Case Law Update

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Amendment 3

As you all must know by now, Amendment 3 passed. The scope and impact of this amendment, and whether it is enforceable at all, will have to be decided by the courts. I personally find it to be extremely poorly written. It says:

Article I, Section 26 is created to read "Claimant's right to fair compensation." In any medical liability claim involving a contingency fee, the claimant is entitled to receive no less than 70% of the first $250,000.00 in all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants. The claimant is entitled to 90% of all damages in excess of $250,000.00, exclusive of reasonable and customary costs and regardless of the number of defendants. This provision is self-executing and does not require implementing legislation.

This Amendment shall take effect on the day following approval by the voters.

To begin with, I am sure there will be plenty of litigation over the meaning of the phrases "70% of the first $250,000.00 in all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement or otherwise, and regardless of the number of defendants," and "90% of all damages in excessive $250,000, exclusive of reasonable and customary costs and regardless of the number of defendants."

I am also convinced that it cannot be applied retroactively to attorneys fees contracts that were in effect before the amendment's effective date. In allowing the amendment on the ballot, the Supreme Court said "[W]e are not persuaded by the argument that the amendment affects portions of the Florida Constitution prohibiting the impairment of citizens' contract rights because it does not propose to transcend similar limitations on attorney-client fee arrangements that are currently in place." In re Advisory Opinion to the Attorney General re Medical Liability Claimant's Compensation Amendment, 880 So.2d 675, 678 (Fla. 2004). See Art. I, 10, Fla. Const.: "No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed.". The United States Constitution also prohibits impairment of contracts: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ." Art. I, 10, Cl. 1.

Arbitration

DeLaurier v. American Welding Society, Inc.
881 So.2d 613 (Fla. 3d DCA 2004)

An employee's whistleblower claim was required to be arbitrated where the arbitration clause in the employment agreement provided for arbitration of "any controversy or claim between the Executive and the Corporation arising out of or relating to this Agreement."

Steve Owren, Inc. v. Connolly
877 So.2d 918 ((Fla. 4th DCA 2004)

The defendant presented evidence of its habit and practice to obtain the signature of all employees on an arbitration agreement, but could not produce the agreement and had no witnesses to testify that the document was signed in their presence. The plaintiff testified that she did not sign any such agreement. The trial court found the plaintiff more credible. The DCA affirmed the denial of arbitration, holding that the employee was not bound by the unsigned agreement merely because she accepted the benefits of employment with the defendant.

Estate of Etting v. Regents Park at Aventura, Inc.
29 FLW D2342 (Fla. 3d DCA 2004)

An arbitration agreement between a nursing home and a resident was not invalidated by the fact that the resident was blind at the time she signed it, where there was no evidence that the nursing home coerced the resident or prevented her from knowing the contents of the agreement. It is my

understanding that the plaintiff has moved for rehearing en banc. Cf., e.g., *McGill v. Henderson*, 98 So. 2d 791 (Fla. 1957) (where defendant took advantage of plaintiff's illiteracy, plaintiff could obtain equitable relief from release).

Attorneys Fees

Francis v. Akerly
29 Fla. L. Weekly D2212 (Fla. 4th DCA 2004)

Relying on *Sarkis v. Allstate*, 863 So.2d 210 (Fla. 2003), which held that a court may not apply a multiplier to a fee award under the offer of judgment statute, the Fourth District holds that no multiplier may be awarded under the nonbinding arbitration statute, 44.103, Florida Statutes. The court certifies the question to the Florida Supreme Court.

Allstate Indem. Co. v. Hicks
880 So.2d 772 (Fla. 5th DCA 2004)

In general, a party is entitled to recover fees for litigating entitlement to fees but not for litigating the amount under 627.428, Florida Statutes, the insurance attorneys fees statute. Here, the court holds that the issue of whether a multiplier is applicable concerns the amount of fees, not entitlement, and a party may not recover fees for litigating it. The court certifies to the Florida Supreme Court the question of whether a multiplier may be applied to fee awards under 627.428. I find this certification troubling, because a long line of cases, including leading Supreme Court cases, have allowed multipliers under this statute. See, e.g., *State Farm Fire & Casualty Co. v. Palma*, 629 So.2d 830, 833 (Fla.1993); *Standard Guar. Ins. Co. v. Quanstrom*, 555 So.2d 828 (Fla.1990).

