Case Law Update

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Barbara Green, P.A.
Attorney at Law
(305) 669-1994

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Admiralty

Carlisle v. Carnival Corp.
29 Fla. L. Weekly D328 (Fla. 3d DCA 2004)

The court certifies to the Supreme Court the question "whether a cruise line is vicariously liable for the medical malpractice of the shipboard doctor committed on a ship's passenger?"

Attorneys Fees

Holiday v. Nationwide Mutual Fire Ins. Co.
29 Fla. L. Weekly D278 (Fla. 5th DCA 2004)

Affirming the application of a contingency risk multiplier in an action by an insured against an insurer under §627.428, Florida Statutes, the court certifies the question: "In light of the Supreme Court's decision in *Sarkis v. Allstate Ins. Co.* 28 Fla. L. Weekly S740 (Fla. 2003)], may a multiplier be applied to enhance an award of attorney's fees granted under a fee-shifting statute such as section 627.428, Florida Statutes (2002)?"

Of course, many, many cases have upheld application a multiplier to statutory attorneys fees, including, for example, *Standard Guaranty Ins. Co. v. Quanstrom*, 555 So.2d 828 (Fla. 1990), and *State Farm v. Palma*, 629 So.2d 830 (Fla. 1993).

P. & R. Smith Corp. v. Arriola
29 Fla. L. Weekly D327 (Fla. 3d DCA 2004)

It is sufficient to file the motion for attorneys fees within 30 days of the final judgment. Rule 1.525 does not require the filing of documentation supporting the motion within that time.

Fisher v. John Carter & Associates, Inc.
29 Fla. L. Weekly D164 (Fla. 4th DCA 2004)

The court holds that the reservation of jurisdiction in the final judgment to award attorneys fees tolls the time for filing the motion for fees under Rule 1.525. Because the court notes possible conflict with *Wentworth v. Johnson*, 845 So.2d 296 (Fla. 5thDCA 2003), you should not rely on this decision until the Supreme Court resolves the issue – file your motion within 30 days anyway, whether or not the court reserves jurisdiction.

Attorneys Fees - Discovery

Brown Distrib. Co. v. Marcel
29 Fla. L. Weekly D438 (Fla. 4th DCA 2004)

Plaintiff was entitled to limited discovery of defense counsel's billing records in connection with plaintiff's claim for attorney's fees. The records are relevant, limited to the amount of time, not the amount charged or any privileged information. "How the time was spent" would be discoverable "to the extent it is not privileged." "Descriptions of services rendered which reveal the mental impressions and opinions of counsel could be privileged, but are not at issue here." But see *HCA Health Services v. Hillman*, 28 Fla. L. Weekly D2758 (Fla. 2d DCA 2003) (requiring showing of relevance, need, and unavailability of substantial equivalent).

Bifurcation

Rooss v. Mayberry
29 Fla. L. Weekly D456 (Fla. 5th DCA 2004)

This case reverses an order of bifurcation, and makes some very important points about why bifurcation is improper in a case where the defendant argues that some or all of the plaintiff's injuries were pre-existing or were caused by subsequent negligent treatment.

It was error to bifurcate liability and damages in a med mal case where liability and damages "are necessarily intertwined." Any argument for the bifurcation based on inconvenience of travel to Germany, where the plaintiff now lives and is being treated, was belied by the trial court's denial of a stay of discovery on

damages. The discovery would have to go forward in any event, "primarily because it simply is not possible in this case to separate the issues of causation and liability from damages." The defense was contending that all of the plaintiff's injuries that ensued in Germany were either caused by the plaintiff or by her pre-existing condition, or by the negligent care she received in Germany. Therefore, evidence of the treatment the plaintiff received in Germany is necessarily relevant to liability.

Continuance

Taylor v. Institute for Medical Weight Loss
29 Fla. L. Weekly D69 (Fla. 4th DCA 2004)

It was an abuse of discretion to deny the plaintiff's motion for continuance where the plaintiff's only expert suddenly refused to testify and refused to return any of plaintiff's counsel's phone calls.

I have been hearing lately about efforts by some groups to intimidate plaintiffs' medical witnesses or otherwise persuade them to refuse to testify. See *Jost v. Ahmad,* 730 So.2d 708 (Fla. 2d DCA 1998) (evidence admissible that someone from hospital's risk management office called doctor's risk management office with "instructions" about his testimony). I don't know if this case resulted from that kind of problem.

