Case Law Update

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Arbitration

SB 978

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The nonbinding arbitration statutes were substantially amended in the most recent legislative session. The amendments make arbitration less formal. The presentation of evidence must be kept to a minimum, with matters presented primarily through counsel. Subpoenas will not issue without good cause. The attorneys fees provision has been amended to match the standards in the offer of judgment / proposal for settlement statute. It is unclear whether this will apply to pending cases; this may depend on whether it is construed as substantive or procedural

MHM Services, Inc. v. Perry

2007 WL 1610181 (Fla. 4th DCA 6/6/2007)

This may be very helpful to litigants in Broward County, where courts routinely order nonbinding arbitration under § 44.103(2), Florida Statutes. The results become binding if neither party timely requests a trial de novo. The trial court ordered non-binding arbitration of the plaintiff's two count complaint. The arbitrator found for plaintiff on the first count, and voluntarily dismissed the second count. Nine days later, the plaintiff filed a notice of acceptance of the arbitrator's decision on count I, and a voluntary dismissal without prejudice of count II. One day later, the employer moved for judgment on the arbitrator's award. It argued that the voluntary dismissal was a "nullity." The trial court and appellate courts both rejected the defendant's argument:

> Neither side demanded a trial as to the claim represented by the second count within 20 days of the arbitration decision. Both sides accepted the arbitrator's decision as to the first count, and so that claim was decided by the arbitration and was no longer subject to litigation. Nonbinding arbitration under section 44.103 is meant to be just that-nonbinding. The employer's argument would effectually make it binding on the employee. The right to trial in a court on civil claims is of constitutional dimensions, with litigants having both the right to access to the courts and to trial by jury. They also have the right by prior agreements to waive litigation and submit specified claims to arbitration. Their right to make such agreements, however, does not mean that binding arbitration can be required over their objection when prior agreement is lacking. Statutes such as this may serve the public interest, but they cannot be construed to weaken these constitutional rights of litigants.

Charles Boyd Construction, Inc. v. Vacation Beach, Inc.

No. 5D06-2168 (June 22, 2007)

In *Buckeye Check Cashing, Inc. v. Cardegna* 546 U.S. 440 (2006), which reversed the Florida Supreme Court's decision in *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860 (Fla. 2005), the United States Supreme Court held that, under the Federal Arbitration Act, the issue of the illegality of the arbitration agreement as a whole must first be decided by the arbitrator. In this case, the 5th DCA applies that reasoning to similar language in the Florida Arbitration Code. Therefore, whether your case is governed by the federal or Florida arbitration code, and whether you are challenging the legality of the arbitration provision or the contract as a whole, the issue of legality, must, according to this case, be first submitted to the arbitrator.

Attorney Disqualification

Bon Secours -Maria Manner Nursing Center, Inc. v. Seaman

No. 2D06-5726 (Fla. 2d DCA 6/16/2007)

The trial court departed from the essential requirements of law in disqualifying a law firm from representing the defendant. Although the first-named partner in the law firm representing plaintiff joined the law firm representing the defendant, the plaintiff failed to offer any sworn testimony. Plaintiff merely filed an unsworn motion and offered unsworn representations of her counsel.

Attorneys Fees

Hustad v. Architectural Studio, Inc.

No. 4D06-3574 (Fla. 4th DCA 6/20/2007)

Plaintiff's voluntary dismissal of the complaint early in the case did not preclude defendant's claim for fees under §57.105, Florida Statutes. It was an abuse of discretion to deny the motion without an evidentiary hearing.

Bill of Discovery

Payne v. Beverly

No. 5D06-3344 (Fla. 5th DCA 6/22/2007)

In this dispute over an internet domain, the plaintiff contended that the domain was stolen from him and sold to one of the defendants. He claimed he needed discovery in order to bring a lawsuit to recover the domain name, and that the discovery was necessary to prove that he was the rightful owner of the domain. Two defendants provided the discovery; the third did not. The trial court erroneously dismissed his complaint against the third defendant with prejudice and assessed fees against him. A complaint for pure bill of discovery must allege: "(1) the nature and contents of documents or other matters in the defendant's possession or control, as to which discovery is prayed, (2) the matter or controversy to which the requested discovery relates, (3) the interest of each party in the subject of the inquiry, (4) the complainant's right to have the requested relief, (5) the complainant's title and interest, as well the complainant's relationship to the discovery claimed, and (6) that the requested discovery is material and necessary to maintain the complainant's claims in the prospective litigation."

