Case Law Update

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Argument – Improper

Worneck v. Worrall

5D04-3323 (Fla. 5th DCA Jan. 6, 2006)

Plaintiff's opening statement and closing argument, in which he repeatedly urged the jury to consider the number of trucks a defendant owned in determining how much to award for pain and suffering, required reversal of a large verdict for plaintiff.

The curative instruction given by the trial court was inadequate where the court instructed the jury "I did mean to the extent that I can to give a curative instruction. The – the amount of sales that R.T.G. or Rooms to Go has is of no relevance whatsoever to this litigation. Its sales are very different than profits or assets. It was an inappropriate comment. And so the jurors will completely disregard that comment." The court pointed out that this instruction could have left the jury with the impression that it could not consider the defendant's sales, but could consider its assets and profits, in determining plaintiff's damages.

The defendant's assets had no logical nexus to the amount of plaintiff's pain and suffering. Even though the argument was made about another defendant, not the appellant, the court found prejudice because the appellant was allegedly engaged in a joint venture with the defendant referred to in the argument. A plaintiff may suggest an arbitrary figure for pain and suffering but may not suggest an irrelevant basis for reaching that number.

The cumulative effect of the plaintiff's arguments required reversal of the order denying new trial.

Attorney-Client Privilege – Waiver

Chomat v. Northern Ins. Co.

No. 3D05-1452 (Fla. 3d DCA Jan. 11, 2006)

Entering into a *Coblentz* settlement agreement with the insureds and bringing an action against the insurance company and agent for denial of coverage and failure to procure coverage did not constitute a blanket waiver of attorney-client privilege by the settling parties.

The plaintiff in such a case has the burden of proving coverage, wrongful refusal to defend, reasonableness of the settlement and absence of bad faith. However, this burden does not entitle the insurer to delve into attorney-client communications.

Such testimony is not necessary to the opposing party's case under §90.510, Fla. Stat.

The reasonableness standard is an objective one. This can be established by expert testimony on the objective reasonableness of the settlement, considering such factors as the extent of the defendant's liability, comparison of the damages amount to damages in other cases, and the expenses the defendants would have incurred in defending the lawsuit.

The element of bad faith would include such concepts as a false claim or collusion. "These matters involve the underlying facts of the case," and do not require inquiry into privileged communications.

The specific *Coblentz* agreement in this case did recite that the insureds had been advised by their counsel that the case, if tried before a jury, would result in a verdict finding them liable. The court held that, to that extent, the attorney-client privilege was waived, but only with respect to that specific subject: the opinion of counsel that a jury trial would result in a finding of liability. However, recitations elsewhere in the settlement agreement reciting merely that the parties had consulted with their counsel did not constitute a waiver of the privilege, because they did not disclose the substance of the advice given.

Attorneys Fees

In Re: Amendment to the Rules Regulating the Florida Bar - Rule 4-1.5(f)(4)(B) of the Rules of Professional Conduct (Grimes Petition)
Case No. SC05-1150

After hearing oral argument on the petition by attorneys representing the Florida Medical Association, which asked the Court to issue a Bar rule capping attorneys fees in medical malpractice cases in accordance with their interpretation of the recently passed constitutional amendment (Art. I, §26), the Court ordered the Florida Bar to prepare a proposed rule. The Court said the rule should include an acknowledgment of the constitutional amendment, a requirement that the attorney fully inform the client about the amendment, and a procedure for a knowing and voluntary waiver. "Such a proposed procedure may involve judicial oversight or review of the waiver and may include a standard waiver form or otherwise provide for the protection of the rights of a potential client."

On February 17, the Bar responded with a proposed rule. The proposed rule will now be published for comment, and eventually the Supreme Court will decide whether to approve it. The proposed amendment would be added to the existing rule on contingency fees, Rule 4-1.5.

The proposed amendment requires the lawyer to provide the client with a copy of the constitutional amendment, and to advise the client orally of its provisions. If the lawyer is not willing to represent the client on terms in accordance with the amendment, the lawyer must advise the client orally and in writing of alternative terms under which the lawyer would represent the client, and the client's right to try to find another lawyer. If the client wishes to waive the constitutional right, it must be done in writing and under oath, on a form that is included in the rule.

