

CASE LAW

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Update

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Additur

Garrett v. Miami Transfer Co.,

Case No. 4D06-82 (Fla. 4th DCA 7/18/2007)

The trial court erred in refusing to grant an additur when the jury made an award of future medical expenses but failed to award damages for future pain and suffering, and the evidence was not only undisputed that the accident caused the plaintiff's injuries but also that the plaintiff will continue to suffer as a result of the injuries. The award was inadequate as a matter of law.

Arbitration

Mercedes Homes, Inc. v. Colon

Case No. 5D05-4292 (Fla. 4th DCA 8/10/2007)

Broadly construing a series of documents in connection with a home purchase and warranty, the court holds that a homeowner was required to submit to arbitration the issue of the arbitrability of his claim for personal injuries allegedly caused by the developer's negligent placement of sod in his yard. One of the documents provided, in pertinent part: "Any disputes concerning the interpretation or the enforceability of this arbitration agreement, including without limitation, its revocability or voidability for any cause, the scope of arbitrable issues, and any defense based upon waiver, estoppel or laches, shall be decided by the arbitrator." The court cited *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002): "[t]he question whether the parties have submitted a particular dispute to arbitration, i.e., the 'question of arbitrability' is an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise." Here, the court holds

that the parties did clearly and unmistakably provide for determination of arbitrability by the arbitrator.

Judge Griffin dissented, pointing out that the transaction was actually much more complex. The "contract" consists of a series of documents, including a "warranty" and a 31-page booklet in which the arbitrability language was contained. The warranty document would lead the buyer to believe that he was actually purchasing added protection, but in fact the document made the "limited warranty" the exclusive remedy, and excluded claims for personal injury. The decision "places an imprimatur of judicial approval on a scheme whose ambitious end is the elimination of personal injury claims in any case where the victim has a contractual relationship with the tortfeasor."

The dissent continues: "A casual examination of these documents might lead a careless reader to think that, if the claim is for a personal injury and the warranty expressly excludes any claim for personal injury, there would be nothing to arbitrate. According to the majority, however, if the arbitration provision in the warranty requires the question of what is arbitrable to be submitted to the arbitrator, even though it is clear that the claim is not covered by the warranty, the question of whether the warranty operates as a bar to any personal injury claim must be decided in arbitration by the arbitrator." This is the result of the decision, "even though it is clear that the plaintiff is making no claim under the warranty and that he has no claim under the warranty." Furthermore, since the arbitration provision is contained in the warranty booklet, it can be construed as agreeing to arbitrate only the arbitrability of warranty claims, not of all claims. Therefore, the agreement to submit the arbitrability of personal injury claims to the arbitrator is not "clear and unmistakable."

The dissent perceives this as an access to courts issue, and argues that at least the case should be remanded to the trial court to determine the issue of unconscionability.

Amendment 7

Morton Plant Hosp. Assoc. v. Shahbas

Case No. 2D06-3856 (Fla. 2d DCA 6/27/2007)

Article X, section 25, subsection (a) of the Florida Constitution provides: “In addition to any other similar rights provided herein or by general law, patients have a right to have access to *any records* made or received in the course of business by a health care facility or provider *relating to any adverse medical incident*.” There is no requirement for the patient to show relevancy, and the plaintiffs were entitled to records they requested for incidents occurring two years after the incident involved in the litigation.

The plaintiffs, as previous patients, are entitled to any of the hospital’s records relating to any adverse medical incident. There is no requirement that the records discoverable under Amendment 7 be relevant to any pending litigation. The hospital may assert the work product privilege by filing a privilege log. But the court does not decide whether the privilege is actually applicable. Further, the court holds that burdensomeness is not a consideration under Amendment 7.

Additionally, the court notes that records may be redacted to protect the privacy of other patients. The trial court erred in requiring production of privileged materials such as the doctor’s credentialing file which do not relate to adverse medical incidents.

At Issue

Labor Ready Southeast Inc. v.

The Australian Avenue Condominium Assoc.

Case No. 4D06-2253 (Fla. 4th DCA 8/22/2007)

Where the case had been at issue for four years and all parties were ready for trial, amendments to correct “technical” issues (to conform the pleadings to positions the party had taken on cross motions for summary judgment) did not prevent the case from being at issue. It was not a violation of Rule 1.440 to try the case where there was no prejudice to any party and the court gave the parties the requisite 30 days’ notice.

