Case Law Update

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Hurricanes – Tolling of time

The Florida Supreme Court has issued orders regarding tolling of time in some circuits and districts affected by hurricanes. Go to http://www.floridasupremecourt.org/clerk/adminorders/2005/index.shtml . Scroll down to "Emergency Request to Extend Periods Under All Florida Rules of Procedure." Orders are listed by circuit or district.

Attorneys Fees – §57.105

Mercury Ins. Co. v. Coatney

2005 WL 2240337 (Fla. 1st DCA Sept. 16, 2005)

The trial court properly exercised its discretion to award fees against the insurance company in this declaratory judgment action under §57.105, Florida Statutes. In the absence of a supreme court decision on point, or a decision from the district court of appeal in the district where the case was pending, the trial court was required to follow the decision of another district court of appeal on point. Under the 1999 version of §57.105, "fees shall be awarded if the party or its counsel knew or should have known that the claim or defense asserted was not supported by the facts or an application of then-existing law." The "then-existing law" in this case was the decision of another district court of appeal.

Although there is an exception in §57.1405(2) allowing a party to make a "good faith argument" to change existing law without incurring a penalty, there was nothing in the record to show that the insurer made such an argument to the trial court, and it did not raise that argument on appeal until its reply brief. The lesson from this case is that, if you are going to make a good faith effort to change existing law, you need to clearly explain to the court at the earliest opportunity, and at every opportunity thereafter, that that is what you are doing. Make sure to make a record in writing or with a court reporter. I do not think this case stands for the proposition that sanctions may be imposed for making a good faith argument for a change in the law.

Nesci v. Duffau

2005 WL 2139372 (Fla. 3d DCA Sept. 7, 2005)

The trial court abused its discretion in awarding fees against the plaintiff under §57.105 for suing the wrong defendant. The plaintiff filed suit against a premises owner and manager under the reasonable belief that the worker who applied a slippery substance to the floor was an employee of the owner. The appellate court noted that "it was unclear" at first whether the worker was employed by the owner or the manager. After deposing the worker and learning that he was not employed by the owner, the plaintiff voluntarily dismissed the claim against the owner. No sanctions against the plaintiff were warranted.

Discovery Sanctions

Cross v. Pumpco, Inc.

2005 WL 2219046 (Fla. 4th DCA Sept. 14, 2005)

The trial court abused its discretion in dismissing the plaintiff's complaint as a sanction for failing to disclose treatment he received for his neck and shoulder seven years before, where he did disclose other prior injuries. While a trial judge has inherent authority to dismiss for fraud, the power should be used cautiously and sparingly, and only upon the most blatant showing of fraud, by clear and convincing evidence. "Except in the most extreme cases, where it appears that the process of trial has itself been subverted, factual inconsistencies, and even false statements, are well managed through the use of impeachment and traditional discovery sanctions."

Insurance – Bad Faith

Aguero v. First American Ins. Co.
2005 WL 2138802 (Fla. 3d DCA Sept. 7, 2005)

Reversing a summary judgment for the insurer, the court held that there were genuine issues of material fact as to (1) whether an insured failed to cooperate with the insurer and, if so, whether the insurer was prejudiced; and (2) whether the insured's letter constituted a rejection of the insurer's defense under a reservation of rights.

On the first issue, there was a genuine issue of fact as to whether the insurer received notice of the lawsuit before the insured entered into a *Coblentz* settlement with the claimant. On the second issue, where an insurer offers a defense under a reservation of rights, an insured must actually reject the insurer's offered defense before the insured may retain its own attorneys without jeopardizing its right to seek indemnification from the insurer. Here, after the insurer offered to defend under a reservation of rights, the insured sent a letter stating that it would "now do what it takes to extinguish its exposure . . . and will enforce through the courts the contract, which your company refused to honor." The court held that the letter could be construed by a jury as a rejection of the defense under reservation of rights. If the letter constituted a rejection, the insured would have been entitled to retain its own attorney without jeopardizing its right to seek indemnification.

Insurance – Exclusions

Taurus Holdings, Inc. v. U.S. F. & G.
No. SC04-771 (Fla. Sept. 22, 2005)

The Comprehensive General Liability (CGL) policies at issue in this case contained a standard exclusion for "products-completed operations hazards." Typical language in such exclusions excludes "all bodily injury and property damage occurring away from premises you own or rent and arising out of your product or your work except (a) products that are still in your physical possession; or (b) work that has not yet been completed or abandoned."

