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Case Law Update

Barbara Green, P.A.
Attorney at Law
(305) 529-1101

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Arbitration

AT&T Mobility vs. Concepcion

__ U.S. __, Case No. 09-893 (4/27/2011)

In *Discover Bank v. Superior Court*, 36 Cal 4th 138 (Cal. 2005), the California Supreme Court held that a class arbitration waiver in a consumer contract is unconscionable if the agreement is in an adhesion contract, disputes between the parties are likely to involve small amounts of damages, and the party with inferior bargaining power alleges a deliberate scheme to defraud. California applied the rule to all contracts, not just arbitration contracts. The United States Supreme Court held that the California law is preempted by the Federal Arbitration Act because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" under the FAA. The FAA provides that it does not preempt generally applicable contract defenses under state law. Nevertheless, because application of the statute to require classwide arbitration would frustrate the purposes of the FAA, the California rule is preempted. The Court did not address whether a provision that would not result in class arbitration, but instead would allow class litigation, would also be preempted.

Attorneys Fees – §57.105, Fla. Stat.

Bionetics Corp. v. Kenniasty

Case No. SC09-1243, 2011 WL 446205 (Fla. 2/10/2011)

The 21-day safe harbor provision of §57.105(4), Fla. Stat. is substantive and applies prospectively. It did not apply to a case where the complaint was filed and the legal harm occurred before the effective date of the safe harbor provision.

Attorneys Fees – Offer of Judgment

Mady v. DaimlerChrysler Corp.

Case No. SC08-808 (Fla. 3/24/2011)

A consumer who resolves a legal action with a warrantor by accepting a settlement offer from the defendant pursuant to the offer of judgment statute is a prevailing party under the Magnuson-Moss Warranty Act, 15 U.S.C. §2301 et seq., and may recover attorneys fees under the MMWA

Attorneys Fees – Wrongful Death

Wagner, Vaughan, Mclaughlin & Brennan, P.A. v. Kennedy Law Group

Case No. SC08-1525, 2011 WL 1304921 (Fla. 4/7/2011)

Survivors in a wrongful death case are entitled to be represented by counsel of their own choosing, and that counsel is entitled to reasonable compensation. Attorneys fees from a wrongful death suit are to be awarded in a manner commensurate with the attorneys' work. In those circumstances where "all of the survivors have a commonality of interest and a single attorney can represent those interests," that single attorney will be entitled to attorney's fees based on the entire recovery. However, where there is no commonality of interest among the survivors, the personal representative's attorney cannot represent all of the survivors without their consent. In those circumstances where survivors have competing claims and are represented by separate attorneys, the fee payable to the personal representative's attorney and the survivors' separate counsel should be determined by the work performed by each."

Experts - Disclosure

Thompson v. Wal-Mart

Case No. 3D10-146, 2011 WL 904552 (Fla. 3d DCA 3/16/2011)

The defense should not have been permitted to offer new expert opinions, and an extensive new PowerPoint illustrating them, that were not disclosed in the expert's deposition or in a proffer of the expert's testimony made at a hearing a few weeks before

trial. The expert testified in deposition that he could not determine what caused the plaintiff's wrist problem.

Before trial, defense counsel proffered that the expert's opinions were the same as in his deposition. At trial, the expert testified that the wrist problems were caused by degeneration from a previous fall, based on measurements he took from an MRI. In deposition, he said he could not take any such measurements from the MRI. He illustrated his reasoning with a forty-five slide PowerPoint, not disclosed to plaintiff until the night before the last day of trial.

Citing *Binger v. King Pest Control*, 401 So.2d 1310 (Fla. 1981), the Third District reversed. The court held that plaintiff was prejudiced because her own expert already had testified without any reference to these new opinions, and there was not sufficient time to prepare cross examination or rebuttal. The court also cautioned against allowing the use of undisclosed last-minute "props" such as the PowerPoint.

Graves Amendment

Vargas v. Enterprise Leasing Co.