Class Actions

Masztal v. City of Miami

Case No. 3D06-1259 (Fla. 3d DCA 8/8/2007)

In a scathing opinion, the Third District affirms the trial court’s order vacating an order that had approved a settlement in a case which was brought as a class action but in which the class was never certified. The action involved the City’s fire fee which was unauthorized and unconstitutional. The

settlement was structured so that the named plaintiffs and their attorneys got a substantial amount of money, the class members got nothing, the settlement was not presented for approval to the City Commission until the statute of limitations had expired, and the class members were not warned that the statute of limitations was expiring against them. The settlement was “patently unfair and compromised the claims of the underlying class.” The law firm breached its fiduciary duty to the class members. The fiduciary duty existed even before the certification of the class.

Defense Medical Examination – Psychological

Webb v. Thomas May Construction Co.

Case No. 1D07-1021 (Fla. 1st DCA 6/21/2007)

The court grants certiorari and quashes an order requiring the plaintiff to submit to a compulsory psychological examination because once the plaintiff dropped her original claim for damages for mental anguish, her mental condition was not “in controversy” under Rule 1.360(a)(1).

Evidence Code

In Re Amendments to the Florida Evidence Code

Case No. SC07-178 (Fla. 7/12/2007)

The Florida Supreme Court has adopted, to the extent they are procedural, two amendments to the Evidence Code passed by the Legislature in the past two years. The Court does this fairly routinely when the Legislature amends the Evidence Code, to avoid disputes about whether the Evidence Code is substantive, which can only be done by the Legislature, or procedural, which can only be done by the Court.

Section 90.804(2)(e), Fla. Stat., replaces the Dead Man’s Statute, former §90.602, with a new hearsay exception for a statement by a deceased or ill, unavailable declarant concerning the same subject matter as one offered by the opposing party and previously admitted. It applies in actions at law against the personal representative, heir at law, devisee or legatee; the trustee of a trust created by a deceased person, or the assignee, committee or guardian of a mentally incompetent person.

Section 90.503 is amended to add apply the psychotherapist-patient privilege to advanced registered nurse-practitioner certified under §464.012, whose primary practice is mental or emotional conditions, including chemical abuse, but only for actions performed in accordance with Part I of Ch. 464.

Insurance – Bad Faith

Peraza v. Robles

Case No. 3D06-725 (Fla. 3d DCA 7/18/2007)

Plaintiff was seriously injured in a car crash. Her attorney sent a demand letter to the tortfeasor's liability insurer for the \$10,000 policy limits within 15 days. The insurer sent a \$10,000 check along with a letter requiring that the plaintiff sign an enclosed release without alteration, and obtain a release from her UM insurer. The plaintiff refused to accept the check with those conditions and filed suit. The insurer moved to enforce the settlement. The plaintiff contended that the additional conditions accompanying the check were not met. The court held that the insurer had the right to waive those conditions, which benefitted only the insurer, and that it did so when it sued to enforce the settlement. Therefore, Plaintiff would not be able to bring a bad faith action. The court found this acceptable, citing the dissent in *Berges v. Infinity Ins. Co.*, 896 So.2d 665 (Fla. 2004).

Insurance – Coverage – Sexual Assault

Keen v. Florida Sheriffs' Self Insurance Fund

Case No. 4D06-1599 (Fla. 4th DCA 8/8/2007)

The Florida Sheriffs' Self-Insurance Fund had no duty to cover or defend a jail inmate's claim against a sheriff for damages arising out of a sexual assault by one of the sheriff's employees. The policy covers incidents "growing out of the law enforcement duties of the covered member." There must be some causal connection between the sexual assault and the law enforcement duties of the tortfeasor. Although the deputy illegally used his position as a pretense to place the plaintiff in a position where he could sexually assault her, his law enforcement duties ended when he coerced an inmate of the jail to have sex with him. Therefore, the sexual assault was not within the law enforcement duties and was not covered.

Jury – Challenge for Cause

Four Woods Consulting, LLC. v. Fyne

Case No. 4D06-4586 (Fla. 4th DCA 8/22/2007)

The trial court erred in denying a challenge for cause in a case involving breach of contract in the sale of a business and real property. The prospective juror stated that she had been involved in a case in which there was a dispute over escrow funds for the sale of a house. She said it left her with a "bad taste," and when asked whether it would prejudice her, said she didn't really know. She said she had negative feelings about "people defaulting." Neither party inquired whether she was the buyer or the seller in the transaction, so it was not clear

which side she might be prejudiced against. "An abstract bias toward the general class of civil cases or a general issue in the case need not, but may, warrant dismissal of a juror for cause, if the juror cannot set aside the bias and apply the law to the facts of the case at hand. See *Montecristi Condo. Ass'n v. Hickey*, 408 So. 2d 671, 674 (Fla. 4th DCA 1982). There was a reasonable doubt about this juror's ability to be impartial.

