Case Law Update

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Adult Protective Services Act

Tenet South Florida Health Systems v. Jackson
2008 WL 4224382 (Fla. 3d DCA 9/17/2008)

The Third District held that a hospital was not a "care giver" subject to the Adult Protective Services Act, Chapter 415, Florida Statutes, and that the complaint, which alleged that the hospital failed to administer proper nursing care and other medical treatment (apparently involving a patient's latex allergy) did not state a claim for neglect under Chapter 415. The court held that it is an ordinary medical malpractice claim, subject to presuit procedures under §766.106, and granted cert to quash the trial court's denial of the hospital's motion to dismiss the complaint. It is not clear whether, in the Third District, a hospital can ever be a "care giver" under Chapter 415. In contrast, the First District has held that there are some situations in which the statute may be applied to a hospital. *Bohannon v. Shands Teaching Hosp. & Clinics,* 938 So.2d 717 (Fla. 1st DCA 2008).

Agency

Del Pilar v. DHL Global Customer Solutions (USA), Inc.
Case No. 1D07-5140 (Fla. 1st DCA 10/24/2008)

Even though DHL's agreement with its independent contractor stated in conclusory terms that the deliverer was an independent contractor, whether he was in fact an agent was a question of fact where the contract left "nothing to chance" and very specifically controlled the details of the work. However, while reversing the defense summary judgment on the theory of agency, the court affirmed on the issue of apparent agency, stating, "We cannot find that appellant, who, by misfortune and happenstance, was involved in an auto accident with a van operated by appellee's agent, relied on the apparent manifestation of the agency relationship, as required by case law."

Amendment 7 (Patients' Right to Know)

Amisub Northridge Hospital Inc. v. Sonaglia
Case No. 4D08-2448 (Fla. 4th DCA 10/22/2008)

Article X, §25 of the Florida Constitution is the Patient's Right to Know amendment, which was passed as "Amendment 7." In this action between two doctors concerning alleged defamation and tortious interference with one doctor's business relationship with a hospital, the plaintiff doctor sought peer review information as well as information concerning a particular patient whose care was at issue in the case. The patient herself, who was pleased with her care, specifically asked the hospital to turn over information about her care to her and to the doctor's attorney. The hospital refused to turn over peer review material. The trial court ordered the hospital to produce the materials. This court held that the order to produce the peer review materials did not depart from the essential requirements of law. The court rejected the hospital's contention that the request was not for a "proper purpose," holding that there is no limit under Amendment 7 to the patient's use of the records once obtained, even if the patient wants the records for the benefit of someone else.

Baptist Hospital of Miami, Inc. v. Garcia
Case No. 3D07-3261 (Fla. 3d DCA 10/22/2008)

The trial court departed from the essential requirements of law in ordering the hospital to produce a list of all documents in the credentialing file, because the list would include documents that were not adverse medical incident documents subject to disclosure under Amendment 7. The court quashed the order without prejudice to allow the plaintiff to file interrogatories requesting documents in compliance with Amendment 7.

Arbitration

Hialeah Automotive v. Basulto
Case No. 3D07-855 (Fla. 3d DCA 10/15/2008)

The court affirmed a trial court order holding that an arbitration agreement was procedurally and substantively unconscionable and that it was void as a matter of law because it defeated the remedial purpose of the applicable statute, FDUTPA. The sellers had the buyers sign the contracts in blank, telling them they would fill them out later. The sellers knew that the buyers did not speak English and relied on them to translate and explain the documents. The buyers testified that the sellers did not tell them anything about arbitration. Having undertaken to explain the contracts to the buyers in Spanish, the sellers were "obliged to do so accurately. The agreement was substantively unconscionable because it contained a waiver of punitive damages; "it is unconscionable to employ an arbitration agreement for purposes of obtaining a waiver of rights to which the signatory would otherwise be entitled under common law or statutory law." Moreover, the plaintiffs requested injunctive relief under FDUTPA, and the arbitrator would not be able to enforce or oversee injunctive relief. The court notes that the First and Fourth Districts have held that an arbitrator can enter an injunction, but note that neither court addressed the issue of the arbitrator's inability to supervise or enforce it. In a footnote, Judge Cope suggests that the court should reconsider *Murphy v. Courtesy Ford, L.L.C.*, 944 So.2d 1131 (Fla. 3d DCA 2006), which requires both procedural and substantive unconscionability before an agreement can be invalidated, noting that it is inconsistent with the court's earlier decision in *Steinhardt v. Rudolph*, 422 So.2d 884 (Fla. 3d DCA 1982).