No. SC08-2269, 2011 WL 1496474
(Fla. 4/21/2011)

The Graves Amendment, 49 U.S.C. §30106, preempts §324.021(9)(b)(2), Fla. Stat., the short term car rental statute. The court affirms a summary judgment for the rental car company.

Under the Supremacy Clause, state laws may be preempted (1) where express federal statutory language so provides; (2) where federal law has so thoroughly occupied a legislative field as to create a reasonable inference that there is no room for the state to supplement it; or (3) where a state law conflicts with a federal law. This statute falls into the third category.

The Florida statute is not exempted from preemption as a "financial responsibility law" under the savings clause of 49 U.S.C. §30106(b).

Still pending before the Court is a long term lease case, *Rosado v. DaimlerChrysler*, 1 So.3d 1200 (Fla. 2d DCA 2009), which the Court had stayed pending its disposition of *Vargas*.

Insurance Bad Faith

Genovese v. Provident Life and Accident Ins. Co.

Case No. SC06-2508, 2011 WL 903988
(Fla. 3/17/2011)

An insured is not entitled to discovery of an insurer's attorney-client privileged communications in a statutory first party bad faith case. The opinion "is not intended to undermine any statutory or judicially created waiver or exception to the privilege."

United Automobile Ins. Co. v. Estate of Levine

Case No. 3D09-3234, 2011 WL 1135518
(Fla. 3d DCA 3/30/11)

Many of us remember with great sadness the loss of Judge Steve Levine. Judge Levine and his passenger were killed when United Auto's insured crashed into them. The Third District affirmed a bad faith verdict and judgment in favor of the Estate of Judge Levine, as assignee of United Auto's insured. The court found that a jury question existed because of the multiple documents that accompanied the insurer's tender, and because of the adjuster's failure to follow up.

The insurer's tender of a check for the policy limits was accompanied by demands for numerous documents. These included a breathtakingly broad release. Among other things, it would have precluded the Estate's claims against other tortfeasors, including the bar that served drinks to the insured before the crash. The insurer also included an equally broad hold harmless agreement. When the Estate did not accept the offer, the insurer "fail[ed] to follow up in more than a superficial way."

After the Estate obtained a $5.2 million verdict against the insured, the Estate obtained an assignment of the insured's bad faith claim and sued the insurer. The insurer presented no expert witnesses at the bad faith trial. The jury found for the Estate on the bad faith claim. The Third District affirmed.

First, the trial court did not abuse its discretion in excluding evidence that United Auto promptly settled the claims of Judge Levine's passenger and the insured's injured passenger. The insurer argued that these settlements tended to prove its good faith toward its insured. The fact that one independent claimant negotiated separate settlement terms did not tend to prove whether the insurer acted properly regarding the claim of another claimant. Moreover, the evidence risked distracting the jury with a "trial within a trial" on the issue of why the passenger and United Auto settled while the Levine estate did not. For example, the Levine estate wanted to preserve a claim against the bar that served alcoholic beverages to the insured. "The focus in a bad faith case is not on the actions of the claimant but rather on those of the insurer in fulfilling its obligations to the insured." *Berges v. Infinity Ins. Co.*, 896 So.2d 665, 677 (Fla. 2005). The insurer's duty is to protect the insured.

Second, the trial court did not abuse its discretion in allowing the Estate to reopen its case. After the Estate rested, the insurer moved for a directed verdict on the grounds that the plaintiff did not prove the validity of the assignment. The court allowed the Estate to present evidence about the assignment to the Estate of the insured's claim. The assignment was not a required element of the Estate's bad faith claim; a judgment creditor of the insured may sue the insurer directly without an assignment. Therefore, the assignment could affect only the entitlement to attorney's fees. The evidence was not presented in front of the jury. The insurer was not prejudiced.

Third, the jury instruction on the insurer's defense of the unwillingness to settle did not improperly shift the burden of proof. The instruction is not set out in the opinion.

