Case Law Update

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Arbitration

Furia v. Ziccarelli
2006 WL 2265365 (Fla. 4th DCA 8/9/2006)

Section 44.103 , Florida Statutes, allows the court to order the parties to participate in non-binding arbitration. The arbitrator's decision becomes final if neither party files a request for trial de novo within 20 days after it is served. §44.103(5); Rule 1.820(h), Fla. R. Civ. P. The court holds that five days for mailing is added to the 20 days, so that parties actually have 20 days from service of the arbitrator's decision to request trial de novo. See Fla. R. Civ. P. 1.090(e) (additional time for service by mail).

Stowe v. Universal Prop. & Cas. Ins. Co.
2006 WL 1896714 (Fla. 4th DCA 7/12/2006)

This decision displays a different attitude toward the arbitration statute and rule, and less deference to the right of access to courts. The court holds that a motion for trial filed after the arbitration hearing but before rendition of the arbitrator's decision is not in compliance with the rule's time requirements. "The purpose of a rule 1.820(h) motion for trial 'is to hasten the litigation along, make the parties evaluate the award, and either accept it or complete the litigation through trial.' . . . An award cannot be evaluated until it is made by the arbitrator, indicating that the rule contemplates a motion made after an award." **Judge Hazouri** dissents, arguing that the majority has placed form over substance. "To hold that Stowe had to wait for the rendition of the arbitrator's decision before filing a notice for trial, which he was prevented from doing due to the trial judge's procedure, creates a 'bright-line rule' that obstructs the fair administration of justice and denies Stowe his right to a jury trial."

I suspect that we have not heard the last of this case. Compare *Swift v. Wilcox*, 924 So.2d 885 (Fla. 4th DCA 2006) (motion for fees filed after trial court granted motion for summary judgment but before entry of final judgment was timely under rule requiring motion to be served "within" 30 days after filing of judgment).

Alterra Healthcare Corp. v. Bryant
No. 4D05-4409 (Fla. 4th DCA 9/13/2006)

Provisions in an arbitration agreement that capped non-economic damages awardable against an assisted living facility at $250,000, and precluded punitive damages were contrary to public policy and unenforceable. Parties may agree to arbitrate statutory claims, but the arbitration agreement cannot defeat the remedial portions of the statute. The assisted living facility statute provides a residents' bill of rights and a civil remedy for violations. §§400.428, 400.429, Fla. Stat. Another provision, waiving any right to appeal the arbitrator's decision, was void as contrary to the Florida Arbitration Code, §682.20, which provides a limited right to appeal. The trial court, not the arbitrator, had the power to decide these issues. Because the arbitration agreement contained a severance provision, the court could order arbitration, while voiding the offending provisions, instead of invalidating the agreement in its entirety.

See also *SA-PC-Ocala, L.L.C. v. Stokes*, 2006 WL 2347369 (Fla. 5th DCA 8/11/2006), discussed below under Nursing Homes.

Attorneys Fees

Superior Protection, Inc. v. Martinez
930 So.2d 859 (Fla. 2d DCA 6/21/ 2006)

Even though the plaintiff 's post trial motion for attorneys' fees was untimely and had to be denied, the plaintiff could still seek attorneys' fees in the appellate court for the work done on the appeal.

Class Actions

Home Depot, Inc. v. Marsh & McLennan Cos., Inc.
2006 WL 2355392 (Fla. 4th DCA 8/17/2006)

A trial court has discretion and is not required to stay a case while a parallel federal class action is pending, particularly where the plaintiff says it intends to opt out of the class.

Death of a Party

Eusepi v. Magruder Eye Institute
No. 5D05-3182 (Fla. 5th DCA 9/15/2006)

After filing suit for malpractice that left him blind, the plaintiff died from causes unrelated to the malpractice. The widow moved to amend to allege a survival action, stating that she was his survivor and would be appointed his personal representative. The motion was granted. Nevertheless, when the estate was not opened within 90 days of the suggestion of death, the judge granted the defendant's motion to dismiss. The 5th DCA reversed, holding that Rule 1.260 only requires the motion to be filed within 90 days of the suggestion of death. It does not require the estate to be opened within that time."Rule 1.260 is in its present form precisely so that the process of substitution of a new party for a party who dies while litigation is pending will not cause otherwise meritorious actions to be lost. *New Hampshire Ins. Co. v. Kimbrell*, 343 So. 2d 107 (Fla. 1st DCA 1977). The rule is supposed to dispel rigidity, create flexibility and be given liberal effect." Id.

