Case Law Update

September 2003

Barbara Green, P.A.
Attorney at Law
(305) 669-1994

Caselaw Update on the Internet

Issues of *Case Law Update* since January 1995 can be found at the new Case Law Update website. The hypertext versions you'll find there are searchable by any text string and you can download to disk or print any portions you desire for your personal use.

www.caselawupdate.com

Arbitration

Shea v. Global Travel Marketing, Inc.

28 Fla. L. Weekly D2004 (Fla. 4th DCA 2003)

On rehearing, the court held that a mother could not bind her minor child to an arbitration agreement in a release prior to undertaking a safari. The court certified to the Supreme Court the following question:

> Whether a parent's agreement in a commercial travel contract to binding arbitration on behalf of a minor child with respect to prospective tort claims arising in the course of such travel is enforceable as to the minor.

Raymond James Financial Services, Inc. v. Saldukas

851 So.2d 853 (Fla. 2d DCA 2003)

The defendant waived the right to arbitration when it repeatedly asserted there was no agreement to arbitrate the claim, actively sought to have the arbitration proceeding dismissed with prejudice, repeatedly asserted that the other party had no right to arbitrate, and threatened to file a lawsuit to enjoin the arbitration proceeding. Certifying conflict with the First and Third DCAs, the Second District holds that a showing of prejudice to the other party is not required before a court can find that a party waived the right to arbitration.

Attorneys Fees

Wiggins v. Estate of Wright

28 Fla. L. Weekly S409 (Fla. 2003)

In a wrongful death case, when survivors have competing claims and are represented by separate attorneys, the trial court should compensate the personal representative's attorney out of the total settlement proceeds, reduced by the amount necessary to reasonably compensate the other survivors' attorneys for their services in representing those survivors in the proceedings. If there are two competing survivors represented by separate attorneys throughout the litigation who successfully prosecute a claim to judgment, the fees should ordinarily be awarded out of the respective recoveries. However, where it can be demonstrated that one attorney played a greater role in securing the total award, a larger fee may be proper. In no instance, however, should a survivor be penalized for hiring separate counsel by having to pay a fee for recovery of the same amount twice.

Pepper's Steel Alloys v. United States

28 Fla. L. Weekly S455 (Fla. 2003)

An insured is entitled to attorney's fees under §627.428, Florida Statutes, for litigating, during a lawsuit to determine coverage under an insurance policy, whether the insured and the insurer settled the coverage issue. Because the suit arose under the policy the insurance company issued to the insured, it is within the scope of §627.428. See *Ins. Co. of North America v. Lexow*, 602 So.2d 528 (Fla. 1992), in which the court held that fees are awardable under the statute for litigation commenced after the insurer has paid the insured the policy limits to determine whether the insured or the subrogated insurer is entitled to funds obtained from the tortfeasor.

David Boland, Inc. v. Trans Coastal Roofing

28 Fla. L. Weekly S626 (Fla. 2003)

A surety on a performance bond for a construction contract is required by §627.428 to pay attorneys fees in excess of the face amount of the bond, in an action by a contractor against a subcontractor and the subcontractor's surety for breach of the subcontractor's contract.

Brown & Williamson Tobacco Co. v. Carter
28 Fla. L. Weekly D1490 (Fla. 1st DCA 2003)

The 1st DCA certifies to the Supreme Court the question of whether a contingency fee multiplier may be applied to a fee award based on an unaccepted proposal for settlement (offer of judgment). This issue is presently pending before the Supreme Court in *Allstate Ins. Co. v. Sarkis*, 809 So.2d 6 (Fla. 5th DCA 2001), review granted, 826 So.2d 992 (Fla. 2002).

Nichols v. State Farm
28 Fla. L. Weekly D1404 (Fla. 5th DCA 2003)

The court certifies to the supreme court the question: "May an insurer recover attorney's fees under rule 1.442, Florida Rules of Civil Procedure, and section 768.79, Florida Statutes, in an action by its insured to recover under a personal injury protection policy.?" This court agrees with the Third DCA's decision in *U.S. Security Ins. Co. v. Cahuasqui*, 760 So.2d 1101 (Fla. 3d DCA 2000) that the offer of judgment rule does apply in PIP cases.

Discovery abuse

J.B. Spence was kind enough to share with me a copy of an excellent protective order he obtained from Judge Bloom last year. The order prohibits abusive discovery in connection with a consortium claim. The defense attorney interrogated the husband of the injured plaintiff about "his complete employment history for the past thirty-six years; his personal life insurance policy; his complete educational history; the number of Plaintiffs' grandchildren and their ages," whether the sixty-one-year-old plaintiff had had morning sickness with her pregnancies more than three decades before, and whether the husband had "ever seen a doctor for any medical reason." After almost an hour and a half of "irrelevant and harassing questioning," plaintiff's counsel terminated the deposition. The judge found the termination proper.

Defense counsel argued at the hearing that she had additional, relevant questions to ask the husband. The judge ruled that, if the questions were that important, defense counsel should have asked them at the outset. The court noted that the question in a consortium claim is simple: "what is the difference in the marital relation before and after the incident sued upon?" Hours of questioning beyond that is just harassment.

Evidence – Expert

Grenitz v. Tomlian
28 Fla. L. Weekly S433 (Fla. 2003)

Although a neuropsychologist is not competent to testify regarding the medical causes of organic brain damage, a neuropsychologist is competent to testify about the results of psychological testing reflecting the presence of organic brain damage, aswell as brain and behavioral development and the relationship of behavioral and functional patterns to human brain development, and the stages of brain development and temporal relationships as they relate to behavioral and functional development.

