Case Law Update

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Judge Robert Shevin passed away this month. His service as a wise and compassionate judge on the Third DCA was the culmination of a lifetime of public service. His death is a loss to us all, and especially to our clients.

Amendment – Leave to Amend

Boca Burger, Inc. v. Forum

2005 WL 1574249, 30 Fla. L. Weekly S539 (Fla. 2005)

Rule 1.190 allows a party to amend a pleading "once as a matter of course at any time before a responsive pleading is served." A motion to dismiss is not a responsive pleading. Therefore, a trial court has no discretion to deny leave to amend a complaint for the first time after a motion to dismiss is served, but before an answer is filed. "The filing of a motion to dismiss does not terminate a plaintiff's absolute right to amend the complaint 'once as a matter of course.' . . . A judge's discretion to deny amendment of a complaint arises only after the defendant files an answer or if the plaintiff already has exercised the right to amend once."

Arbitration

Global Travel Marketing, Inc. v. Shea

2005 WL 1576244, 30 Fla. L. Weekly S511 (Fla. 2005)

The father's wrongful death claim against a travel company for the death of his son who was killed by hyenas while on a safari was required to be arbitrated pursuant to an arbitration clause in a contract signed by the deceased child's mother. The arbitration agreement in the contract was enforceable against the minor or the minor's estate in a tort action arising out of the contract.

A parent's authority to make decisions for their child, under the liberty provision of the 14th Amendment and Art. I, §23 of the Florida Constitution, encompasses decisions about the activities appropriate for their children, including travel and adventure opportunities. "Parents who choose to allow their children to engage in these activities may also legitimately elect on their children's behalf to agree in advance to arbitrate a resulting tort claim if the risks of these activities are realized." The state has some parens patriae interest, and has chosen to authorize court protection of children's interests in existing causes of action, but has not prohibited arbitration of those claims.

An arbitration does not extinguish the claims, but merely constitutes a prospective choice of forum. The court declines to address whether the release of liability also contained in the contract, is enforceable, or whether its enforceability should be decided by the trial court or by arbitration.

Attorneys Fees

In Re: Amendment to the Rules Regulating the Florida Bar - Rule 4-1.5(f)(4)(B) of the Rules of Professional Conduct, Case No. SC05-1150

Attorneys representing the Florida Medical Association have petitioned the Florida Supreme Court to enact an ethics rule limiting attorneys fees in medical malpractice cases in accordance with their own interpretation of the recently passed constitutional amendment.

The proposed amendment would amend Rule 4-1.5 to make it an ethical violation for an attorney in a "medical liability case" to charge a fee exceeding 30 percent of the first $250,000 and ten percent of all damages in excess of $250,000, "of all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants."

An original and nine paper copies of all comments must be filed with the Court with a certificate of service verifying that a copy has been served on the Executive Director of The Florida Bar, John F. Harkness, Jr., 651 E. Jefferson Street, Tallahassee, Florida 32399-2300, and Stephen H. Grimes, Post Office Drawer 810, Tallahassee, Florida 32302, as well as a separate request

for oral argument if the person filing the comment wishes to participate in oral argument scheduled for November 30, 2005. The Court will determine who will be granted oral argument prior to that date. Electronic copies of all comments also must be filed in accordance with the Court's Administrative Order In Re: Mandatory Submission of Electronic Copies of Documents, Fla. Admin. Order No. AOSC04-84 (Sept. 13, 2004).

Boca Burger, Inc. v. Forum
2005 WL 1574249, 30 Fla. L. Weekly S539 (Fla. 2005)

An appellate court only has authority to impose sanction under §57.105 for conduct occurring in the appellate court. It cannot impose sanctions for conduct that occurred in the trial court. However, an appellate court can award fees as a sanctions against an appellees or their counsel for "defending indefensible orders." The presumption of correctness usually accorded a trial court's order on appeal is based on the assumption that the appellee correctly informed the trial court of the applicable facts and law. Appellate courts should impose sanctions only in rare circumstances, and should "exercise great restraint in imposing appellate sanctions."

FIGA

Jones v. Florida Insurance Guaranty Assoc., Inc.
2005 WL 1580606, 30 Fla. L. Weekly S581 (Fla. 2005)

The Florida Insurance Guaranty Association (FIGA) stands in the shoes of an insolvent insurer and has a duty to defend the insured when the complaint alleges facts that fairly and potentially bring the action within the coverage of the policy. FIGA cannot be liable for bad faith. However, FIGA can be liable for failure to defend. The immunity provision of FIGA's enabling statute does not preclude an action against FIGA for breach of its duty to defend.

FIGA's liability is limited to the policy limits of the insolvent insurer (not to exceed the statutory maximum), plus interest from the date of the judgment against the insured if interest is provided for under the policy's supplementary payment provision. In addition, FIGA is liable for statutory interest from the date of the judgment against FIGA and for any attorney's fees resulting from FIGA's denial of coverage.

"The act is designed to protect Florida citizens, not the insurance industry."

