Case Law Update

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Additur

Mora v. Waste Management

2005 WL 2373860 (Fla. 4th DCA 2005)

When a trial court enters an additur under §768.043, Florida Statutes, the court must allow the plaintiff the opportunity to reject the amount of damages set by the court and, if the plaintiff rejects it, the court must grant a new trial. The court acknowledges conflict with *Beyer v. Leonard*, 711 So.2d 568 (Fla. 2d DCA 1997), which held that the plaintiff is not a "party adversely affected" by the additur and that only the defendant is entitled to reject it.

Attorneys Fees

In Re: Amendment to the Rules Regulating the Florida Bar - Rule 4-1.5(f)(4)(B) of the Rules of Professional Conduct, Case No. SC05-1150

Many of you have filed comments to the "Grimes Petition." The petition asks the Court to enact an ethics rule limiting plaintiffs' attorneys fees in medical malpractice cases. The Court required everyone filing comments to file original and nine copies with the court, with a certificate of service showing service on John Harkness, Executive Director of the Florida Bar, and on Stephen Grimes. Electronic copies of all comments must also be filed. On October 12, the Court issued an order listing those whose compliance was somehow deficient, and allowing until November 1 for full compliance.

The order is on the Supreme Court website at:

http://www.floridasupremecourt.org/pub_info/summaries/briefs/05/05-1150/Filed_10-12-2005_OrderNoncompliance.pdf

Attorneys Fees – Time for Filing Motion

Certified Marine Expeditions v. Freeport Shipbuilding, Inc.

2005 WL 2313616 (Fla. 1st DCA Sept. 23, 2005)

Rule 1.525 requires service (not filing) of a motion for attorneys fees within 30 days of the filing of a final judgment. A motion served 31 days after the filing of the final judgment is untimely, even if the trial court's order reserved jurisdiction to award fees and costs. Cf. *Fisher v. John Carter & Assocs*., 864 So.2d 493 (Fla. 4th DCA 2004), holding that a reservation of jurisdiction in the final order does extend the time for filing the motion for fees.

Attorneys Fees – Prevailing Party

Terranova Corp. v. 1550 Biscayne Assoc.

2005 WL 2447860 (Fla. 3d DCA Oct. 5, 2005)

Where the plaintiff claimed it was entitled to a six percent commission on a transaction, and the defendant argued plaintiff was only entitled to 1.5 percent, and the court ruled that the plaintiff was entitled to three percent, neither party was the prevailing party, and neither was entitled to attorneys fees.

Attorneys Fees – 57.105

Connelly v. Old Bridge Village Co-op, Inc.

Case No. 2D04-4905 (Fla. 2d DCA Oct. 12, 2005)

Even though the defendants prevailed in their argument that they should not have been sued in the plaintiffs' declaratory judgment action, the defendants were not entitled to fees under §57.105. The issue was "not so obvious that the plaintiffs' attorney should have known that the claim was unsupported

by the material facts or the application of then-existing law to the material facts." Although the post-1999 version of the statute has expanded the power of the courts to award fees, it is still addressed to frivolous claims and defenses. It should be applied carefully to ensure that it does not lead to more expensive litigation and does not infringe on the right of access to courts under article I, §21, of the Florida Constitution.

Ex Parte Communications

Estate of Stephens v. Galen Health Care, Inc.
2005 WL 2398519 (Fla. 2d DCA 2005)

In a medical malpractice wrongful death case, the trial court's order allowing the defendant to communicate ex parte with any physicians or other health care providers responsible for treating the patient during the relevant time was a departure from the essential requirements of law.

Section 456.057(5)(a), Fla. Stat., provides that, except in worker's comp cases, "records may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient or the patient's legal representative or other health care practitioners and providers involved in the care and treatment of the patient, except upon written authorization of the patient." The exception for health care providers involved in the patient's treatment allows disclosure only to providers currently involved in the care of the patient. However, the defendant may have discussions with its employees and agents and former employees and agents because "there is no 'disclosure' when a hospital corporation discusses information obtained in the course of employment with its employees." The court analogizes to an attorney disclosing client confidences to his partners, associates, secretary or paralegal involved in the case.

