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Case Law Update

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Arbitration - Nursing Home

Santa Rosa Inv., Inc. v. Wilson, No. 1D14–3935, 2015 WL 4925217 (Fla. 1st DCA Aug. 19, 2015)

A nursing home patient had given her brother a durable power of attorney which authorized him, among other things, to pursue actions for "liquidated or liquidated" damages. The brother signed a nursing home arbitration agreement. The nursing home argued that the phrase was obviously a typo and that it should be interpreted to say "liquidated or unliquidated." The trial court held that the power of attorney clearly authorized the brother to pursue only actions for liquidated damages and refused to compel arbitration.

The First DCA reversed and held that the trial court was required to hold an evidentiary hearing to determine the intent of the ambiguous document. The court should consider parol evidence as well as the document as a whole.

Autos - Permissive User - Caps

De Los Santos v. Brink, 167 So.3d 519 (Fla. 5th DCA 2015)

The 5th DCA reduced a judgment against a vehicle owner in excess of $12.8 million to $600,000. The owner's liability was purely vicarious. The court cited §324.021(9)(b)(3), Fla. Stat. That section provides:

"The owner who is a natural person and loans a motor vehicle to any permissive user shall be liable for the operation of the vehicle or the acts of the operator in connection therewith only up to $100,000 per person and up to $300,000 per incident for bodily injury and up to $50,000 for property damage. If the permissive user of the motor vehicle is uninsured or has any insurance with limits less than $500,000 combined property damage and bodily injury liability, the owner shall be liable for up to an additional $500,000 in economic damages only arising out of the use of the motor vehicle. The additional economic damages shall be reduced by amounts actually recovered from the permissive user and from any insurance or self-insurance covering the permissive user. Nothing in this subparagraph shall be construed to affect the liability of the owner for his or her own negligence."

This is a reminder of how important it is to try to find a theory of negligence, such as negligent entrustment, against a vehicle owner who is a natural person. At least one court has found that, because of this statute, it is now permissible to plead negligence of the owner in addition to vicarious liability under the dangerous instrumentality doctrine. See *Trevino v. Mobley*, 63 So.3d 865 (Fla. 5th DCA 2011), distinguishing *Clooney v. Geeting,* 352 So.2d 1216 (Fla. 2d DCA 1977).

Class Certification

Lucarelli Pizza & Deli v. Posen Constr., Inc., No. 2D14–4311, 2015 WL 4923706 (Fla. 2d DCA Aug. 19, 2015)

The trial court correctly refused to certify a class action against a construction company for loss of gas services caused when defendant's employee damaged a gas line. The plaintiff failed to prove that any other members of the class suffered damages.

Evidence - Daubert

Booker v. Sumter County Sheriff's Office, 166 So.3d 189 (Fla. 1st DCA 2015)

This is the first reasonably comprehensive look at how *Daubert* is going to work procedurally in Florida state courts. Although it is a workers comp case, the First DCA generally applies the rules of evidence in workers comp the same way as in other cases.

The trial court has discretion to set deadlines for *Daubert* challenges and to determine if a *Daubert* challenge has been timely raised.

Next, the trial judge, as gatekeeper, "must determine whether the objection was sufficient to put opposing counsel on notice so as to have the opportunity to address any perceived defect in the expert's testimony." The objection should include, for example, instance, citation to "conflicting medical literature and expert testimony." "[U]nsubstantiated facts, suspicions, or theoretical questions regarding the expert's qualifications are not sufficient" A general objection at the expert's deposition is not enough.

Here, the trial court properly found that "Daubert objections must be directed to specific opinion testimony and 'state a basis for the objection beyond just stating she was raising a Daubert objection in order to allow opposing counsel an opportunity to have the doctor address the perceived defect in his testimony.'"

The Daubert statute makes "pure opinion" testimony inadmissible. The trial court did not abuse its discretion in finding that the experts' opinions here were not impermissible "pure opinion," but were based on published medical literature, as well as an examination of the patient.