Jaylene, Inc. v. Moots
2008 WL 4181140 (Fla. 2d DCA 9/12/2008)

The nursing home patient's attorney-in-fact had the authority to bind the patient to the nursing home's arbitration agreement where the power of attorney provided that the attorney-in-fact "shall have full power and authority to act on my behalf . . . to manage and conduct all of my affairs and to exercise all of my legal rights and powers, including all rights and powers that I may acquire in the future;" and expressly included the power to enter into binding contracts and to "take any and all legal steps necessary to collect any amount or debt owed to me, or to settle any claim, whether made against me or asserted on my behalf against any other person or entity," and it was titled "General Power of Attorney."

Default Proof Credit Card Systems, Inc.
2008 WL 4224345 (Fla. 3d DCA 9/17/2008)

A contract between an Illinois law firm and a Florida client for representation in a patent enforcement action involved interstate commerce and therefore, in a subsequent action for legal malpractice, the arbitration provision in the contract came within the scope of the Federal Arbitration Act, 9 U.S.C. §1 et seq. The contract's provision for application of the law of another state was therefore enforceable, because it was permitted by the Federal Act.

Attorneys Fees – Workers Comp

Murray v. Mariner Health
Case No. SC07-244 (Fla. 10/23/2008)

Declining to address any constitutional issues, the Supreme Court held, "based upon the plain language of the statute, that when a claimant is entitled to recover attorney fees from a carrier or employer as provided by section 440.34(3)(a), (b), (c), or (d), the claimant is entitled to recover 'a reasonable attorney's fee.' See § 440.34(3), Fla. Stat. (2003)." Section 440.34(3), does not define "reasonable attorney's fee," and an ambiguity results when subsection (1) and subsection (3) are read together. Accordingly, the court determined that reasonable attorney fees for claimants, when not otherwise defined in the workers' compensation statute, are to be determined using the factors of rule 4-1.5(b) of the Rules Regulating the Florida Bar. See *Lee Eng'g & Constr. Co. v. Fellows*, 209 So. 2d 454, 458 (Fla. 1968) (applying Canon 12 of the Canons of Professional Ethics, the predecessor to rule 4-1.5(b)).

Employment Discrimination – Retaliation

Two new cases hold that pregnancy discrimination is prohibited under the Florida Civil Rights Act.

Carter v. Health Management Associates
2008 WL 4180337 (Fla. 2d DCA 9/12/2008)

An employee who alleged that her employer violated the anti-retaliation provision of the Florida Civil Rights Act, by firing her in retaliation for filing a charge of gender and pregnancy discrimination, stated a cause of action. The provision makes it unlawful for an employer to discriminate against any person because that person has opposed any unlawful employment practice or has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing. §766.10(7). To state a cause of action, the employee must allege facts demonstrating that (1) she engaged in statutorily protected activity; (2) she suffered an adverse employment action; and (3) the adverse employment action is causally related to the protected activity. The causal link merely requires that the protected activity and the adverse employment action are not completely unrelated.

The court rejected the employer's contention that pregnancy is not a protected status under the Act; all that is required is a basis for an objectively reasonable belief by the employee that his or her participation directed against an unlawful employment practice. The Florida Commission on Human Relations, the agency charged with enforcing the Act, interprets the Act's prohibition of sex discrimination to prohibit pregnancy discrimination.

Carsillo v. City of Lake Worth
2008 WL 4147120 (Fla. 4th DCA 9/10/2008)

The Florida Civil Rights Act prohibits discrimination based on pregnancy; the provision prohibiting sex discrimination was intended to include pregnancy discrimination.

Insurance – Bad Faith – Assignment and Release

Wachovia Ins. Services, Inc. v. Toomey
2008 WL 4379587 (Fla. 9/29/2008)

A settlement agreement between an insured and claimants containing an assignment of the insured's claims against an insurance broker and the immediate release of the insured on the same cause of action was valid and properly assigned the insured's causes of action for breach of fiduciary duty and negligence for failure to procure coverage. The claims were two separate claims and were both assignable. The Court describes the breach of fiduciary duty claim based on the broker's decision to summarily remove coverage as "essentially a bad faith claim." The broker could not escape liability by relying on a document executed by others where those parties did not intend to release him.

Invasion of Privacy – False Light

Jews for Jesus, Inc. v. Rapp
Case No. SC06-249 (Fla. 10/23/2008)

The Supreme Court declines to recognize the tort of false light invasion of privacy, holding that it is "largely duplicative of existing torts, but without the attendant protections of the First Amendment." The court also clarifies "that Florida recognizes a cause of action for defamation by implication; and "that a communication can be considered defamatory if it 'prejudices' the plaintiff in the eyes of a 'substantial and respectable minority of the community,' as set forth in comment e of the Restatement (Second) of Torts § 559 (1972)." The court says that a literally true statement can be defamatory if it creates a false impression, explaining that "Defamation by implication arises, not from what is stated, but from what is implied when a defendant '(1) juxtaposes a series of facts so as to imply a defamatory connection between them, or (2) creates a defamatory implication by omitting facts, [such that] he may be held responsible for the defamatory implication . . . .'" Such a claim is subject to first amendment protections and to the statutory protections and procedures for defamation claims contained in Chapter 770.