Evidence – Frye

State v. Hardware
29 Fla. L. Weekly D377 (Fla. 3d DCA 2004)

The Third District held that polygraph tests are inadmissible as a matter of law, and not subject to the test of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). However, the court certified to the Supreme Court the question: "Are the results of polygraph tests inadmissible in evidence as a matter of law or are polygraph tests subject to the *Frye* test?"

Failure to Prosecute

Moransais v. Jordan
29 Fla. L. Weekly D454 (Fla. 2d DCA 2004)

and

Wilson v. Salamon
29 Fla. L. Weekly D79 (Fla. 2d DCA 2004)

Holding that orders pertaining to withdrawal of counsel are "passive" and not sufficient record activity to preclude dismissal for failure to prosecute, the court certifies to the Supreme Court the question:

> After the decision in *Metropolitan Dade County v. Hall*, 784 So.2d 1097 (Fla. 2001), are trial court orders that are entered and filed to resolve motions that have been properly filed in good faith under the rules of procedure automatically treated as activity, or must the trial court continue to assess its own orders to determine whether they are passive entries in the court record?

Sewell Masonry Co. v. DCC Construction, Inc.
29 Fla. L. Weekly D35 (Fla. 5th DCA 2003)

The court rejects the plaintiff's contention that whenever a dispositive motion is pending, the duty to proceed rests with the trial court and the case cannot be dismissed for lack of prosecution. The court distinguishes Third DCA cases where the motions had been argued and the parties were awaiting the court's ruling. The court certifies conflict with *Dye v. Security Pacific Financial Services, Inc.*, 828 So.2d 1089 (Fla. 1st DCA 2002), which held that where a motion to dismiss has not been disposed of, even though it has never been set for hearing, the case cannot be dismissed for failure to prosecute.

Forum Non Conveniens

Wedge Hotel Management (Bahamas) Ltd. v. Meier
29 Fla. L. Weekly D205 (Fla. 3d DCA 2004)

Rule 1.061(g) requires that a motion to dismiss based on forum non conveniens must be served not later than 60 days after service of process on the moving party. The time is not tolled by the defendant's motion to quash service. Therefore, the trial court properly denied the defendant's motion.

Impact Rule

Welker v. Southern Baptist Hospital
29 Fla. L. Weekly D171 (Fla. 1st DCA 2004)

The court certifies to the Supreme Court the question: "Does Florida's impact rule preclude the recovery of damages for emotional injuries in a negligence case alleging that the defendant's actions wrongfully caused the plaintiff to lose custody of his children and all other parental rights for a significant period?" This court held the plaintiff's claim was not barred by the impact rule.

The case involved a hospital's liability for the mental health services provided by one of its agents, a psychologist, who wrote a letter accusing the plaintiff of child abuse, resulting in his loss of custody and visitation with his children, until he was able to regain them in court proceedings. The court also held that, because the agent was a psychologist, and the claim did not arise out of the rendering or failure to render medical services, the med mal presuit provisions did not apply.

Med Mal – Arbitration

Barlow v. North Okaloosa Medical Center
29 Fla. L. Weekly S64 (Fla. 2004)

Under the version of the med mal act that was in force from 1998-2002, §§766.201- 212, if the parties arbitrate, the measure of damages for a wrongful death claim is not limited by the wrongful death act. Rather, the plaintiff is entitled in arbitration to the full range of damages including economic damages defined in §766.207(7)(a): "financial losses which would not have occurred but for the injury giving rise to the cause of action, including, but not limited to, past and future medical expenses and 80 percent of wage loss and loss of earning capacity."

Med Mal – Financial Responsibility

Mercy Hospital, Inc. v. Baumgardner
29 Fla. L. Weekly D56 (Fla. 3d DCA 2004)

Section 458.320(2) requires physicians to comply with one of three financial responsibility options in order to have hospital staff privileges. The court holds that the statute imposes a duty on the hospital to ensure compliance. Therefore, the plaintiff's complaint, seeking to hold the hospital liable for a staff physician's failure to comply with the financial responsibility statute, stated a cause of action. Accord, *Robert v. Paschall*, 767 So.2d 1277 (Fla. 5th DCA 2000); *Baker v. Tenet Healthsystem Hosp., Inc.*, 780 So.2d 170 (Fla. 2d DCA 2001).