Legal Malpractice

Stern v. Security National Servicing Corp.

Case No. SC-06-361 (Fla. 7/6/2007)

The assignee of a note and mortgage did not have standing to sue an attorney for malpractice for his untimely filing of a foreclosure action, where the assignment did not take place until the appeal from the dismissal of the foreclosure action was pending. The court reiterates the limited assignability of legal malpractice claims. The court rejects the argument that the assignment occurred incident to the assignment of the note and mortgage. Moreover, the assignee did not gain standing by forming an attorney-client relationship with the attorney during the appeal from the dismissal of the foreclosure. Standing cannot be acquired by establishing an attorney-client relationship after the malpractice has occurred.

Litigation Immunity

Kidwell v. General Motors

Case No. 2D05-5935 (Fla. 2d DCA 8/3/2007)

An arbitration proceeding before the Better Business Bureau is a "quasi-judicial proceeding" and therefore the defendant was entitled to immunity for alleged misrepresentations that allegedly were made to deny the plaintiff access to remedies under Chapter 681, Florida Statutes, the Lemon Law. The Lemon Law requires a consumer to exhaust a manufacturer's procedures if those procedures are "certified" as defined in the statute.

Longarm Jurisdiction

Casita, L.P. v. Castlewood Equity Partners, L.P.

Case No. 3D06-1292 (Fla. 3d DCA 7/11/2007)

Injury alone to a Florida plaintiff caused by a tortious act committed outside the state is not sufficient to confer personal jurisdiction under §48.193(1)(b), Florida Statutes, "committing a tortious act within this state", where none of the tortious act occurred in Florida and the defendants had no other Florida connections. The case involved defamation which, under Florida law, is committed where it is published. The court gave a limited reading to cases from the First DCA that otherwise would appear to conflict.

Motion for Rehearing or New Trial

Thomas v. Smith

Case No. 1D07-2070 (Fla. 1st DCA 7/24/2007)

The trial court has no jurisdiction to extend the time for filing a motion for rehearing or new trial under Rule 1.530. Therefore, even though the appellant filed the motion for rehearing within the extended time allowed by the trial court, the notice of appeal, filed within 30 days of the ruling on that motion, but more than 30 days from the rendition of the final judgment, was untimely and the appeal was dismissed.

If you need more time to prepare a motion for rehearing or new trial, file and serve at least a bare bones motion for rehearing or new trial within the 10 days provided by the rule, and ask the trial court for time to supplement or amend it. Rule 1.530 allows amendment of a motion for rehearing or new trial at any time before the trial court rules on the motion. But it does not allow for an extension of time to file the motion itself.

Med Mal Presuit

Robinson v. Scott

Case No. 3D05-2943 (Fla. 3d DCA 7/5/2007)

It was error to dismiss plaintiff's complaint for medical malpractice for failure to comply with presuit discovery where the defendant was not prejudiced. The record showed that the defendant's presuit expert reviewed some, if not all, of the same documents reviewed by the plaintiff's expert, and the defendant unequivocally denied the claim without mentioning in its denial the lack of discovery. "The record before us contains no evidence that Appellants' failure to provide presuit discovery prevented Dr. Scott from investigating the claim, assessing potential liability and choosing whether or not to enter into settlement negotiations or admit liability and submit to arbitration on damages." The purposes of presuit, to encourage settlement of meritorious claims and screen out nonmeritorious claims, was satisfied. See *Kukral v. Mekras*, 679 So.2d 278 (Fla. 1996); *De la Torre v. Orta*, 785 So.2d 553 (Fla. 3d DCA 2001).

Negligence – Foreseeability

Smith v. Grove Apartments LLC.