The waiver form includes a provision that authorizes the lawyer to present the waiver to a court for approval of the fee agreement without the client's presence.

The waiver provision is subject to the other provisions of the contingency fee rule, including (f)(4)(B), which provides for court approval of any fee in excess of the fees specified in the other provisions of the rule. On first reading, it is not clear to me whether this means that the waiver only needs to be approved if the fee exceeds the limits applicable to contingent fees in general.

Class Actions

Beckford v. General Motors
3D05-1781 (Fla. 3d DCA Jan. 18, 2006)

The trial court stayed a statewide class action because a previously filed nationwide class action was pending in federal court. The plaintiffs petitioned for certiorari, arguing that there were state law claims that were not part of the federal case. The court denied certiorari, holding that the plaintiffs could have asserted their state claims in federal court but chose not to. That choice was not a reason to overcome the established rule that when a previously filed action involving substantially the same issues and parties is pending in federal court, the state court action should be stayed.

Default

Lanza v. Allied Trucking of Fla., Inc.
Case No. 3D05-53 (Fla. 3d DCA Jan. 11, 2006)

A party moving to set aside a default must show excusable neglect, due diligence, and a meritorious defense. Defendant's affidavit showed that the complaint was faxed to the defense attorney's office but, due to the vacations of certain personnel, a timely response was not filed. The court cites a number of cases involving a breakdown in established procedure or a mistake by an employee, allowing the default to be set aside.

Evidence – Hearsay – State of Mind Exception

Penalver v. State
Case No. SC00-1602

Evidence that the defendant's roommate stated he was planning to travel to North Carolina for the weekend was not admissible to prove that the roommate actually went there, where there was no other evidence that he did so. Section 90.803(3) allows admission of a declarant's then-existing state of mind, including a statement of intent, where the statement is offered to prove or explain the declarant's subsequent conduct. However, the Supreme Court held that the statement was not admissible because such statements are admissible only if they "involve the state of mind of the declarant and there is evidence demonstrating that the declarant acted in accord with the state of mind or intent."

Fabre

AMH Appraisal Consultants, Inc. v. Argov Gavish Partnership

Case No. 4D04-4681 (Fla. 4th DCA Jan. 11, 2006)

Defendant was not entitled to have an insurance agent placed on the verdict form as a *Fabre* defendant because it did not present expert testimony about the agent's fault. In order to have a *Fabre* defendant placed on the verdict form, a defendant has the burden of proving the *Fabre* defendant's negligence. See, e.g., *Nash v. Wells Fargo Guard Servs.*, 678 So. 2d 1262, 1264 (Fla. 1996); *Lagueux v. Union Carbide Corp*., 861 So. 2d 87, 88 (Fla. 4th DCA 2003).

Expert testimony is not always necessary to establish the negligence of an insurance agent, however. It depends on what the agent was supposed to be doing. In general, a failure to obtain requested coverage, or to make premium payments on time, might not require expert testimony. But a failure to warn the insured that the appraisal was too low likely would require expert testimony. See *Necessity of Expert Testimony to Show Standard of Care in Negligence Action Against Insurance Agent or Broker*, 52 A.L.R. 4th 1232 (2004).

Interest

The new interest rate on judgments pursuant to §55.03, Florida Statutes, is 9 percent. http://www.fldfs.com/aadir/interest.htm

Inventory Attorney

Rule 1-3.8, Rules Regulating the Florida Bar

Rule 1-3.8 of the Rules Regulating the Florida Bar now requires each attorney to designate an Inventory Attorney to inventory his or her files and take actions to prevent prejudice to clients, in the event of the attorney's death, incapacity or other inability to practice. The designation does not require the person to serve, but allows the court to contact the person and find out if they wish to serve. The new rule is at http://www.floridabar.org/divexe/rrtfb.nsf/FV/4A31D2835FF12AD685256EA7005B3860.

