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Case Law Update

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Amendment — Relation Back; Impact Rule

Doe v. Sinrod

Case No. 4D11-3004 (Fla. 4th DCA May 8, 2013)

In an action arising out of sexual abuse of children by a teacher, an amendment to the complaint to add claims for violation of title IX as to the children relates back to the filing of the original complaint. The Title IX claim arose from the same conduct and resulted in the same injury as the original negligence claim.

However, an amendment to add claims on behalf of the parents for negligent infliction of emotional distress fails to state a cause of action because of the impact rule. The parents did not suffer an impact, nor did they see or hear the abuse nor arrive at the scene as it was occurring.

Arbitration

Mckenzie v. Betts

Case No. SC11-514 (Fla. April 11, 2013)

The Supreme Court has held that it cannot invalidate, on public policy grounds, a class action waiver provision in a consumer contract providing for arbitration, because such a determination is preempted by the Federal Arbitration Act. "[T]he FAA preempts invalidating the class action waiver in this case on the basis of it being void as against public policy. . . . We decline to answer the certified question because it is moot in light of [AT&T Mobility, LLC v.] *Concepcion*, [131 S. Ct 1740 (2011)]. In other words, even if the Fourth District is correct that the class action waiver in this case is void under state public policy, this Court is without authority to invalidate the class action waiver on that basis because federal law and the authoritative decision of the United States Supreme Court in Concepcion preclude us from doing so."

Raymond James Financial Serv. v. Phillips

Case No. SC11-2513 (Fla. May 16, 2013)

Section 95.011, Fla. Stat. defines the term "actions" to which the statute of limitations applies. The Supreme Court holds that the term "action" includes any "civil action or proceeding" and that arbitration is a "proceeding." Therefore, the statute of limitations applies to arbitrations as well as court actions.

Damages - Loss of Future Earning Capacity

Estrada v. Mercy Hospital, Inc.

Case No. 3D12-1529 (Fla. 3d DCA April 10, 2013)

The parties arbitrated this medical malpractice claim under §766.207, Fla. Stat. Pursuant to the statute, liability was admitted and the only issue was damages. The case involved a failure to diagnose breast cancer, which substantially reduced the plaintiff's life expectancy. The court held that her damages for loss of future earning capacity must be based on her pre-injury life expectancy, not on her life expectancy as reduced by the defendant's negligence.

An award of damages is supposed to "place the injured party in an actual, as distinguished from a theoretical position, financially equal to that which he would have occupied had his injuries not occurred." *Renuart Lumber Yards, Inc. v. Levine*, 49 So. 2d 97, 98 (Fla. 1950). This is true where the plaintiff's life expectancy is affected by the tortfeasor's negligence. The defendant's failure to timely diagnose and treat the plaintiff's cancer is the reason for her shortened life expectancy. "Accordingly, her damages for loss of future earning capacity must be based upon her pre-injury life expectancy. To rule otherwise would result in under-compensation for [the plaintiff] and in essence reward [the defendant] for its negligence."

Graves Amendment

Rosado v. DaimlerChrysler Financial
No. SC09-390 (Fla. April 4, 2013)

The Graves Amendment preempts liability under section 324.021(9)(b)(1), Florida Statutes (2002), which defines when a long-term lessor remains the owner of a leased motor vehicle and thereby subject to vicarious liability for damages caused by the vehicle under Florida's dangerous instrumentality doctrine. Vicarious liability claims against long-term lessors are preempted.

HIPAA

Opis Mgmt. Resources, LLC. v. Secretary Florida Agency for Health Care Admin
No. 12-12593 (11th Cir. April 9, 2013)

Section 400.145, Fla. Stat., which provides for the release of medical records of deceased residents of nursing homes to certain specified individuals is preempted by the confidentiality provisions and regulations of the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 U.S.C. § 1320d to d-9. Therefore, a nursing home properly declined to provide the records to spouses and attorneys-in-fact of deceased residents who had not been appointed personal representatives of the residents' estates.

The HIPAA "privacy rule," 45 C.F.R. §164.502(a), 164.508(a)(1) prohibits "covered entitities" from disclosing "protected health information" except in specified circumstances.Section 164.502(a)(1)(i), (g)(1) allows disclosure to a "personal representative." The court refuses to interpret the term "personal representative" to include a spouse.

This means that, in order to get the medical records of a deceased nursing home resident, an estate will have to be opened and a personal representative will have to be appointed.

Insurance – Bad Faith

Hunt v. State Farm
Case No. 2D11-6484 (Fla. 2d DCA April 5, 2013)

An appraisal award satisfies the requirement under §624.155, Fla. Stat. and *Blanchard v. State Farm Mut. Aut. Ins. Co.*, 575 So.2d 1289 (Fla. 1991) of a "determination of the existence of liability on the part of the uninsured tortfeasor and the extent of the plaintiff's damages..." prior to bringing a statutory bad faith action.

The Civil Remedy Notice required by the statute is not required to state the specific amount required to cure the violation.

Even if the claim had been brought prematurely, summary judgment is not the appropriate remedy.

Insurance – Procedure — Adding Insurer Before Final Judgment

Geico Gen. Ins. Co. v. Williams
Case No. 4D11-3144 (Fla. 4th DCA April 10, 2013)

Section 627.4136(4), Fla. Stat., provides, in part, "At the time a judgment is entered or a settlement is reached during the pendency of litigation, a liability insurer may be joined as a party defendant for the purposes of entering final judgment or enforcing the settlement by the motion of any party, unless the insurer denied coverage under the provisions of s. 627.426(2) or defended under a reservation of rights pursuant to §627.426(2). A copy of the motion to join the insurer shall be served on the insurer by certified mail."