The trial court did not abuse its discretion in admitting the experts' testimony because it "found the experts were well-acquainted with Appellant's medical history and current medical condition, they relied on published medical studies generally accepted within the medical community, and they applied the results of those studies to the facts of this case in reaching their opinions on causation."

The court reviewed the Daubert rulings for abuse of discretion. Frye rulings were reviewed de novo. See Hadden v. State, 690 So.2d 573 (Fla. 1997).

Hearsay - Business Records

Cardona v. Nationstar Mortgage LLC,
No. 5D14–3584, 2015 WL 4140265 (Fla. 5th DCA July 7, 2015)

A bank employee's testimony based solely on his review of business records, not on any personal knowledge, was inadmissible hearsay where the records themselves were not introduced in evidence.

Insurance - Assignment

United Water Rest. Gp., Inc. v. State Farm Fla. Ins. Co.,
No. 1D14–3797, 2015 WL 4111662 (Fla. 1st DCA July 8, 2015)

The First DCA granted cert and reversed a decision of the circuit court appellate division. The lower court applied the wrong law and denied due process by going outside the four corners of the complaint and ruling that the assignee of a first party insurance claim could not state a claim because the insurer denied coverage.

The court held that the insured's assignee may claim damages under a policy even when the insurer denied coverage, and may litigate the disputed issue of coverage.

Insurance - Bad Faith

North Am. Capacity Ins. Co. v. C.H.
No. 2D14–3161, 2015 WL 4681046 (Fla. 2d DCA Aug. 7, 2015)

The nonjoinder statute, § 627.4136, Fla. Stat., permits the plaintiff, with leave of court, to add an insurer as a defendant after verdict, before entry of judgment. After the verdict in the tort case, the trial court allowed the plaintiff to amend to add the insurer as a party, with a count seeking coverage and the policy limits and another count for bad faith. The court abated the bad faith count. In an appeal from a partial final judgment on the coverage issue, the insurer tried to raise the issue of whether the order allowing amendment to add the bad faith count was proper. The court held that review of the earlier order allowing the bad faith count was untimely.

The court mentions the decision in *GEICO General Insurance Co. v. Harvey*, 109 So. 3d 236, 237 (Fla.4th DCA 2013), which held that an insurance bad faith claim must be raised in a separate cause of action and cannot be brought in an underlying tort action, because it deprives the insurer of the right to remove the action. This court does not reach that issue, but notes that " nothing appears to prevent [the insurer] from raising this argument on appeal from the final judgment of the bad faith claim once it is decided in the underlying action."

As to the insurer's alleged "right" to remove, see *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994). There, the court stated, "[w]hile a defendant does have a right, given by statute, to remove in certain situations, plaintiff is still the master of his own claim," and "[d]efendant's right to remove and plaintiff's right to choose his forum are not on equal footing."

Insurance - Dec Action

Homeowners Prop. & Cas. Ins. Co. v. Hurchalla,
No. 4D15–481, 2015 WL 4747551 (Fla. 4th DCA Aug. 12, 2015)

The Fourth District held that it was error for the trial court to enter an order staying the insurer's dec action to determine coverage and duty to defend while the underlying case was pending.

The factors the court should consider include:

(1) whether the two actions are mutually exclusive; (2) whether proceeding to a decision on the indemnity issue will promote settlement and avoid the problem of collusive actions between the claimant and the insured in order to create coverage where there is none; and (3) whether the insured has resources independent of insurance, so that it would be immaterial to the claimant whether the insured's conduct was covered or not covered by the indemnity insurance.

The trial court may, however, issue protective orders to protect information that is covered by the attorney-client privilege or is otherwise privileged. The insured may raise specific objections to discovery questions that may reveal her defense strategy

Insurance - Homeowners - Exclusion

Miglino v. Universal Prop. & Cas. Ins. Co., No. 4D13–4161, 2015 WL 4930564 (Fla. 4th DCA Aug. 19, 2015)

Describing the case as one of first impression in Florida, the court held that the insurer had no duty to defend or indemnify the insured in an action arising out of a shooting, because of a "physical abuse" exclusion in the policy.

