Case Law Update

May 2006

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Attorneys Fees

Saia Motor Freight Line, Inc. v. Reid,
SCO4-2443 (Fla. May 11, 2006)

Rule 1.525 requires a motion for attorneys fees to be filed "within 30 days after filing of the judgment, including a judgment of dismissal, or the service of a notice of voluntary dismissal." The Supreme Court held that even if the judgment specifically reserves jurisdiction to award fees, the motion still must be filed within the 30 days. The rule "was created to establish a bright-line rule to resolve the uncertainty surrounding the timing of these post trial motions." Note that the language of the rule has been amended and it now requires filing "no later than" 30 days after filing of the judgment. The amendment was intended to resolve the question of whether a motion filed before filing of the judgment was timely.

Bifurcation

USAA v. McDermott
Case No. 2D05-694 (Fla. 2d DCA May 19, 2006)

The trial court did not abuse its discretion in denying the uninsured motorist carrier's motion to try its case separately from the case of the insured, who, at the time of the accident, was a criminal fleeing from the police, and who appeared in court in an orange jumpsuit. Bifurcation would have required trying the case twice.

Corporations – Pro Se

Caldwell Construction, Inc. v. Colby Materials, Inc.
SCO4-774 (Fla. March 16, 2006)

The owner of a defendant corporation, not an attorney, filed the defendant's responsive pleadings. The plaintiff's motion to strike and for entry of default was granted. The Supreme Court held that it was improper to strike the corporation's responsive pleadings and enter a default without first giving the corporation an opportunity to retain counsel and file an appropriate motion or answer. A pleading filed by someone who is not an attorney should not be treated as a nullity.

"Trial courts should not treat papers filed by unlicensed or unauthorized agents as an absolute nullity but, rather, should give litigants in such situations a reasonable opportunity to secure Florida counsel. . . . Only if the party does not timely act thereafter should sanctions be imposed. . . ." No showing of excusable neglect is required.

Discovery – Neuropsychological Exam

Byrd v. Southern Prestressed Concrete, Inc.
Case No. 1D05-5370 (Fla. 1st DCA May 2, 2006)

A trial court's order prohibiting the plaintiff's attorney from attending a compulsory defense neuropsychological examination was quashed as a departure from the essential requirements of law. Just like a physical examination, Rule 1.360 requires that a plaintiff be allowed to have counsel present unless the defense establishes both (1) a case-specific reason why the attorney's presence would disrupt the examination and (2) that no other qualified individual in the area would be willing to conduct the examination with the attorney present. The doctor's concerns about being distracted by having a third party present cannot outweigh the right of the plaintiff to have his counsel present. References to "standard practices," references to texts and other general statements are not enough.

Evidence – Rebuttal

Wax v. Tenet Health System Hospital, Inc.
No. 4D04-1673 (Fla. 4th DCA May 17, 2006)

Where the defendant failed to depose the plaintiff's rebuttal expert, who was plaintiff's only expert to rebut a particular part of the defense, and the defense claimed to be surprised by the scope of the expert's testimony, the trial court should not have excluded the witness but at most should have recessed the trial to allow the deposition to be taken. Defense counsel apparently did not understand the description of the expert's testimony in the plaintiff's pretrial disclosure. The court described this as a "good faith misimpression and held that "We do not think that these designations of the substance of testimony in pretrial notices of experts should be subjected to literalistic, mechanical or crabbed readings. If a disclosed witness's trial testimony is even arguably within the designation, exclusion of the testimony by the witness should not be employed. In the instances where a good faith misimpression occurs, the trial judge has other remedies to correct any injustice."

In an extreme case, the court could allow the defense to offer a new witness to respond to he rebuttal testimony. However, the extreme sanction of excluding the witness was excessive and prejudicial where it was the plaintiff's only expert on the subject.

The court also held that the fact that the plaintiff had already offered testimony in the same general area did not render another expert's specific rebuttal testimony cumulative. "To be cumulative the substance, function and effect of the previous evidence should be the same."