Fourth, the trial court properly denied the insurer's motion for directed verdict. Although the insurer promptly sent a check for the policy limits, it transmitted the check with a "Release of All Claims" and a "Hold Harmless and Indemnification Agreement," along with a letter demanding (1) a subrogation waiver from the UM carrier, (2) disclosure of all medical/health insurance liens and subrogation claims, (3) written confirmation that those liens and claims would be satisfied out of the proceeds of the settlement, (4) the hold harmless agreement and (5) letters of administration. The release and hold harmless were "sweeping in their breadth and scope." For example, the release would have released all of the Estate's claims against anyone, including against the bar that served the insured drinks before the crash. The hold harmless agreement required the Estate to hold the insurer harmless from "any and all other Insurer's claims or subrogated liens."

United Auto's "initial enthusiasm for tendering its policy limits to the Levine estate pales when set against the one-size-fits-all release required by UAIC, UAIC's failure to follow up in more than a superficial way (in a case plainly involving a catastrophic claim), and UAIC's failure to present expert testimony responsive to the Estate's expert. The case was properly submitted to the jury.

Insurance - Life Insurance - Void

TTSI Irrevocable Trust v. Reliastar Life Ins. Co.

Case No. 5D10-1459, 2011 WL 1810601 (Fla. 5th DCA 5/13/2011)

An insurance agent arranged for a life insurance policy for a client, naming the TTSI Irrevocable Trust as beneficiary. On the application, it listed the relationship between the insured and beneficiary as "family trust;" in reality there was no family relationship. Because the Trust had no insurable interest in the insured's life, the policy was void ab initio and the Trust was not entitled to a refund of premiums. Because the insurance agent is also a licensed attorney, the court sent a copy of its opinion to the Florida Bar.

Insurance – Uninsured Motorist

Swan v. State Farm Mut. Auto. Ins. Co.

Case No. 3D10-107, 2011 WL 1563934 (Fla. 3d DCA 4/27/2011)

University of Miami Law Professor Alan Swan was tragically killed by an uninsured motorist. The family had two vehicles insured under separate State Farm policies. They had stacked UM coverage under the policy for the car involved in the crash, but had rejected UM coverage in the policy covering their other car. Despite the fact that they purchased stacked coverage for one vehicle, they were not entitled to stack UM coverage with the other vehicle, because they paid no premium for UM coverage on that vehicle. The court held that UM coverage is based on the number of premiums paid.

"While the policy premium for non-stacked coverage is at least twenty percent less than the premium for stacked coverage, non-stacked coverage is subject to numerous coverage limitations that are not applicable to stacked coverage. See §627.727(9)(a)-(e), Fla. Stat. (2010). These limitations include not just the inability to add together (or "stack") the UM liability limits of two or more motor vehicle policies—which is the primary focus of the appellants—see § 627.727(9)(a), Fla. Stat. (2010), but also the restriction that non-stacked coverage does not apply to an insured who is injured 'while occupying any vehicle owned by such insured for which uninsured motorist coverage was not purchased.' 627.727(9)(d), Fla. Stat. (2010). Unlike stacked coverage, non-stacked UM coverage does not provide coverage for every vehicle that the insured owns— it only provides coverage for the vehicle on which the UM premium was paid."

Jury Interview

Simon v. Maldonado

Case No. 3D08-2369, 2011 WL, 1485978 (Fla. 3d DCA 4/27/2011)

An affidavit in support of a motion for jury interview in a medical malpractice case was insufficient where it alleged only the "possibility" of juror misconduct, and the information allegedly withheld was not material. The juror admitted during voir dire working in the insurance department of a hospital and being involved in litigation against a doctor. The litigation that was not disclosed were minor collection matters, liens and mortgage foreclosures, and it did not appear that the juror was even aware of some of them. Moreover, the plaintiff never asked in voir dire whether the juror had had any legal claims against her, only whether she had made any claims.

In order to demonstrate the right to a jury interview or a new trial based on juror misconduct, the courts have imposed a three part test. "First, the complaining party must establish that the information is relevant and material to jury service in the case; second, that the juror concealed the information during questioning; lastly, that the failure to disclose the information was not attributable to the complaining party's lack of diligence." See *De La Rosa v. Zequeira*, 659 So.2d 239 (Fla. 1995).