Legal Malpractice

Technical Packaging Inc. v. Hanchett
2008 WL 4366038 (Fla. 2d DCA 9/26/2008)

The client's failure to appeal the federal district court's dismissal of the underlying claims on statute of limitations grounds did not constitute abandonment of the client's legal malpractice claim against the attorney for allegedly giving incorrect dates for the termination of the limitations period, where the underlying claims were barred under any theory.

Med Mal – Limitations

Germ v. St. Luke's Hospital
Case No. 1D07-1265 (Fla. 1st DCA 10/24/2008)

In 1996, the legislature amended §95.11(4)(b), the medical malpractice statute of limitations, to add the following language: "except that this 4 year period shall not bar an action brought on behalf of a minor on or before the child's eighth birthday." The court holds that this amendment allows extension of the four year statute of repose, which runs from the date of the incident, but not the two year statute of limitations, which runs from the time the incident is discovered or should have been discovered.

Pollution

Curd v. Mosaic Fertilizer, LLC
2008 WL 4224835 (Fla. 2d DCA 9/17/2008)

Commercial fishermen alleged that the defendant fertilizer company polluted the waters of Tampa Bay, reducing the available supply of fish, which damaged their businesses and reduced their income. The court held that the fishermen could not state a claim in negligence or strict liability to recover for purely economic losses unrelated to injury to their persons or property and that the fishermen did not state a claim under Chapter 376 which imposes strict liability "for all damages resulting from a discharge or other condition of pollution." Cf. *Aramark Uniform & Career Apparel, Inc. v. Easton*, 894 So.2d 20 (Fla. 2004) (holding that the statute creates a private cause of action for the non-negligent discharge of pollution). Although affirming the dismissal of their complaint, the court certified two questions of great public importance to the Florida Supreme Court:

DOES FLORIDA RECOGNIZE A COMMON LAW THEORY UNDER WHICH COMMERCIAL FISHERMEN CAN RECOVER FOR ECONOMIC LOSSES PROXIMATELY CAUSED BY THE NEGLIGENT RELEASE OF POLLUTANTS DESPITE THE FACT THAT THE FISHERMEN DO NOT OWN ANY PROPERTY DAMAGED BY THE POLLUTION?

DOES THE PRIVATE CAUSE OF ACTION RECOGNIZED IN SECTION 376.313, FLORIDA STATUTES (2004), PERMIT COMMERCIAL FISHERMEN TO RECOVER DAMAGES FOR THEIR LOSS OF INCOME DESPITE THE FACT THAT THE FISHERMEN DO NOT OWN ANY PROPERTY DAMAGED BY THE POLLUTION?

Judge, now Justice, Canady dissented.

Privilege – Attorney-Client

Atlas Air, Inc. v. Greenberg Traurig P.A.
2008 WL 4224398 (Fla. 3d DCA 9/17/2008)

Where documents subject to the attorney-client privilege were inadvertently delivered to opposing counsel, who "took an unfair informational advantage of its adversary," the entire law firm had to be disqualified, not just the particular partner who received the documents. The attorney who viewed the documents refused to testify about what she had read, claiming attorney-client and work product privileges, so it was impossible to determine the extent of the tactical advantage obtained, or whether another remedy short of disqualification, would suffice. See *Abamar Housing & Dev. Inc. v. Lisa Daly Lady Decor, Inc.*, 724 So.2d 572 (Fla. 3d DCA 1998). That case holds that disqualification is not automatic; but to avoid disqualification, the attorney receiving the inadvertently disclosed documents must immediately notify the sender and return them immediately without exercising any unfair advantage such as photocopying them.

Privilege – Psychotherapist

Brousseau v. Broward County Board of Commissioners
Case No. 4D08-2947 (Fla. 4th DCA 10/22/2008)

The trial court departed from the essential requirements of law in ordering production of the plaintiff's psychological records, as well as a psychological examination, in this employment discrimination case. The plaintiff sought only lost wages and benefits, not psychological damages. Although the plaintiff listed a psychological expert, the expert was not going to testify about the plaintiff's psychological condition, but about the defendants' stereotypical notions of how a woman should behave.

Removal

Bailey v. Janssen Pharmaceutica, Inc.
536 F.3d 1202 (11th Cir. 2008)

The Eleventh Circuit has adopted the "last served defendant" rule in multi-defendant cases. This means that each defendant has 30 days from the time it is served in which to file its notice of removal. The federal appellate courts are split on this issue. The court notes that the rule would be better termed the "each defendant" rule, since each defendant has 30 days from receipt of service in which to file a notice of removal. In other words, I don't think that later service on Defendant 2 extends the time for removal by Defendant 1. Defendant 1 must still file the notice of removal within 30 days of the time Defendant 1 was served.

