Case Law Update

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Agency

Gillet v. Watchtower Bible & Tract Soc.
2005 WL 1107005 (Fla. 3d DCA 2005)

A Jehovah's witness who accidentally ran over another Jehovah's witness with her car as both were leaving a meeting to go canvassing door-to-door was not an agent of the entities that owned and published the materials they were going to distribute or of the church where she attended. The driver was going to distribute the literature because it was mandated by her religion, and not as an agent of the religious organizations. There was no evidence that the organizations instructed, advised or controlled the means by which she was to get to the place where she was going to proselytize. The hallmark of agency is the right to control the activity of the agent.

Arbitration

King Motor Co. v. Jones
2005 WL 1163005 (Fla. 4th DCA 2005)

The plaintiff leased a car from the defendant under a contract that contained an arbitration clause. The clause required arbitration of "all claims, demands, disputes or controversies of every kind or nature between them arising from, concerning or relating to any of the negotiations involved in the sale/lease or financing of the vehicle, the terms and provision of the sale, lease, or financing arrangements, the arrangements for financing, the purchase of insurance, extended warranties, service contracts or other products purchased as an incident to the sale, lease or financing of the vehicle, the performance or condition of the vehicle, or any other aspects of the vehicle and its sale, lease or financing . . . ." The court held that this provision did not require the plaintiff to arbitrate her claim that the defendant's employee stole her identity and used it to make fraudulent purchases and bank account withdrawals. The trial court properly refused to compel arbitration. The claim arose from the defendant's duty to keep customer information confidential and safe, not from the lease agreement. The contract did not include an agreement to arbitrate a subsequent independent tort. See *Seifert v. U.S. Home Corp.*, 750 So.2d 633 (Fla. 1999).

Buscemi v. City of Plantation
2005 WL 1109634 (Fla. 4th DCA 2005)

Section 44.103, Florida Statutes allows the judge to order "non-binding" arbitration. The arbitration award becomes binding, however, if neither party requests a trial de novo within 20 days. "If no request for trial de novo is made within the time provided, the decision shall be referred to the presiding judge in the case who shall enter such orders and judgments as are required to carry out the terms of the decision, which orders shall be enforceable by the contempt powers of the court, and for which judgments execution shall issue on request of a party." If the trial de novo does not end in a result more favorable to the party requesting it, that party may be assessed arbitration costs, court costs and attorneys fees. This procedure is being used very often by the courts in Broward. Here, the arbitrator made an award to the plaintiff, and neither party requested trial de novo. The trial court was required to enter a final judgment in favor of the prevailing party. The arbitrator's award gave the plaintiff a specific dollar amount "plus any amounts to which there is an outstanding lien to which the parties will agree to the amount." It is not entirely clear to me exactly what the amount of the judgment is supposed to be.

Connell v. City of Plantation
2005 WL 1026562 (Fla. 4th DCA 2005)

In this case involving arbitration under §44.103, Florida Statutes, the trial court sent the issues of liability and damages to non-binding arbitration. Nobody requested trial de novo and the defendant paid the plaintiff the full amount of the arbitration award prior to entry of judgment or any award by the trial court of costs. The court held that the trial court was still required to enter judgment and award costs. The court suggests that, in the future, the trial court should consider also sending the issue of costs to the arbitrator.

Attorneys Fees

Pridgen v. Agoado
2005 WL 1105251 (Fla. 2d DCA 2005)

An award of attorneys fees must be supported by substantial competent evidence, including the attorney's own testimony about the hours spent, and an expert's testimony about the reasonableness of the hours and the reasonable hourly rate.

Unterlack v. Westport Ins. Co.
2005 WL 1109604 (Fla. 4th DCA 2005)

The insured was a defendant in a tort action. The insured tendered the lawsuit to his insurer to defend. The insurer filed a declaratory judgment action. Subsequently, the insurer voluntarily dismissed the declaratory judgment action without prejudice, and settled the underlying lawsuit with the plaintiffs. The insured filed a motion for fees and costs in the dec action, and the trial court denied the motion. This court reversed and held that a judgment in the insured's favor is not an absolute prerequisite to an award of attorneys fee to an insured under §627.428. Accord, *O'Malley v. Nationwide Mutual Fire Insurance Co.*, 890 So.2d 1163 (Fla. 4th DCA 2004)

Arango v. United Auto. Ins. Co.
2005 WL 1026565 (Fla. 3d DCA 2005)

The insured prevailed at trial and the insurer appealed. The insurer voluntarily dismissed its appeal. The court held that when the insurer dismissed its appeal, the insured became the prevailing party on appeal and was entitled to appellate fees under §627.428.