Closing Argument

Shoaf v. Geiling

2007 WL 1573912 (Fla. 5th DCA 2007)

It was reversible error to allow the plaintiff to play in closing argument portions of a video deposition that had not been introduced into evidence.

Dangerous Instrumentality –- Shop Exception

Youngblood v. Estate of Villanueva

2007 WL 1628275 (6/6/2007)

The Supreme Court dismissed review as improvidently granted. The lower court decision, *Estate of Villanueva v. Youngblood*, 927 So.2d 955 (Fla. 2d DCA 2006) stands. The Second DCA reversed a summary judgment for the defendant and held that the shop exception to the dangerous instrumentality doctrine did not apply to a car that defendant gave to a used car dealer on consignment. The defendant assumed the car would only be used for test drives, but did not expressly limit it. The dealer took the car home, ostensibly for safekeeping, and got in an accident while driving it to a Christmas party at his sister's house. The court holds that the shop exception is limited to repair and service situations, and that whether the vehicle was converted by the used car dealer is a question of fact for the jury.

Defense Medical Examination

Bacallao v. Dauphin

2007 WL 1544149 (Fla. 3d DCA 2007)

The court grants certiorari and quashes an order requiring the plaintiff to submit to a compulsory defense neuropsychological examination without her attorney and without a videotape. The neuropsychologist testified "that the presence of a third party as well as video or audio taping of the examination is disruptive, potentially affects the validity of the exam, compromises test security by releasing confidential test materials to the general public, and violates professional and ethical obligations." She also claimed that plaintiff's counsel had disrupted a previous exam by refusing to let the plaintiff answer certain questions. However, when asked whether there were any other physicians in the area who would conduct a neuropsychological examination with the presence of a third party, she testified that "there were others in private practice who advised her that they would be willing to do so solely for financial reasons."

With respect to the presence of counsel, the defense provided case specific reasons, but did not meet their burden of proving that no other neuropsychologist would perform the examination. With respect to the videotape, the defense provided only general, not case-specific reasons, and did not meet their burden of proving that no other neuropsychologist would perform the examination.

There is a delicate balance here with regard to the disruption by the attorney. The reason for allowing the presence of counsel is that the attorney is required to protect his client by making sure that the examination doesn't turn into another excuse for cross examination of the client.

Employment Discrimination

Winn-Dixie Stores, Inc. v. Reddick
954 So.2d 723 (Fla. 1st DCA 4/26/2007)

The court holds that an attorneys fee multiplier is not available to a plaintiff under the Florida Civil Rights Act, but that a plaintiff is entitled to fees for the time spent litigating entitlement to fees. See §766.11, Florida Statutes. The court uses case law under the federal civil rights law to aid it in interpreting the Florida statute.

FDUTPA

Prohias v. AstraZeneca
No. 3D06-2733 (Fla. 3d DCA 6/13/2007)

The court affirms the dismissal of an attempted FDUTPA class action involving the drug Nexium on preemption grounds, and because of the "safe harbor" provision in FDUTPA for acts "specifically permitted by federal or state law." The court says that the advertising and promotional activities alleged in the complaint were all specifically authorized by the FDA. The plaintiff's claim for unjust enrichment failed on that basis as well.

Hospital Liability

Horowitz v. Plantation General Hosp. Ltd. Partnership
2007 WL 1498968 (Fla. 2007)

Section 458.320, Florida Statutes, requires hospitals to require their physicians to maintain certain minimum levels of financial responsibility. The supreme court holds that the statute does not create a duty to the patients and does not create a cause of action in favor of a patient injured by a doctor who has not met the financial responsibility requirement.

Insurance – Homeowners

State Farm Florida Ins. Co. v. Ondis
2007 WL 1385958 (Fla. 1st DCA 5/14/2007)

The court affirmed the finding below that the plaintiff insured's home was a "total loss" under the Valued Policy Law. Section 627.702, Florida Statutes, the Valued Policy Law, essentially requires a homeowners insurer to pay the full value of the policy if the home is damaged by a covered peril and is a total loss. The court holds that a building is an "actual total loss" when it "no longer retains its identity and the specific characteristics which define it as a building." In addition, a building is a "constructive total loss" when, "although still standing, [the building] is damaged to the extent that ordinances or regulations in effect prohibit or prevent the building's repair, such that the building has to be demolished." A reasonable factor for the court to consider is whether the cost to repair the home exceeds the value of the home. The court certifies to the Florida Supreme Court the following question:

> Does section 627.702(1), Florida Statutes (2004), referred to as the Valued Policy Law, require an insurance carrier to pay the face amount of the policy to an owner of a building deemed a total loss when the building is damaged in part by a covered peril but is significantly damaged by an excluded peril?

