Case Law Update

May 2004

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

Caselaw Update on the Internet

Issues of *Case Law Update* since January 1995 can be found at the new Case Law Update website. The hypertext versions you'll find there are searchable by any text string and you can download to disk or print any portions you desire for your personal use.

www.caselawupdate.com

Additur

Brant v. Dollar Rent a Car Systems, Inc.

29 Fla. L. Weekly D941 (Fla. 4th DCA 2004)

The trial court erred in entering an order granting additur to award pain and suffering damages without allowing the plaintiff the opportunity to reject the additur and have a new trial. The additur statute requires that option. §768.043(1), Florida Statutes; *ITT Hartford Ins. Co. v. Owens*, 816 So.2d 572 (Fla. 2002). The court calls an additur for pain and suffering damages questionable in any event: "When the subject is unliquidated damages for intangible losses such as pain and suffering, the Legislature's authority to have trial judges fix the amount of something the jury has not seen fit to include, and to which the adverse party does not consent, is constitutionally dubious." See Art. I, §22, Fla. Const." (right to trial by jury)

Attorneys Fees

Ingalsbe v. Stewart Agency, Inc.

864 So.2d 30 (Fla. 4th DCA 2004)

On rehearing, the court certifies as a question of great public importance: Does the litigation privilege of *Levin Middlebrooks v. United States Fire Ins. Co.*, 639 So.2d 606 (Fla. 1994) apply to claims alleging direct interference with an attorney's fee earned by representing a consumer's claim for unfair or deceptive practices in a sale of a motor vehicle, where the interference arose from a seller-initiated settlement without counsel in which the fee due the lawyer was reduced without the lawyer's consent.

Payne v. Cudjoe Gardens

29 Fla L. Weekly D934 (Fla. 3d DCA May 5, 2004)

The plaintiff condo association was the prevailing party, and the homeowners were not entitled to attorneys fees, where the condo association sued to compel the homeowners to comply with a deed restriction, and the plaintiffs voluntarily complied during the lawsuit, and the condo association voluntarily dismissed its claim as moot, and dropped its claim for attorneys fees. The condo association's requests for fees and costs was only ancillary to the main relief sought, so the homeowners did not prevail on the significant issue in the case when the condo association dropped that claim. The homeowners voluntary compliance was the functional equivalent of judgment in favor of the condo association, so the condo association was the prevailing party.

Class Actions

Richardson v. Gyves

2004 WL950281 (Fla. 4th DCA May 5, 2004)

The court denies certiorari and refuses to quash a decision of the trial court to allow discovery on the merits of the claim before the class is certified, because the defendant has failed to show irreparable harm. The concurring opinion points out that the trial court should be required to follow the decision of the 5th DCA in *Policastro v. Stelk*, 780 so.2d 989 (Fla. 5th DCA 2001), holding that such discovery is not allowed. However, the entire court agrees that there is no irreparable harm, so certiorari cannot be granted.

Collateral Source

Didonato v. Youth Investments of Davie

2004 WL 950179(Fla. 4th DCA May 5, 2004)

To the extent HMO benefits and Medicare benefits are interchangeable, the court certifies conflict with *Goble v. Frohman*, 848 So.2d 406 (Fla. 2d DCA 2003), rev. granted, 865 So.2d 480 (Fla. Jan. 22, 2004). *Goble* held that evidence of HMO discounts was not admissible at trial to challenge the reasonableness and necessity of the plaintiff's medical bills. However, the trial court should set off the contractual discount post judgment.

Cooperative Leasing, Inc. v. Johnson
29 Fla. L. Weekly D902 (Fla. 2d DCA 2004)

The plaintiff was not entitled to recover for medical expenses beyond those paid by medicare because she never had any liability for those expenses and would have been made whole by an award limited to the amount that medicare paid her medical providers.

Concurring Cause

Hadley v. Terwilliger
29 Fla. L. Weekly D826 (Fla. 5th DCA 2004

The trial court erroneously refused to give the concurring cause instruction, and a new trial is required in this medical malpractice case involving failure to diagnose meningitis. The plaintiff testified that she repeatedly brought the child back to the pediatrician, complaining of worsening symptoms. The doctor's records did not support the mother's testimony, but the history she gave at the hospital did. The hospital also initially failed to make the correct diagnosis. The plaintiff's experts testified that, had the meningitis been diagnosed earlier, some or all of the injury to the child could have been prevented. The court described this as a "classic" situation where the concurring cause instruction should have been given. "The purpose of the concurring cause instruction is to negate the idea that a defendant is excused from the consequences of his or her negligence by reason of some other cause concurring in time and contributing to the same damage"

Costs

Melton v. Krott-Shaughnessy
29 Fla. L. Weekly D944 (Fla. 4th DCA 2004)

The defendant waived costs by not filing a motion for fees within the time required by Rule 1.525 after the plaintiff's voluntary dismissal. The court notes that the plaintiff was proceeding pro se in the first proceeding and indicates its belief that the defendant intentionally waived costs.