The trial court's order was too broad because it did not limit discussions to the defendant corporation's present and former employees or agents.

Forum Non Conveniens

Fox v. Union Carbide Corp.
2005 WL 2292043 (Fla. 4th DCA Sept. 21, 2005)

Rule 1.061(g) requires a motion to dismiss based on forum non conveniens to be "served not later than 60 days after service of process on the moving party." Where a motion is untimely under that rule, the motion should be denied.

Insurance – Coverage

Basik Experts & Imports, Inc. v. Preferred Nat'l Ins. Co.
2005 WL 2439225 (Fla. 4th DCA Oct. 5, 2005)

An insurer's payment of a third party claim against the insured (in a case which the insurer defended under a reservation of rights) did not amount to a confession of judgment in a parallel dec action brought by the insured against the insurer to determine coverage. The court distinguishes payment of a first party claim, which does amount to a confession of judgment.

Jurors – Voir Dire

Taylor v. Magana
2005 WL 2439202 (Fla. 4th DCA Oct. 5, 2005)

A juror's concealment during voir dire that he was a defendant in a pending lawsuit constituted "concealment," even if it was not intentional. Where the lack of disclosure was not attributable to counsel's lack of diligence, and counsel's questions were specific, unambiguous, and not "cluttered with sophisticated or confusing legalese," a new trial was required.

Medicaid Lien

Strafford v. Agency for Health Care Administration
2005 WL 2467615 (Fla. 2d DCA Oct. 7, 2005)

In a case where medicaid paid the decedent's medical bills, the court held that the Agency for Health Care Administration (AHCA) was entitled to be paid before the proceeds were apportioned to the estate and the survivors. Prior to any judgment or settlement, AHCA must be given notice and a reasonable opportunity to file and satisfy its lien. Section 409.910(11)(f) provides that after costs, and attorneys fees calculated at 25 percent of the judgment or settlement, are deducted, one-half of the remaining recovery shall be paid to AHCA up to the total amount of medical assistance provided.

For a different view of this issue, see *Ahlborn v. Arkansas Dept. of Human Services* 397 F.3d 620 (8th Cir. 2005), holding that the state was entitled to a lien only on that portion of the plaintiff's recovery representing past medical expenses. The case relied on language in the federal medicaid law, 42 U.S.C. §1396p, also called the "anti-lien statute." The court held that the federal law preempts conflicting state law.

Medical Malpractice – Presuit

Bonati v. Allen
2005 WL 2398530 (Fla. 2d DCA Sept. 30, 2005)

A presuit affidavit that did not mention by name the doctor who recommended an unnecessary procedure, or discuss his activities, but only discussed the activities of other physicians who performed the procedure recommended by that defendant, did not satisfy the statutory presuit requirements as to the defendant who recommended the procedure. The court held that the affidavit only provided the required corroboration for the doctors who performed the procedure.

The court did not discuss Fla. R. Civ. P. 1.650 (1)(b), which states: "Notice of intent to initiate litigation sent by certified mail to and received by any prospective defendant shall operate as notice to the person and any other prospective defendant who bears a legal relationship to the prospective defendant receiving the notice. The notice shall make the recipient a party to the proceeding under this rule." It could be that this particular defendant did not bear a legal relationship to the other defendants.

The court is careful to point out, however, that the presuit affidavit is not required to give notice of every possible instance of medical negligence. See *Davis v. Orlando Regional Medical Center*, 654 So.2d 664 (Fla. 5th DCA 1995) (holding that new theories may develop as the case progresses). In light of this decision, and *Largie v. Gregorian*, 30 Fla. L. Weekly D1694 (Fla. 3d DCA July 13 2005), please make sure that your presuit affidavit mentions every potential defendant by name.