Discovery Privilege

Kay Scholer LLP v. Zalis
878 So.2d 447 (Fla. 3d DCA 2004)

The failure to respond to discovery or to provide a privilege log, after numerous requests and agreed extensions of time, constituted a waiver of any privilege. The court cites with approval *TIG Ins. Co. v. Johnson*, 799 So.2d 339 (Fla. 4th DCA 2001). Rule 1.280(b)(5) requires a privilege log in order to preserve a privilege. In addition, because of recalcitrance and misleading the trial court, the trial court must conduct a hearing to determine a reasonable amount of attorneys fees to be paid for the unnecessary litigation.

Employment Law

Russell v. KSL Hotel Corp
29 Fla. L. Weekly D2119 (Fla. 3d DCA 2004)

The court reinstated a judgment for the plaintiff in a sexual harassment, hostile work environment, retaliatory discharge case. The trial court "improperly utilized a divide-and conquer approach to separate the alleged instances of misconduct into sexual and non-sexual conduct. Rather, any harassment or other disparate treatment of an employee that would not occur but for the gender of the employee may, if there is a pattern or pervasiveness in the conduct, constitute 'hostile work environment' sexual harassment. Moreover, offensive conduct is not required to include sexual overtones in every instance."

Immunity Statutory

McGraw v. R and R Investments
877 So.2d 886 (Fla. 1st DCA 2004)

I didn't know that the horse show industry had gotten some statutory immunity from litigation. Section 773.04, Florida Statutes, requires sponsors of equine activities to post warnings of their nonliability for injuries or death resulting from the inherent risks of equine activities. Because the defendant failed to post the notice, it was not entitled to the immunity provided in 773.02 for sponsors of equine activities for injuries or death of the participant resulting from any of the inherent risks of equine activities. The immunity is broad, but it has several exceptions where, for example, the sponsor provided equipment it knew or should have known was defective, or did not take reasonable steps to determine that the participant was qualified to handle a horse it provided; or if the injury was caused by a known latent condition on the premises owned by the sponsor. The broadest exception under the statute, besides lack of notice, is when the sponsor "commits an act or omission that a reasonably prudent person would not have done or omitted under the same or similar circumstances or that constitutes willful or wanton disregard for the safety of the participant, which act or omission was a proximate cause of the injury.

Impact Rule

Willis v. Gami Golden Glades, LLC.
881 So.2d 703 (Fla. 3d DCA 2004)

The plaintiff was robbed in a motel parking lot. A gun was held to her head and she was forced to lift her clothes while the robber patted her down looking for money. The plaintiff suffered severe emotional distress, with physical manifestations including sexual dysfunction, peripheral temperature changes, muscle tightening and increased sweat gland activity.

The court held that the impact rule barred the plaintiff's claim, but certified four questions to the Florida Supreme Court:

1. Is the evidence that the plaintiff was touched against her will by the pistol placed to her head and in "patting down" her body sufficient to satisfy the Florida impact rule? See and compare, e.g., *Gracey v. Eaker*, 837 So.2d 348, 355 (Fla.2002); *Zell v. Meek*, 665 So.2d 1048 (Fla.1995); *Eagle-Picher Industries, Inc. v. Cox*, 481 So.2d 517 (Fla. 3d DCA 1985), review denied, 492 So.2d 1331 (Fla.1986).

2. Is the evidence that the plaintiff was apparently the object of an assault and multiple batteries sufficient to satisfy a "free standing tort" exception to the impact rule which may exist in Florida? See *Kush v. Lloyd*, 616 So.2d 415 (Fla.1992).