Dangerous Instrumentality

Sontay v. Avis Rent-A-Car
29 Fla. L. Weekly D942 (Fla. 4th DCA 2004)

The Fourth District upholds the constitutionality of §324.021(9) (1999), Florida Statutes, which limits the vicarious liability of a short term automobile lessor, against challenges that it denies the right of access to courts without affording a commensurate benefit or expressing overpowering public necessity, as well as equal protection, due process, and the right to jury trial.

The court rejects the argument that the damages cap, by distinguishing between serious and less serious injuries, violates equal protection.

Employment Discrimination

Maggio v. Dept. of Labor & Employment Security
29 Fla. L. Weekly D839 (Fla. 2d DCA 2004)

The court holds that an employment discrimination claim under the Florida Civil Rights Act against a state agency is a tort claim and presuit notice in compliance with the sovereign immunity statute is required. The court certifies to the Supreme Court the question:

> "Are Claims filed pursuant to the Florida Civil Rights Act of 1992 tort claims and thus subject to the presuit notice requirements of section 768.28(6), Florida Statutes?"

Insurance – Misrepresentation

Ricardo v. United Auto Ins. Co.
29 Fla. L. Weekly D921 (Fla. 3d DCA 2004)

Reversing summary judgment for the insurance company, the court holds there is a factual issue as to which policy covered the insured at the time of the crash. The plaintiff attached a copy of what he thought was his policy to the complaint. However, the company also provided a computer-generated form, listing a different policy form number, and created more confusion by using the first form at the deposition of its corporate representative. One policy voided coverage for any misrepresentation related to the policy; the other only for misrepresentations in the application. The insured, who was with a woman other than his wife at the time of the crash, initially reported the car as stolen. Because this was not a misrepresentation in the application, there was a factual issue as to whether there was coverage.

Jurisdiction – Longarm

Golden State Industries v. Cueto
29 Fla. L. Weekly D923 (Fla. 3d DCA 2004)

Defendant waived personal jurisdiction by not raising it initially, but instead pursuing a motion to set aside a default that had been entered against it. The motion was based on excusable neglect, due diligence and meritorious defense, not on lack of jurisdiction. The fact that the proposed answer made a conclusory reference to lack of jurisdiction, without any factual support, does not change the result. Moreover, the defendant created confusion between two corporations by using the same

corporate name in two different states, and keeping that information hidden for months until the trial court denied the motion to set aside the default.

Jury Misconduct

State Farm v. Levine
29 Fla. L. Weekly D916 (Fla. 3d DCA 2004)

The defendant failed to proffer sufficient evidence that a juror withheld material information, where the defendant proffered a traffic accident report involving a person of the same name, but failed to establish that the person involved in the accident was the same person as the juror who had denied involvement in any serious accidents. A jury consultant's proffered opinion was irrelevant where she admitted her opinion was speculative because nobody had interviewed the juror, even though the court's earlier ruling would have allowed it.

Med Mal -- Limitations

Bryant v. Adventist Health
29 Fla. L. Weekly D832 (Fla. 5th DCA 2004)

The plaintiff sufficiently pled concealment that would toll the statute of limitations in a med mal case. The plaintiff alleged that the defendants allowed the plaintiff's head to fall out of a head frame during the surgery but the incident did not appear in the medical records, and the records stated that there were no complications or untoward events during the surgery. When defendants actively misrepresent or conceal their negligence, or conceal known facts relating to the cause of the injury, the statute of limitations does not begin to run until the plaintiff is able to discover the negligence. Plaintiff's knowledge that he suffered an injury is not enough to start the statute running where there is active concealment of the negligence or the facts about the cause of the injury.