The court held that these provisions excluded coverage for lawsuits brought against insured gun manufacturers by municipalities seeking compensation for medical, legal and law enforcement expenses they have incurred because of crimes involving the use of handguns manufactured by the insureds. The lawsuits involved theories of negligence, negligent supervision and entrustment, negligent marketing, distribution, and advertising, nuisance, failure to warn, false advertising and unfair and deceptive trade practices based on the insured's on-premises business practices.

The court rejected the argument that the phrase "arising out of" is ambiguous. The court explained that *Westmoreland v. Lumbermens Mutual Cas. Co.*, 704 So.2d 176 (Fla. 4th DCA 1997), the only Florida case finding that phrase ambiguous, found an ambiguity only when that phrase was combined with other policy language. While "arising out of" does not equate with proximate cause, it does require "some level of causation greater than coincidence." The court interprets "arising out of" broadly.

The court also rejected the argument that the exclusion applies only to defective products, noting that the word "defective" is not in the exclusion.

Finally, the court points out that insurers offer optional coverage that is a "mirror image" of the exclusion, so that there would be no "gap" in coverage if the insured purchased the optional coverage.

Litigation Loans

Fausone v. U.S. Claims, Inc.
2005 WL 2218027 (Fla. 2d DCA Sept. 14, 2005)

A personal injury claimant obtained a "litigation loan," selling her interest in her claim to the lender. The agreement provided that if the proceeds of the claim were less than the money owed, the lender would be entitled to 100% of the proceeds, but that if there were no recovery, the claimant would not owe any money unless the failure of recovery were due to fraud, breach of warranty or failure to perform any covenant by the claimant. It also prohibited her from selling any other portions of her claim. It contained an arbitration clause. The interest rates were "well above the rates normally allowed for consumer transactions." The agreement provided for waiver of objections to jurisdiction and venue in Delaware and Pennsylvania.

When the plaintiff's case settled, she instructed her attorney not to pay the lender. The lender initiated arbitration in Pennsylvania, and the claimant filed a dec action in Florida arguing that the contract was unconscionable and usurious. The trial court stayed the dec action pending arbitration.

The court upheld an arbitration award in favor of the lender and granted its motion for attorneys fees. The claimant, pro se and assisted by a nonlawyer, had not preserved any issues for appeal. The court noted that the law does not regard these transactions as loans "because the corporation that gives money to the plaintiff has no right to recover from the plaintiff in the event that the lawsuit is unsuccessful," but that the transactions are "quite similar to any other non-recourse loan secured by an interest in any form of transferable property."

"There appear to be no laws regulating such agreements in Florida." Acknowledging that a person who suffers a severe personal injury will often need money to care for herself and her family during the litigation; and that "grocery stores and

mortgage lenders do not wait for payment" when someone is unable to work, the court pointed out that the contract in this case was "one-sided and designed to prevent a Florida citizen from having access to a local court . . . ." The court urged action by the Florida Bar and the Legislature.

Offer of Judgment / Proposal for Settlement

Heymann v. Free

2005 WL 2179733 (Fla. 1st DCA Sept. 8, 2005)

An offer of judgment from the plaintiff which did not apportion amounts attributable to the different defendants was not valid under Rule 1.442(c)(3), because a joint proposal for settlement must differentiate between the parties, even when one party's alleged liability is purely vicarious. See *Lamb v. Matetzschk*, 906 so.2d 1037 (Fla. 2005). The court agrees with the concurring opinion in *Lamb* that requiring an offer "to apportion fault between equally liable defendants may not promote settlements." Such a result would be contrary to the legislative intent of §768.79. The court questions whether there is a rational way to apportion fault between "equally liable defendants," and suggests that the rule should be amended.

Work Product

Huet v. Tromp

2005 WL 2175521 (Fla. 5th DCA Sept. 9, 2005)

Where a party listed its investigators as witnesses, the trial court properly denied a motion for protective order based on work product, because a party waives work product protection when he elects to present the investigator as a witness. However, where the party subsequently filed an amended witness list, striking the investigators, they "cured the basis for the prior ruling." The opposing party is then entitled to discovery only of materials (reports, photographs, surveillance videos, etc.) intended to be used at trial, unless they can show exceptional circumstances.