Lubell v. Martinez
2005 WL 1026721 (Fla. 3d DCA 2005)

The plaintiff fired her first attorney after rejecting a settlement offer, and the second attorney she hired settled the case. The trial court erroneously ordered the second attorney to pay the first attorney out of his share of the fee. Furthermore, the first attorney was not entitled to his percentage contingent fee. He was only entitled to quantum meruit, up to a maximum of the amount he would have been entitled to under the contingency fee contract. He was only entitled to fees if he was discharged without cause. His fees were to come out of the client's recovery, not out of the second attorney's fee.

Collateral Source

Goble v. Frohman
2005 WL 977016, 30 Fla. L. Weekly S280 (Fla. 2005)

Under §768.76, Florida Statutes (1999), it is appropriate to set off against the damages portion of an award the amounts of reasonable and necessary medical bills that were written off by medical providers pursuant to their contracts with a health maintenance organization. "Contractual discounts negotiated by an HMO fall within the statutory definition of collateral sources subject to setoff" under §768.76. If that is the law, then shouldn't the plaintiff be permitted to introduce evidence of the full amount of the bills, not just the HMO rate, so that the jury can determine the full amount before it is set off?

Experts – Biomechanical

Stockwell v. Drake
2005 WL 1109598 (Fla. 4th DCA 2005)

The trial court did not err in excluding the testimony of the Plaintiff's biomechanical expert that her brain injury was more likely than not caused by the accident. Such an expert is not qualified to testify about the extent of injuries. See *Mattek v. White*, 695 So.2d 942 (Fla. 4th DCA 1997). However, the court noted that a biomechanical engineer might be able to testify about whether failure to wear a seat belt caused an injury, depending on the mechanism of the injury. The court explained that a biomechanical engineer could testify about the forces and acceleration involved in hitting the dashboard, for example, and whether a seatbelt would have prevented it. In those circumstances, the expert would not be testifying about the extent of the injuries.

HMOs

Westside EKG Associates v. Foundation Health
2005 WL 1026183 (Fla. 4th DCA 2005)

Section 641.3155, Florida Statutes, requires HMOs to follow certain procedures to make prompt payments of claims submitted by health care providers. Even though the statute does not explicitly provide for a cause of action, a service provider can bring a breach of contract action against an HMO to enforce the prompt payment provision. The service provider's complaint, alleging entitlement to payment as a third party beneficiary of the contracts between HMOs and their patients, were presumed to incorporate existing law. The court certified the following as a question of great public importance: "Are the prompt pay provisions of the health maintenance organization act enforceable by courts in an action founded on principles of breach of contract brought against an HMO by a service provider?"

Impact Rule

Southern Baptist Hosp. of Florida, Inc. v. Welker
2005 WL 851030, 30 Fla. L. Weekly S259 (Fla. 2005)

The Supreme Court declined to answer the question certified by the 5th DCA as to whether the impact doctrine barred a father's claim against a mental health service provider who allegedly negligently wrote a letter incorrectly stating that the father had abused his children, resulting in the father's loss of access to his children. The court also declined to address whether medical malpractice presuit requirements applied to the claim. The court remanded to the trial court with directions to allow the father to amend his complaint so that a determination could first be made at the trial level of whether there was a cause of action for negligent interference with parental rights.

School Bd. of Miami-Dade County v. Trujillo
2005 WL 1026683 (Fla. 3d DCA 2005)

On the first day of school, the school board assigned a new driver to a special education bus and he got lost. The bus was approximately four hours late arriving at school, and the plaintiffs' special needs child was traumatized, had urinated on himself and was dehydrated. His pediatrician found no physical injury. He was unable to ride the bus any more. The court held that the negligence claim was barred by the impact doctrine. In an earlier case, *Willis v. Gami Golden Glades*, 881 So.2d 703 (Fla. 3d DCA 2004), the Third District certified to the Supreme Court the question of whether the impact doctrine should be abolished. I will be arguing *Willis* on June 9th.

Insurance – Estoppel

FCCI Ins. Co. v. Cayce's Excavation, Inc.
2005 WL 954538 (Fla. 2d DCA 2005)

The insured's business was involved in seawall and jetty work, septic tank work, and excavation work. The insurer's agent told the insured he had all the insurance coverage he needed. However, the policy did not cover employees while they were working on the water. The insured sued the insurer and the agent and broker on a theory of promissory estoppel. The trial court granted summary judgment to the insured. The DCA reversed, holding that there was a genuine issue of material fact as to whether the insured's reliance was reasonable.

