# Case Law Update

June 2006



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## Employment – Sexual Harassment

### *Speedway SuperAmerica v. Dupont*

No. 5D04-14 Fla. 5th DCA (May 26, 2006)

En banc, the 5th DCA finds evidence adequate for the jury in a sexual harassment - hostile work environment case. Florida has strong policy on sexual harassment and the statute is to be liberally construed.

To be actionable, harassment need not seriously affect employee's well being or lead him or her to suffer injury. The required standard is that the conduct/harassment was so severe or pervasive, that it adversely affected the terms or conditions of the employee's employment. The adverse effect on the employee must be subjective, and objective. Not only must the employee suffer from the harassment, but it is also required that a reasonable person in the shoes of the employee would likely have suffered from such conduct.

Remedial steps the employer took were inadequate and not prompt. "Failure to investigate Dupont's complaints resulted in no effective measures being taken by Speedway to stop the harassment. No disciplinary action was taken against Coryell . . . and in fact he was recommended . . . for a management position because the was such a 'good worker'".

The award of punitive damages was upheld because the jury could have concluded that management level employees were not truthful and that the employer's reckless indifference allowed the harassment to continue for weeks, eventually forcing the plaintiff to leave her job. The court certified the question whether the *Mercury Motors* punitive damages standard applies to this kind of case.

## Forum Non Conveniens

### *TMW Corp. v. D&D Enterprises, Inc.*

2006 WL 1626975 (Fla. 4th DCA June 14, 2006)

Plaintiff, a Florida corporation, purchased goods from the defendant, a California corporation. The transaction was initiated by a phone call from the defendant to the plaintiff's Florida office. The goods were delivered without the documents necessary for the plaintiff to be able to resell them. They were delivered "FOB Origin," meaning that title passed in California. The court held that the trial court had to consider all of the factors of *Kinney System, Inc. v. Continental Ins. Co.*, 674 So.2d 76 (Fla. 1996). Assuming that California was an "adequate alternative forum," the court had to consider all of the Kinney factors including "adequate access to evidence and relevant sites, adequate access to witnesses, adequate enforcement of judgments, and the practicalities and expenses associated with the litigation." In addition, the court had to give deference to the plaintiff's choice of forum. The *Kinney* private interest factors were approximately equal, and it would be just as inconvenient for the plaintiff to litigate in California as it would be for the defendant to litigate in Florida. Therefore, the presumption favoring the plaintiff's choice of forum was not overcome, and the trial court correctly denied the defendant's motion.

### *Scotts Co. v. Hacienda Loma Linda*

2006 WL 1540907 (Fla. 3d DCA June 7, 2006)

The Third District reversed a denial of dismissal of a products liability action based on forum non conveniens. The action was brought by a foreign corporation against the foreign manufacturer of the product and the manufacturer's regional representative. Panama, the principal place of business of the plaintiff, was an adequate alternative forum; private interests weighed in favor of dismissal; public interests weighed in favor of dismissal because Florida had no interest in adjudicating the dispute of a Panama corporation whose property was injured in Panama by events taking place there; and there would be no inconvenience or undue prejudice to the plaintiff in reinstating the suit in Panama, its country of domicile. Where the plaintiff is a foreign corporation, the court gives no special weight to the plaintiff's choice of forum. However, the trial court should retain jurisdiction to make sure that Panama did not refuse to entertain the case based on pre-emption.