Insurance – PIP – Discovery

Southern Group Indem., Inc. v. Humanitary Health Care, Inc.
2007 WL 1542019 (Fla. 3d DCA 2007)

Section 627.736(6)(d) does not require an insurer to provide a PIP payout log to its insured or the insured's assignee before suit is filed.

Jurisdiction – Longarm

The Credit Counseling Foundation, Inc. v. Hylkema
No. 4D05-4727 (Fla. 4th DCA 6/13/2007)

A Washington judgment in a consumer protection case was entitled to full faith and credit because Washington properly exercised personal jurisdiction over the defendant. There was evidence from which the Washington court could properly conclude that the defendant either transmitted, or conspired with another who transmitted, nine unsolicited spam emails to the plaintiff in Washington. The court holds this evidence was sufficient to establish personal jurisdiction. The emails contained a link which directed the plaintiff to a website which

contained a form for him to fill out; the form resulted in phone calls from the defendant. However, the decision seems to rest on the emails.

Negligence – Duty

Ziegler v. Tenet Health Systems, Inc.
2007 WL 1485861 (Fla. 4th DCA 5/23/2007)

A hospital owed no duty to the husband of a patient who fainted after he assisted a nurse in applying a dressing to his wife's hand. The husband told the nurse that he felt hot, and she told him he should go wait in the waiting room. He got up and, as he was walking to the waiting room, he fainted, fell and was severely injured. The court stated that the husband was not within the hospital's control and the hospital did not create a foreseeable zone of risk.

Negligence – Standard of Care

DeLibero v. Q Clubs, Inc.
2007 WL 1610153 (Fla. 4th DCA 6/6/2007)

The trial court did not err in refusing to give a cautionary instruction on standard of care under *Nesbitt v. Community Health of South Dade, Inc.*, 467 So.2d 711, 715 (Fla. 3d DCA 1985). Nesbitt allows admission of evidence of industry custom, but only with a cautionary instruction that it is only some evidence of the standard of care but does not set the standard of care. The alleged negligence here was the failure of the defendant health club to have a defibrillator on hand. The defendant did not put on evidence that the standard of care in the industry was not to have defibrillators. The evidence was only that, at the time of this incident, defibrillators were being considered, but there was no custom or standard of care as to whether a health club should or should not have one. One might question whether the lack of a standard of having a defibrillator is materially different from a standard of not having a defibrillator, but the court found the distinction significant.

Nursing Home

Avante Villa at Jacksonville Beach v. Breidert
2007 WL 1593242 (Fla. 1st DCA 6/5/2007)

Under Fla. Const. Art. X §25, commonly known as Amendment 7, a health care facility or provider is required to provide access to records of adverse medical incidents. This Court holds that a nursing home is not a "health care facility" or "health care provider" required to produce reports under the amendment. The amendment states that "The phrases 'health care facility' and 'health care provider' have the meaning given in general law related to a patient's rights and responsibilities." The court states that, although nursing homes are sometimes treated as health care facilities under general law, they are not under general law relating to patients' rights and responsibilities.

Place at Vero Beach, Inc. v. Hanson
953 So.2d 773 (Fla. 4th DCA 4/25/2007)

The trial court properly denied the nursing home's motion to compel arbitration. The agreement provided for the arbitration to be administered by the American Health Lawyers Association ("AHLA") The AHLA rules required proof of intentional or reckless misconduct by clear and convincing evidence. The court held that this impermissibly conflicts with the Florida Nursing Home Act, Chapter 400, Florida Statutes, which sets the standard as preponderance of the evidence. The provision in the agreement that it would be governed by Florida law did not cure this defect. Nor was it cured by a severability clause. "In this case, the arbitration clause is built around the Place's intent that the AHLA and its rules would control the arbitration. The trial judge correctly determined that he would be unable to simply sever a sentence from the provision, but would be forced to add the requirements that Chapter 400 and the Florida rules of arbitration would apply." The trial court was not required to rewrite the agreement in that manner.

