Case Law Update

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Appeals – Extension of Time

Paul Revere Life Ins. Co. v. Kahn

2004 WL 1162150 (Fla. 3d DCA 2004)

It was a denial of due process for the Circuit Court, Appellate Division, to allow the appellant an extension of time to file its brief only until the date the transcript was due to be completed. It is unfair to require a litigant to prepare an appellate brief without benefit of the transcript. Although the circuit court appellate division has discretion to control its own proceedings, that discretion cannot be exercised without regard for due process and the essential requirements of law

Argument – Improper

Bocher v. Glass

2004 WL 1175817 (Fla. 1st DCA May 28, 2004)

The DCA reverses the trial court's denial of a new trial after a 43 million verdict for the wrongful death of a 19-year-old, based on the improper arguments of plaintiff's lawyer, to which the defense objected at trial. The arguments included efforts during voir dire to ingratiate himself with the jury, including telling the jury that plaintiffs' counsel was a former football player and resented armchair quarterbacking, efforts to relate a personal story about counsel and his grandfather and a "magic button" closing argument, in which the plaintiff's counsel said that if a magic button were placed in front of a particular named juror, and the plaintiff mother could get $6 million by pressing it, she would walk right by it to get her son back. The court compares this argument to a golden rule argument, although it did not really ask the jurors to put themselves in the plaintiffs' place.

Somewhat troubling is the court's criticism of plaintiffs' counsel, during voir dire, stating that almost every week the local newspaper runs a column about "frivolous lawsuits." This is a difficult issue that has to be dealt with somehow in voir dire. The court's real concern seems to have been that the plaintiff's lawyer appeared to be "testifying" about the issue. This case should not be read as prohibiting asking in voir dire about jurors' feelings about so-called frivolous lawsuits and tort reform.

Noting that the Supreme Court held in *Murphy v. International Robotics*, 766 So.2d 1010 (Fla. 2000) that contemporaneous objections are almost always required before a new trial can be granted for improper arguments, the court noted that the defense complied with *Murphy*, but the results were unfair to the defense: "By scrupulously following the law after *Murphy*, appellants' counsel risked alienating the jury with repeated objections. Jurors cannot be expected to understand the basis of counsel's repeated objections. All that is apparent to jurors placed in this position is that frequent objections and sidebar conferences prolong their service, and perhaps limit the information available to the jury. Thus, counsel's repeated objections to the same type of behavior may well lead the jury to infer that one side of the case is trying to hide or disguise matters that would be useful to the jury." To protect the defense from the ensuing prejudice, a new trial is required.

I appreciate the court's acknowledgment that the contemporaneous objection requirement really puts a burden on a trial lawyer who must make tactical decisions during trial about which is worse: the prejudicial argument or the prejudice from repeatedly objecting in front of the jury. However, as the Supreme Court acknowledged in *Murphy*, if an improper argument is so bad that it impairs not only the opposing party's right to a fair trial, but the public's interest in our system of justice, an improper argument to which there was no contemporaneous objection may be raised in a motion for new trial.

Attorneys Fees

Allstate v. Barnes Family Chiropractic
2004 WL 1058277 (Fla. 5th DCA May 7, 2004)

The statutory right to attorneys fees to a party who prevailed against an insurance company under §627.428 and under the PIP statute, 627.736(8) includes the right to fees for successfully defending against the insurance company's efforts to disqualify the plaintiff's attorneys. Sadly, we seem to be seeing more and more of parties using a motion for disqualification as a litigation tactic. Here, the court properly makes the insurance company pay for doing so. The court holds that, in order to obtain a judgment against the insurance company, it was reasonable and necessary for the plaintiffs to prevail against the insurance company's efforts to disqualify their counsel.

Class Actions

Courtesy Auto Group, Inc. v. Garcia
2004 WL 1123794 (Fla. 5th DCA 2004)

Affirming an order certifying a class, the court holds that the Motor Vehicle Lease Disclosure Act, §521.004, Florida Statutes, requires the lessor to provide the lessee with a copy of every document signed by the lessee in the transaction, and a lessee who did not receive a copy of her credit application and the consumer option plan that she signed had standing to represent class members who did not receive copies of all documents required by the statute. The court rejects the argument that some of the documents were intended for the lessor's internal use only, because the statute requires the lessor to provide copies of all documents signed by the lessee in connection with the transaction.

