# Case Law Update

September 2008



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**

## Adult Protective Services Act

### *Bohannon v. Shands Teaching Hosp. & Clinics*
938 So.2d 717 (Fla. 1st DCA 2008)

Chapter 415, Florida Statutes, the Adult Protective Services Act, protects "vulnerable adults" from "abuse, neglect, and exploitation" by "caregivers," "Vulnerable adult" means a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging." "Caregiver" means a person who has been entrusted with or has assumed the responsibility for frequent and regular care of or services to a vulnerable adult on a temporary or permanent basis and who has a commitment, agreement, or understanding with that person or that person's guardian that a caregiver role exists. Section 415.1111 provides a cause of action for actual and punitive damages. The remedies are expressly provided in addition to and cumulative with other remedies available.

The court holds that an ordinary medical negligence action against an acute care hospital is not automatically also a cause of action under Chapter 415. However, the court acknowledges that there are scenarios, such as when the patient is in a coma and is then abused or neglected, where the statute could apply.

## Class Action

### *Jackson v. Southern Auto Finance Co.*
No. 4D07-3284 (Fla. 4th DCA 8/20/2008)

Defendant's offer to the named plaintiff of the full amount the plaintiff sought, which the plaintiff rejected, did not render the class action moot. The court notes that both Florida and federal courts reject the practice of "picking off" the class representative. See *Allstate Indem. Co. v. De La Rosa*, 800 So.2d 245 (Fla. 3d DCA 2001); *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004).

## Discovery – Medical Records of Nonparties

### *Graham v. Dacheikh*
No. 2D07-5347 (Fla. 2d DCA 8/20/2008)

The court granted certiorari to quash an order that required a doctor who examined the plaintiff for the defense pursuant to Rule 1.360 to produce all reports of examinations pursuant to Rule 1.360 that he had prepared for a three year period. The order allowed the doctor to remove the names and other identifying information, but made no other provisions for confidentiality and no provision for in camera inspection. Plaintiff requested these items for impeachment purposes. The court held that the order departed from the essential requirements of law because it lacked adequate protections for the privacy of the nonparties, and made no provision for notification of the nonparties as required by §456.057(7), Florida Statutes. The plaintiffs did not argue that such notice would be impossible. The court distinguished *Amente v. Newman*, 653 So.2d 1030 (Fla. 1995), because Amente was a medical negligence case, the doctor involved was a party, the evidence related to substantive issues in the case rather than impeachment, and compliance with the statute was impossible. The court also notes that because the individuals examined were all involved in prior litigation, it should be possible to contact them through their attorneys.

The court suggests that, if the documents are needed for impeachment to show bias, the plaintiff would not need the entire report of the patient's history and examination "as opposed to the doctor's impressions or conclusions at the end of his report."

## Evidence – Impeachment

### *Nationwide Mut. Fire Ins. Co. v. Bruscarino*
982 So.2d 753 (Fla. 4th DCA 2008)

Where plaintiff dropped her claim for lost wages and loss of future earning capacity on the day of trial, the trial court properly prohibited the defense from impeaching her with deposition testimony about her earnings as a waitress which conflicted with her tax returns. The impeachment would have concerned a collateral issue.

## Graves Amendment (Rental Car Immunity)

### *Brookins v. Ford Credit Titling Trust*
2008 WL 2744335 (Fla. 4th DCA 7/16/2008)

Certifying conflict with the Third District's decision in *Kumarsingh v. PV Holding Corp*., 983 So.2d 559 (Fla. 3d DCA 2008) and *Bechina v. Enterprise Leasing Co*., 972 So.2d 925 (Fla. 3d DCA 2007), the Fourth District holds that the federal Graves Amendment, 49 U.S.C. §30106, does not preempt either the Florida common law dangerous instrumentality doctrine or the Florida rental car financial responsibility statute, §324.021(9), Florida Statutes.

## Hurricane – Tolling of Time

### *In Re: Emergency Request to Extend Time Periods Under All Florida Rules of Procedure for the Third District Court of Appeal*
Admin. Order. No. AOSC08-37 (8/21/2008)

Because of Tropical Storm Fay, in the Third District Court of Appeal, "all time limits authorized by rule and statute applicable to notices of appeal of final and non-final orders, whether filed in the circuit or county court, are tolled from 5:00 p.m. on Friday, August 15, 2008 through 8:00 a.m. on Wednesday, August 20, 2008, nunc pro tunc." The court allows further discretion in the courts, in all districts, in which a case is pending, on a case by case basis, where a party demonstrates that lack of compliance was "directly attributable to the emergency situation."