More information and a form for designating an inventory attorney can be found at http://www.floridabar.org/tfb/TFBOrgan.nsf/043adb7797c8b9928525700a006b647f/99a4545140922815852570ea0049323b?OpenDocument.

Jurisdiction – Longarm

Borden v. East-European Ins. Co.

No. SC04-1737 (Fla. Jan. 19, 2006)

Sections 626.906 and 626.907, Florida Statutes (2005) allow a Florida court to effectuate service of process on and exercise personal jurisdiction over an unauthorized foreign insurer whenever the insurer engages in one of the acts enumerated in § 626.906. Those acts include: "(1) The issuance or delivery of contracts of insurance to residents of this state or to corporations authorized to do business therein; (2) The solicitation of applications for such contracts; (3) The collection of premiums, membership fees, assessments, or other considerations for such contracts; or (4) Any other transaction of insurance." The Court held that this statute is only available to plaintiffs who are residents of Florida, and cannot be used by non-residents to obtain jurisdiction over an unauthorized foreign insurer.

Fletcher Jones West Shara Ltd. v. Rotta

Case No. 3D05-56 (Fla. 3d DCA Feb. 1, 2006)

Ebay sellers beware. The court held that the defendant Ebay seller had sufficient minimum contacts with Florida to justify longarm jurisdiction under §48.193(1)(b), Florida Statutes, where the defendant allegedly made false statements directed to the plaintiff in this state, in connection with the sale of a Porsche on Ebay, knowing that the plaintiff was in Florida. "Telephonic, electronic, or written communications into Florida may form the basis for personal jurisdiction under § 48.193(1)(b) if the alleged cause of action arises from the communications." *Wendt v. Horowitz*, 822 So. 2d 1252, 1260 (Fla. 2002).

Judges – Recusal

Jarp v. Jarp

Case No. 3D05-2537 (Fla. 3d DCA Jan. 18,2006)

The fact that the trial judge repeatedly had recused herself from cases involving one party's attorney did not require her to recuse herself in this case. The incidents giving rise to the alleged animus between the judge and the attorney had occurred 20 years earlier, and there was no allegation of any new incidents. The petitioner's attorney had actively campaigned against the judge, engaged in heated exchanges with her, and had learned of a statement by her husband that made him fear he would not get a fair trial. The court held that these incidents were "stale." Whether disqualification is required when there has been a dispute between the judge and a party's attorney depends on the nature of the dispute and the length of time since it occurred.

Jurisdiction – Personal

Alvarado v. Cisneros
3D004-2907 (Fla. 3d DCA Jan. 18, 2006)

The defendant did not waive its objection to personal jurisdiction by failing to take an interlocutory appeal under Rule 9.130 after the trial court denied its motion to dismiss for lack of personal jurisdiction. The defendant asserted lack of personal jurisdiction in its answer, and did not seek any affirmative relief from the court. Types of actions that may constitute a waiver include filing permissive counterclaims or cross claims, or asking the court to compel arbitration.

Negligence – Duty

Horton v. Freeman
No. 4D04-2908 (Fla. 4th DCA Jan. 18, 2006)

The plaintiff alleged that the defendants undertook to take care of and supervise the plaintiff's son while the plaintiff tended to a family emergency, negligently allowed the use of illegal drugs, and failed to care for him when they discovered him on the floor suffering from a drug overdose, resulting in his death. Reversing dismissal of the complaint, the court held that one who undertakes to do something for the benefit of another, even gratuitously, must exercise reasonable care.

Notice for Trial

Genuine Parts Co. v. Parsons
4D05-4638 (Fla. 4th DCA Jan. 11, 2006)

Due to the plaintiff's terminal illness, the trial court granted the plaintiff's motion to expedite the trial of this asbestos case involving 54 defendants. However, the plaintiff had never filed a notice for trial under Rule 1.440. The appellate court granted a writ of mandamus and reversed. The appellate court refused to treat the plaintiff's motion to expedite as a notice for trial. Compliance with Rule 1.440 is mandatory. The trial court also failed to comply with the Amended Omnibus Order on Trial Setting, Discovery and Product Identification in Personal Injury Asbestos Litigation, so that order could not provide an excuse for failure to comply with the rule.

