case law Update

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Amendments to Florida Rules of Civil Procedure

On September 8, 2010, the Supreme Court amended the Florida Rules of Civil Procedure. These changes take effect on January 1, 2011 at 12:01 a.m. Here are some of the most significant:

New Rule 1.071 provides the procedure for notifying the Attorney General or State Attorney of a challenge to the constitutionality of a statute or a county or municipal charter, ordinance or franchise, as required by §86.091, Fla. Stat. A notice must be filed and served by certified or registered mail, identifying the provision challenged and the document or paper raising the challenge. A new form, **1.975**, is adopted for the notice. The rule does not require joinder of the Attorney General or State Attorney as a party.

Rule 1.080(b) is amended so that service by delivery shall be deemed complete on the date of delivery. The Supreme Court specifically declined to adopt a proposal to allow the extra five days for mailing time to apply to hand deliveries.

New Rule 1.285 provides a new procedure for handling the inadvertent disclosure of privileged materials. Within 10 days of discovering the disclosure, the person asserting the privilege must serve written notice asserting the privilege specifying with particularity the materials, the nature of the privilege, and the date of disclosure.

The party receiving the notice must promptly return, sequester or destroy the materials and any copies, and notify anyone to whom it has disclosed the documents and take reasonable steps to retrieve them.

If the person who received the documents wants to challenge the assertion of privilege, notice, specifying the grounds of the challenge must be served within 20 days of service of the original notice of privilege. Failure to challenge within 20 days waives the privilege. If the court determines the materials are privileged or that the right to challenge the privilege has been waived, it shall direct what is to be done with the documents to preserve them for appellate review. The challenger must notify everyone to whom it has disclosed the documents of the court's ruling.

Rule 1.310 now requires that a deposition subpoena served on the person to be examined shall state the method or methods for recording the testimony.

It also says that **Rule 1.351** provides the exclusive procedure for obtaining documents or things by subpoena from nonparties without deposing the custodian or other person in possession of the documents. "The amendment is intended to prevent the use of rules 1.310 and 1.410 to request documents from nonparties pursuant to a subpoena without giving the opposing party the opportunity to object to the subpoena before it is served on the nonparty as required by rule 1.351."

Rule 1.351 is also amended to state that it is the exclusive method.

Rule 1.340 is amended to clarify that service of fewer than all of the standard initial interrogatories is permitted.

Rule 1.360 requires that, if the physical examination of a party is to be recorded or observed by others, the request or response shall also include the number of people attending, their role, and the method or methods of recording. I don't think this was intended to overrule established case law regarding the right of the examinee, but not the examining party, to record the examination or to have an attorney or court reporter attend. There is no amendment to the committee notes to suggest what would be such a momentous change. See *U.S. Sec. Ins. Co. v. Cimino*, 754 So.2d 697 (Fla. 2000); *Chavez v. J&L Drywall*, 858 So.2d 1266 (Fla. 1st DCA 2003); *Prince v. Mallari*, 36 So.3d 128 (Fla. 5th DCA 2010).

Rule 1.420 is amended to clarify that a plaintiff may voluntarily dismiss, by notice, an action, a claim, or any part of a claim without court order. If it is done by stipulation, it need only be signed by all current parties, not by all parties who have appeared in the case at any time. Costs attributable solely to any dismissed claim may be assessed, but only when all claims are resolved at the trial level as to the party seeking taxation of costs.

Rule 1.442 is amended to allow unapportioned joint proposals to or from a party which is solely vicariously, constructively, derivatively or technically liable. Acceptance by any party shall be without prejudice to rights of contribution or indemnity.

Rule 1.470 specifies that the standard jury instructions on the Supreme Court's website should be used if applicable. If the Committee Notes state that a certain kind of instruction should not be given, the judge should follow that, as well. The judge may vary from these requirements, but only when necessary to accurately and sufficiently instruct the jury. Parties must object to preserve error in varying from the published standard instructions and notes.

Rule 1.480(b) is amended to conform to Fed. R. Civ. P. 50(b), eliminating the requirement for renewing at the close of all the evidence a motion for directed verdict already made at the close of an adverse party's evidence.

Rule 1.525 now requires a motion for fees to be made within 30 days of filing a judgment, dismissal, or service of notice of voluntary dismissal which concludes the action as to a particular party.

Form 1.986, verdict forms, is deleted and parties are directed to refer to the model verdict forms contained in the FSJI, as applicable.

Amendment to Rules of Judicial Administration - Confidential Information

Rule 2.420 of the Florida Rules of Judicial Administration has been amended, effective October 1. It now requires attorneys to redact confidential information such as social security and bank account numbers, juvenile records, adoption records, and grand jury records. The rule contains a list of items that are deemed confidential. A form must accompany any court filing that includes confidential information, indicating what the information is and where it is in the document. If a lawyer thinks information is confidential but it doesn't fall within the categories on the form, a separate motion must be filed. A free online CLE is available at www.floridabar.org/cle .

Arbitration

Laizure v. Avante at Leesburg, Inc.

Case No. 5D09-2049, 2010 WL 3808683
(Fla. 5th DCA Oct. 1, 2010)
Review Granted, 2010 WL 3737719
(Fla. Sept. 17, 2010).

The court holds that an arbitration agreement signed by the deceased is binding on the estate and survivors. Their claims, though separate, are derivative of the claim of the deceased. The court certifies the question to the Florida Supreme Court:

> Does the execution of a nursing home arbitration agreement by a party with the capacity to contract, bind the patient's estate and statutory heirs in a subsequent wrongful death action arising from an alleged tort within the scope of an otherwise valid arbitration agreement?