Blom v. Adventist Health System/Sunbelt, Inc.
2005 WL 2319000 (Fla. 5th DCA 2005)

An action alleging an improper mental health commitment was an action for medical malpractice, so that the plaintiff was required to comply with presuit requirements.

Negligence – Duty

Roos v. Morrison
2005 WL 2372094 (Fla. 1st DCA 2005)

Using the "zone of risk" analysis of *McCain v. Fla. Power Corp.*, 493 So.2d 500 (Fla. 1992), the court held that the plaintiff stated a cause of action against a defendant, a passenger in an SUV, who undertook to advise the SUV driver and had a better view than the driver but failed to warn him of the plaintiff's approach on a motorcycle. In general, a passenger is entitled to "trust the vigilance and skill" of the driver. However, the passenger who undertook to give the advice had a duty to use reasonable care in giving it.

Rental Car Caps

Lewis v. Enterprise Leasing Co.
2005 WL 2447873 (Fla. 3d DCA Oct. 5, 2005)

Section 342.021(9)(b), Florida Statutes, limits the liability of a vehicle lessor to "$100,000 per person and up to $300,000 per incident" for bodily injury. "Per person" does not mean "per claimant," but means "per injured person." The court rejects the analogy of the cap applicable in the arbitration provision of the medical malpractice statute, which the Supreme Court held applied separately to each wrongful death beneficiary in *St. Mary's Hospital v. Phillipe*, 769 So.2d 961 (Fla. 2000). The court also held that the statute does not violate the equal protection clause, even though multiple claimants for damages arising out of a single injury would recover less per claimant than a single claimant would recover for damages arising out of similar injuries. The disparity is "rationally related" to the "legitimate legislative purpose" of shifting responsibility for damages from the owner to the operator or lessee of the vehicle.

Requests for Admissions

Asset Management Consultants of Virginia, Inc. v. City of Tamarac
No. 4D04-3086 (Fla. 4th DCA Oct. 12, 2005)

The trial court did not abuse its discretion in refusing to allow the appellant to file belated answers to requests for admission, where the appellant did not move to file the belated answers until after the hearing on a motion for summary judgment. The requests for admissions were "deemed admitted" and were the basis for the summary judgment. There was nothing in the record to contradict the admissions, other than the proposed answers filed after the summary judgment hearing, and the appellant did not have a good excuse in the record for its lack of diligence.

Venue

Chase v. Jowdy Industries, Inc.
No. 4D04-648 (Fla. 4th DCA Oct. 12, 2005)

The trial court erred in dismissing the action for improper venue, when it found that venue was proper in another county but that the plaintiff was barred from refiling the case in that county due to the statute of limitations. The trial court should have transferred the case to the proper county instead of dismissing it. See Fla. R. Civ. P. 1.060(b). Moreover, the plaintiff did not waive the right to transfer by waiting until the hearing on the motion to dismiss to raise it orally. The defendant's motion should have asked the court to abate or transfer.

Three Seas Corp. v. FFE Transp. Services, Inc.
2005 WL 2447888 (Fla. 3d DCA October 5, 2005)

A defendant waives the defense of improper venue by failing to timely raise it in its answer. See Rule 1.140(b): "The grounds on which any of the enumerated defenses are based and the substantial matters of law intended to be argued shall be stated specifically and with particularity in the responsive pleading or motion. Any ground not stated shall be deemed to be waived . . . ." The defense could not be revived by the plaintiff's filing of an amended complaint that did not change the substance of the original claim.

Workers' Comp Lien

Summit Claims Management, Inc. v. Lawyers Express Trucking, Inc.
No. 4D04-2458 (Fla. 4th DCA Oct. 12, 2005)

The trial court properly denied the workers' compensation carrier's claim of lien on settlement proceeds from a third party suit where the carrier failed to seek the lien until after the tort action concluded, despite having actual knowledge of the proceedings. The court certifies to the Supreme Court the question: "Whether a workers' compensation insurance carrier that failed to seek its statutory lien until after the tort action concluded, despite having actual knowledge of the proceedings, is entitled to an equitable lien?"