Case Law Update

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Additur and Remittitur

Waste Management, Inc. v. Mora
940 So.2d 1105 (Fla. 2006)

The statute on remittitur and additur, section 768.043, Fla. Stat., provides that, if a court orders remittitur or additur, and "the party adversely affected" does not agree, the court must hold a new trial on damages. The issue in this case was the meaning of the term "party adversely affected." The court held that "the party adversely affected" could be a plaintiff in whose favor additur was granted, but who was not satisfied with the amount. Similarly, a defendant who has requested a remittitur may be the "party adversely affected" when the trial court grants a remittitur that still leaves the verdict too large. In sum, regardless of who requested the remittitur or additur, either party may object and request a new trial on damages instead.

A"party adversely affected" under the statute is the party complaining about the amount of the trial judge's additur or remittitur which is ordered in lieu of a new trial because of the jury verdict's excessiveness or inadequacy. The court recognizes that its decision means that "only when the parties agree with the trial court's amount of remittitur or additur will the remittitur or additur be enforced in lieu of a new trial," and that "the statute is authorization for a trial judge to decide the amount of a remittitur or additur which, if accepted by the parties, will avoid the time and expense of a new trial."

Argument – Improper

Wyatt v. Marcus
No. 3D05-1529 (Fla. 3d DCA March 7, 2007)

In *Murphy v. International Robotics*, 766 So.2d 1010, the Florida Supreme Court held that an appellate court may review improper closing arguments to which no objection was made at trial, but only if the issue is raised in a motion for new trial, and then only under a high standard that is similar to the old standard for fundamental error. Here, the Third District makes it clear that the high standard for unobjected-to argument does not apply where the objections and motions for mistrial have been made during or at the close of the argument. The court points out that the high *Murphy* standard only applies "when there is a failure to object during closing argument or a failure to request a mistrial based on such statements during or at the close of such argument." (Court's emphasis). See also *Garbutt v. LaFarnar*a, 807 So.2d 83 (Fla. 2d DCA 2001).

Admiralty and Maritime Law

Carnival Corp. v. Carlisle
2007 WL 471172 (Fla. Feb. 17, 2007)

Under admiralty law, a shipowner is not vicariously liable for the negligence of the ship's doctor. Under federal maritime law a state may, in exercising its in personam jurisdiction in maritime cases, adopt such remedies as it sees fit so long as it does not make changes in the substantive law. A state should adhere to federal principles of harmony and uniformity when applying federal maritime law. Therefore, because most states have not imposed respondeat superior liability on the shipowner for negligence of the ship's doctor, Florida will not either.

Arbitration

O'Keefe Architects, Inc. v. CED Const. Partners, Ltd.
944 So.2d 181 (Fla. 2006)

In a dispute between Florida corporations about a Florida construction project, the court held, pursuant to the agreement of the parties, that interstate commerce was not involved and therefore the Florida arbitration code applied rather than the

federal law. The arbitration clause provided: "Claims, disputes or other matters in question between the parties to this Agreement arising out of or relating to this Agreement or breach thereof shall be subject to and decided by arbitration." The contract also provided that "In no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statutes of limitations." The court held that the defense of statute of limitations should be determined by the arbitrator, not by a court. "Although the agreement provides that a demand for arbitration is untimely if the claim would be barred by the applicable statute of limitations, there is nothing in the agreement that establishes that the parties agreed to have this defense to an otherwise arbitrable claim decided by the court."

Attorneys' Fees

Brass & Singer, P.A. v. United Auto Ins. Co.
944 So.2d 252 (Fla. 2006)

Under section 627.428(1), an appellate court may not award attorney's fees to an insured unless the insured prevails on appeal. The court may not award fees, conditioned on prevailing at trial, to an insured who loses on appeal.

Class Actions

Engle v. Liggett Group
945 So.2d 1246 (Fla. 2006)

The Third District erroneously reversed, post trial, the earlier determination of another panel of that court which had upheld the certification of the class at an earlier stage of the proceeding. The doctrine of law of the case would permit decertification of a class by one panel of appellate judges, after certification of that class by another panel, a trial, and entry of final judgment, only upon showing that the original certification ruling resulted in clear manifest injustice. The trial court did not abuse its discretion in certifying the class.

However, class certification was not viable for the next phase of the class action because individualized issues, including legal causation, comparative fault, and damages predominated with respect to the issues designated for trial in that phase. The court allowed class members one year to bring individual actions, in which the common issues determined by the jury in the class action would be binding, except on issues of fraud and intentional infliction of emotional distress, which involved highly individualized claims.

The court held that bifurcation in this manner, to allow class treatment of the underlying findings of breach of duty and causation of types of disease, but individual trials of issues such as individual causation and damages, did not violate the right to trial by jury under Art. I, section 21, Fla. Const., and that the 7th Amendment of the U.S. Constitution did not apply in state court.