3. Is the innkeeper-guest relationship involved in this case a "special relationship" under an exception to the impact rule which may exist in Florida? *Rowell v. Holt*, 850 So.2d 474 (Fla.2003); *Gracey v. Eaker*, 837 So.2d 348 (Fla.2002).

4. Should the impact rule be abolished?

The plaintiff is pursuing Supreme Court review, and the court has ordered briefing.

Williams v. Worldwide Flight Services
877 So.2d 869 (Fla. 3d DCA 2004)

The plaintiff employee did not state a cause of action for intentional infliction of emotional distress although his supervisor repeatedly called him the "n" word, and "monkey" in front of other employees and over the radio, falsely accused him of stealing, threatened him with firing, tried to build up false accusations in his personnel file, and assigned him to difficult and hazardous work, outdoors in bad weather. The court thinks this is not outrageous enough, and does not satisfy the impact rule. I think the ruling is unfortunate.

Insurance Dec Action

Higgins v. State Farm
29 Fla. L. Weekly S630 (Fla. 2004)

A declaratory judgment action to determine coverage and duty to defend was proper even while the main tort action was pending, even though it was necessary to determine factual issues in the dec action. The trial court had authority to allow the dec action to proceed first. The court may also first determine the duty to defend and abate the part of the dec action relating to the duty to indemnify until the conclusion of the underlying tort action. Acknowledging the wide variety of circumstances in which these issues arise, the Court refuses to set a hard and fast rule for which issues should be tried first. The Court "recede[s] from *Columbia Casualty Co. v. Zimmerman*, 62 So.2d 338 (Fla.1952)," and its progeny.

With respect to the duty to defend, however, the Court holds, consistent with a long line of precedent, that "an insurer's obligation to defend is determined solely by the claimant's complaint if suit has been filed. . . . This decision should in no way be as read as a rejection of the principle . . . that '[t]he allegations of the [underlying] complaint govern the duty of the insurer to defend.' . . . Therefore, when suit is filed against an insured, there generally is no need for a declaratory action in respect to the insurer's obligation to defend."

Insurance PIP

Direct General Ins. Co. v. Morris
29 Fla. L. Weekly D2310 (Fla. 1st DCA 2004)

Certifying conflict with the Fifth DCA's decision in *Hunter v. Allstate Ins. Co.*, 498 So.2d 514 (Fla. 5th DCA 1986), the First DCA holds that the PIP statute does not require the insurer to pay mileage for travel to a necessary medical treatment, but particular policy language may require such payment. The Third and Fourth DCA's agree with the First.

Nursing Home

Doyle v. Mariner Healthcare of Nashville, Inc.
29 Fla. L. Weekly D2307 (Fla. 2d DCA 2004)

Under the 1999 version of the nursing home act (chapter 400), in effect when the cause of action accrued, the trial court properly instructed the jury that for the resident's estate to recover on its residents' rights claim, the alleged violation of the resident's rights had to be a legal cause of his death. The court agrees with the Fourth District's decision in *Beverly Enterprises-Florida, Inc. v. Knowles*, 766 So.2d 335 (Fla. 4th DCA 2000). The court certifies conflict with the Fifth District's decision in *Estate of Youngblood v. Halifax Convalescent Center, Ltd.*, 874 So.2d 596 (Fla. 5th DCA 2004).

Pollution Strict Liability

Aramark Uniform v. Easton
29 Fla. L. Weekly S551 (Fla. 2004)

The Supreme Court unanimously holds that 376.313(3), Florida Statutes, creates a strict liability cause of action for pollution discharged from the defendant's property, without requiring proof that the defendant caused the pollution. The cause of action is separate from, and in addition to, any other causes of action.

The statute allows a cause of action "for all damages resulting from a discharge or other condition of pollution covered by 376.30-376.319. . . . Except as otherwise provided in subsection (4) or subsection (5), in any such suit, it is not necessary for

such person to plead or prove negligence in any form or manner. Such person need only plead and prove the fact of the prohibited discharge or other pollutive condition and that it has occurred."