The policy excluded "occurrences" "[a]rising out of sexual molestation, corporal punishment or physical or mental abuse." The policy did not define "physical abuse." The court looked to Black's Law Dictionary and a non-legal dictionary.for definitions of "physical" and "abuse."

> The plain meaning of "physical abuse" encompasses the intentional shooting of Miglino by the sister. Such an act clearly constitutes "physical ... maltreatment," "physical injury," and "hurt or injur[y] by maltreatment" ...

The court ruled that no torment or humiliation was required to constitute "physical abuse."

Jurisdiction - Discovery

Vazquez v. Romero, No. 1D15–0623, 2015 WL 4925265 (Fla. 1st DCA Aug. 19, 2015)

The court rejected an employer's effort to use the worker's comp system to do an end run around discovery procedures in the pending civil action the employee had filed against it.

After filing a petition for worker's comp benefits, an injured worker voluntarily dismissed the claim without prejudice and sued the employer in circuit court. The employer attempted to use the worker's comp proceeding to get discovery. The court held that once the petition for benefits was dismissed, the JCC had no jurisdiction to order any discovery, and granted a writ of prohibition.

Jury Selection - Backstriking

Aquila v. Brisk Transp., L.P. No. 4D12–4498, 2015 WL 4549484 (Fla. 4th DCA July 29, 2015)

The right to a peremptory challenge includes the right to view the panel as a whole before exercising the challenge. This means the parties have the right to backstrike until the jury is sworn. *Tedder v. Video Electronics, Inc.*, 491 So.2d 533 (Fla. 1986). The trial court erroneously refused to allow backstriking.

The jury was tentatively selected but not sworn. The court had dismissed the rest of the panel. Then, one of the chosen jurors said he could not serve because of a prepaid vacation. The court excused him, but when both parties expressed a wish to backstrike, the court refused to allow it. The plaintiff did not specify which juror he would backstrike. Jury selection continued for several hours. The plaintiff never renewed his objection or his request to backstrike.

The court held that it was error to refuse to allow backstriking. However, the plaintiff's failure to renew his objection before the jury was sworn, or to specify which juror or jurors he would have stricken, waived the error.

Rule 1.431(f), Fla. R. Civ. P. provides: "No one shall be sworn as a juror until the jury has been accepted by the parties or until all challenges have been exhausted." The accompanying Committee Note explains that "Subdivision (f) has been added to ensure the right to "back-strike" prospective jurors until the entire panel has been accepted in civil cases." However, as this case demonstrates, you must preserve the error by renewing the objection right before the jury is sworn and specifying which juror you would have excused.

Med Mal - Amendment 7

Bartow HMA v. Edwards, No. 2D14–3450, 2015 WL 4154180 (Fla. 2d DCA July 10, 2015)

Amendment 7 does not give the plaintiff access to medical incident records that were not "made or received in the course of business". The requested documents were external peer review documents and were privileged. The court holds that the external peer review was not kept in the course of a regularly conducted business activity, but was generated for purposes of litigation.

The court rejected the plaintiff's argument that the hospital was trying to avoid Amendment 7 by outsourcing its peer review.

Bartow HMA v. Kirkland, No. 2D14–5970, 2015 WL 4621323 (Fla. 2d DCA July 31, 2015)

Amendment 7 only gives the plaintiff access to documents that relate to adverse medical incidents, "relating to an actual patient," not to policies on how to handle adverse incidents generally. The court granted certiorari and quashed an order requiring the hospital to produce policies and procedures, meeting minutes involving discussion of policies, and other similar documents. The court remanded to the trial court to go through the documents produced in camera. "Though we recognize the burden that the trial court will face by having to wade through the approximately 3000 pages of documents at issue, we conclude that that is the only way to ensure that each document is thoroughly reviewed under both an Amendment 7 and statutory protection analysis."

Med Mal - Ex Parte

Weaver v. Myers, No. 1D14–3178, 2015 WL 4429170 (Fla. 1st DCA July 21, 2015)

The First DCA ruled that the 2013 amendments to §§766.106 and 766.1065, Fla. Stat., allowing defense lawyers in med mal cases to have ex parte contact with treating doctors are constitutional and are not preempted by HIPAA.