## Insurance – Bad Faith

### *Scott v. Progressive Express Ins. Co.*
2006 WL 1541047 (Fla. 4th DCA June 7, 2006)

The trial court erred in dismissing the plaintiff's bad faith claim. Plaintiff alleged that the insurer was obligated to pay 80% of all reasonable and necessary medical expenses under the PIP provisions of his policy, and failed to make payment, and that this violation occurred with such frequency as to indicate a general business practice constituting willful, wanton, malicious and reckless disregard for the rights of its insureds. The plaintiff claimed punitive damages. The bad faith claim was filed after the settlement of the plaintiff's PIP suit. The settlement documents specifically preserved any subsequent bad faith claim. The insurer argued that, because the plaintiff could not allege any compensatory damages other than the PIP benefits that had already been paid, the claim for punitive damages could not be sustained. Citing *Howell-Demarest v. State Farm Mut. Auto. Ins. Co.*, 673 So.2d 526 (Fla. 4th DCA 1996), the court rejected the insurer's argument, holding that to dismiss the plaintiff's bad faith claim in these circumstances would render the remedies under §624.155, Fla. Stat., ineffectual. Furthermore, the insurer's settlement of the plaintiff's PIP claim was the equivalent of a verdict in favor of the insured; therefore, the insured's action for benefits was resolved in his favor. The insurer's failure to pay benefits to the insured under his policy within 60 days of receiving the notice under §624.155 entitled the insured to make his claim for bad faith. The insured's allegations of general business practice and willfulness and reckless disregard were sufficient to state a cause of action for punitive damages.

## Insurance – Garage Policy

### *Discover Prop. & Cas. Ins. Co. v. Beach Cars of West Palm Beach, Inc.*
2006 WL 1476061 (Fla. 4th DCA May 31, 2006)

In a case of first impression, the court construes an ambiguous garage policy in favor of the insured and finds coverage for the insured for a vehicle that was sold during the policy period, where the injury occurred after the policy period, allegedly due to defective seat belts. The court emphasizes that the insurer could have clearly excluded coverage for incidents occurring after the policy period if it chose to do so. The court specifically and emphatically rejects the insurer's argument that allowing coverage would lead to an absurd or unreasonable result.

## Jurisdiction – Longarm

### *Small v. Chicola*
2006 WL 1409791 (Fla. 3d DCA May 24, 2006)

The trial court did not have jurisdiction over a defendant doctor where the wife of a deceased cruise ship passenger failed to rebut the affidavit and deposition of the doctor that he did not treat the patient in the forum state's territorial waters, was not involved in the decision to evacuate the patient to a hospital in the forum state, and never engaged in or carried on a business in the forum state.

## Jury Instructions

### *Pollock v. CCC Investments LLC*
2006 WL 1409129 (Fla. 4th DCA May 24, 2006)

This was a wrongful death action against an assisted living facility. The resident was murdered by another resident. There was evidence that the facility violated statutes and regulations pertaining to who could be admitted to an assisted living facility. The trial court erred in refusing to instruct the jury on several statutes and regulations where there was evidence from which the jury could find that the defendant violated them.

## Legal Malpractice

### *Kirkpatrick & Lockhart v. Bell Holdings, Inc.*
2006 WL 1540845 (Fla. 3d DCA June 7, 2006)

In a legal malpractice action, the client cannot be found comparatively negligent merely for following the negligent advice of the attorney.

## Med Mal – Experts

### *In Re Lustgarten*
http://www.aoc.state.nc.us/www/public/coa/opinions/2006/050891-1.htm
(N.C.App. June 6, 2006)

Some plaintiffs' attorneys have observed the chilling effect of what appears to be an effort to discourage doctors from testifying against other doctors in medical malpractice cases. In this case, a state disciplinary board suspended the license of a doctor who had testified against another doctor. The North Carolina Court of Appeal reversed. The record showed that the doctor had a good faith basis for the opinions for which the medical board sought to impose discipline. Because there was no

evidence in the record to support the disciplinary board's decision, the court ordered the disciplinary charges against the expert dismissed.

## Nursing Homes

### *Estate of Githens v. Bon Secours-Maria Manor Nursing Care*

2006 WL 1443354 (Fla. 2d DCA May 26, 2006)

Nursing home patients are among the most vulnerable of plaintiffs because often they are unable to speak for themselves to explain how they were injured. Here, the court reverses a summary judgment that was entered in favor of the nursing home and rejects the nursing home's argument that a finding in favor of the plaintiff would require an impermissible stacking of inferences upon inferences. The patient suffered a broken leg, which contributed to her death shortly thereafter. None of her caregivers admitted knowing how the broken leg occurred, but they admitted that she was totally dependent on them for ambulation, turning and repositioning. The court rejected the nursing home's argument that the plaintiff had to disprove theories that someone else besides the nursing home staff injured the patient, or that the patient's leg had become caught in the bed rail or sheets, when there was no evidence that any of those things occurred.

