Case Law Update

March 2005

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Arbitration

Cardegna v. Buckeye Check Cashing, Inc.
30 Fla. L. Weekly S29 (Fla., Jan 20, 2005)

An arbitration provision contained in a contract which is void under Florida law cannot be separately enforced while there is a claim pending in a Florida trial court that the contract containing the arbitration provision is itself illegal and void ab initio.

The plaintiffs filed a class action suit against a "check cashing" company, arguing that its check cashing services were really illegal, usurious loans. The transactions contained an arbitration provision, and the defendant moved to compel arbitration. The court held that arbitration could not be compelled until the court determined whether the agreement was illegal, citing with approval the 5th DCA decision in *Party Yards v. Templeton*, 751 So.2d 121 (Fla. 5th DCA 2000): "A party who alleges and offers colorable evidence that a contract is illegal cannot be compelled to arbitrate the threshold issue of the *existence* of the agreement to arbitrate; only a court can make that determination."

The court distinguished the U.S. Supreme Court's decision in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), which held that a claim of fraud in the inducement must be arbitrated, because fraud in the inducement merely renders a contract voidable. In contrast, an illegal usurious contract, as alleged here, is void from the outset.

This case was decided under the Florida arbitration code. The 11th Circuit has reached the opposite conclusion under the Federal act. See *Bess v. Check Express*, 294 F.3d 1298 (11th Cir.2002).

Attorneys Fees

Price v. Tyler
890 So.2d 246 (Fla. 2004)

Unless there is a separate statutory or contractual basis, there is no right to attorney's fees in a declaratory judgment action. There is no right to fees in a declaratory action to quiet title. The provision for costs in §86.081 of the declaratory judgment act cannot be construed to include attorneys fees.

Discovery Sanctions

Ham v. Dunmire
891 So.2d 492 (Fla. 2004)

A party's lack of participation in sanctionable conduct by the party's attorney does not automatically preclude dismissal sanctions against the party; however, whether the party participated or not is an "extremely important" factor that the court must consider. "An action should not be dismissed when the malfeasance can be adequately addressed through the imposition of a contempt citation or lesser degree of punishment directly on counsel."

Moreover, "dismissal is far too extreme as a sanction in those cases where discovery violations have absolutely no prejudice to the opposing party."

In this case, the plaintiff's discovery violations, which "boil down to the untimely, but ultimately completed, update interrogatory responses, an asserted failure to submit a formal witness list thirty days prior to the trial date, and an apparent problem with the exchange of prospective trial exhibits," did not justify the sanction of dismissal.

The Court reiterated that the factors that the court must consider are those set out in *Kozel v. Ostendorf*, 629 So.2d 817 (Fla. 1994):

> 1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2) whether the attorney has been previously sanctioned; 3) whether the client was personally involved in the act of disobedience; 4) whether the delay prejudiced the opposing party

through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for noncompliance; and 6) whether the delay created significant problems of judicial administration.

The court emphasized that, "Upon consideration of these factors, if a sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative."

Robinson v. Nationwide Mut. Fire Ins. Co.
887 So.2d 328 (Fla. 2004)

Absent extraordinary circumstances, a consideration of sanctions under *Mercer v. Raine*, 443 So.2d 944 (Fla. 1983) does not include an examination of the merits of the claim set out in the pleading or other legal filing ordered stricken by the trial court as a sanction.

Mercer holds that pleadings should not be stricken as a sanction except in the most extreme circumstances, where the record demonstrates a deliberate and contumacious disregard of the trial court's authority, bad faith, wilful disregard of a trial court's order, or deliberate callousness.

The petitioners filed a motion for attorney's fees pursuant to the demand for judgment statute, section 768.79, Florida Statutes (1997). The respondent filed its opposition, asserting that the petitioners were not entitled to fees because their demand for judgment was served prematurely. The parties then engaged in discovery on the issue of timeliness of the demand. The trial court concluded that the respondent had committed several discovery violations. The petitioners filed a motion for sanctions, and the trial court sanctioned the respondent by striking the respondent's opposition to the petitioners' claim for attorney's fees and awarding the petitioners attorney's fees for the entire litigation.

On appeal, the DCA concluded that the trial court did not abuse its discretion when it imposed sanctions against the respondent for the discovery violations. Nevertheless, the DCA then proceeded to consider the merits of the respondent's defense of untimeliness of the petitioners' demand for judgment that was set out in the stricken response. The DCA reversed the trial court's order imposing sanctions, concluding that because the petitioners' demand for judgment was untimely, the sanctions were not authorized.