Discovery

Expert Installation Service, Inc. v. Fuerte
2006 WL 1999374 (Fla. 3d DCA 7/19/2006)

A defendant which was added to the case after the plaintiff was deposed for seven hours by other defendants was entitled to take the plaintiff's deposition. The new defendant was first added as a fourth party defendant by one of the third party defendants, but the plaintiff then chose to add it as an additional defendant. The court found this factor most important.

Dram Shop

Murphy v. Southern Mut. Mgmt. Corp.
2006 WL 2547276 (Fla. 4th DCA 9/6/2006)

The court reversed a summary judgment in favor of a bar under the dram shop act. Evidence that the bar served a driver substantial amounts of liquor once or twice a week for nine years, and served him a large glass of scotch the morning of the crash, and that another bar refused to serve him a short time later because he was intoxicated, was sufficient evidence to defeat summary judgment under §768.125. "Proof that a bar served an individual a substantial amount of alcohol on multiple occasions would be evidence from which a jury could determine that the vendor had sufficient knowledge to have violated" the statute.

Experts – Limiting

Sanz v. Carter
2006 WL 2135752 (Fla. 4th DCA 8/2/2006)

The trial court should not have excluded the defendant doctor's second expert on the 13th day of trial with no prior warning. The trial court had limited the parties to two experts each, and reasoned that the doctor himself, who had testified, counted as one expert. The DCA was particularly concerned that it was done so late in the case, without advance warning and with no opportunity to change strategy.

Insurance – Bad Faith

Menchise v. Liberty Mutual
932 So.2d 1130 (Fla. 2d DCA 6/16/2006)

Reversing a defense summary judgment, the court holds that the evidence was sufficient to create an issue of fact as to whether the insurer breached its duty of good faith to its insured. An insurer is required to "investigate the facts, give fair consideration to a settlement offer that is not unreasonable, and settle the claim, if possible, 'where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so . . . .'" See *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So.2d 783 (Fla. 1980). Negligence is relevant to the question of bad faith. Here the insurer realized that its insured was responsible for the accident as early as the day after it occurred, and recognized the potential for an excess judgment a few months later. When an offer to settle came, approximately eight months after the accident, Liberty Mutual misplaced the offer letter. Then, when purporting to accept the settlement offer, it ignored some of the conditions of the offer, including a request for information about other insurance or the insured's employment, without explanation. The insurer did not even tell the insured about the offer until after the claimants filed suit against her.

Insurance – UM

USAA Cas. Ins. Co. v. Shelton
932 So.2d 605 (Fla. 2d DCA 6/30/2006)

The court holds that an insurer's payment of PIP benefits is not relevant or admissible as an admission that the damages the insured is claiming in a UM case are reasonable or necessary. However, their admission on that issue was harmless error, because the payment of PIP benefits must come into evidence for purposes of setoffs.

Intoxication Defense

Pearce v. Deschesne
932 So.2d 640 (Fla. 4th DCA 7/12/2006)

Section 768.36, Florida Statutes, precludes recovery by a plaintiff if the "trier of fact" finds that the plaintiff was under the influence of alcohol or drugs to the extent that the plaintiff's faculties were impaired or the plaintiff had a blood alcohol level above .08 and as a result the plaintiff was more than 50% at fault for his own injury. The court holds that a trial court is not a "trier of fact" under the statute, and cannot make the determination under the statute on a motion for summary judgment. The jury must apportion the percentages of fault.

Letter of Protection

Koenig v. Theofilos
2006 WL 2135856 (Fla. 4th DCA 8/2/2006)

A doctor who treated a patient based on a letter of protection from an attorney was entitled to be paid out of the proceeds of the settlement, even though he was not able to connect the condition he treated to the accident. The attorney, who took a fee but failed to pay the doctor out of the settlement proceeds, was required to pay the doctor.

Medicaid Lien

Ross v. Agency for Health Care Admin.
2006 WL 2356162 (Fla. 3d DCA 8/16/2006)

When a case is resolved where there is a medicaid lien, this court states that "pursuant to Section 409.910(11)(f)(1), Florida Statutes (2002), Medicaid is to be fully reimbursed unless full reimbursement would take away more than half of a third party benefit." Where full reimbursement of Medicaid would not take away more than half of the settlement, the proceeds must be allocated to fully reimburse Medicaid.