Sanctions – Fraud on the Court

Villasenor v. Martinez,
2008 WL 4367820 (Fla. 5th DCA 9/26/2008)

Emphasizing that dismissal as a sanction must be based on "clear and convincing evidence" and is appropriate only in the most egregious cases, the court stated, "Except in the most extreme cases, where it appears that the process of the trial itself has been subverted, factual inconsistencies, and even false statements are well managed through the use of impeachment and traditional discovery sanctions." Moreover, an evidentiary hearing is always required, and the party alleging the fraudulent conduct has the burden of proof by clear and convincing evidence."

Bass v. City of Pembroke Pines
Case No. 4D07-1039 (10/8/2008)

Applying the abuse of discretion standard ("reasonable minds could differ"), the court affirmed the dismissal of plaintiff's complaint as a sanction for failing to disclose prior treatment for migraines in a case in which she sought damages for, among other things, a head and neck injury. The dissent pointed out that she gave enough information for the defendant to "easily" discover the omitted information, so that prejudice was minimal; that the defendant would be able to vigorously cross examine the plaintiff; and that other sanctions could have been imposed, including a jury instruction, preclusion of the affected claims, or attorneys fees and costs. The dissent stated, "I fail to discern a deliberate attempt by the plaintiff to conceal information as she disclosed enough information to allow the City to easily uncover her prior medical history."

Service of Process

Premier Capital, LLC v. Davalle
2008 WL 4224362 (Fla. 3d DCA 9/17/2008)

The trial court erroneously failed to consider that it was permitted to grant an extension of time for service even without a showing of good cause or excusable neglect under Fla. R. Civ. P. 1.070(j).

Settlements

Johnson v. Skarvan
Case No. 5D07-3102 (Fla. 5th DCA 10/17/2008)

Reversing an order granting a motion to enforce settlement, because the attorney had authority to settle for $7500 but not for $6500, the court pointed out that the mere employment of an attorney does not give the attorney the implied or apparent authority to settle the client's claim. Although Florida courts have stated that there is an exception when an attorney is facing an emergency which requires immediate action to protect the client's interests and consultation with the client is impossible, the court notes that no Florida court actually has found the exception applicable in any particular case.

Summary Judgment

Usiabulu v. Progressive Express Ins. Co.
Case No. 3D07-1218 (Fla. 3d DCA 10/8/2008)

The court reversed a summary judgment in favor of Progressive on its subrogation claim, where Progressive's motion and supporting affidavit relied only on the pro se defendant's failure to respond to Progressive's request for admissions, and the defendant filed a "statement of defense" raising "a number of facially genuine and material issues of fact." A summary judgment cannot be based solely on a defendant's failure to respond to requests for admission. See *Brown v. Travelers Indem Co.*, 755 So.2d 167 (Fla. 3d DCA 2000). The court also cited *Martinez v. Fraxedas*, 678 So.2d 489 (Fla. 3d DCA 1996), requiring liberal construction of pleadings, especially those filed by pro se parties. The court also commended Progressive's appellate counsel for bringing the *Brown* case to its attention.

Warranties – Magnuson-Moss

Ocana v. Ford Motor Co.,
2008 WL 4412454 (Fla. 3d DCA 10/1/2008)

Plaintiff entered into an "as is" lease with an automobile dealer, which expressly disclaimed any express or implied warranties. Affirming the dismissal of plaintiff's complaint, the court held that the standards and remedies of the Magnuson Moss Warranty Act, 15 USC §2304, are not incorporated into express limited warranties. The court disagreed with the Fourth District's opinion in *Gates v. Chrysler Corp*., 397 So.2d 1187 (Fla. 4th DCA 1981), which stated that "a cause of action exists under Magnuson-Moss where there has been a breach of warranty which has not been remedied although the warrantor has been given a reasonable opportunity to cure the breach." The court also rejected plaintiff's claim for a cause of action under the Act for breach of an implied warranty, because the Act applies to the manufacturer and the plaintiff failed to plead sufficient facts demonstrating that the dealer was an agent or apparent agent of the manufacturer.

Workers Comp Lien

Anderson Columbia v. Brewer,
Case No. 1D07-5658 (Fla. 1st DCA 10/22/2008)

The attorneys who mishandled an injured worker's product liability claim by allowing the statute of limitations to expire were not third party tortfeasors under §440.39(2), Florida Statutes, and therefore the employer and worker's comp carrier were not entitled to a lien on the proceeds of the settlement of the worker's legal malpractice claim against them. The court pointed out that the employer and carrier could have prevented the loss of the products liability claim by filing their own suit against the tortfeasor as allowed by 440.39(4).