Med Mal – Limitations

Rodriguez v. Saenz
29 Fla. L. Weekly D456 (Fla. 5th DCA 2004)

In a med mal case, the statute of limitations begins to run when the plaintiff has knowledge of the injury and that there is a reasonable possibility that the injury was caused by medical malpractice. *Tanner v. Hartog*, 618 So.2d 177 (Fla. 1993). Suffering a second heart attack while under treatment would not necessarily have put plaintiff on notice that she was being negligently treated, where she was a longtime smoker with a family and personal history of heart disease, and not medically "sophisticated." A question of fact was presented for the jury.

Negligence - Duty

Clay Electric, Inc. v. Johnson
28 Fla. L. Weekly S866 (Fla. 2003)

This is the most recent case in the long-established "negligent undertaking" doctrine. One who undertakes to provide a service to others, gratuitously or by contract, assumes the duty to act carefully and to not put others at undue risk of harm. The doctrine applies not just to parties in privity with one another, but to third party within the foreseeable zone of risk. See, e.g., *Union Park Memorial Chapel v. Hutt*, 670 So.2d 64 (Fla. 1996); *Banfield v. Addington*, 140 So. 893 (Fla. 1932). The duty can arise where the failure to exercise reasonable care increases the risk of such harm, or the defendant has undertaken to perform a duty owed by another to the third person, or the harm is suffered because of reliance of the other or the third person on the undertaking. An electric company under a contract to maintain street lights had a legally recognized duty to a pedestrian to maintain the lights, and could be held liable when a motorist, who could not see the pedestrian, struck and killed him because the lights were negligently maintained and were not working.

NICA

All Children's Hospital, Inc. v. Dept. of Admin. Hearings,
29 Fla. L. Weekly D227 (Fla. 2d DCA 2004)

This is only a slightly revised version of the opinion that originally appeared at 28 Fla. L. Weekly D2507. It involves NICA, the Florida Birth Related Neurological Injury Compensation Act, §§766.301-306, Florida Statutes (1998). (The statute has since been amended). The court held that the ALJ did not have jurisdiction to make any determination other than whether the claim was compensable under the NICA plan. The ALJ does not have any jurisdiction to determine whether the notice given by the health care provider pursuant to the act was sufficient, or whether the provider is entitled to immunity from tort liability, or to require the plaintiff to make an election of remedies. The court certifies conflict with *O'Leary v. Florida 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).

Although the court takes note of the "ping-pong effect" of the conflicting decisions, it states that it is "constrained to follow the ball wherever the legislature chooses to send it." In my opinion, that raises serious due process concerns. See generally *Aldana v. Hollub*, 381 So.2d 231 (Fla. 1980) (finding medical mediation panel laws unconstitutional because they have proved "unfair and arbitrary and capricious in their application.")

Nursing Home

Knittel v. Beverly Health & Rehab. Services, Inc.
29 Fla. L. Weekly D308 (Fla. 2d DCA 2004)

The trial court should not have permitted the defense attorney to conduct ex parte interviews with the non-party physicians who treated the decedent while she was a resident at the defendant's nursing home. The physicians were not employees of the nursing home. Section 456.057 allows communications among "health care providers involved in the care or treatment of the patient," but the doctors were no longer involved in the care and treatment of the patient, because she is deceased. Once the health care providers are no longer involved in the care and treatment of the patient, "they may not continue to discuss a patient's confidential medical information for their own, or anyone else's purposes." *LeMieux v. Tandem Health Care of Florida, Inc.*, 28 Fla. L. Weekly D2501 (Fla. 2d DCA 2003).

Offer of Judgment

Connell v. Floyd
29 Fla. L. Weekly D175 (Fla. 1st DCA 2004)

The trial court properly denied attorneys fees under §768.79 and Fla. R. Civ. P. 1.442, because the offer contained a non-monetary term that was not stated with the particularity required by Fla. R. Civ. P. 1.442(c)(2)(c) and (D). The case involved a counterclaim, and the offer required the offeree to stipulate to a final judgment that would have made a specific finding that the offeror prevailed in defense of the offeree's claims against them. The stipulation might have been admissible in the litigation of the remaining counterclaims, and eviscerated the offeree's defense. "While a proposal for settlement may settle only a portion of a lawsuit, a valid proposal must at least settle that portion with certainty. Because the non-monetary condition was not susceptible to meaningful evaluation by the [offeree], it was not stated with sufficient particularity to have rendered the proposal valid."