This decision appears to me to be inconsistent with the United States Supreme Court decision in *Arkansas Dept. of Health & Human Serv. v. Ahlborn*, 126 S.Ct. 1752 (2006). In *Ahlborn*, the court held that a similar statute in Arkansas was invalid because it conflicted with the anti-lien provision of the federal Medicaid statute. That provision, 42 U.S.C. §1396p(a)(1), prohibits States from imposing liens "against the property of any individual prior to his death on account of medical assistance paid on his behalf under the State plan." The court held that the law allows a state to impose a lien only on the portion of the settlement intended to reimburse the medicaid recipient for medical care. In a footnote, the court suggested that it might in some circumstances be appropriate for a court to hold an apportionment hearing to determine how much of the settlement should be applied to medical care, to avoid attempts to evade the lien. But the Supreme Court was very clear that the state may not impose a lien on any portion of the settlement that does not compensate medical care.

Med Mal – Comparative Negligence

Vidal v. Macksoud
933 So.2d 659 (Fla. 3d DCA 7/12/2006)

The plaintiff was entitled to a directed verdict on comparative negligence where there was no evidence that any of the alleged acts of negligence by the patient (smoking, obesity, missing therapy appointments) caused the condition that the jury found the patient had. In a footnote, the court points out that there is no authority for requiring a patient to disclose a history of all medical ailments unless the physician has asked for it. In order to support a finding of comparative negligence by a patient, the defendant must show (1) the plaintiff-patient owed a duty of care to himself; (2) the patient breached that duty; and 3) the breach was the proximate cause of the damages the patient sustained. See *Borenstein v. Raskin*, 401 So.2d 884 (Fla. 3d DCA 1981); *Riegel v. Beilan*, 788 So.2d 990 (Fla. 2d DCA 2000).

Med Mal – Experts

Fullerton v. Fla. Medical Assoc.
2006 WL 1888545 (Fla. 1st DCA 7/11/2006)

Many trial lawyers have observed a movement toward intimidating experts to prevent them from testifying for plaintiffs in medical malpractice cases. In this case, an expert decided to fight back. He brought suit against the FMA and doctors who sent out a letter that stated that his testimony for a plaintiff fell below reasonable professional standards. The FMA asserted immunity under §766.101, the Florida peer review statute, and the Health Care Quality Improvement Act of 1986, 42 U.S.C. §11111. The court held that neither statute immunizes the conduct of the FMA in evaluating the testimony of a medical expert in a

medical malpractice action. Testimony is not diagnosis, care or treatment of a patient, so "peer review" of testimony is not immune.

Med Mal – Causation

Wroy v. North Miami Medical Center

2006 WL 1687656 (Fla. 3d DCA 6/21/2006)

The plaintiff's expert's presuit affidavit stated that the defendant's negligence caused a delay in plaintiff's diagnosis and decreased her chance of survival. This affidavit was not sufficient to defeat summary judgment. In order to prevail in a medical malpractice action, the plaintiff must show that the defendant's actions "more likely than not" caused her damages. This case involved failure to diagnose cancer and the plaintiff is now cancer-free. She was not able to show that she suffered any damage; she was only able to show speculation that she might have a recurrence.

Med Mal – Presuit

University of Miami v. Wilson

2006 WL 1687685 (Fla. 3d DCA 6/21/2006)

In this wrongful death medical malpractice action, the presuit notices of intent were served by the patient's daughters before they were appointed personal representatives of the estate. The court held that their subsequent appointment as personal representatives related back and rendered the notices valid. See, e.g., *Talan v. Murphy*, 443 So.2d 207 (Fla. 3d DCA 1983) (p.r.'s actions before appointment ratified when p.r. appointed). The court rejects the defendants' argument that the purpose of the presuit notice is to promote settlement and at the time they sent the notices, the daughters did not have authority to settle the claim. See *Berges v. Infinity Ins. Co.*, 896 So.2d 665 (Fla. 1995). "Section 733.601, Florida Statutes, regarding the administration of estates, specifically permits the actions of a personal representative, taken before being appointed, to be ratified on behalf of the estate, and if those actions benefit the estate, they are given the same effect as those occurring after appointment."

Notice

Jones v. Flowers

126 S. Ct. 1708 (2006)

When the state plans a tax sale of property, notice to the owner by certified mail, return receipt requested, is insufficient where the mail is returned unclaimed. As a matter of due process, the state must take additional reasonable steps to contact the owner before it may proceed with the sale. Simply publishing the notice in the newspaper is not enough. Additional efforts, such as posting the notice on the property, must be attempted. I don't know if these requirements will be applied beyond the tax sale situation.