Med Mal -- Presuit

Tenet St. Mary's v. Serratore
29 Fla. L. Weekly D866 (Fla. 4th DCA 2004)

Plaintiff's complaint alleged that, after she underwent dialysis, the defendant's employee attempted to assist her in returning her chair to an upright position. The employee tried to kick the footrest of the chair, and instead kicked the plaintiff's foot, resulting in a severe injury requiring amputation. The court held this was not medical negligence, but ordinary negligence, and therefore no presuit under ch. 766 was required.

New Trial

Collins v. Douglass
29 Fla. L. Weekly D936 (Fla. 4th DCA 2004)

Once the trial court had entered an order denying motions for new trial and additur. the court had no jurisdiction to sua sponte grant rehearing, hold a second hearing, and grant a motion for additur or new trial.

NICA

Florida Birth-Related v. Ferguson,
29 Fla. L. Weekly D841 (Fla. 2d DCA 2004)

Clarifying on rehearing, the 2d DCA holds that the ALJ exceeded his jurisdiction in determining not only the issue of immunity, but also the factual issue of notice. The court certifies conflict with the 3d DCA in *University of Miami v. M.A.*, 793 So.2d 999 (Fla. 3d DCA 2001); the 5th DCA in *O'Leary v. Florida Birth Related Neurological Injury Compensation Ass'n,* 757 So.2d 624 (Fla. 5th DCA 2000), and the 4th DCA in *Gugelmin v. DOAH*, 815 So.2d 765 (Fla. 4th DCA 2002) and *Behan v. Florida Birth-Related Neurological Injury Compensation Ass'n,* 664 So.2d 1173 (Fla. 4th DCA 1995)

Patient Dumping

Montejo v. Martin Memorial
2004 WL 950228
(Fla. 4th DCA May 5, 2004)

The patient, an illegal alien, suffered severe brain damage and the hospital intervened in his guardianship to try to discharge him so he could be transferred to a hospital in Guatemala, where his family resided. The court held that a letter from a Guatemalan official was inadmissible hearsay and could not be relied on to justify the transfer. The only admissible testimony about what treatment was available in Guatemala was that no appropriate treatment was available. Furthermore, the trial court lacked subject matter jurisdiction to authorize the deportation of the patient to Guatemala.

Premises Liability

Miami-Dade County v. Hoyos
29 Fla. L. Weekly D920 (Fla. 3d DCA 2004)

Evidence that there was a defective ring in a manhole cover which caused it to protrude 7/16 of an inch above the street, that the cover was discolored and rusty, and that the County was the only entity responsible for installation and maintenance of the manhole cover; combined with evidence that the inner seal of the manhole cover had been repaired in 1995, and was found to be in need of repair in 1999 (two years after plaintiff's accident), was sufficient evidence of constructive notice to the county, even though there was no evidence of prior accidents.

Release

Cousins Club Corp. v. Silva
29 Fla. L. Weekly D868 (Fla. 4th DCA 2004)

The plaintiffs' son was injured in an amateur boxing match after signing a pre-event release that stated "I hereby assume the inherent and extraordinary risks involved in Monday Night Boxing and any risks inherent in any other activities connected with this event . . . ". The court held the release did not bar the plaintiffs' claim that the defendant failed to provide or obtain medical treatment, failed to maintain its premises in a reasonably safe condition, and failed to properly supervise the event.

Sanctions

American Express Co. v. Hickey
29 Fla. L. Weekly D818 (Fla. 5th DCA 2004)

It was error for the trial court to dismiss the plaintiff's claim with prejudice because of the attorney's repeated failure to comply with court rules and deadlines. "To dismiss a case based solely on the attorney's neglect unduly punishes the litigant . . . " *Kozel v. Ostendorf*, 629 So.2d 817, 818 (Fla. 1993). In addition to the severity and willfulness of the attorney's conduct, the court must consider whether the client was involved in the misconduct, and whether the other side was prejudiced. Other sanctions such as an award of fees may be appropriate when the attorney is at fault.

Workers Comp Immunity

The Bombay Co. v. Bakerman
29 Fla. L. Weekly D862 (Fla. 3d DCA 2004)

The plaintiff presented sufficient evidence to go to the jury on the "substantial certainty" standard, allowing the jury to find for the plaintiff on comp immunity where the employer required employees to stand on the top step of a ladder to reach merchandise on the upper shelves; the ladder was worn and would sway from side to side, requiring the employees to hold on to the shelves; the ladder was not an appropriate design for the space and had to be propped against the shelving instead of being opened, and the employer repeatedly failed to respond to the manager's specific requests for the money to replace the ladder