Fabre

Nieves v. Snapp Industries, Inc.
No. 3D04-2917 (Fla. 3d DCA May 10, 2006)

The plaintiff and one defendant entered into a settlement in which the settling defendant agreed to pay the plaintiff a sum of money and, in exchange, the plaintiff would not oppose the defendant's motion for summary judgment. The plaintiff stated that the purpose of the agreement was to preclude the defendant from becoming a *Fabre* defendant. A former defendant in whose favor a summary judgment was entered on the merits (not, for example, on immunity grounds) cannot be a *Fabre* defendant. See *Southern Bell Tel. & Tel. Co. v. Fla. Dept. of Transp.*, 668 So.2d 1039 (Fla. 3d DCA 1996). The court held, however, that in this case, the settlement was not enforceable under *Dosdourian v. Carsten*, 623 So.2d 241 (Fla. 1993). Dosdourian bans *Mary Carter* agreements because they are misleading to a jury. In a *Mary Carter* agreement, a settling defendant remains in the case through trial. Here, however, there is no trial, there is just a summary judgment. Nevertheless, the court held that Dosdourian bars this kind of settlement. I don't think this case should preclude a plaintiff from failing to oppose a defendant's motion for summary judgment where the plaintiff in good faith has no evidence to offer against the motion.

Insurance – Cancellation

Miller v. Scottsdale Ins. Co.
Case No. SC05-936 (Fla. May 18, 2006)

Section 627.848, Florida Statutes, sets out the required procedure for an insurance company to follow when canceling an insurance policy. It plainly says, "the insurance contract shall not be canceled unless cancellation is in accordance with the following provisions." Those provisions require notice of cancellation to insureds, mortgagees, loss payees and premium finance companies, with an effective date of cancellation 10 days after notice. Answering a question certified from the 11th Circuit, the Supreme Court holds that the statute must be strictly followed, and that an insurance policy cannot be canceled as to different insureds at different times. The statute "contemplates a single cancellation date for the insurance policy as a whole."

Insurance – Duty to Defend

Bellsouth Telecommunications, Inc. v. Church & Tower, Inc
Case No. 3D05-1645 (Fla. 3d DCA March 29, 2006)

The insurer breached its duty to defend, and the insured prevailed in an action seeking damages and indemnity, but not specific performance. The Third District held that the insurer may not then select counsel of its own choosing to defend the insured. The insurer forfeited its right to control the defense by wrongfully refusing to defend instead of defending with a reservation of rights.

Jury Instructions

In Re Florida Standard Jury Instructions In Civil Cases (No. 05-02)
Case No. SC05-2000 (Fla. Feb. 23, 2006)

The Supreme Court has adopted a revised instruction 6.2(g) to be given to the jury for cases in which a plaintiff is injured subsequent to the accident involved in the lawsuit:

> You have heard that (claimant) may have been injured in two events. If you decide that (claimant) was injured by (defendant) and was later injured by another event, then

you should try to separate the damages caused by the two events and award (claimant) money only for those damages caused by (defendant). However, if you decide that you cannot separate some or all of the damages, you must award (claimant)any damages that you cannot separate as if they were all caused by (defendant).

In Re Florida Standard Jury Instructions In Civil Cases (No. 05-03)

Case No. SC05-2000 (Fla. Feb. 23, 2006)

The Supreme Court has adopted a revised instruction 6.13(c) to deal with the "paid or payable" collateral source PIP problem:

> Some expenses claimed as damages by (claimant) may have been paid [or are payable] by personal injury protection insurance. You should not award (claimant) any damages for [earnings lost in the past] [or] [past medical expenses] that have been paid [or that are payable] by personal injury protection insurance. ["Payable" expenses are expenses that have been incurred and will be paid by personal injury protection insurance].

See *Caruso v. Baumle*, 880 So.2d 540 (Fla. 2004), *Rollins v. Pizzarelli,* 761 So.2d 294 (Fla. 2000).