The court rejected arguments based on (1) the separation of powers doctrine, Art. V §2(a), Fla. Const; (2) the constitutional limitation on special legislation, Art. III §11, Fla. Const; (3) the constitutional guarantee of access to courts, Art. I §21, Fla. Const; and (4) the decedent's constitutional right to privacy, Art. I §23, Fla. Const..

Here is the court's reasoning on each issue:

The court found the amendments are primarily substantive, do not infringe on the Supreme Court's rulemaking power, and do not impermissibly conflict with Rule 1.650, Fla. R. Civ. P.

They are not prohibited "special laws" because they do not benefit "local or private interests." The criteria are: (1) the class is open to others who may enter it; and (2) there is a rational distinction between those in the class and those outside it, when the purpose of the legislation and the subject of the regulation are considered.

The amendments do not create a "significantly difficult" impediment to the right of access to courts, but merely create a reasonable condition precedent to filing suit.

The right of privacy in the plaintiff's medical information is waived by filing a medical malpractice claim. The court points out that information not relevant to the potential lawsuit is not discoverable by ex parte means.

On the HIPAA issue, the court adopts the reasoning of the Eleventh Circuit in *Murphy v. Dulay*, 768 F.3d 1360 (11th Cir.2014).

PIP - Medicare Schedules

Orthopedic Specialists v. Allstate Ins. Co., 2015 WL 4927203 (Fla. 4th DCA Aug. 19, 2015).

In thirty-two consolidated cases brought by medical services providers, the court held that Allstate's insurance policy provision electing to use Medicare fee schedules was unclear and ambiguous. The policy must be construed against the insurer. Therefore the language was not legally sufficient to authorize Allstate to apply the Medicare fee schedule reimbursement limitations set forth in section 627.736(5)(a)2., Florida Statutes

The language at issue is:

> Any amounts payable under this coverage shall be subject to any and all limitations, authorized by section 627.736, or any other provisions of the Florida Motor Vehicle No–Fault Law, as enacted, amended or otherwise continued in the law, including, but not limited to, all fee schedules.

The court agreed with the providers that it was not clear whether Allstate actually was adopting the fee schedules or only reserving the right to do so.

The court certified conflict with *Allstate Fire & Cas. Ins. Co. v. StandUp MRI of Tallahassee*, P.A., 2015 WL 1223701, 40 Fla. L. Weekly D693 (Fla. 1st DCA Mar. 18, 2015).

Proposal for Settlement

Feinzig v. Deehl & Carlson, Nos. 3D14–2539, 3D14–904, 2015 WL 4747876 (Fla. 3d DCA Aug. 12, 2015)

In this action, an appellate law firm sued a trial lawyer firm for failing to pay her as agreed. The trial law firm had the case on a contingency basis, but had orally agreed to pay the appellate law firm on a reduced hourly basis. Substantial competent evidence supported the trial court's finding that the agreement between the trial and appellate lawyers was not contingent on the outcome of the case.

The Third DCA found the appellate law firm's proposal for settlement valid even though the attached proposed "mutual release" included additional releasees besides those named in

the proposal for settlement. The releases included not just the law firms but the individual attorneys as well. The court stated that a "standard release identifying typical affiliates of a party" does not create an ambiguity.

This case is the second time in recent months that an appellate court has required trial lawyers to pay fees they had agreed to pay to appellate lawyers but had refused to pay. See *Burlington & Rockenbach v. Law Offices of E. Clay Parker*, 160 So.3d 955 (Fla. 5th DCA 2015).

Borden Dairy Co. v. Kuhadja, No. 1D14–4706, 2015 WL 4774629 (Fla. 1st DCA Aug. 14, 2015)

The court held that a proposal for settlement that did not mention fees was invalid even though fees were not part of the claim.