## Offer of Judgment

### *State Farm v. Nichols*

Nos. SC04-1483, SC04-1653 (Fla. June 1, 2006)

The offer of judgment / proposal for settlement statute is applicable in PIP cases. Despite the provision in §768.71(3) stating that, "if a provision of this part is in conflict with any other provision of the Florida Statutes, such other provision shall apply," the court holds that the provision in the PIP statute providing for fees only from the insurer to the insured does not conflict with the allowance of fees to an insurer who beats an offer of judgment.

The application of the offer of judgment statute in PIP cases does not defeat the "quid pro quo" necessary to prevent PIP from being an unconstitutional denial of access to courts. "[F]or the offer of judgment statute to apply, the plaintiff either must have a very weak case, or must reject a very generous offer. Encouraging plaintiffs to settle in those circumstances, rather than pursue needless litigation, "is entirely consistent with the intent of the no-fault legislation of relieving our overburdened court system." Therefore, application of the offer of judgment statute to PIP suits does not render the PIP statute constitutionally infirm."

Where an insured recovers some damages from the insurer, but not more than 75 percent of the offer, both the insured and the insurer will recover fees. The insured will recover pre-offer fees, and the insurer will recover post-offer fees. In determining whether the insured has beaten the offer, the insured's recovery, including any pre-offer fees, should be included in order to determine the total "judgment obtained" by the insured. See *White v. Steak & Ale*, 816 So.2d 546 (Fla. 2002) (pre-offer costs must be included in determining the "judgment obtained.") Here, the court says that the insurer will not be entitled to fees unless the insured's total recovery, including pre-offer costs and fees and prejudgment interest, does not beat the offer.

However, in this particular case, the offer of judgment did not meet the particularity requirement of Rule 1.442(c)(2)(C)-(D). The release is one of the nonmonetary terms or conditions that must be described with particularity in the offer. Here, the insurer's offer required a general release, but did not set out the terms of the release or attach the release to the offer. This rendered the offer ambiguous because, in addition to the PIP claim, the plaintiff in this case also had an uninsured motorist claim against the same insurer, and it was not clear whether that claim was to be included in the general release. The offer must be "sufficiently clear and definite to allow the offeree to make an informed decision without needing clarification."

### *Shoppes of Liberty City, LLC, v. Sotolongo*

2006 WL 1540881 (Fla. 3d DCA June 7, 2006)

The defendant's proposal for settlement was not premature where it was served 90 days before the defendant was first named in a proposed amended complaint attached to a motion for leave to amend. Even if the proposal were premature, however, the court holds that this did not invalidate it. The court acknowledges conflict with the approach taken by the court in *Grip Dev., Inc. v. Coldwell Banker Residential Real Estate, Inc.*, 788 So.2d 262 (Fla. 2001).

### *Rivera v. Publix Super Markets, Inc.*

2006 WL 1541246 (Fla. 4th DCA June 7, 2006)

This may well be an example of the vague kinds of offers the Supreme Court was talking about in *Nichols*. An offer that required execution of a general release, a no-lien affidavit, a "hold harmless" agreement and a stipulation for dismissal, but did not include the terms of those documents or attach copies, did not comply with the requirement that conditions be stated with particularity. It was not sufficient that the offeror made the documents available for the offeree to review at the office of the offeror's attorney. "The rule requires that the offer itself state these conditions, and not a form tucked away in an office somewhere."

## Products Liability

### *Ferlanti v. Liggett Group, Inc.*
2006 WL 1541068 (Fla. 4th DCA June 7, 2006)

To the extent the plaintiff's claims against a tobacco company were based on defective design, they were not preempted by federal law. Congress did not intend to preclude regulation of tobacco products; it only intended to preclude banning them from the market. The court relies on the U.S. Supreme Court's decision in *Food & Drug Administration v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120 (2000) involving the FDA's lack of jurisdiction over cigarettes.