Nursing Home – Arbitration

SA-PG-Ocala, L.L.C. v. Stokes

2006 WL 2347369 (Fla. 5th DCA 8/11/2006)

An arbitration agreement that substantially limited a resident's remedies under the nursing home statute was void as contrary to public policy. The agreement required clear and convincing evidence of intent or recklessness before the arbitrator could award consequential, special or punitive damages. The court held that the nursing home could not impair a resident's right to damages for negligence in this manner. "It would be against public policy to permit a nursing home to dismantle the protections afforded patients by the Legislature through the use of an arbitration agreement."

Furthermore, it was for the court, not the arbitrator, to decide this issue. "It is the court's obligation, in deciding a motion to compel arbitration, to determine whether a valid written agreement to arbitrate exists"

Offer of Judgment

Talbott v. American-Isuzu Motors, Inc.

2006 WL 2135880 (Fla. 2d DCA 8/2/2006)

The Magnuson-Moss Warranty Act attorneys' fees provision does not preempt the offer of judgment statute and rule.

Stasio v. McManaway

2006 WL 2080385 (Fla. 5th DCA 7/28/2006)

A discrepancy in the amount of the offer of judgment stated in the offer and the amount stated in the attached release rendered the offer invalid. The burden cannot be placed on the offeree to clarify any uncertainties in the offer.

Hamilton v. Ford Motor Co.

2006 WL 2520089 (Fla. 4th DCA 9/1/ 2006)

The Magnuson-Moss Warranty Act preempts state law, so that a prevailing plaintiff is entitled to fees for the time spent litigating fees. Furthermore, because the plaintiff beat the offer of judgment made by the defendant by the amount required by the offer of judgment statute, it was error for the court to consider that offer as cutting off the plaintiff's entitlement to fees under *Scottsdale Ins. Co. v. DeSalvo*, 748 So.2d 941, 943 (Fla.1999) (insured cannot recover attorneys fees incurred after settlement offer greater than amount ultimately awarded).

Because the plaintiff beat the offer by more than 25%, both the offer and the defendant's expert's testimony that relied on it, were inadmissible.

Privilege – Psychotherapist

Garbacik v. Wal-Mart Transp., LLC
932 So.2d 500 (Fla. 5th DCA 6/16/2006)

Although the plaintiff waived the psychotherapist-patient privilege by claiming damages for emotional anguish, including depression, post-concussion syndrome, and "pain disorder" involving psychological components, he revoked the waiver when he dropped that claim. Therefore, the defendant was not entitled to depose his psychologist. The fact that the information might be useful for impeachment did not entitle the defendant to invade the psychotherapist-patient relationship.

Products Liability

Rentas v. Daimler Chrysler
2006 WL 2419136 (Fla. 4th DCA 8/24/2006)

The Magnuson-Moss Warranty Act, 15 U.S.C. §2301-2312, creates an independent federal cause of action for breach of warranty. The court rejects a defense argument that the statute only provided for federal court jurisdiction of existing state law remedies. The statute creates minimum standards for warranties and provides a remedy for their breach. Privity between the manufacturer and the consumer is not required.

Philip Morris USA, Inc. v. Arnitz
933 So.2d 693 (Fla. 2d DCA 7/21/2006)

A smoker's design defect product liability claim against a cigarette manufacturer was not preempted by the Federal Cigarette Labeling and Advertising Act. Plaintiff alleged that the manufacturer put additives in the cigarettes to make them more inhaleable, flue-cured the tobacco which heightened the cancer risk; and used other additives that also made it more dangerous. The statute "does not generally preempt state-law obligations to avoid marketing cigarettes with manufacturing defects or to use a demonstrably safer alternative design for cigarettes." *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

McConnell v. Union Carbide
2006 WL 1750384 (Fla. 4th DCA 6/28/2006)

The plaintiff in an asbestos case was entitled to a "consumer expectations" instruction. The court erred in refusing to give FSJI PL4-PL5. It does not matter whether the defect was in the design or the manufacture or both. Furthermore the manufacturer of asbestos had a duty to warn and was not entitled to a "learned intermediary" defense.

Release

Cain v. Banka
932 So.2d 575 (Fla. 5th DCA 6/30/2006)

The plaintiff signed a release on his first visit to a motorsports track, but not on subsequent visits. Although noting that exculpatory clauses are disfavored and must be construed narrowly, the court held that the release was not ineffective for failing to specifically mention negligence, but noted conflict with decisions in other districts. Cf. *Witt v. Dolphin Research Center, Inc.*, 582 So.2d 27 (Fla. 3d DCA 1991); *Levine v. A. Madley Corp.*, 516 So.2d 1101 (Fla. 1st DCA 1987); *Rosenberg v. Cape Coral Plumbing, Inc.*, 920 So.2d 61 (Fla. 2d DCA 2005); V*an Tuyn v. Zurich American Ins. Co.*, 447 So.2d 318 (Fla. 4th DCA 1984). However, the court held that the release did not clearly and unequivocally inform the plaintiff that he was contracting away his rights in connection with any future visits to the track. Therefore, it could not release the track from liability for negligence on a subsequent visit.