Employment Law

Ross v. Jim Adams Ford, Inc.
2004 WL 1057655 (Fla. 2d DCA May 7, 2004)

The plaintiff's claim for employment discrimination accrued on the day he was fired, and the statute of limitations was not tolled while he pursued his administrative claim. The confusion under the cumbersome administrative procedure created by the statute, §760.10, et seq., continues.

Evidence – Frye

State Farm Mut. Auto. Ins. Co. v. Johnson
2004 WL 1057689 (Fla. 2d DCA May 12, 2004)

The requirements of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) have been adopted in Florida and require that the proponent of expert testimony based on new or novel scientific evidence must prove it is based on principles generally accepted in the scientific community. The court holds that the *Frye* requirement does not apply to pure opinion evidence. Consequently, the plaintiff's expert doctor was properly permitted to testify that the automobile accident was the legal cause of the plaintiff's fibromyalgia, and did not have to undergo screening under *Frye*.

Fabre

Jackson v. York Hannover Nursing Centers
2004 WL 1057650 (Fla. 5th DCA May 7, 2004)

In plaintiff's action under the nursing home statute, Chapter 400, against a nursing home, the nursing home was properly permitted to name as a *Fabre* defendant the hospital at which the plaintiff was treated before she was admitted to the nursing home. The court distinguishes *D'Amario v. Ford Motor Co.*, 806 So.2d 424 (Fla. 2001), which held that, in an action for injuries arising from a defective seat belt, the driver of the car that caused the accident could not be made a *Fabre* defendant. The distinction that court makes is that, in the present case, both the hospital and the nursing home were dealing with a continuum of the same injury, not the separate and distinct injury that arises in crashworthiness cases. However, the court in *D'Amario* analogized to actions involving medical negligence that follows an initial negligently caused injury; in such cases the cause of the initial injury that required medical assistance is not ordinarily considered a legal cause of injuries resulting from later medical malpractice and the initial wrongdoer is not a joint tortfeasor with the subsequent medical provider. In my opinion, this case is not easily reconciled with those medical malpractice cases. See *Stuart v. Hertz Corp.*, 351 So.2d 703 (Fla. 1977), *Whitehead v. Linkous*, 404 So.2d 377 (Fla. 1st DCA 1981).

Another thing I find particularly troubling in this decision is that the nursing home standard of care is different from the medical malpractice standard of care. See *Integrated Health Care Services v. Lang-Redway*, 840 So.2d 974, 979 (Fla. 2002) ("Chapter 400, on the other hand, provides for the development and enforcement of basic standards of care imposed upon nursing homes. Section 400.022 creates twenty-two unique *statutory* requirements applicable to nursing homes."). I'm

not sure you can compare the fault under the nursing home standard of care with the fault under the med mal standard of care set by §766.102(1), Florida Statutes ("The prevailing professional standard of care for a given health care provider shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.")

It seems to me that it would be like comparing negligence and intent, which the Supreme Court prohibited in *Merrill Crossings Associates v. McDonald*, 705 So.2d 560 (Fla. 1997).

Insurance – Premium Finance

Smith v. Foremost Ins. Co.
2004 WL 1073899 (Fla. 2d DCA May 14, 2004)

The "service fee" charged by an insurance company to allow the insured to pay premiums in monthly installments was governed by the premium finance statute, §627.902, Florida Statutes. Even though the insurance company did not advance any funds, the agreement involved financing and therefore the insurance company was required to comply with the statute.

Insurance – Property

Aldridge v. Peak Property & Cas. Inc. Co.
2004 WL 1072169 (Fla. 2d DCA May 14, 2004)

The mortgagee took at an insurance policy on the homeowners' property. The property apparently was damaged by a sinkhole. The policy provided that the homeowner were "additional insured as respects any residual amounts of insurance over and above the insurable interest of the Insured [mortgagee]". The court held that, because the outstanding balance due on the mortgage exceeded the amount of the policy, the insurable interest of the mortgagee exhausted the limits of the policy and the homeowners were entitled to nothing. The dissent argues that, because the record did not show that the mortgagee had made any claim or been paid anything under the policy, the summary judgment was improper. The dissent argues that the majority was interpreting the policy as mortgage insurance, rather than property and casualty insurance, and that the homeowners, as additional insureds, should be permitted to "go forward on the merits to find out exactly what was intended by the policy that the plaintiffs-mortgagors were paying for."