Betts v. Ace Cash Express
29 Fla. L. Weekly D133 (Fla. 5th DCA 2004)

Amendments to Rule 1.442, the offer of judgment / proposal for settlement rule, do not apply to offers that were rejected before the effective date of the rule, even if the rule became effective during the pendency of the action.

Punitive Damages

Standard Jury Instructions - Civil Cases,
29 Fla. L. Weekly S77 (Fla. 2004)

The Supreme Court has amended the standard jury instructions on punitive damages by adding "However, you may not award an amount that would financially destroy [defendant]".

Remittitur - Additur

Hauss v. Waxman
29 Fla. L. Weekly D424 (Fla. 4th DCA 2004)

A motion for remittitur or additur must be filed within 10 days of the verdict, not of the judgment. It is governed by Rule 1.530(b), which requires that a motion for new trial or rehearing be filed within 10 days of the verdict.

Res Judicata

Topps v. State
29 Fla. L. Weekly S21 (Fla. 2004)

The Court finally sets a uniform rule for the res judicata effect of denials of extraordinary writs. Unelaborated denials of an extraordinary writ by any court is not a decision on the merits which would bar the litigant from presenting the same or substantially similar issue on appeal or by a subsequent writ petition, or by other means, in the same or another Florida court. Before this decision, the different courts were free to set their own rules, resulting in inconsistencies and confusion. See *Green, Cracking the Code: Interpreting and Enforcing the Appellate Court's Decision and Mandate*, 32 Stetson L. Rev. 393, 403-405 (2003).

Sanctions

Medina v. Florida East Coast Railway
29 Fla. L. Weekly D170 (Fla. 3d DCA 2004)

In my opinion, it is commendable that the courts have become more vigilant against discovery abuses, and are imposing sanctions for egregious violations, destruction of evidence and perjury. These sanction apply equally to plaintiffs and defendants. See, e.g., *Figgie International v. Alderman*, 698 So. 2d 563 (Fla. 3d DCA 1997) (affirming default entered against defendant for destroying evidence and lying about it). However, courts must be cautious and only impose the ultimate sanction of dismissal or default in the most extreme circumstances, and only after notice and an opportunity to be heard. Here, the court reverses dismissal because the court did not allow an evidentiary hearing, which the plaintiff requested. He should

be given "the opportunity to appear in person and possibly explain the discovery violations which were the basis for the dismissal."

Service of Process

Koechli v. BIP Intel.

28 Fla. L. Weekly D2806 (Fla. 1st DCA 2003)

Technical defects in documents served under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters will not defeat service where the plaintiff has attempted in good faith to comply and the defendant received sufficient notice despite the technical defects.

Spoliation

Fleury v. Biomet

29 Fla. L. Weekly D43 (Fla. 2d DCA 2004)

In this product liability action, the plaintiff was not guilty of spoliation of his defective artificial knee where the hospital threw it out when a second knee replacement was performed on the plaintiff. Therefore, it was error to preclude plaintiff's expert from testifying about causation, and then entering summary judgment for defendant, which was tantamount to dismissing the plaintiff's case. The defendant suffered no real prejudice because both parties are in the same position – they will have to present testimony based on the observations of the artificial knee at the time, not on examination or testing of it.

Work Product

Northup v. Acken

29 Fla. L. Weekly S37 (Fla. 2004)

"All materials reasonably expected or intended to be used at trial, including documents intended solely for witness impeachment, are subject to proper discovery requests . . . and are not protected by the work product privilege." Prior depositions of a witness that are not intended to be used as impeachment are protected as work product; but that protection does not apply once the materials are "reasonably expected to be used as impeachment at trial."

The Supreme Court disapproves the Fourth District's decision in *Gardner v. Manor Care*, 831 So.2d 676 (Fla. 4th DCA 2002), which required counsel to cull through materials and determine which are relevant and turn them over. An attorney may not be compelled to disclose his or her mental impressions resulting from investigations, labor or legal analysis, "unless the product of such investigation itself is reasonably expected or intended to be presented . . . at trial. Only at such time as the attorney should reasonably ascertain in good faith that the material may be used or disclosed at trial is he or she expected to reveal it to the opposing party."