The court also holds that the trial court did not err in allowing evidence of the negligence of a subsequent treating doctor, and allowing that doctor's name to go on the verdict form as a *Fabre* defendant. The court holds that such evidence is admissible unless the plaintiff can prove that the original

defendant was liable as a matter of law for the negligence of the subsequent defendant.

Med Mal - Presuit - Certiorari Jurisdiction

Williams v. Oken

Case No. SC10-92, 2011 WL 1675242 (Fla. 5/5/2011)

The District Court of Appeal did not have certiorari jurisdiction to review an order denying a motion to dismiss to determine whether the plaintiff's med mal presuit expert was qualified under the medical malpractice statutes. Certiorari review is permitted solely to ensure that the procedural aspects of the presuit requirements are met. The District Court could grant certiorari to determine whether the plaintiff complied with the procedural presuit requirements in terms of submitting a corroborating affidavit. However, the District Court exceeded the scope of certiorari review when it granted the petition to determine whether the plaintiff's presuit expert was a qualified expert under the statute.

The Court discussed the analogous issue of the scope of certiorari review of an order granting leave to amend to plead punitive damages. Citing *Globe Newspapers, Inc. v. King*, 658 So.2d 518 (Fla. 1995), the Court explained:

A review of *Globe* supports Williams' arguments and demonstrates three things: (1) that a defendant cannot demonstrate material harm required for certiorari review concerning whether a punitive damages claim is viable, or by analogy, an expert is qualified, because those things do not deprive the defendant of the statutorily guaranteed process, (2) utilizing certiorari to review the trial court's findings regarding whether a claim for punitive damages exists, or, by analogy, whether an expert is qualified amounts to reviewing the sufficiency of the evidence, and (3) that granting a petition for writ of certiorari to review the sufficiency of the evidence is inappropriate.

Premises Liability

Slaats v. Sandy Lane Residential, LLC.

Case No. 3D10-1896, 2011 WL 1485997 (Fla. 3d DCA 4/20/2011)

Rejecting the trial court's conclusion that a step-down was open and obvious, the court reversed summary judgment. Genuine issues of material fact precluding summary judgment were created by the plaintiff's testimony that she could not see the step-down because it was uniform in color and the sun was shining directly in her eyes, and by the testimony of an architectural expert who said the step-down created a unique, special hazard because the drop was hidden and unexpected.

Statutes - Retroactivity

Cohn v. Grand Condominium Ass'n, Inc.

Case No. SC10-430, 2011 WL 1158938 (Fla. 3/31/2011)

A statute governing voting in mixed use condominiums could not be applied retroactively to change the voting percentages required for board of directors elections. Retroactive application would violate the impairment of contracts provision of Art. I, §10, Fla. Const.

Stipulations

Central Square Tarragon LLC v. Great Divide Ins. Co.

Case No. 4D09-4795 (Fla. 4th DCA 4/27/2011)

The trial court erred in submitting to the jury the issue of whether the plaintiff was the assignee of the insurance proceeds at issue where the parties stipulated to the assignment in their joint pretrial statement. The court strongly condemns the insurance company's "gotcha" tactics.

The insurer agreed in the joint pretrial statement that the only issues for trial were whether it breached the insurance contract and, if so, how much it owed. It included the fact of the assignment of the proceeds to the plaintiff in the "agreed facts." Nevertheless, at trial, the insurer moved for directed verdict on the failure of the plaintiff to prove the assignment, and ultimately got a jury instruction on the issue. The jury found in the insurer's favor. The Fourth District reversed. The court stated:

> Here, the purchaser and insurer entered into a joint pretrial stipulation that limited the dispute to the amount to be paid to the purchaser for damages from Hurricane Wilma. The parties stipulated that: (1) the named insured assigned its right to the insurance proceeds to the purchaser; and (2) the insurer tendered payment to the purchaser for the damage. The disputed issues were whether the insurer or the purchaser breached the insurance contract and the amount of damages owed to the purchaser, if any. The assignment was never at issue. In fact, throughout hearings and opening statement, insurance counsel admitted the dispute concerned only the amount of damage—not the purchaser's entitlement.