Pleading – Federal Court

Bell Atlantic Corp. v. Twombly
127 S. Ct. 1255 (2007)

The standard plaintiffs must meet to state a claim in federal court may just have gotten higher. The court overruled *Conley v. Gibson*, 355 U.S. 41 (1957) which had for fifty years established the rule that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." This is an antitrust case, and the discussion may be seen as specific to antitrust cases, but *Conley* was an employment case, so the decision may be read more broadly. It appears that the new test, at least for antitrust cases, is whether the allegations show the claim is "plausible."

Premises Liability

Fieldhouse v. Tam Investment Co.
No. 4D06-3432 (Fla. 4th DCA 6/20/2007)

The trial court erred in entering summary judgment for the premises owner where the plaintiff tripped over a tree root that was covered by leaves when she was getting her bike from a common area of the apartment building. The fact that the root was a natural condition does not preclude liability. See *Witt v. Silverman*, 788 So.2d 210 (Fla. 2001). Plaintiff's knowledge that it was there precludes a claim for failure to warn, but not a claim for failing to maintain the premises in a reasonably safe condition.

Privilege – Peer Review

Brandon Regional Hosp. v. Murray
2007 WL 1362903 (Fla. 2007)

A plaintiff in a medical malpractice case is entitled to discovery of the privileges granted to a doctor by a hospital. The plaintiff is not entitled to the records of the peer review credentialing committee. "[T]here is nothing in the legislative scheme for peer review that would prevent a patient from securing such information from a hospital that has granted a physician practice privileges within the hospital, even though a portion of the process for determining the privileges to be granted may involve a peer review committee. The availability of such information would appear fundamental and essential to any patient's decision to consent to a medical procedure to be performed by a physician in the hospital." The Court found "nothing in the statutory scheme ... that would exempt a hospital from disclosure of its decision to grant or deny certain practice privileges to a physician. Similarly, while the statutory scheme grants explicit protection to peer review committee records, there is no such statutory protection extended to separate hospital records that may contain information provided by or partially based upon peer review committee action."

Privilege – Psychotherapist

Doherty v. John Doe No. 22
2007 WL 1486106 (Fla. 4th DCA 5/23/2007)

In an action against an archdiocese involving sexual abuse by a priest, the plaintiff was entitled to portions of a psychological evaluation of the non-party priest which pertained to child abuse, even though they did not relate to abuse of the plaintiff. Section 90.503(2) provides for a psychotherapist-patient privilege. That section is limited, however, by §39.204, which states that the privilege "shall not apply to any communication involving the perpetrator or alleged perpetrator in any situation involving known or suspected child abuse, abandonment, or neglect ..." The exception to the privilege is not limited to situations where the allegedly abused child is a party in the case.

Respondeat Superior

Garcia v. City of Hollywood
2007 WL 1610156 (Fla. 4th DCA 6/6/2007)

A police officer was not acting within the course and scope of his employment when he struck the plaintiff, a pedestrian, while the officer was in uniform, driving his police car, on his way to the station an hour before his shift started to study for the lieutenant's exam.

Sanctions

Howard v. Risch
2007 WL 1373781 (Fla. 2d DCA 5/11/2007)

The trial court erred in dismissing the plaintiff's personal injury complaint for alleged fraud on the court. The trial court failed to conduct an evidentiary hearing, and therefore erroneously found by "clear and convincing evidence" that the plaintiff wilfully committed a fraud on the court when he inaccurately answered discovery about his criminal convictions and medical history. The plaintiff, who had only an eighth grade education, failed to disclose a criminal conviction that occurred when he was very young. The court pointed out that the conviction had only minimal relevance, and that the plaintiff stated in an affidavit that he did not realize it was a conviction. As to the medical history, the records involved only minor problems unrelated to the injury at issue and no doctor testified that they would have made any difference in the case.

While courts have – and should have – inherent authority to dismiss for fraud on the court, some defendants abuse this tactic by trying to catch plaintiffs in minor mistakes such as this on peripheral issues, and then blowing them out of proportion. See, e.g., *Medina v. Florida East Coast Railway*, 866 So.2d 89 (Fla. 3d DCA 2004) and *Medina v. Florida East Coast Railway*, 921 So.2d 767 (Fla.3d DCA 2006). The dismissal sanction has been described as the "death penalty" sanction, and should only be used in the most egregious cases.