Jurisdiction – Longarm

Virginia Farm Bureau Mut. Ins. Co. v. Dunford
2004 WL 1161819 (Fla. 4th DCA May 26, 2004)

An insurer's bad faith failure to settle a claim arising out of an accident in Florida was a breach of a contract to be performed in Florida and therefore Florida had jurisdiction under the longarm statute. An action for bad faith is "bottomed" on the contract. The insurer which undertakes to defend an action and engaged in negotiations for the insured has a duty to act in good faith. Further, the exercise of jurisdiction did not offend due process, because the insurer agreed to exercise good faith in defending the insured in claims arising throughout the United States and therefore should have foreseen being haled into court in Florida, if it breached its duty in Florida.

Med Mal – Presuit

Wolford v. Boone
2004 WL 1074113 (Fla. 5th DCA 2004)

Before the court could strike the defendant doctor's pleadings for failure to comply with presuit discovery under §766.201, Florida Statutes, the court was required to make a finding of willfulness. The court treats this as it would a discovery sanction, and not as a failure to comply with the stataute.

New Trial

The Hertz Corp. v. Gleason
2004 WL 1103598 (Fla. 4th DCA May 19, 2004)

The trial court properly granted a new trial after a defense verdict, where there was no dispute that the plaintiff suffered some injury in the accident, and the trial court found the verdict was against the manifest weight of the evidence. However, the new trial was to be limited to plaintiff's orthopedic and soft tissue injuries, as to which the evidence was undisputed, and not his closed-head injuries, as to which there was directly contradictory evidence. This case seems to make the new trial standard, which is supposed to be discretionary, awfully close to the directed verdict standard.

Products Liability

Bambu v. E. I. Dupont De Nemours & Co., Inc.
2004 WL 1161634 (Fla. 3d DCA May 26, 2004)

This was one of many actions involving the fungicide, Benlate, which allegedly destroyed the plaints in plaintiffs' nursery. The 3d DCA held that the trial court properly directed a verdict on their civil RICO claims, under §772.104, Florida Statutes. The plaintiffs were not injured by the defendant's activities in the criminal "predicate" acts underpinning the RICO claim. Showing the violations of mail fraud or wire fraud statutes, without showing that the plaintiff was injured by those violations, is not enough. The plaintiff must have been a target of the scheme to defraud and must have relied to his detriment on misrepresentations made in furtherance of the scheme. Indirect injuries are not enough. The plaintiffs presented no evidence that they saw or heard any of the communications which constituted thee predicate acts proved at trial.

In addition, DuPont could not be both a "person" under the RICO act and the "enterprise" under the RICO act – it could be part of a greater enterprise but it could not be the enterprise all by itself and also be a person subject to suit under the act. In my opinion, this dangerously helps insulate corporations from RICO liability. The plaintiffs failed to distinguish between Dupont as a person and Dupont as the enterprise.

In addition, the court held that FIFRA, the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§136-136y, preempted the plaintiffs' RICO claims: "to the extent that any claims in the instant action "depend[ed] upon a showing that a pesticide manufacturer's 'labeling or packaging' failed to meet a standard 'in addition to or different from' FIFRA requirements, section 136v [of FIFRA] pre-empts those claims."

Finally, the court improperly gave an adverse presumption instruction based on *Public Health Trust v. Valcin*, 507 So.2d 596 (Fla. 1987) based on Dupont's failure to preserve plants that were destroyed at one of its facilities in Costa Rica as a result of Benlate testing, when it knew that litigation was imminent. The court improperly resolved disputed facts and invaded the province of the jury. Further, the plaintiffs did not prove their inability to proceed without the destroyed evidence. The court held *Valcin* is inapplicable where the plaintiff is able to proceed in spite of the destroyed evidence. Further, the plaintiffs were entitled at most to an inference, not a presumption; an instruction on an inference is usually an improper comment on the evidence.