The court holds: "On its face, therefore, section 376.313(3) departs from the common law by creating a damages remedy for the non-negligent discharge of pollution without proof that the defendant caused it. The only proof required is 'the fact of the prohibited discharge or other pollutive condition and that it has occurred.'" The absence of a causation requirement in the statute is not "a legislative oversight," but must be assumed to be deliberate.

Products Liability

Force v. Ford Motor Co.
879 So.2d 103 (Fla. 5th DCA 2004)

It was reversible error for the trial court to refuse to instruct the jury on the consumer expectations test "[the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer]" FSJI PL5. The consumer expectation test is recognized in Florida. *Cassisi v. Maytag*, 396 So.2d 1140 (Fla. 1st DCA 1981). This instruction applies to seat belts. The court rejects the argument that seat belts are "too complex" for a logical application of the consumer expectation standard. The court states that the Third Restatement "alternative design" test has not been adopted in Florida.

Sanctions

Robinson v. Nationwide Mut. Fire Ins. Co.
29 Fla. L. Weekly S629 (Fla. 2004)

Where the trial court struck the defendant's pleadings opposing the plaintiff's demand for judgment as a discovery sanction, the court could not afterwards consider the issue of whether the plaintiff's demand for judgment was timely. Once the defendant's pleadings were stricken, the court could not consider defenses raised in those pleadings. "[T]he district court erred in considering the merits of the respondent's position after concluding that there was no error in striking the filing that raised the issue of timeliness." See *Mercer v. Raine*, 443 So.2d 944 (Fla. 1983).

Separation of Powers

Bush v. Schiavo
29 Fla. L. Weekly S515 (Fla. 2004)

A statute that gave the governor the power to stay the removal of a feeding tube from one specific person, without any guiding standards for how the governor should exercise that power, and after a judge had already entered a final judgment determining the issue, violated the separation of powers. This was a unanimous decision. A judge's final judgment cannot be reversed by the legislature or the governor. Moreover, the legislature cannot delegate power to the governor without specific standards for how to exercise that power.

Setoff

Caruso v. Baumle
880 So.2d 540 (Fla. 2004)

Evidence of PIP benefits for purposes of setoff must be presented to the trier of fact. The jury must be instructed that plaintiff may not recover damages for which PIP benefits are paid or payable. The parties may stipulate to have the judge do it post trial. **Justices Pariente, Cantero** and **Anstead**, concurring, point out the need for new jury instructions addressing this issue.

Norman v. Farrow
880 So.2d 557 (Fla. 2004)

Pursuant to section 627.736(3), which bars all recovery of damages paid or payable by PIP benefits, the amount for which PIP benefits have been paid or payable is to be deducted by the trier of fact from the amount awarded as economic damages in the verdict. Those amounts are not recoverable. Following that deduction, the noneconomic damages awarded should be added and then the percentage of comparative negligence found by the trier of fact is to be applied to reduce the amount of damages which are recoverable from the torfeasor. The remainder is the amount of the judgment.

Sovereign Immunity

M.S. v. Nova Southeastern University
881 So.2d 614 (Fla. 4th DCA 2004)

Nova Southeastern ran a school for disabled children pursuant to a contract with the Broward County School Board. A number of children were molested by one of the employees. They sued Nova. Nova claimed sovereign immunity, and the trial court granted summary judgment for Nova. The DCA reversed, holding there were genuine issues of material fact as to whether the contract gave the school board sufficient control over Nova to make Nova its agent. The contract required the school board to pay Nova, and required Nova to comply with local and state health and safety standards, and the school board reserved the right to review the instructional program, audit records and bookkeeping procedures to determine compliance with the contract.

It also stated that each party assumed responsibility for the negligence of its own employees and agents. The court said

this was some evidence that the school board did not intend to make Nova its agent.

The court also rejected the argument that Nova was immune because it was carrying out a nondelegable duty of the school board to provide education to these children. "[E]ven if the School Board had such a duty, the doctrine of non-delegable duty would create liability for the School Board but not absolve Nova of its negligence."