Nursing Home – Arbitration

Bland v. Health Care and Retirement Corp. of American

Case No. 2D05-3107 (Fla. 2d DCA May 10, 2006)

A nursing home arbitration agreement signed by the resident's daughter four days after admission was not invalid as unconscionable. It was not procedurally unconscionable because the daughter was not rushed into signing it and the nursing home's practice was to tell residents or those acting on their behalf that it was optional and that the resident would not be evicted from the nursing home for refusal to sign. Whether the agreement, which limited the amount of damages recoverable and precluded any award of punitive damages or attorneys fees, was contrary to public policy was a question to be determined by the arbitrator. The court noted that the plaintiff never raised the issue of whether the daughter was authorized to sign on behalf of the mother.

Seat Belt

Cybroski v. Wright

No. 4D05-646 (Fla. 4th DCA May 17, 2006)

A parent owes a duty of care to a child to protect the child by using the child's seat belt while the child is a passenger in a car driven by the parent. A parent may be liable to the child to the extent of insurance. Here the child, through a guardian ad litem, brought suit against her mother. The court held that the claim against the mother was not barred by §316.614, Fla. Stat. That section provides:

> A violation of the provisions of this section shall not constitute negligence per se, nor shall such violation be used as prima facie evidence of negligence or be considered in mitigation of damages, but such violation may be considered as evidence of comparative negligence, in any civil action.

The court holds that the statute was only intended to clarify how the failure to use a seat belt should be used at trial on the issue of comparative negligence. It was not intended to abolish a parent's common law obligation to protect her child by fastening the child's seat belt.

Uninsured Motorist Coverage – Setoff

USAA v. McDermott

Case No. 2D05-694 (Fla. 2d DCA May 19, 2006)

The uninsured motorist carrier was not entitled to a setoff for future medical and wage workers comp benefits that are likely to be available for the plaintiff because there is no express statutory entitlement to such a setoff and the insurer did not attempt to establish such a right within its own insurance contract. The general public policies announced in section 627.727, Florida Statutes (2002), do not authorize the court to give the insurer a remedy that does not exist either in its contract or the statute regulating its contract.

> The injured plaintiff is not placed at risk of receiving nothing from the uninsured motorist insurance company today because of a setoff for future workers' compensation benefits payable by an insurance company that may no longer exist when the future benefits are payable. The uninsured motorist carrier normally receives full subrogation rights against the tortfeasor from its insured, and the workers' compensation carrier receives its lien against payments made by the tortfeasor. See §§ 440.39(3)(a), 627.727(6), Fla. Stat. (2002). The injured plaintiff does not need to worry that medical treatment which the jury today determined to be related to the accident will be disputed years from now by the workers' compensation carrier when the treatment is actually needed or incurred.

Workers Comp Immunity

Aravena v. Miami-Dade County

Case No. SCO4-2349 (Fla. April 6, 2006)

A traffic crossing guard who worked for the county was killed by a car as a result of the negligence of county employees who failed to maintain a traffic light. The court held that the county was not immune under the workers comp immunity statute.

The workers comp immunity statute provides an exception to immunity for employees who are assigned primarily to "unrelated works." §440.11(1), Fla. Stat. (Under the sovereign immunity statute, the County is substituted for the employees). County employees who work at different physical locations for different departments, have different supervisors, and perform different duties and functions in their primary assignments fall within the unrelated works exception to workers' compensation immunity. Although no bright-line rule governs, the unrelated works exception has "both locational and operational components" and requires consideration of several factors, including:

> (1) whether the coemployees work at the same location, (2) whether the coemployees must cooperate as a team to accomplish a specific mission; (3) the size of the employer; (4) whether the coemployees have similar job duties, (5) whether the coemployees have the same supervisor; and (6) whether the coemployees work with the same equipment.

The court also clarifies pleading requirements. Immunity is an affirmative defense; the unrelated works exception is an avoidance that must be pled by the plaintiff.