Rule 1.442(c)(2)(F) requires the proposal to "state whether the proposal includes attorneys' fees and whether attorneys' fees are part of the legal claim" Strict compliance with the rule is required.

The court certified conflict with *Bennett v. American Learning Systems of Boca Delray, Inc.*, 857 So. 2d 986 (Fla. 4th DCA 2003)

Three Lions Constr. v. The Namm Group, No. 3D14–880, 2015 WL 4464494 (Fla. 3d DCA July 22, 2015

It is not enough to file a motion for extension of time to respond to a proposal for settlement; the motion must be set for hearing before the proposal expires. The court rejected an effort to accept a proposal more than 30 days after it was made, because the proposal expired without the extension of time having been granted. It is not entirely clear from the way the opinion is written whether the motion must actually be heard or whether it is enough to try to get it heard during that time. Compare *Donohoe v. Starmed Staffing,* 743 So.2d 623 (Fla. 2d DCA 1999) (time not tolled where offeree "chose not to set its motion for hearing"), distinguishing *Goldy v. Corbett Cranes Services*, 692 So.2d 225 (Fla. 5th DCA 1997) (parties agreed to one extension, offer was withdrawn before motion for extension could be heard).

Stipulations

Palm Beach Polo Holdings v. Broward Marine, Inc., No. 4D13–1618, 2015 WL 4926551 (Fla. 4th DCA Aug. 19, 2015)

This case emphasizes the decisive role that pretrial stipulations play in determining the issues in the case.

The Fourth DCA reversed an amended final judgment that found that the defendant had waived its statute of limitations defense. The court held that the pretrial stipulation controlled the issues to be tried, regardless of what was pled. Because the defense was included in the pretrial stip, it was not waived.

The trial court erroneously ruled that, because the statute of limitations defense was not framed in the preliminary instructions to the jury and the defendants did not argue the issue in their opening statement, the defense was waived.

> [W]e take this opportunity to remind judges and litigators that any previous skirmishes or dust-ups or contentious pretrial issues become mostly irrelevant once the parties prepare and stipulate as to the final agreed-upon "executive summary" as to what the impending trial is about and the specific issues that remain on the table. The Pretrial Stipulation is surely one of the most coveted and effective pretrial devices enjoyed by the trial court and all involved parties. Cf. *Broche v. Cohn*, 987 So. 2d 124, 127 (Fla. 4th DCA 2008) ("A stipulation that limits the issues to be tried 'amounts to a binding waiver and elimination of all issues not included.'" (quoting *Esch v. Forster*, 168 So. 229, 231 (Fla. 1936))).
>
> Everyone connected with the trial—from witnesses unsure if they will ultimately be called to trial, to well-prepared and efficient lawyers— benefits from a mandated and thereafter duly enforced Pretrial Stipulation.
>
> The Pretrial Stipulation is a powerful blueprint that fully enables a well-run and fair trial. "'[I]t is the policy of the law to encourage and uphold stipulations in order to minimize litigation and expedite the resolution of disputes.'" Id. (quoting *Spitzer v. Bartlett Bros. Roofing*, 437 So. 2d 758, 760 (Fla. 1st DCA 1983)). "'Pretrial stipulations prescribing the issues on which a case is to be tried are binding upon the parties and the court, and should be strictly enforced.'" Id. (quoting *Lotspeich Co. v. Neogard Corp*., 416 So. 2d 1163, 1165 (Fla. 3d DCA 1982)).

Whether or not the limitations issue was contained in the preliminary instruction to the jury or was referenced in the appellants' opening statement is of no consequence.

Successive Tortfeasors Stuart v. Hertz

Allstate v. Theodotou, 2015 WL 4486578 (Fla. 5th DCA July 24, 2015)

Under *Stuart v. Hertz,* 351 So.2d 703 (Fla. 1977), an initial tortfeasor cannot force a plaintiff to litigate a medical malpractice claim by filing a third party complaint against the plaintiff's subsequent treating doctors alleging that their malpractice

aggravated the plaintiff's injuries. The plaintiff has the choice of whether and when to sue their doctors.