The Supreme Court reversed. The standard under *Mercer* requires that the ultimate sanction of dismissal or default should be employed only in extreme circumstances where the record demonstrates a party's deliberate and contumacious disregard of the trial court's authority, bad faith, or willful disregard to a trial court's order, or conduct which evinces deliberate callousness. When a court has considered those factors, the court may not then consider the merits of a pleading that has been stricken.

Economic Loss Rule

Indemnity Ins. Co. of North America v. American Aviation, Inc.
891 So.2d 532 (Fla. 2004)

The economic loss rule has caused a lot of confusion over the years. The Supreme Court finally clarifies that the economic loss rule only applies in two very limited situations (1) when the parties are in privity of contract and one party seeks to recover damages in tort for matters arising from the contract, and (2) when there is a defect in a product that causes damage to the product but causes no personal injury or damage to other property.

The court held that the plaintiffs' claims were not barred by the economic loss rule. The plaintiffs, the owner of an aircraft and its insurer, sued a company that serviced the aircraft's landing gear, before the owner bought the aircraft, for negligence, negligence per se, negligent misrepresentation, and breach of warranty, alleging that the aircraft was severely damaged during landing when its landing gear failed to extend.

When the parties have negotiated remedies for nonperformance pursuant to a contract, one party may not seek to obtain a better bargain than it made by turning a breach of contract into a tort for economic loss. A manufacturer or distributor in a commercial relationship has no duty beyond that arising from its contract to prevent a product from malfunctioning or damaging itself.

However, even in those cases, other exceptions to the economic loss rule, such as for professional malpractice, fraudulent inducement, and negligent misrepresentation, or freestanding statutory causes of action, still apply.

The Court emphasizes, "in general, actionable conduct that frustrates economic interests should not go uncompensated solely because the harm is unaccompanied by any injury to a person or other property. We therefore hold that cases that do not fall into either of the two categories articulated above should be decided on traditional negligence principles of duty, breach, and proximate cause."

The Court disapproves *Palau International Traders, Inc. v. Narcam Aircraft, Inc.*, 653 So.2d 412 (Fla. 3d DCA 1995).

Insurance – Bad Faith

Berges v. Infinity Ins. Co.

— So.2d —, 2004 WL 2609255, 29 Fla. L. Weekly S679, 29 Fla. L. Weekly S787 (Fla. Nov. 18, 2004)

This is one of the most important insurance bad faith cases to come down in a long time. It contains several significant holdings.

First, the court reiterated that when a liability insurer has control over the handling of the claim, including all decisions about litigation and settlement, its duty of good faith to the insured requires it to investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, when a reasonably prudent person, faced with the prospect of paying the total recovery, would do so. The insurer must also advise the insured of settlement opportunities (not just offers, but "opportunities" and "overtures", see *Powell v. Prudential*, 584 So.2d 12 (Fla. 3d DCA 1981)), and of the probable outcome of the case; warn the insured of the possibility of an excess judgment, and advise the insured of any steps he might take to avoid an excess judgment. See *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So.2d 783 (Fla. 1980).

Second, because the duty of good faith requires diligence and care in the investigation and evaluation of the claim, negligence is relevant to the question of good faith.

Third, court approval is not required for a settlement offer on behalf of a minor to be valid. This really has been the law for quite some time. See *Government Employees Ins. Co. v. Grounds*, 311 So.2d 164 (Fla. 1st DCA 1975). Therefore, the insurer could not avoid liability for bad faith where it did not timely accept an offer made by the injured minor's father, who was also the surviving spouse of the other accident victim, merely because the parent had not been appointed guardian of the child or personal representative of his wife's estate. An offer is not invalid merely because subsequent court approval is required.

Fourth, where the offer required the insurer to pay the policy limits before a particular deadline, the insurer's mere offer to pay the policy limits, without actual delivery of the money, was not sufficient. A jury could have found, based on the evidence, that the twenty-five day time limit was reasonable, and that the insurer could have met the deadline if it had acted with due regard for the interest of its insured, and could have protected the insured from an excess judgment. If the insurer believed court approval could not be obtained within the time limit, it should have tendered the funds into an interest bearing account, as the offer requested, or should have requested a time extension before the offer expired.

Fifth, because the insurer's duty is to protect its insured from the claimant, the focus in the bad faith case is not on the claimant's actions, but on the insurer's actions in fulfilling its obligations to its insured.