Insurance – Windstorm

Florida Windstorm Underwriting Ass'n v. Gajwani
2005 WL 1109465 (Fla. 3d DCA 2005)

The plaintiff's policy issued by the FWUA stated: "We will not pay for loss or damage to the interior of any building or structure, or the property inside the building or structure, caused by rain, snow, sleet, sand or dust whether driven by windstorm or not, unless the direct force of Hurricane, other Wind, or Hail damages the building or structure causing an opening in the roof or wall and the rain, snow, sleet, sand or dust enters through this opening." The court held that this provision excluded coverage for damage caused by wind-driven rain. The exclusion was not void as against public policy.

Jury Selection

Bell v. Greissman
2005 WL 906266, 30 Fla. L. Weekly D1023 (Fla. 4th DCA 2005)

The trial court erroneously denied a challenge for cause to a potential juror who had worked for several years as an investigator in a medical malpractice defense firm. The juror said his decision as a juror would be based on his personal beliefs, and that he would do what he thought was fair. The court held that there was a reasonable doubt as to whether the juror could be fair and impartial.

Limitations

Hermanowski v. Morrison, Brown Argiz and Co., P.A.
2005 WL 1111867 (Fla. 3d DCA 2005)

This is an odd little opinion. The court affirms the dismissal of the plaintiff's fourth amended complaint. However, the court states, without explanation, that, should the plaintiff re-file her complaint, the new complaint will relate back to the original filing for statute of limitations purposes.

New Trial

Koletzke v. Small
2005 WL 1026046 (Fla. 2d DCA 2005)

Where the defendant admitted that his negligence caused damage to the plaintiff, the plaintiff's treatment at the hospital was not unreasonable or unnecessary, and the jury was given the standard collateral source instruction, the trial court properly granted a new trial because the jury did not award the plaintiff even one dollar for his medical expenses. The expenses undisputedly were not barred by the no-fault threshold. Once a defendant has admitted liability in a personal injury case where the plaintiff made a reasonable trip to the emergency room after an automobile crash, the jury must award at least the minimal damages.

Offer of Judgment / Proposal For Settlement

Dollar Rent A Car v. Chang
2005 WL 1163011 (Fla. 4th DCA 2005)

The plaintiff, as mother and natural guardian of her minor child, made a proposal for settlement. The proposal was made by "Plaintiff, Lydia Chang, as natural mother and legal guardian for Matthew Chang, a minor, by and through her undersigned attorneys . . . to settle her claim." The court held this proposal did not have to be apportioned between the mother and the child because its language only referred to her in her capacity as his guardian, and to claim on behalf of the child, not to any plural "claims," and not to any claim she might have had individually as his mother. Therefore, the proposal was valid.

Jones v. Double D Properties, Inc.
2005 WL 957063 (Fla. 4th DCA 2005)

A proposal for settlement from two defendants was invalid where it did not differentiate the amounts attributable to each defendant. The court construes *Willis Shaw Express, Inc. v. Hilyer Sod, Inc*., 849 So.2d 276 (Fla.2003),as resolving the question of whether offers of judgment made by multiple offerors must apportion the amounts attributable to each offeror, regardless of whether the offer is made by plaintiffs or defendants, and regardless of whether one defendant is vicariously liable for the actions of the other.

Dryden v. Pedemonti
2005 WL 856974, 30 Fla. L. Weekly D992
(Fla. 5th DCA 2005)

The trial court properly refused to grant fees under a proposal for settlement which required execution of a release but did not attach the release, and which set out terms for the release which were ambiguous and confusing because they were not clear as to whether the plaintiff would also have to give up claims to PIP benefits and health insurance benefits under *Connecticut General Ins. Co. v. Dyess*, 569 So.2d 1293 (Fla. 5th DCA 1990). Under Dyess, future health insurance benefits may be released in a general release if they are not specifically preserved. (The Florida Bar Trial Lawyers Section sample general release form, available on line at http://www.flatls.org/StandardRelease.asp includes suggested language to preserve the benefits). The majority rejects the argument by the dissent that the plaintiff should have moved to strike the proposal if she did not understand its terms.

Parties

Estate of Morales v. Iasis Healthcare Corp.
2005 WL 1107067 (Fla. 2d DCA 2005)

The trial court erroneously dismissed the plaintiff's medical malpractice action for failure to timely substitute a new personal representative after the original personal representative died. Florida Rule of Civil Procedure 1.260, which requires a motion for substitution to be made within 90 days after the death of a party is suggested on the record, does not apply when the personal representative of an estate dies. The personal representative is merely a nominal party, not the real party in interest. The real parties in interest are the estate and the survivors. Furthermore, the purpose of the rule is not served by dismissal because the appropriate mechanism for handling the affairs of the estate are in place, and the affairs of the decedent are being processed under the supervision of the probate court.