Sovereign Immunity

Orlando v. Broward County
Case No. 4D04-4868
(Fla. 4th DCA December 21, 2005)

The school board could not be held liable for the death of a middle school student who was struck by a car and killed while crossing a busy street on his way home from school during rush hour. The child previously had lived outside the 2 mile limit and was entitled to bus service; when the family moved closer to the school, he eventually was no longer provided bus service, despite his family's requests. The court held that the school board's decision to end the school day at 4:00 p.m. during rush hour was a planning level activity under the test in *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla. 1979). The school board did not set a "hidden trap" and fail to warn of it, which could have allowed liability under *Dept. of Transp. v. Nielson*, 419 So.2d 1017 (Fla. 1982), because the danger of crossing a street in rush hour was open and obvious. Therefore, the school board was entitled to sovereign immunity.

Gallagher v. Manatee County
Case No. 2D04-3724 (Fla. 2d DCA Feb. 1, 2006)

The $100,000 sovereign immunity cap applies to the plaintiff's entire recovery against a sovereign entity in a civil rights employment discrimination case under Chapter 760, Florida Statutes. Section 760.11(5) provides that "the total amount of recovery" must be limited by the sovereign immunity cap in §768.28(5). The court holds that the term, "total amount of recovery" refers to all of the elements of the monetary award to a plaintiff against a sovereignly immune entity, including costs and attorneys fees.

Voir Dire – Time Limits

Carver v. Niedermayer
4D04-2381 (Fla. 4th DCA Jan. 25, 2006)

The trial court abused its discretion in limiting voir dire to 30 minutes per side, even though the court itself questioned the jurors first, and even though the court then allowed an additional 15 minutes per side, where the total time allowed counsel only 2-3 minutes with each juror and counsel pointed out specific areas of questioning he needed to pursue, and was not repetitive in his questioning of the jurors. The fact that the court first questioned the jurors did not, by itself, make the allotted time adequate. The trial court also abused its discretion in waiting until the beginning of questioning to announce the time limit.

Workers Comp Immunity

U.S. Holdings v. Belance

Case No. 3D04-872 (Fla. 3d DCA Jan. 11, 2006)

Defendant wore three hats. It was the owner of the premises where the plaintiff was injured; a safety consultant for the plaintiff's employer, and the self-insured workers' comp carrier. The court held the defendant was immune for its actions as the safety consultant and as the comp carrier, but that the defendant was not immune for its actions in its role as premises owner. See 440.11(3), Florida Statutes.

Workers Comp Immunity – Insurance Coverage

Griffin Bros. Co. v. Mohammed

No. 4D04-2802 (Fla. 4th DCA Jan. 25, 2006)

The personal representative sued the deceased's employer, attempting to allege the intentional tort exception to workers comp immunity recognized in *Turner v. PCR, Inc.*, 754 So.2d 683 (Fla. 2000). The employer settled with the personal representative and asserted a claim against its insurance agent for failure to procure adequate coverage by failing to obtain coverage for intentional tort claims. Affirming summary judgment for the agent, the court reasoned that there are two ways to prove the intentional tort exception under *Turner*: either by proving subjective intent or by proving objectively that the employer knew or should have known that its conduct was substantially certain to cause injury or death. The court held that, if the personal representative's complaint were construed to allege subjective intent to injure, there would be no coverage because it would be contrary to public policy. The agent could not be liable for failing to obtain coverage that could not be obtained because public policy prohibits it. However, if the complaint were construed to allege liability under the substantial certainty test, the policy provided coverage under *Travelers Indem Co. v. PCR, Inc*., 889 So. 2d 779 (Fla. 2004); therefore the agent was not liable because there was, in fact, coverage.

Note that, in 2003, the legislature amended the worker's comp immunity statute, §440.11, expressly adopting an intentional tort exception, but making it exceedingly difficult to prove.