The court certifies the question to the Florida Supreme Court:

> Is a party that has had judgment entered against it entitled to seek equitable subrogation from a subsequent tortfeasor when the judgment has not been fully satisfied?

However, where judgment has been entered against the initial tortfeasor for all of plaintiff's damages, and the tortfeasor has not paid the judgment, this court holds that the initial tortfeasor may intervene in the plaintiff's subsequent medical malpractice action to claim equitable subrogation against the subsequent treating healthcare providers.

Ordinarily, a torfeasor is required to pay all of the damages before bringing an action for equitable subrogation. The court says an exception to that rule is justified here, because the plaintiff "elected to sue only [the initial tortfeasors, presumably knowing that they could not afford to pay a multi-million dollar judgment," and then chose to sue the medical providers.

> "The issue we address is whether, under Underwriters at *Lloyds v. City of Lauderdale Lakes*, 382 So. 2d 702 (Fla. 1980), an initial tortfeasor or her insurer may assert an equitable subrogation claim against a subsequent tortfeasor when: (1) the initial tortfeasor was precluded from bringing the subsequent tortfeasor into the original personal injury action under *Stuart v. Hertz*, 351 So. 2d 703 (Fla. 1977); (2) judgment was entered against the initial tortfeasor for the full amount of the injured person's damages, regardless of the initial tortfeasor's portion of the fault; and (3) that judgment has not been completely paid by the initial tortfeasor or her insurer. We conclude that, under the circumstances presented in this case, equity dictates that Appellants be allowed to seek equitable subrogation from the Medical Providers. "
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> "Notably, the other central policy goals of *Stuart* were to: (1) allow the plaintiff to choose the manner of the litigation; and (2) spare the plaintiff the "trauma" of an "extensive" medical malpractice trial. Here, the plaintiff chose the manner of the litigation. He elected to sue only the Boozers, presumably knowing that they could not afford to pay a multi-million dollar judgment. He then chose to sue the Medical Providers, leading to, ironically, his involvement in what could become an "extensive" medical-malpractice trial. The intervention of the initial tortfeasor into that lawsuit is a consequence of these choices."

Summary Judgment

Wilson v. Stone, No. 3D13–2604, 2015 WL 4928319 (Fla. 3d DCA Aug. 19, 2015)

The court affirmed summary judgment for defendant University of Miami. Plaintiff alleged that UM was liable for the negligence of one doctor. At the summary judgment hearing, plaintiff tried to argue that UM was liable for the negligence of other doctors, but did not move to amend the complaint to allege UM's liability for those other doctors. The trial court entered final summary judgment for UM and the Third District affirmed.

Compare, e.g., Old Republic Ins. Co. v. Wilson, 449 So.2d 421 (Fla. 3d DCA 1984) ("Leave to amend should be freely given when justice so requires, Fla.R.Civ.P. 1.190(a), the more so when a party seeks such a privilege at or before a hearing on a motion for summary judgment")

Trial - "At Issue"

Gawker Media v. Bollea, No. 2D15–2857, 2015 WL 4031705 (Fla. 2d DCA July 2, 2015)

The court granted a petition for write of mandamus to prohibit the trial of the case less than 50 days after the case was at issue.

The plaintiff moved for leave to amend to add punitive damages, and that motion was not heard and decided until six weeks before trial. Although the court said the defendants were excused from filing an answer to the amendment, the DCA held that the defendants had the right to answer unless they waived it; the court could not merely excuse it in order to get the case to trial..

In addition, one defendant, who was challenging personal jurisdiction, had not answered. Although plaintiff dropped that defendant, he did not do so until days before the scheduled start of trial.

"Rule 1.440(a) provides that an action is deemed at issue "after any motions directed to the last pleading served have been disposed of or, if no such motions are served, 20 days after service of the last pleading." Thereafter, under subsection (b) a party must serve a notice that the action is at issue and ready to be scheduled for trial. Per subsection (c), the court must then enter an order setting trial no fewer than thirty days hence. The rule thus prescribes a minimum interval of fifty days between service of the last pleading and commencement of trial."