Case No. 3D06-688 (Fla. 3d DCA 8/22/2007)

Reversing a summary judgment in favor of a landlord, the court held that the issue of foreseeability was for the jury, where the tenant was injured trying to perform maintenance that the landlord failed to perform. The landlord failed to trim trees and shrubbery in the parking area, in spite of numerous complaints

by tenants. The branches were scratching cars, causing power outages and poking people's eyes. When the tenant spoke to the maintenance manager, the manager suggested that the tenant do it himself. The tenant was injured when he fell off the ladder. The tenant argued that the landlord had both a statutory and common law duty to maintain its parking lot properly as one of the common areas of the leased premises; the landlord breached this duty by not trimming back the overgrown trees and vines, and that foreseeability of his injury was for the jury. The court agreed. Because duty was established, foreseeability related to proximate cause, which is a jury question under *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Fla. 1992). It is immaterial that the defendant could not foresee the precise manner in which the plaintiff would be injured. *Id.*

Offer of Judgment / Proposal for Settlement

Sparklin v. Southern Industrial Assoc., Inc.

Case No. 5D06-913 (Fla. 5th DCA 7/20/2007)

A proposal for settlement was void, and the defendant offeror was not entitled to fees, because the release attached to the proposal was ambiguous. There were multiple defendants, many of whom are bound together by the concept of privity, and two of whom were insured by the same insurance carrier. When the offeror served its offer of judgment, the attached general release would have released the offeror and its insurer "from all actions, suits, sums of money, trespasses, controversies, damages, losses, injuries, and so forth, arising out of the accident that was the subject matter of the suit, including all claims asserted or which could have been asserted." The ambiguity arises because the insurer insured both the offeror and one of the other defendants. The release, by its terms, also would have released anyone in privity with the offeror. Thus, accepting the offer of judgment might well have had the effect, unintended or otherwise, of releasing another party not named in the release. The court rejects the offeror's argument that the release was acceptable because it was a "standard form."

Release

Fields v. Kirton

Case No. 4D06-1486 (Fla. 4th DCA 8/8/07)

Reversing a summary judgment for the defense, the court holds that a pre-incident release, signed on behalf of a minor by the minor's parent, could not bind the minor's estate. While parents have the right to make decisions for their children, "There is no basis in common law for a parent to enter into a compromise or settlement of a child's claim, or to waive substantive rights of the child without court approval." The

court distinguishes *Global Travel Marketing, Inc. v. Shea*, 908 So. 2d 392 (Fla. 2005), which involved an arbitration agreement, not the waiver of substantive rights. The court notes “implicit conflict” with *Lantz v. Iron Horse Saloon, Inc.*, 717 So. 2d 590 (Fla. 5th DCA 1998).

Service of Process

Banco Latino v. Avtek Electronica, CA

Case No. 3D06-1460 (Fla. 3d DCA 7/18/07)

The trial court departed from the essential requirements of law when it denied, without explanation, the plaintiff’s motion for additional time for service of process pursuant to Fla. R. Civ. P. 1.070(j). The plaintiff had obtained several previous extensions. The record showed that the plaintiff was attempting to locate the defendants, and had even hired a private investigator and had made some progress. The court held that the plaintiff had shown “good cause” for an extension.

Workers Comp Immunity

Sanchez Vasquez v. Sorrels Grove Care, Inc.,

Case No. 2D06-3369 (Fla. 2d DCA 8/17/2007)

The plaintiff did not elect workers’ comp as his exclusive remedy when he settled his workers’ comp claim. Although plaintiff initially chose to file his petition in the workers’ compensation forum, after the defendants asserted that he was not an employee, he willingly filed a civil tort action. However, because the defendants then asserted that the plaintiff was an employee, he was forced to return to the workers’ compensation forum. His return to workers’ compensation was thus solely due to the inconsistent pleadings filed by the defendants. When the plaintiff settled the comp claim, the release specifically stated that it was not intended as an election of remedies and would not relieve the defendants of any potential civil liability. Nor was the settlement a determination of the workers’ comp claim on its merits. The release expressly stated that it did not constitute a determination on the merits or an admission of liability. The release was entered into with the comp insurer and specifically stated that the defendants did not agree to it.

Bakerman v. The Bombay Company

Case No. 3D03-1532 (Fla. 3d DCA 8/22/2007)

On remand from the Supreme Court, the Third District rejected the defendant’s argument that further proceedings were required. The court held that the Supreme Court’s decision in this case, 2007 WL 1774420 (Fla.), 32 Fla. L. Weekly S342, discussed in the last issue of Caselaw Update, required that the jury’s verdict, finding that the employer’s actions met the substantial certainty test for the exception to workers’ comp immunity, must be reinstated.