The court also held that the trial court improperly allowed the jury to determine punitive damages prior to determining causation and damages, and that in any event, the punitive damages award was excessive.

The court also held that certain improper comments by plaintiffs' counsel during the course of the trial did not require a new trial, where they were isolated comments over the course of a two year trial, "not made on the same day or contained within a two- or three-hour closing argument." The Court noted that "context is crucial" in making such a determination. Where objections to arguments are preserved, a new trial is required if the improper argument deprived the opposing party of a fair trial.

Dismissal – Failure to Prosecute

Patton v. Kera Technology, Inc.
2006 WL 3025713 (Fla. Oct. 26, 2006)

A pending motion does not necessarily preclude dismissal for failure to prosecute under Rule 1.420(e). The issue is whether the pending motion provided good cause for the failure to conduct any record activity for one year. A hearing was held on the motion but nobody submitted a proposed order. The plaintiffs failed to show good cause for the failure to prosecute prior to the order dismissing for failure to prosecute.

Due Process – Notice

Vosilla v. Rosado
944 So.2d 289 (Fla. 2006)

Notice of a tax deed sale must comply with due process and be reasonably calculated to give notice to parties who are entitled to it. Compliance with the statutory procedure is not enough. The notice must be adequate under the totality of the circumstances, including unique information about an intended recipient that might require the taxing authority to make efforts beyond those required by the statutory scheme under ordinary circumstances.

Evidence – Expert Testimony

Linn v. Fossum
2006 WL 3093186 (Fla. Nov. 2, 2006)

An expert may not bolster his testimony by testifying that he reached his opinion by consulting with other experts in the field. The expert should not be permitted to become a conduit for the opinion of another expert who is not subject to cross examination, or for other otherwise inadmissible evidence.

High-Low Agreements

Gulf Industries, Inc. v. Nair
4D05-2433 (Fla. 4th DCA March 7, 2007)

A high-low agreement was not a *Mary Carter* agreement and was not prohibited by *Dosdourian v. Carsten*, 624 So.2d 241 (Fla. 1993). Dosdourian declared Mary Carter agreements void as against public policy. A *Mary Carter* agreement is "a contract by which one codefendant secretly agrees with the plaintiff that, if such defendant will proceed to defend himself in court, his own maximum liability will be diminished proportionately by increasing the liability of the other co-defendants." The high-low agreement in this case did not require the settling defendant to participate in the trial, and the range of the settlement ($1,000,000 between the high and low limits) gave the insurer a real incentive to defend itself.

The trial court did not err in refusing to allow the non-settling defendant to introduce the high-low agreement into evidence.

HMOs

Foundation Health v. Westside EKG Associates
944 So.2d 188 (Fla. 2006)

Section 641.3155 of the HMO Act contains provisions requiring the HMO to make prompt payment. A health care provider may assert this provision in a breach of contract action brought as a third party beneficiary of the contract between the HMO and the patient. The statute is incorporated into the contract, and the providers are entitled to prove that they are third party beneficiaries because the contracts are intended to "primarily and directly benefit" them.

Insurance – Bad Faith

Macola v. Government Employees Ins. Co.
2006 WL 3025757 (Fla. Oct. 26, 2006)

A liability insurance company's tender of policy limits, after the initiation of a lawsuit against the insured, but before the entry of an excess judgment, in response to the insured's civil remedy notice under the bad faith statute, section 624.155, Fla. Stat., did not preclude the insured's action against the insurer for common law third party bad faith. Allowing tender of the policy limits after the claimant's offer to the insured had expired to preclude the common law bad faith action would put the insured in a worse position than he or she would have been if the legislature had never enacted the statute. This would be contrary to the intent of the statute, and contrary to its language, which states that it "does not preempt any other remedy or cause of action provided for pursuant to ... the common law of this state."

Dadeland Depot v. St. Paul Fire & Marine Ins. Co.
945 So.2d 1216 (Fla. 2006)

The obligee of a surety contract is an "insured" entitled to file a first party bad faith action under section 624.155, Fla. Stat. An arbitration panel's findings that the surety's principal had breached its duty to the obligee and that the surety was obligated to the extent that its principal was bound did not bar a later statutory claim against the surety for bad faith refusal to settle under the doctrine of res judicata. At the time of the arbitration, the owner's statutory bad faith refusal to settle claim had not accrued, because there had not been a determination as to whether the principal had breached its obligations under the construction contract or whether damages flowing from such breach were covered under the performance bond.

Additionally, the arbitration panel's rejection of the surety's affirmative defenses collaterally estopped the surety from asserting those defenses in the bad faith case, but did not estop the surety from asserting its belief at the time that those defenses were valid, to try to demonstrate that it was not acting in bad faith.