Summary Judgment

Edwards v. Simon
No. 4D06-1502 (Fla. 4th DCA 6/13/2007)

The trial court erred in granting summary judgment to the defendant in a medical malpractice case. The plaintiff did not present an expert opinion using the words "standard of care," but did file the deposition of a treating doctor stating that the surgery performed by the defendant was unnecessary. Further expert testimony specifically using the precise words was not required in order to defeat the motion for summary judgment.

Cassamassina v. United States Life Ins. Co. of the city of New York
No. 4D05-4008 (Fla. 4th DCA 6/20/2007)

On defendant insurance company's motion for summary judgment, the trial court properly considered the plaintiff's medical records that previously had been provided to the insurer by the insured or by a health care provider pursuant to a court-ordered release. The court may consider circumstantial evidence in determining the authenticity of documents, including business records authenticated by certification

in compliance with §90.803(6) and §90.902(11). Additionally, Rule 1.510(e) allows a party to supplement affidavits in the court's discretion.

Because of language in the insurance application limiting it to the "best of [the applicant's] knowledge and belief," a jury question was presented on whether there was a material misrepresentation in the application that would void the policy. See *Green v. Life & Health of America*, 704 So.2d 1386 (Fla. 1998). However, the trial court properly entered summary judgment in favor of the medical assistant who was an agent of the insurance company when she took the information for the application; she owed no duty to the plaintiff to accurately advise him on how to fill out the form. The court found the negligent undertaking doctrine in cases such as *Clay Electric Cooperative v. Johnson*, 873 So. 2d 1182, 1186 (Fla. 2003) inapplicable because there was no physical injury and because the plaintiff did not reasonably rely on the insurer's agent.

Venue

University of Florida Bd. of Trustees v. Andrew
2007 WL 1555732 (Fla. 1st DCA 2007)

Venue for a wrongful death case against the University of Florida was proper in Columbia County, where the University had established a university hospital. Section 768.28(1) allows venue against a state university to be "brought in the county in which that university's main campus is located or in the county in which the cause of action accrued if the university maintains therein a substantial presence for the transaction of its customary business" The university hospital constitutes a substantial presence for the transaction of its customary business.

Venue – Forum Non Conveniens

American Suzuki Motor Corp. v. Friese
2007 WL 1135602 (Fla. 4th DCA 4/18/2007)

The forum non conveniens analysis of *Kinney Systems, Inc. v. Continental Ins. Co.*, 674 So.2d 86 (Fla. 1986) applies to transfer to a more convenient form in a foreign jurisdiction, but does not apply to transfers within the state. Transfer to another circuit within the state is governed by §47.122, Florida Statutes. The court quotes *Kinney*, which described the statutory standard as "far more limited." The trial court properly refused to transfer venue to another circuit in Florida because of that more limited standard.

Workers Comp. Immunity

Bakerman v. Bombay Co.
No. SC05-358 (Fla. June 21, 2007)

The Supreme Court has quashed the decision of the Third District. The Court holds that, under the "substantial certainty" test of *Turner v. PCR*, 754 So. 2d 683 (Fla. 2000), in order to prove the intentional tort exception to workers comp immunity, a plaintiff is not required to prove concealment by the employer. Concealment is a factor that may be considered in determining intent, but it is not a requirement.

Note that the Legislature amended the statute in 2003 to add a concealment requirement unless there is a deliberate intent to injure. The Court held that the amendment is not retroactive.

It was my privilege to handle this appeal for the plaintiff in the Supreme Court.

Wrongful Death – Cause of Death – Summary Judgment

Marshall v. HQM of Winter Park, LLC.
2007 WL 1647561 (Fla. 5th DCA 6/8/2007)

The trial court erred in granting summary judgment to the defense based solely on the death certificate, where plaintiff presented a doctor's contrary affidavit. The cause of death listed on the death certificate was not conclusive. The death certificate is only "prima facie proof of the 'fact, place, date, and time of death as well as the identity of the decedent.' § 731.103(2), Fla. Stat. (2007). It does not constitute prima facie proof of the cause of death, nor does it create conclusive proof of any fact related to the death."