Nursing Home

Knowles v. Beverly Enterprises-Florida, Inc.

— So.2d —, 2004 WL 2922097
30 Fla. L. Weekly S29 (Fla. Dec. 16,2004)

Section 400.023(1), Florida Statutes (1997) provides:

> Any resident whose rights as specified in this part are deprived or infringed upon shall have a cause of action against any licensee responsible for the violation. The action may be brought by the resident or his or her guardian, by a person or organization acting on behalf of a resident with the consent of the resident or his or her guardian, *or by the personal representative of the estate of the deceased resident when the cause of death resulted from the deprivation or infringement of the decedent's rights.*

(Court's emphasis). The court interprets this language to mean that a personal representative may not bring a cause of action under this version of the statute on behalf of a deceased resident of a nursing home for alleged infringement of the resident's statutory rights when the infringement has not caused the resident's death.

The court holds that the specific language in this statute has a limiting effect and overcomes the provision in the survival statute, §46.021, Florida Statutes, that "No cause of action dies with the person. All causes of action survive and may be commenced, prosecuted, and defended in the name of the person prescribed by law."

The statute has since been amended to allow for claims brought by the personal representative under the survival statute when the violation of the nursing home statute did not cause the resident's death. It now provides:

> Any resident whose rights as specified in this part are violated shall have a cause of action. The action may be brought by the resident or his or her guardian, by a person or organization acting on behalf of a resident with the consent of the resident or his or her guardian, or by the personal representative of the estate of a deceased resident regardless of the cause of death. If the action alleges a claim for the resident's rights or for negligence that caused the death of the resident, the claimant shall be required to elect either survival damages pursuant to s. 46.021 or wrongful death damages pursuant to s. 768.21. If the action

alleges a claim for the resident's rights or for negligence that did not cause the death of the resident, the personal representative of the estate may recover damages for the negligence that caused injury to the resident.

Workers Comp Immunity

Reeves v. Fleetwood Homes of Florida, Inc.
889 So.2d 812 (Fla. 2004)

A nonfinal order denying a defendant's motion for summary judgment on workers comp immunity, because factual issues remain as to the level of the defendant's culpability, is not an appealable order. Just because the order says that the motion is denied "as a matter of law," that does not make it an appealable nonfinal order under Fla. R. App. P. 9.130(a)(3)(C)(v). The rule allows appeals only of orders that determine that, as a matter of law, the defendant is not entitled to workers comp immunity. If facts remain, the order is not appealable.

When the Supreme Court first enacted the rule in *Mandico v. Taos Constr., Inc.*, 605 So.2d 850 (Fla. 1992), the language was a little bit confusing. The Court subsequently amended it to provide that the district courts of appeal may review orders that "determine . . . that, as a matter of law, a party is not entitled to workers compensation immunity."

The order is not reviewable by cert, either.

Travelers Indem. Co. v. PCR Inc.
889 So.2d 779 (Fla. 2004)

In *Turner v. PCR, Inc*., 754 So.2d 683 (Fla. 2000)the Supreme Court held that an employer who commits an intentional tort is not entitled to worker's comp immunity. The court held that a plaintiff may prove the intentional tort in either of two ways: by showing that the defendant had a subjective, deliberate intent to harm, or, objectively, that the employer's conduct was such that a reasonable person knew or should have known that the conduct was substantially certain to result in injury or death.

This test has subsequently been modified by the legislature in §440.11, Florida Statutes, which recognizes an intentional tort exception to comp immunity but sets specific requirements. The court characterizes the *Turner* standard as "much more liberal" than the new statutory standard, but does not apply it to this case.

Here, in a dispute over insurance coverage for the *Turner* case, the court holds that, where an employer is liable under the objective test, the employer's insurance policy may provide coverage.

Such coverage is not contrary to public policy. Two factors determine whether a liability insurance policy is contrary to public policy: (1) whether the type of conduct would be encouraged if one could insure against the risk of liability arising from such conduct; and (2) whether the purpose served by the imposition of liability is to deter wrongdoers or to compensate victims.

The particular insurance policy in this case was an employer's liability policy. The court noted that such a policy is generally issued as a companion to a worker's compensation policy. The exclusion provided "[t]his insurance does not cover ... bodily injury intentionally caused or aggravated by" the employer. Consistent with general insurance law, the court construed the exclusion narrowly, and the coverage provisions broadly.