Releases

Gonzalez v. City of Coral Gables
2004 WL 1057724 (Fla. 3d DCA 2004)

Because the child's mother signed a hold harmless agreement to allow her child to participate in the Coral Gables Fire Rescue Explorer Program, which trained students to be fire rescue personnel, the child could not sue the city for an injury arising out of a fall in the fire station. The court held that this was the type of "commonplace child oriented community or school supported activities for which a parent or guardian may waive his or her child's litigation rights in authorizing the child's participation." The court cited *Shea v. Global Travel Marketing*, 28 Fla. L. Weekly D2004 (Fla. 4th DCA 2003), in which the court held that a safari in the African wilds was not the kind of program for which a parent may waive a child's litigation rights.

Sanctions

Sullivan v. Communications, Concepts & Investments, Inc.
2004 WL 1103559 (Fla. 4th DCA May 19, 2004)

The trial court should not have dismissed plaintiffs' complaint for failure to file a joint pretrial stipulation, where the plaintiff sent the defendant a proposed joint pretrial stipulation, and the defendant never responded until the day the stipulation was due. A finding of willfulness is required, and no such finding could be made on these facts.

Bank One, N.A. v. Harrod
2004 WL 1103770 (Fla. 4th DCA 2004)

In *Kozel v. Ostendorf*, 629 So.2d 817 (Fla. 1993), the Supreme Court listed factors that a trial court must consider in deciding whether to dismiss for discovery violations. The factors include, among others, whether the violation is willful and whether it is the fault of the client. Here, the trial court erroneously dismissed, where there was no willfulness and no evidence that the violation was the fault of the client, rather than the lawyer. The trial court also erred in failing to make specific findings.

Sovereign Immunity

Pollack v. Fla. Dept. of Highway Patrol
2004 WL 1274334 (Fla. June 10, 2004)

Even thought the highway patrol had a policy requiring it to promptly dispatch a trooper to the scene of a stalled vehicle, it did not have a legal duty to do so. Consequently, the highway patrol was not liable for two deaths caused when a car slammed into the back of a tractor-trailer stalled, with no lights on, at night, on the Palmetto Expressway. If no duty of care is owed with respect to alleged negligent conduct, then there is no governmental liability, and the question of whether the sovereign should be immune from suit need not be reached. The highway patrol did not own or operate the road; it merely patrolled it. Since it did not control the road, it had no duty to keep it free from obstructions.

"FHP's enabling statute does not afford the agency ownership or control over the state's roadways; therefore, FHP cannot be held to the standard of care that accompanies the right of ownership or control." Moreover, although a statute permitted FHP to clear obstructions from the road, the statute did not require it to do so and did not create a legal duty.

"Patrolling the state highways, controlling the flow of traffic, and enforcing the traffic laws are duties FHP owes to the general public, as opposed to an individual person." A duty owed to the general public, rather than to an individual, cannot create a cause of action. See *Trianon Park Condo. Assoc. v. City of Hialeah*, 468 So.2d 912, 921 (Fla.1985).

However, a special tort duty does arise when law enforcement officers become directly involved in circumstances which place people within a "zone of risk" by creating or permitting dangers to exist, by taking persons into police custody, detaining them, or otherwise subjecting them to danger. See, e.g., *Kaisner v. Kolb*, 543 So.2d 732, 735 (Fla. 1989) (officer had a duty to protect a detained motorist from the hazard of onrushing traffic); *Brown v. Miami-Dade County*, 837 So.2d 414, 418 (Fla. 3d DCA 2001) (officer carrying out a sting operation owed a duty to bystanders to use reasonable care to avoid harming them); *Henderson v. Bowden*, 737 So.2d 532, 534-35 (Fla.1999) (duty of care arising from police officer's instruction to intoxicated man to drive to a convenience store and call for a ride home where the driver continued on and subsequently collided with a tree killing two passengers in the vehicle). The distinction is whether the officer has "arrived on the scene or taken control of the situation."

Ingram v. Wylie
2004 WL 1092296 (Fla. 1st DCA May 18, 2004)

Plaintiff, a child with whom a teacher initiated a sexual relationship, sued the Department of Education for negligently re-issuing a license to the teacher, after the teacher's license had been permanently revoked for impregnating another student. The court held that the DOE was not protected by sovereign immunity, because the action did not involve the discretionary making of policy, but how the policy was carried out.