The Supreme Court has granted review.

Attorneys Fees

Florida Insurance Guaranty Association v. Petty

2010 WL 3766879
(Fla. 2d DCA Sept. 29, 2010)

The court holds that a claim for attorneys' fees under §627.428 is not a "covered claim" under FIGA. The court certifies conflict with *Florida Insurance Guaranty Association v. Soto*, 979 So.2d 964 (Fla. 3d DCA 2008)

Filing

Strax Rejuvenation v. Shield

Case No. SC10-57, 2010 WL 3782044
(Fla. Sept. 30, 2010)

Resolving a conflict among the DCA's, the court holds that filing is accomplished by delivery of a document to the clerk. Under Rule 1.080(e), the clerk's date stamp on the face of a paper filed in court creates a presumption that that is the date it was filed. The presumption may be overcome by sufficient evidence that the document was actually received by the clerk within the time deadline.

Here, the date stamp showed a notice of appeal was filed one day late, but the defendant presented affidavits showing it was actually delivered to the clerk's office the day before.

The court reiterates that the rules of civil procedure should be construed "in a manner leading to a just determination of a cause," and to "further justice and not frustrate it."

In these days of overwhelmed, underfunded, short-staffed clerk's office, it is always worth the small additional expense and inconvenience of getting a date-stamped copy of any jurisdictional document that you file.

Insurance – Sinkholes

Warfel v. Universal Ins. Co.

36 So.3d 136
(Fla. 2d DCA 2010),
Review granted, 41 So.3d 219 (Fla. 2010)

Section 627.7073(1)(c), Fla. Stat. (2005) provided that the findings, opinions and recommendations of an insurer's engineer and professional geologist would be "presumed correct." The court held that the presumption did not shift the burden of proof to the insured, but was a "bursting bubble" or "vanishing" presumption that affected only the burden of producing evidence. Therefore, it was error to instruct the jury on the presumption. The court certified the question to the Supreme Court:

> Does the language of section 627.7073(1)(c) create a presumption affecting the burden of proof under section 90.304 or does the language create a presumption affecting the burden of producing evidence under section 90.303.

The Supreme Court has granted review.

Interest

Bosem v. Musa Holdings, Inc.

Case No. SC09-1277, 2010 WL 3701293
(Fla. Sept. 23, 2010)

"[T]his Court's precedent has remained unchanged for over one century, and . . . prejudgment interest is a matter of right under the prevailing 'loss theory' of recovery for pecuniary damages, i.e., damages for economic or tangible losses." The Court reiterates what it held in *Argonaut Ins. Co. v. May Plumbing Co*., 474 So.2d 212 (Fla. 1985): "[W]hen a verdict liquidates damages on a plaintiff's out-of-pocket, pecuniary losses, plaintiff is entitled, as a matter of law, to prejudgment interest . . . from the date of that loss."

Medicare Liens

Bradley v. Sebelius

2010 WL 3769132
(11th Cir. Sept. 29, 2010)

In a wrongful death action, Medicare is not entitled to a lien on the portion of the recovery attributable to the claims of the survivors.

The personal representative settled a wrongful death claim with a nursing home for the amount of the policy limits. HHS, which had paid the decedent's medical bills, took the position that it was entitled to the entire proceeds, minus the costs of recovery. The plaintiff asked the probate court to apportion the claims, and the probate court ruled that HHS was only entitled to a fraction of its claim, because the case settled for far less than its actual value, and because most of the recovery was attributable to the survivors' claims, not the medical bills. The plaintiff invited HHS to participate in the probate court proceedings, but HHS declined.

Plaintiff paid HHS the amount it demanded under protest, and filed suit in federal court. The court held that HHS was entitled only to the reduced amount determined by the probate court. The claim of the estate for the medical bills was separate and distinct from the claim of the survivors.

Counsel "properly turned to the probate court for proration." The court notes that this is sensible and economical and encourages settlements and minimizes additional litigation which would incur additional costs, further diminishing the amount available for settlement. The HHS position would have "a chilling effect on settlements."

The court also holds that it was error to rely on the agency's interpretation of law contained in its field manual. "Agency interpretations contained in policy statements, manuals and enforcement guidelines are not entitled to the force of law"

NICA

Samples v. Florida Birth-Related Injury Compensation Fund

40 So.3d 18 (Fla. 5th DCA 2010)
Review Granted, 2010 WL 3737719
(Fla. Sept. 17, 2010)

Upholding the constitutionality of the NICA statute's cap of $100,000 on recovery by parents of a brain-injured baby, regardless of whether there is one parent or two, under §766.31(1)(b)(11), the court certified the following question to the Florida Supreme Court:

> Does the limitation in section 766.31(1)(b)(11), Florida Statutes, of a single award of $100,000 to both parents violate the Equal Protection Clause of the United States and Florida Constitutions?

The Supreme Court has granted review.

Nondelegable Duty

Tarpon Springs Hosp. Foundation v. Reth

40 So.3d 823
(Fla. 2d DCA 2010)

The court holds that a hospital has no nondelegable duty to provide non-negligent anesthesia services to surgical patients. The court certifies conflict with *Wax v. Tenet Healthcare System Hospitals, Inc.*, 955 So.2d 1 (Fla. 4th DCA 2006).