Evidence – Frye

Castillo v. E. I. Dupont de Nemours
29 Fla. L. Weekly S538 (Fla. 2003)

The lower court erred in applying what was essentially a *Daubert* standard in this Benlate products liability case. Florida does not use the *Daubert* test for the admissibility of scientific evidence that is applied in federal court. Florida uses the test set out in *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923), which applies only to new or novel scientific evidence:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable states is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Thus an inquiry is not required every time scientific or expert evidence is offered, only when it is based on a new or novel scientific principle or method. The proponent of the evidence has the burden of showing by a preponderance of the evidence that the underlying scientific principles and methodology are generally accepted by the relevant members of its particular field. The courts will look at expert testimony, scientific and legal writings, and judicial opinions to make the determination.

It is error for the court to consider the results, rather than the underlying scientific method, in making its Frye determination. The plaintiffs did not need to present epidemiological studies to support their expert. Differential diagnosis is a generally accepted methodology for addressing specific medical causation. The plaintiffs did not have to conclusively rule out all other possible causes. Moreover, it was properfor the plaintiffs to rely in part on extrapolation from other studies. Extrapolating data is generally accepted methodology. The weakness of the theory goes to its weight, not its admissibility.

Impact Rule

Rowell v. Holt
28 Fla. L. Weekly S491 (Fla. 2003)

Although Florida still clings to the impact rule, its grip is loosening. Here the court holds that the impact rule is inapplicable to a legal malpractice action against an attorney who had papers in his possession proving the client's innocence, and promised to present them to the judge, but failed to do so, resulting in the client's continued imprisonment for almost two weeks. The court considered the special professional duty created by the relationship between the client and the attorney, and the clear foreseeability of emotional harm resulting from lengthy wrongful incarceration, and held that, in such circumstances, there was no underlying justification for the impact rule, and that application of the rule would be unjust.

Judges – Disqualificatoin

Tableau Fine Art Group, Inc. v. Jacoboni
28 Fla. L. Weekly S412 (Fla. 2003)

A trial judge must rule within 30 days on a motion for judicial disqualification filed pursuant to Rule 2.160.

Jurisdiction – Longarm

Acquadro v. Bergeron
28 Fla. L. Weekly S533 (Fla. 2003)

In order to commit a tortious act in Florida for purposes of jurisdiction under §48.193(1)(b), Florida Statutes, the defendant need not be physically present in Florida. Allegedly defamatory phone calls made into Florida by a nonresident could be sufficient to establish personal jurisdiction. Electronic or written communications into Florida may also be enough.

The procedure for contesting personal jurisdiction is:

Initially, the plaintiff may seek to obtain jurisdiction over a nonresident defendant by pleading the basis for service in the language of the statute without pleading the supporting facts. By itself, the filing of a motion to dismiss on grounds of lack of jurisdiction over the person does nothing more than raise the legal sufficiency of the pleadings. A defendant wishing to contest the allegations of the complaint concerning jurisdiction or to raise a contention of minimum contacts must file affidavits in support of his position. The burden is then placed upon the plaintiff to prove by affidavit the basis upon which jurisdiction may be obtained.

28 Fla. L. Weekly at S535, citing *Venetian Salami Co. v. Parthenais*, 554 So.2d 499 (Fla. 1989). If the defendant's and plaintiff's affidavits conflict, an evidentiary hearing is required to resolve it.

Public Records

State v. City of Clearwater
28 Fla. L. Weekly S682 (Fla. 2003)

Not all e-mails transmitted or received by government employees on government computers are public records. Even though the city had a policy stating that the city's computers are city property and that employees had no expectation of privacy in them, that did not make the e-mails public records under the Public Records Act, because they are not "made or received pursuant to law or ordinance or in connection with the transaction of official business" under §119.011(1). I do not see anything in this decision that would exempt such e-mails from discovery in a case in which they are reasonably calculated to lead to relevant evidence.

Punitive Damages

Zuckerman v. Robinson
28 Fla. L. Weekly D1381 (Fla. 4th DCA 2003)

A claim for injuries caused by a drunk driver, by its very nature, qualifies for a punitive damages instruction to the jury. See *Ingram v. Pettit*, 340 So.2d 922 (Fla. 1976). However, the damages may not be so large that they exceed the defendant's financial ability to pay. The court certifies the question to the Supreme Court "Whether the economic castigation limitation on punitive damages should be eliminated entirely or at least amended in cases of injury caused by driving while intoxicated."

Sanctions

Rose v. Fiedler
28 Fla. L. Weekly D1772 (Fla. 4th DCA 2003)

It was error to enter a directed verdict for the defendant in a medical malpractice case because of the plaintiff's counsel's misconduct, where the plaintiff did not participate in the misconduct. *Kozel v. Ostendorf*, 629 So.2d 817 (Fla. 1993) requires the court to consider the following factors:

> 1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2) whether the attorney has been previously sanctioned; 3) whether the client was personally involved in the act of disobedience; 4) whether the delay prejudiced the opposing party

through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for noncompliance; and 6) whether the delay created significant problems of judicial administration.

The court certified the following question to the Supreme Court:

> May a trial court dismiss a civil action as the result of the plaintiff's attorney's misconduct during the course of the litigation where a consideration of all of the Kozel factors point to dismissal except that there is no evidence that the client was personally involved in the act of disobedience?

Personal Note:

Since the last Caselaw Update, we have lost three important members of our community, **Federal District Judge Wilkie Ferguson**, **Third DCA Judge James Jorgenson**, and former **Third DCA Judge Dan Pearson**. All three of these fine men were judges on the Third DCA during the early part of my career. All three set examples of professionalism, and had more influence on me than they knew. Their passing is a great loss to our profession and our community.