The trial court erroneously granted summary judgment to the defendant on the plaintiff's defect and warning claims. The record showed that factual issues remained, including whether the amount of tar and nicotine made the cigarettes defective, whether the risks associated with smoking cigarettes were open, obvious, and common knowledge, and whether the deceased relied on any statements or omissions. The tobacco company did not conclusively rebut the allegations and evidence presented that the cigarettes were defective. Nor did it disprove detrimental reliance. The surviving wife's "lack of knowledge concerning what her husband relied on and what he discussed with his children, grandchildren, and other individuals does not conclusively establish that the decedent did not rely on any statements or omissions."

## Removal

### *Speedway SuperAmerica v. Dupont*
No. 5D04-14 Fla. 5th DCA (May 26, 2006)

The plaintiff alleged in the complaint that the amount in controversy was less than the federal jurisdictional amount. After the case was removed, the federal court looked at the amount in controversy and remanded. The plaintiff was not limited to recovering the amount pled. "Good faith pleading of the amount in controversy, not the amount actually recovered, is the rule of law for the state courts as well as where court jurisdiction is at issue." Even though the federal court acted correctly in remanding this case back to the state court, plaintiff was not estopped from recovering more, where her complaint did not specify any particular sum for punitive damages.

## Sanctions

### *Kirkland's Stores, Inc. v. Felicetty*
2006 WL 1541066 (Fla. 4th DCA June 7, 2006)

The trial court properly entered a default against a defendant for failing to file an amended answer and affirmative defenses when ordered to do so, and alternatively as a sanction for disregarding several orders involving discovery and related issues. The plaintiff was 73 years old and did not yet know what the issues would be in the case as of the start of trial, or what evidence the defendant would offer. The plaintiff was totally without fault and had not made any unreasonable discovery demands. The defendant was not entitled to a continuance to cure the violations.

## Workers Comp Immunity

### *Jones v. Martin Electronics, Inc.*
No. SC04-1538 (Fla. June 15, 2006)

Answering a certified question, which the court rephrased, the Supreme Court unanimously held that an employee who successfully litigated, before a worker's comp judge, a challenge to the rate paid for attendant care, did not elect worker's comp as his exclusive remedy and was not estopped to sue the employer for an intentional tort under the "substantial certainty" test.

The Court rephrased the certified question to state:

Is an employee who is entitled to and has received worker's compensation benefits for a workplace injury but has not pursued the compensation case to a conclusion on the merits estopped from later filing a separate civil action against the employer in circuit court for tort damages resulting from the same workplace injury if the employer's conduct that caused the workplace injury rises to the level of intentional conduct substantially certain to result in injury for which the exclusive remedy doctrine is not available?

The employer voluntarily provided benefits from the time of injury but at one point disputed the rate paid for attendant care. There was never any dispute as to whether comp benefits would be paid. In the dispute over attendant care, the employee checked "yes" in a box in response to a question about whether the injury was compensable.

The court answered the rephrased question in the negative. The court held that the claimant's successful petition for an adjustment in attendant care benefit rates did not amount to pursuit to a conclusion on the merits of a workers' compensation claim and, therefore, did not constitute an inconsistent election of remedies. The petition was simply a request for a change in the rate used to calculate a benefit that the compensation carrier had been voluntarily providing from the time of injury. The only subject matter of the contested comp hearing was the rate for attendant care services.

The issues of whether the incident which resulted in the plaintiff's injuries was compensable or caused by neglect or intent was not litigated before the comp judge. Neither the plaintiff's entitlement to workers' compensation benefits nor the extent of his injuries was ever a contested issue, as the compensation carrier for the employer began voluntarily making benefit payments almost immediately after the plaintiff was injured. Therefore, the petition, hearing, and resulting order from the comp judge did not constitute litigation to a conclusion on the merits of the compensation claim and did not constitute an election by the plaintiff of his workers' compensation remedy.

The answer to a standard yes/no question about whether the injury was compensable, on a form designed only to outline the disputed issues for the hearing, was not enough to constitute a knowing waiver of any common law rights against the employer for the intentional injuries as alleged here.

There will be no double recovery because a plaintiff may recover damages in the tort suit that would not be recoverable in worker's comp, and the comp carrier will be entitled to reimbursement of benefits paid if the third party tortfeasor is found liable for the employee's injuries.