The plaintiff sought to add Geico as a defendant for the purpose of taxing fees and costs. The court held that the insurer is a party as a matter of law for purposes of taxation of fees and costs under §627.4136(2). Although a final judgment had been entered in the case before the plaintiff filed the motion, that judgment specifically reserved jurisdiction on fees and costs. The court held that, for purposes of fees and costs, Geico was timely added before final judgment was entered on fees and costs.

Limitations

Estate of Eisen v. Philip Morris USA, Inc.
Case No. 3D12-1114 (Fla. 3d DCA April 10, 2013)

This wrongful death action originally was brought by the surviving spouse, as personal representative of the estate, even though he never had been appointed personal representative. After a personal representative was appointed, an amendment to substitute that personal representative related back to the filing of the original complaint, even though the husband never had authority to file the complaint.

In determining whether an amendment to substitute a party relates back under Fla. R. Civ. P. 1.190, the courts consider (1) whether the timely-filed action gave the defendants fair notice of the legal claim and underlying allegations; (2) whether the is an identity of interest between the original and substituted plaintiffs; (3) whether the amendment caused any prejudice to the defendants; and (4) whether the amendment to substitute plaintiffs would create a "new' cause of action.

The original complaint was not a nullity. Because the proposed amendment merely substituted one nominal plaintiff for another, involved nominal plaintiffs sharing an identity of interest,

resulted in no change to the real parties in interest, did not affect or alter the underlying allegations or claims in the complaint, and caused no prejudice to the defendants, the amendment related back to the filing of the original complaint.

NICA

Samples v. Florida Birth-Related Neurological Injuries Compensation Ass'n

Case No. SC10-1295 (May 16, 2013)

The Florida Birth-Related Neurological Injuries Compensation Act (NICA) provides a no-fault alternative to malpractice litigation for a limited group of birth-related neurological injuries. If NICA applies, certain health care providers who comply with its requirements are immune from litigation. Section 766.31(1)(b)1 provides for an award of $100,000 to the parents. The Supreme Court held that the total award available is $100,000, regardless of whether the child has one parent or two.

The Supreme Court held that this limitation does not violate equal protection, is not void for vagueness, and does not violate the constitutional right of access to courts.

This does not dispose of the issue of caps in medical malpractice actions. The Court was careful to distinguish the question of caps in an action where fault is an issue:

> Whereas the provision of the Medical Malpractice Act at issue in *St. Mary's Hospital* [*Inc. v. Phillipe*, 769 So. 2d 961 (Fla. 2000)] expressly concerns fault-based noneconomic damages for survivors of the deceased, the Plan at issue here establishes a system of no-fault compensation. The no-fault character of the Plan sets the parental award provision apart from the statutory limitation on fault-based damages at issue in *St. Mary's Hospital*. Limitations on damages that raise equal protection concerns under a fault-based system are dissimilar and appropriately viewed differently than limitations on compensation under a system where eligible claimants are assured of a recovery without regard to fault.

Offer of Judgment / Proposal for Settlement

In Re: Amendments to Florida Rule of Civil Procedure 1.442

Case No. SC13-224 (Fla. April 11, 2013)

Rule 1.442(f)(1) has been amended. The amendment clarifies that a notice of acceptance of a proposal for settlement must be served within thirty days of service of the proposal, and that new rule 2.514(b), which allows an additional five days to act after service by mail or e-mail, does not apply

Bradshaw v. Boynton-JCP Associates, Inc.

Case No. 4D11-4242 (Fla. 4th DCA April 10, 2013)

In a case involving multiple defendants and multiple plaintiffs, the offer was unenforceable because it was ambiguous as to whether it referred to singular or plural plaintiffs or defendants. "The offer, entitled 'Defendant's Joint Proposal for Settlement,' also appears to have been adopted from a form without sufficient editing; it requires 'Plaintiff'(s)' to 'execute a stipulation,' and 'Plaintiff(s)' to 'execute a general release of "Defendant(s).'"

Trade Secrets

Cooper Tire & Rubber Co. v. Cabrea

Case No. 3D12-2922 (Fla. 3d DCA May 8, 2013)

The Third District granted cert and quashed an order requiring the defendant to produce documents containing trade secrets because the trial court, while apparently finding that some of the documents did contain trade secrets, failed to specifically determine which documents, if any, contained trade secrets or to make a determination of reasonable necessity. Specific findings are required. It is not enough for the trial court to simply order the documents produced under a protective order.

Workers Comp Immunity

Pyjek v. Valleycrest Landscape Dev., Inc.

Case No. 2D12-2999 (Fla. 2d DCA May 15, 2013)

The court reversed a summary judgment that had been granted in favor of a subcontractor on a workers comp immunity defense. Section 440.10(1)(e), Fla. Stat., provides that a subcontractor is immune from liability for an injury to an employee of another subcontractor if the defendant subcontractor provides workers comp to its own employee and if the defendant's gross negligence was not "the major contributing cause of the injury."

The court found there was a genuine issue of material fact as to whether the defendant was grossly negligent in replanting a palm tree that already had fallen over once. The palm tree fell over a second time, injuring the plaintiff, who was there working for a different subcontractor on a contract to install a fence nearby. The tree was between 18 and 30 feet tall.

To establish gross negligence, the plaintiff had to prove: "(1) a composite of circumstances which, together, constitute a clear and present danger; (2) an awareness of such danger by the subcontractor; and (3) a conscious voluntary act or omission by the subcontractor that is likely to result in injury"