Insurance – Uninsured Motorist

Tobin v. Michigan Mutual
2006 WL 3741050 (Fla. Dec. 21, 2006)

The court upheld the reformation of an insurance policy issued to Ford, to exclude coverage to plaintiffs, who were either injured or killed in accidents with uninsured drivers while operating or occupying vehicles leased from Ford. The court held that neither Ford nor the insurance company intended to provide such coverage to retail lessees. Ford had purchased the policy to provide coverage for its employees participating in a lease evaluation program. Language appearing to include the plaintiffs as named insureds was the result of a mutual mistake by Ford and the insurance company. The trial court "properly reformed the policy to reflect the mutual intent of the contracting parties."

State Farm v. Roach
945 So.2d 1160 (Fla. 2006)

The insurer issued, in another state, a policy to insureds who were residents of that state, but who spent a substantial amount of time in Florida, and who were injured in Florida. The court held that the doctrine of lex loci contractus required application of the law of the state where the policy was issued. The court declined to apply Florida law under a public policy exception, because the insureds were not Florida residents. The public policy exception requires *both* a Florida citizen in need of protection *and* a paramount Florida public policy. In the case of an insurance contract, it also requires that the insurer must be on reasonable notice that the insured is a Florida citizen.

Litigation Privilege

Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole

2007 WL 268769 (Fla. Feb. 1, 2007)

Plaintiffs asserted a class action against a law firm which had sent letters to them at the outset of foreclosure proceedings which Plaintiffs contended violated the Florida Deceptive and Unfair Trade Practices Act and the Florida Consumer Collection Practices Act. The Supreme Court remanded the case for a determination of whether the letters were protected by the litigation privilege. The court held that the privilege applies to all kinds of causes of action, including statutory ones. The privilege provides "legal immunity for actions that occur in judicial proceedings," for statements or actions that are relevant to the proceedings.

NICA

Florida Birth Related Neurological Injury Compensation Assoc. v. Florida Div. Of Admin. Hearings

2007 WL 63639 (Fla. Jan. 11, 2007)

When the issue of whether notice was adequately provided pursuant to section 766.316 is raised in a NICA claim, the ALJ has jurisdiction to determine whether the health care provider complied with the requirements of the statute.

Nondelegable Duty

Wax v. Tenet Health System Hospitals, Inc.

No. 4D04-1673 (Fla. 4th DCA March 7, 2007)

Reversing a summary judgment in favor of a hospital, the court, in a long and scholarly opinion, holds that a hospital has a nondelegable duty, pursuant to contract and statute, to provide non-negligent anesthesia services. "If there were negligence in the provision of anesthesia services, then the Hospital would be liable as a matter of law."

A nondelegable duty can arise from a contract, statute, regulation or common law. In general, the law makes a duty nondelegable when "the responsibility is so important to the community that the [original party] [sic] should not be allowed to transfer it to a third party."

If a duty is nondelegable, the party having the duty can contract out the work, but not the responsibility for it, absent an express waiver.

In agreeing to the surgery, the decedent signed a consent form, headed with the name of the hospital, which authorized the surgeon to perform the surgery, consented to the administration of anesthesia as deemed necessary by the anesthesiology group, and accepted the listed risks. The consent form constituted an express contract by the hospital to perform a specific duty. The court finds nothing in the consent form that would constitute a waiver of the hospital's duty.

In addition, the nondelegable duty stems from statutes and regulations, including §395.002(13)(b), §395.1055(1)(a), and §395.1055(1)(d), Fla. Stat. (2005), and Fla. Admin. Code 59A-3.2085(4). The statutes define "hospital" as "an establishment that, among other things, regularly makes available 'treatment facilities for surgery." They require AHCA to adopt rules that include "reasonable and fair minimum standards for ensuring that . . . . [s]ufficient numbers and qualified types of personnel and occupational disciplines are on duty and available at all times to provide necessary and adequate patient care and safety." The regulation mandates that hospitals providing surgical or obstetrical services *"shall have an anesthesia department*, service or similarly titled unit *directed by a physician member of the organized professional staff."* (Court's emphasis).

The court concludes that "because the statute and regulation impose this duty for non-negligent anesthesia services on all surgical hospitals, it is important enough that as between the hospital and its patient it should be deemed nondelegable without the patient's express consent."

The court adopted much of the analysis of the court in *Pope v. Winter Park Healthcare Group, Ltd*., 939 So.2d 185 (Fla. 5th DCA 2006). However, in *Pop*e, the court found the existence of a nondelegable duty was a question of fact, based on language in the consent form. Here, the court found no such language in the consent form, and no question of fact. Consequently, the hospital had responsibility for the nondelegable duty as a matter of law.