The defendant also asserted immunity under §549.09, Florida Statutes, which allows motorsports tracks to condition admission on the signing of a valid release, the statute does not define what a valid release is. Therefore, it does not required a more liberal application of exculpatory clauses, and does not affect the court's interpretation of this release.

Rental Car Immunity

Graham v. Dunkley
2006 NY Slip Op 26358; 2006 N.Y. Misc. LEXIS 2375 (S.Ct. N.Y. 9/11/2006)

A New York Supreme Court judge (analogous to a Circuit Judge in Florida) has held that the federal rental car immunity statute is unconstitutional under the 10th Amendment, which reserves power not specifically delegated to the federal government or prohibited to the states, to the states and to the people. The court held the statute exceeds Congress' power under the interstate commerce clause. I thank Roy Wasson for calling this case to my attention.

New York has a dangerous instrumentality doctrine similar to Florida's, enacted by statute. Congress has power under the interstate commerce clause to regulate in three areas: (1) "the use of the channels of interstate commerce" (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may only come from intrastate activities," and (3) "those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce" *United States v. Lopez*, 514 U.S. 549, 558 (1995). The court found that the New York dangerous instrumentality / vicarious liability statute has to do with "an individual's pursuit of justice" in the courts of New York and

has "nothing to do with 'commerce.'" The court "cannot conclude" that the New York statute "has a substantial effect on interstate commerce or that there is a rational basis for" the federal statute. The court held:

> The issue of supremacy of congressional legislation over New York State law is not one to be simply assumed, for Congress has only those powers to legislate that are conferred on it by the United States Constitution. The substantive law of torts is not to be faintly acquiesced to legislation by Congress, particularly when there is no preponderance of constitutional authority to support such a conclusion. While the court's decision is strictly limited to the facts of this case, this court can not wholly exempt a corporate class of tortfeasor from liability to otherwise innocent men, women and children, who seek recompense in the courts of the State of New York when they become sick, seriously injured, permanently maimed or even killed, directly as result of a dangerous instrumentality owned by that corporate class of tortfeasor who is doing business in the State of New York and subject to the laws of the State of New York, unless otherwise directed by the New York State Legislature.

Sanctions

Johnson v. Swerdzewski
2006 WL 2095895 (Fla. 1st DCA 7/31/2006)

The trial court erred in entering a JNOV against the plaintiff as a sanction for inconsistent testimony and failure to disclose names of prior treating doctors. It appears that the plaintiff identified most of the doctors in depositions in some way, such as their location, even if he did not remember their names. The court held that the high standard for a JNOV was not met, and that it could not be imposed as a sanction. The credibility of the plaintiff at that point was for the jury, which heard all the inconsistencies. See *Cross v. Pumpco, Inc.*, 910 So.2d 324 (Fla. 4th DCA 2005): "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."

Spoliation

Fini v. Glascoe
2006 WL 2135830 (Fla. 4th DCA 8/2/2006)

After the defendants installed an alarm system in the plaintiffs' truck, the truck began to malfunction intermittently, including sudden acceleration. Despite attempts to fix it, the truck continued to malfunction, eventually causing the plaintiff to lose control of the truck, resulting in a serious rollover crash. While the truck was in the highway patrol impound lot, one of the defendants scaled the fence and destroyed evidence of the installation of the alarm system.

The trial court properly granted summary judgment for the defendants on the plaintiff's spoliation claim, because Florida does not recognize an independent cause of action for first party spoliation (where the party who lost or destroyed the evidence is also an alleged tortfeasor who caused the underlying injury). *Martino v. Wal-Mart Stores, Inc*., 908 So.2d 342 (Fla. 2005). The proper remedies for first party spoliation are sanctions and an inference or presumption of negligence (depending on whether the spoliation was negligent or intentional). However, the trial court improperly granted summary judgment on the negligence count. Because the defendants destroyed key evidence that could have enabled the plaintiffs to prove that defendants' negligence caused the malfunction and crash, the plaintiffs would be entitled to a presumption of negligence, raising a genuine issue of material fact precluding summary judgment.