 999 (Fla. 3d DCA 2001), the court holds that the ALJ’s jurisdiction does not include the power to decide factual and legal issues related to notice and tort immunity. The court holds those issues are within the jurisdiction of the circuit court. The ALJ may only determine whether the injury is compensable under NICA. The ALJ also erred in requiring the plaintiff to make an election of remedies.

This is an area desperately in need of resolution by the supreme court. The uncertainty, and the hoops the plaintiffs must jump through, are creating serious obstacles to the plaintiffs’ right of access to courts.

Offer of Judgment

Tran v. State Farm Fire & Cas. Co.

28 Fla. L. Weekly D2471 (Fla. 1st DCA 2003)

The court holds that §768.79, Florida Statutes, applies to PIP cases, and to cases in small claims courts, and certifies the question as one of great public importance: “May an insurer recover attorney’s fees under Rule 1.442, Fla. R. Civ. P., and §768.79, Florida Statutes, in an action by its insured to recover under a personal injury protection policy?”

Hales v. Advanced Systems Design, Inc.

28 Fla. L. Weekly D2348 (Fla. 1st DCA 2003)

An offer of judgment or proposal for settlement under Rule 1.442 or §768.79 is supposed to state with particularity any relevant conditions or non-monetary terms. The offer in this case was invalid because it required the plaintiff to execute a general release releasing defendant and its “present and former officers, directors, employees, agents, servants, contractors, attorneys, corporate affiliates, successors and assigns of any and all claims at law or in equity, that plaintiff may have against any of those parties, whether known or unknown, liquidated or not liquidated, accrued or not accrued . . .” The court held that the plaintiff “could not reasonably evaluate whether the offer was sufficient to cover any claim that might ever arise in the future against [the defendant] or any affiliated persons.”

Privilege – Doctor-Patient

Lemieux v. Tandem Health Care

28 Fla. L. Weekly D2501 (Fla. 2d DCA 2003)

The trial court departed from the essential requirements of law in allowing counsel for the defendant rehab facility to conduct ex parte communications with the plaintiff’s treating doctors. This was an action under chapter 400, and for negligent hiring and retention of staff, but “did not state any cause of action for medical malpractice.” The court rejects the contention that the proposed ex parte discussions fell within the exception to the physician-patient privilege in §456.057(6) where both the defendant and the physicians are “healthcare practitioners and providers involved in the care or treatment” of the plaintiff. The court interprets the statute to allow communication only between health care providers *currently* involved in treating the patient, not former treaters. Moreover, nothing in the exception to the confidentiality requirement allows for “the disclosure of confidential medical information by one health care provider to the attorney of a different health care provider.” The court distinguishes *Royal v. Harnage*, 826 So.2d 332 (Fla. 2d DCA 2002), which allows med mal defendants to confer with their current and prior employees. The federal medical privacy law, HIPAA, may have an impact on this issue, but is not mentioned in this decision.

Privilege – Psychotherapist

Breeden v. Cook

28 Fla. L. Weekly D2740 (Fla. 4th DCA 2003)

In a malpractice action arising out of ankle surgery resulting in infection, the plaintiff did not place his mental or emotional condition at issue by pleading a claim for loss of enjoyment of life, without more, and therefore did not waive the psychotherapist-patient privilege for his treatment for substance abuse. See also *Byxbee v. Reyes*, 850 So.2d 595 (Fla. 4th DCA 2003); *Partner-Brown v. Borenstein*, 734 So.2d 555 (Fla. 5th DCA 1999).

Privilege – Self Incrimination

Boyle v. Buck

28 Fla. L. Weekly D2530 (Fla. 4th DCA 2003)

The trial court properly ordered the defendant in a wrongful death case to produce the car that hit the deceased’s motorcycle. The defendant’s fifth amendment objection was rejected. The fifth amendment protects only testimonial or communicative evidence, not real or physical evidence.

Release

Cousins Club Corp. v. Silva

28 Fla. L. Weekly D2426 (Fla. 4th DCA 2003)

The plaintiff was seriously injured in a boxing match held in a nightclub. He had signed a release assuming “the inherent and extraordinary risks involved in Monday Night Boxing and any risks inherent in any other activities connected with this event in which I may voluntarily participate.” The trial court properly denied the nightclub’s motion for summary judgment because the release referred only to the inherent risk of the boxing match. It did not clearly and unequivocally release the defendant for liability for its own negligence. The defendant’s negligence fell outside the scope of the release. The jury found the defendant failed to provide or obtain medical treatment for the plaintiff, failed to maintain its premises in a reasonably safe condition, and failed to properly supervise the boxing event.

Sanctions

Ruiz v. City of Orlando

28 Fla. L. Weekly D2686 (Fla. 5th DCA 2003)

Dismissal for fraud on the court should be reserved for only the most extreme circumstances. Here, the plaintiff made conflicting statements about prior injuries, but it was not shown that she engaged in knowing misrepresentations about a prior back injury in 1963 when she denied her back had been

injured in a 1963 accident but did admit she had been treated for arthritis. There was no false information given under oath pervasively and repeatedly.

Ham v. Dunmire

28 Fla. L. Weekly D2389 (Fla. 1st DCA 2003)

Even though “the party herself was in no way at fault,” the court affirms dismissal as a sanction for failing to furnish a witness list, to list or exchange exhibits, or to answer interrogatories timely after an agreed order to compel. The court certifies conflict with *Marin v. Batista*, 639 So.2d 630 (Fla. 3d DCA 1994). In *Marin*, the Third District held that the trial court abused its discretion in dismissing a case as a sanction where the party was not at fault. In my opinion, the Third District is correct, and the First District has failed to apply *Kozel v. Ostendorf*, 629 So.2d 817 (Fla. 1993), which states that the court must consider:

1) whether the attorney’s disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2) whether the attorney has been previously sanctioned; 3) *whether the client was personally involved in the act of disobedience*; 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for noncompliance; and 6) whether the delay created significant problems of judicial administration. *Upon consideration of these factors, if a sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative.*

Workers Comp Immunity

Byers v. Ritz

28 Fla. L. Weekly D2721 (Fla. 3d DCA 2003)

Section 440.11(1) provides an exception for worker’s comp immunity for a supervisor or manager who has violated a law providing for a penalty of 60 days or more imprisonment, whether or not a crime has been charged. The plaintiff alleged that the deceased was killed in a post-Hurricane Andrew incident involving a backhoe that was allegedly stolen by the defendant. The trial court erred in refusing to give the standard jury instruction on theft, where the theft may have “caused the injury,” even though the injury did not occur during the theft. The trial court should not have instructed the jury on the defense of necessity where there was no indication that the debris that the defendant was attempting to clear posed any immediate danger to anyone at the time.

Torre v. Chong

28 Fla. L. Weekly D2405 (Fla. 3d DCA 2003)

The trial court properly awarded \$13,500 fees against the defendant for lying in a deposition, even though the defendant eventually admitted that the testimony had been untruthful.

Wrongful Death – Damages

Bellsouth Telecommunications, Inc. v. Meeks

28 Fla. L. Weekly S775 (Fla. 2003)

Damages recoverable by a minor child for wrongful death of his parents pursuant to §768.21(3) are not limited to the period of minority, but should be calculated based on the joint life expectancies of the minor child and the deceased parent.