## Insurance – Agent

### *Essex Ins. Co. v. Zota*
2008 WL 2520879 (Fla. 6/26/2008)

An insurance broker is an agent of the insured, not the insurer, where the broker is employed by the insured to procure insurance. However, this presumption can be overcome by evidence of a special relationship, i.e., indicia of agency, showing that the broker's arrangement with the insurer was not a standard relationship. A broker represents the insured by acting as a middleman, soliciting insurance from the public under no employment from any special company, and placing the insurance with a company selected by the insured or, if the insured does not make a selection, with a company selected by the broker. An agent represents the insurer under an exclusive employment agreement. The distinction is important because the acts of an agent are imputable to the insurer; the acts of a broker are imputable to the insured. Here, the broker was a broker, not an agent, and the delivery of the policy by the insurer to the broker satisfied the requirement of delivery to the insured. The court holds that the requirement of delivery to the insured is applicable to a surplus lines insurer.

## Insurance – CGL Coverage

### *Auto-Owners Ins. Co. v. Pozzi Window Co.*
984 So.2d 1241 (Fla. 2008)

Under a standard CGL policy with products completed operations hazard coverage, issued to a general contractor, faulty workmanship that is neither expected nor intended from the standpoint of the insured contractor can constitute an "accident" and thus a covered "occurrence." In this case, if the claim is for repair and replacement of windows that were not initially defective but were damaged by defective installation, this constitutes physical injury to tangible property and there is coverage. However, if the windows were purchased directly by the homeowner and were defective themselves before they were installed, there would be no coverage.

## Insurance – Punitive Damages – Estoppel

### *First Specialty Ins. Co. v. Caliber One Indem. Co.*
No. 2D07-3257 (Fla. 2d DCA 8/15/2007)

An insurance policy that provided coverage for "compensatory" damages and excluded "civil, criminal or administrative fines or penalties" did not provide coverage for punitive damages or attorneys fees awarded in a medical malpractice case against the insured. The court remands for the trial court to determine

whether the insurer's agent's representations that the policy would cover punitive damages required coverage under a promissory estoppel theory.

## Limitations

### *C.H. v. Whitney*
2008 WL 2219261 (Fla. 5th DCA 5/30/2008)

Amendment of the complaint in a wrongful birth action to substitute the mother as plaintiff for the guardian of the child related back to the original filing of the complaint, and was not barred by the statute of limitations, where the amended complaint sought only economic damages for the benefit of the child, which were part of the original damages claimed by the guardian.

The relation back doctrine is applied liberally. An amendment adding a new party relates back if the new party is sufficiently related to an original party that the amendment would not prejudice the opponent. These principles apply whether the change in parties is as to plaintiffs or defendants. See, e.g., *Darden v. Beverly Health & Rehab*., 763 So.2d 542 (Fla. 5th DCA 2000). Here, the complaints arose out of the same conduct, transaction or occurrence. The child, the guardian and the mother all had an identity of interest in recovering medical benefits for the care of the child and the defendants showed no prejudice from the amendment. See Fla. R. Civ. P. 1.190.

The cause of action for wrongful birth belongs to the parents, not to the child, but it is brought, in part, for the benefit of the child, to obtain funds to care for the child, and the Supreme Court has held that the money recovered for the care of the child must be held for the child's benefit. *Kush v. Lloyd*, 616 So.2d 415 (Fla. 1992). The summary judgment motion raised for the first time the argument that the guardian was not the proper person to bring the lawsuit. The plaintiff moved ore tenus to amend the complaint at the hearing on the defendants' motion for summary judgment. Note that a court has discretion to grant leave to amend at any time before a summary judgment is entered, and should grant leave to amend even if the motion is made at the summary judgment hearing; it is an abuse of discretion to deny leave to amend if it is apparent that the plaintiff can state a cause of action. E.g., *Greenburg v. Johnson,* 367 So.2d 229 (Fla. 3d DCA 1979); *Old Republic Ins. Co. v. Wilson,* 449 So.2d 421 (Fla. 3d DCA 1984). *Gate Lands Co. v. Old Ponte Vedre Beach Condo*., 715 So.2d 1132 (Fla. 5th DCA 1998).

### *Porumbescu v. Thompson*
No. 1D07-4231 (Fla. 1st DCA 8/20/2008)

The trial court erred in granting summary judgment to the defendants on the grounds of statute of limitations where it failed to give the plaintiffs credit for the automatic 90 day extension of time filed pursuant to §766.104(2), which is tacked on to the end of the limitations period and does not run simultaneously with the 90 day presuit tolling period under §766.106(4). See *Hankey v. Yarian*, 755 So.2d 93 (Fla. 2000). The court explains that once the 90 day extension under §766.104(2) is "purchased," the statute of limitations becomes 2 years and 90 days. This period is tolled by the 90 day presuit investigation period after the plaintiff serves the notice of intent.