Public Records

Dept. of Highway Safety & Motor Vehicles v. Rigau
2005 WL 1026063 (Fla. 2d DCA 2005)

Sections 943.0585 and 943.059, Florida Statutes, allow a trial court in certain limited circumstances to seal criminal history records. The statutes do not allow a court to seal DHSMV records of a license suspension. The suspension is an administrative, civil proceeding, not a criminal sanction.

Rental Car Caps

Dollar Rent A Car v. Chang
2005 WL 1163011 (Fla. 4th DCA 2005)

Section 324.021(9), under certain conditions, caps rental car liability at $100,000, and, if the lessee fails to have the specified insurance, allows an additional $500,000 in economic damages. The statute provides, in part, that "The additional specified liability of the lessor for economic damages shall be reduced by amounts actually recovered from the lessee, from the operator, and from any insurance or self-insurance covering the lessee or operator ...." The court holds that the setoff provision applies only to the $500,000 additional economic damages, not to the $100,000. Therefore, there is no PIP setoff against an award of $100,000 against a car rental company under this statute.

T.H.E. Ins. Co. v. Dollar Rent-A-Car Systems, Inc.
2005 WL 924316, 30 Fla. L.Weekly D1045
(Fla. 5th DCA 2005)

The court upholds an exclusion for driving under the influence in an excess supplemental insurance policy on a rental car. The exclusion was not void as against public policy. Sections 324.021 and 324.022 require a minimum amount of insurance. Above that required amount, however, an exclusion in a supplemental policy may be valid. Although the insurer did not deliver a copy of the policy to the insured, as required by §627.421, the insured was not prejudiced because the exclusion appeared in large type on the rental agreement.

Service of Process

Gardina v. Aronowitz
2005 WL 906170, 30 Fla. L. Weekly D1033
(Fla. 4th DCA 2005)

Plaintiffs, without a lawyer, sued a defendant who had been a Florida resident at the time of the accident but moved to Georgia. They served her by substituted service on the secretary of state, but failed to mail her a copy of the summons and complaint by certified mail as required by §48.161(1), Florida Statutes. The defendant filed a motion to quash service. Plaintiffs subsequently hired a lawyer who achieved personal service on the defendant in Georgia, and at the same time, filed a motion asking the court to validate the original substituted service or, alternatively, to grant an after-the-fact "extension of time" recognizing and accepting the personal service recently effected as timely done. The trial court denied the motion and dismissed the case for untimely service under Rule 1.070. The court held that the plaintiffs had fulfilled the purpose of Rule 1.070(j), and the defendant had actual notice of the action against her. The court reversed the dismissal.

Sovereign Immunity

Schmid v. City of Miami Beach
2005 WL 1107649 (Fla. 3d DCA 2005)

The city was not immune from liability as a matter of law for a fall by a pedestrian whose shoe got caught in a "decorative groove" around a tree planted in the concrete walkway. Once the government exercised its discretionary function to decide to plant the tree, it had an operational level duty to do so in a non-negligent manner.

Del Rio v. City of Hialeah
2005 WL 1109439 (Fla. 3d DCA 2005)

Three City of Hialeah Ordinance sections impose on the owner of abutting property liability for injuries sustained by a pedestrian if the abutting property owner contributed to or caused the dangerous condition of the sidewalk which was the proximate cause of the plaintiff's injury.

Spoliation

Kimball v. Publix Super Markets, Inc.
2005 WL 991387 (Fla. 2d DCA 2005)

The Second DCA does not allow assertion of a claim of spoliation where the defendant in the underlying case is the spoliator. However, in this case, the plaintiff sought leave to amend to assert a claim that the defendant's spoliation of evidence impaired her ability to sue another tortfeasor. The court held that the court should have allowed the plaintiff to amend to assert her spoliation claim, distinguishing *Jost v. Lakeland Reg'l Med. Ctr., Inc.*, 844 So.2d 656 (Fla. 2d DCA 2003), review dismissed, 888 So.2d 622 (Fla.2004).

Whistleblower

Tracey-Meddoff v. J. Altman Hair & Beauty Centre, Inc.
2005 WL 841680, 30 Fla. L. Weekly D964
(Fla. 4th DCA 2005)

Individual corporate officers are not "employers" within the meaning of the private sector whistleblower act, so they are not subject to whistleblower liability under §448.101-105, Florida Statutes.