Pollock v. Florida Dept. of Highway Patrol
882 So.2d 928 (Fla. 2004)

In a case arising out of a fatal accident caused by a tractor-trailer stalled in the road, the Highway Patrol did not own the road, which belonged to the Florida Dept. of Transportation, and thus had no duty to maintain the highway in a reasonably safe condition or warn of known dangers. A statute authorizing the FHP to remove stalled vehicles was permissive only, and did not create a duty. The FHP officers had no duty where they had not yet arrived at, or assumed control of, the scene of the stalled vehicle. As a result of a call notifying the FHP of the stalled truck, the FHP owed a general duty to the public, but not a special duty to the plaintiffs, and therefore there could be no liability.

Whistleblower Statute

Roland v. Fla. E. Coast. Ry.
873 So.2d 1271 (Fla. 3d DCA 2004)

The federal whistleblower statute protecting railroad employees does not pre-empt the Florida whistleblower statute. Therefore, the plaintiff's claim under the Florida statute should be allowed to proceed. The court explains the relationship between federal and state law in this area: "[I]n adjudicating the Florida whistleblower case, any applicable federal law and regulations regarding the operations and safety standards of railroads are, of course, controlling. As we view the matter, Congress has allowed an aggrieved plaintiff to elect to proceed in state court on a whistleblower claim. However, wherever federal law and regulations govern railroad operations and safety standards, federal law will be applied by the state court."

Workers Comp Immunity

Taylor v. School Board of Brevard County
29 Fla. L. Weekly S421(Fla. 2004)

Section 440.11(1), Florida Statutes, provides an exception to workers comp immunity for "employees of the same employer when each is operating in furtherance of the employer's business but they are assigned primarily to unrelated works within private or public employment." The Supreme Court holds that this exception must be interpreted narrowly. It does not apply in an action by a school bus attendant in an action against the school board for negligence of bus mechanics in maintaining the buses. The court overrules *Lopez v. Vilches*, 734 So.2d 1095 (Fla. 2d DCA 1999), which held that the exception applied to a funeral home's van driver's claim against the fellow employees who negligently maintained the van. However, as **Justice Lewis** points out in a concurring opinion, the court provides no real guidance for how to apply the exception in other cases. The majority says, "While we would like to be more precise in providing guidance to those initially charged with deciding disputes based upon this exception, we are limited by our lack of precise knowledge of the legislative intent behind the exception and the reality that we could not hope to contemplate the myriad of factual circumstances that may give rise to the issue."

Martin Electronics, Inc. v. Jones
877 So.2d 765 (Fla. 1st DCA 2004)

Mere passive acceptance of worker's compensation benefits does not constitute an election of remedies that would preclude a tort suit against the employer. But filing a petition for additional attendant care benefits, litigating before the judge of compensation claims on the theory that a covered industrial accident occurred, and obtaining an order predicated on the finding that the worker sustained an injury by accident "implie[d] a conscious intent ... to choose compensation benefits over a tort action." The court certifies the question to the Florida Supreme Court: "May an employee receiving workers' compensation benefits litigate entitlement to additional benefits then, having obtained an award of the additional workers' compensation benefits, bring suit in circuit court for the personal injuries sustained on the job that were the basis for the award?"

The Bombay Co. v. Bakerman
29 Fla. L. Weekly D2282 (Fla. 3d DCA 2004)

Reversing itself on rehearing, the court holds that, where an employer knew that its ladder was dangerous and deteriorating, and still required employees to climb on it despite repeated complaints, the employee's claim for injuries resulting from a fall from the ladder was barred by worker's compensation immunity. The court considers the "substantial certainty" test, but adds a requirement that the employer engage in an effort to hide the danger from the employee. In my opinion, this added requirement is difficult to reconcile with the Supreme Court's decision in *Turner v. PCR, Inc.*, 754 So.2d 683, 686 (Fla.2000), which held that the "substantial certainty" test is an objective test and does not require specific intent. The plaintiff has retained me to move for rehearing and rehearing en banc.