## Offer of Judgment / Proposal for Settlement

### *Attorneys' Title Ins. Fund, Inc. v. Gorka*
No. 2D07-3369 (Fla. 2d DCA 9/3/2008)

Defendant's proposal for settlement to plaintiffs was invalid. It offered $12,500 to each plaintiff and stated that it was "conditioned upon the offer being accepted by both [plaintiffs]. In other words, the offer can only be accepted if both [plaintiffs] accept and neither plaintiff can independently accept the offer without their co-plaintiff joining in the settlement." In light of the "penal nature" of §768.79 and the requirement of strict construction, the court held the proposal invalid because one offeree could be subject to the penalty of paying attorneys fees due to the actions of the other, and could not make an independent decision to accept or reject the proposal. The court distinguishes *Clements v. Rose*, 982 So.2d 731 (Fla. 1st DCA 2008), which upheld an offer to two defendants which conditioned acceptance on both defendants accepting the offer. The court points out that *Clements* actually decided only whether the offer in that case was ambiguous, and did not address the issue addressed in this case. However, the court certifies conflict with *Clements* to the extent that it holds valid joint offers conditioned on acceptance by all of the joint offerees.

## Sanctions

### *Granados v. Zehr*
979 So.2d 1155 (Fla. 5th DCA 2008)

Art. I, §21, Fla. Const. guarantees the right of access to courts. Therefore, courts should be very cautious in dismissing a case for fraud on the court, and should only do so based on clear and convincing evidence of fraud, pretense, collusion or other similar wrongdoing. Where a plaintiff, in answering interrogatories, denied prior injuries, physical infirmities or sickness, but disclosed the name of the doctor who had treated her for back pain a year before, the issue was appropriate for cross examination but dismissal was excessive. "While this might be considered an inconsistency, a nondisclosure or even a false statement, it quite clearly did not unfairly hamper the preparation of the

defense." "Generally speaking, therefore, allegations of inconsistency, nondisclosure, and even falseness, are best resolved by allowing the parties to bring them to the jury's attention through cross examination or impeachment, rather than by dismissal of the entire action."

### *Ibarra v. Izaguirre,*
2008 WL 2116665 (Fla. 3d DCA 5/21/2008)

Dismissal was too harsh a sanction for plaintiff's failure to disclose a slip in a bank when asked about accidents or injuries prior to or after the accident that was the subject of the suit. The plaintiff had slipped but did not fall; experienced some discomfort the following night; did not make a formal claim, and reported the fall to the bank but did not hire a lawyer or bring suit. Clear and convincing evidence of fraud is required. Alleged inconsistencies can better be handled through impeachment or cross examination.

There seems to be a trend developing limiting the sanction of dismissal for fraud on the court to the most egregious cases. But be careful with these cases. Not every dismissal results in a reported opinion. I am aware of at least one recent PCA without opinion.

### *Burgess v. Pfizer*
No. 3D07-754, 3D07-455 (Fla. 3d DCA 8/3/2008)

The court upholds monetary sanctions against plaintiff's attorney, but reverses monetary sanctions against the plaintiff and also reverses dismissal of her complaint, where all of the improper conduct, disobedience of orders regarding pleadings, and failure to appear at a case management conference were the actions of the attorney, not the client.

## Statutes – Retroactivity

### *Williams v. American Optical Corp.*
985 So.2d 23 (Fla. 4th DCA 2008)

The Florida Asbestos and Silica Compensation Fairness Act, Chapter 774, Part II, Florida Statutes, was enacted in 2005. It requires a claimant bringing an action for damages from exposure to asbestos, as an indispensable element, to plead and prove an existing malignancy or actual physical impairment for which asbestos exposure was a substantial contributing factor. Prior to the act, it was only necessary to show that they had suffered an injury from an asbestos-related disease. Florida recognized a cause of action for asbestos disease without any permanent impairment or cancer. The plaintiffs had filed suit before the effective date of the Act. The court held the Act could not be applied retroactively to their claims. Their right to their cause of action was vested before the enactment of the Act. Therefore, it was error to dismiss their claims on the ground that they had not yet suffered any malignancy or actual physical impairment.

The court recognizes that a cause of action which has accrued is a form of intangible property and cannot retroactively be impaired or abolished by statute.

The court agrees with the plaintiff that the Third District's decision in *Daimler Chrysler Corp. v. Hurst*, 949 So.2d 279 (Fla. 3d DCA 2007) is distinguishable because the plaintiff in that case could not prove any medical connection between asbestos exposure and his illness. However, noting that courts have been applying *Hurst* more broadly, the court certifies conflict, "to the extent that it does stand for a holding that the Act may be validly applied to asbestosis claimants with accrued causes of action for damages but without permanent impairments or any malignancy."

Also finding that the Act is not severable, because "it is not intellectually possible on the basis of any recognized principles to disconnect the several provisions of an Act whose singular purpose is to end litigation by claimants who have been damaged by asbestos exposure without resulting malignancy or physical impairment," the court holds the act in its entirety is inapplicable to these claims.