Joint and Several Liability

American Home Assur. Co. v. National Railroad Passenger Corp.
2005 WL 1580639, 30 Fla. L. Weekly S516 (Fla.2005)

Section 768.81, Fla. Stat. (the *Fabre* statute) requires apportionment of an active tortfeasor's share of fault to a party that is only vicariously liable for the active tortfeasor's conduct. The court rejects the argument of an insurer that because it was only vicariously, not actively, at fault, the comparative fault statute should not apply to it. "As a matter of policy, the vicariously liable party carries the entire burden of fault imputed from the active tortfeasor." The court clarifies a statement in *Nash v. Wells Fargo Guard Services, Inc.*, 678 So.2d 1262 (Fla. 1996), which said that "the named defendant cannot rely on the vicarious liability of a nonparty to establish the nonparty's fault." The court explained that the statement in *Nash* was in the context of putting a nonparty's name on a verdict form for the purpose of apportioning fault. In other words, there is no apportionment of fault between an active tortfeasor and one who is vicariously liable for the active tortfeasor's negligence.

Offer of Judgment

Lamb v. Matetzschk
2005 WL 1475395, 30 Fla. L. Weekly S467 (Fla. 2005)

Florida Rule of Civil Procedure 1.442(c)(2)allows an offer of judgment or proposal for settlement to be made jointly by or to "any combination of parties." It requires a joint proposal to "state the amount and terms attributable to each party." The rule makes no distinction between multiple plaintiffs and multiple defendants. Nor does it make any distinction based on the theory of liability, such as vicarious liability. A proposal must differentiate between the parties, even when one party's alleged liability is purely vicarious.

Preemption

Boca Burger, Inc. v. Forum
2005 WL 1574249, 30 Fla. L. Weekly S539 (Fla. 2005)

A defendant may raise the defense of federal preemption in a motion to dismiss. The issue of federal preemption is a question of subject matter jurisdiction. Where a defendant does so, a trial court must determine the issue as a matter of law based only on the well-pleaded allegations of the complaint, assuming the truth of the facts asserted.

Sovereign Immunity

American Home Assur. Co. v. National Railroad Passenger Corp.
2005 WL 1580639, 30 Fla. L. Weekly S516 (Fla.2005)

This case points out an important distinction under the sovereign immunity statute between states and municipalities, and the applicability of the statute to actions for damages in tort. §768.28, Florida Statutes.

Only the Legislature has authority to enact a general law that waives the state's sovereign immunity. Except as provided in the statute, the state is immune from suit for damages in tort. However, prior to the sovereign immunity statute, municipalities did not share the state's immunity from tort liability for their proprietary functions. The sovereign immunity statute included municipalities in the definition of "state agencies or subdivisions." The effect is to limit the liability of municipalities in the same manner as the liability of the state is limited.

However, the sovereign immunity statute only applies to actions in tort. Therefore, the sovereign immunity statute did not limit the liability of a municipal utility authority for breach of an indemnity contract.

Furthermore, municipalities have broad general authority to enter into contracts, unless such a contract was previously prohibited by law. Therefore, a contract does not have to be specifically authorized by statute in order for the municipality to be liable for its breach.

Spoliation

Martino v. Wal-Mart Stores, Inc.
2005 WL 1575772, 30 Fla. L. Weeky S536 (Fla. 2005)

Where a defendant destroys ("spoliates") evidence to the extent that it hampers a plaintiff's ability to pursue a cause of action against that defendant, the Supreme Court holds that the plaintiff's remedy is not an independent cause of action against that defendant for spoliation of evidence. Instead, the remedy for such "first party spoliation" is the presumption under *Public Health Trust of Dade County v. Valcin*, 507 So.2d 596 (Fla. 1987).

If the evidence is intentionally lost, misplaced or destroyed, the trial court may impose sanctions under Fla. R. Civ. P. 1.380(b)(2), up to and including entry of a default under *Mercer v. Raine*, 443 So.2d 944, 946 (Fla. 1983). If the loss of the evidence was determined to be negligent, the plaintiff is entitled to a rebuttable presumption of negligence for the underlying tort. The presumption only applies when the absence of the evidence hinders the plaintiff's ability to establish a prima facie case. It shifts the burden of proof. The presumption is not overcome until the trier of fact believes that the presumed negligence has been overcome by whatever degree of persuasion is required by the substantive law.

In a footnote, the court emphasizes that its opinion does not apply to "third party spoliation claims." "Third party spoliation" occurs "when a person or an entity, though not a party to the underlying action causing the plaintiff's injuries or damages, lost, misplaced or destroyed evidence critical to that action."

Workers Comp Immunity

Aguilera v. Inservices, Inc.
2005 WL 1403993, 30 Fla. L. Weekly S440 (Fla. 2005)

The immunity provisions of the worker's comp statute are not designed to allow "open season" on workers. Worker's compensation is the exclusive remedy against both the employer and carrier under §440.09 and 440.11, but that immunity is not without limits. While there is no statutory bad faith action against the comp insurer, and the insurer is immune for mere negligent conduct, "simple bad faith and minor delays in payment," it does not have blanket immunity for all of its conduct during the claims process, particularly its intentional tortious conduct.

Here, the carrier's alleged conduct included blocking emergency medication and treatment that all doctors agreed were work-related and that the employee needed, attending the employee's doctor appointments and telling the employee to lie to his attorney about it, insisting on tests that were contraindicated and painful, and obstructing emergency surgery until the employee had been urinating feces and blood for over ten months.

The carrier's alleged outrageous conduct is not immune in an action for intentional infliction of emotional distress. "The worker's compensation system was never designed or structured to be used by employers or insurance carriers as a sword to strike out and cause harm to individual employees during the claim process and then provide a shield from responsibility for an employee's valid intentional tort claim for that conduct through immunity flowing under the law. Most certainly, the worker's compensation system was never intended to function as a substitute for an employee's right to seek relief in a common law intentional tort action against an employer or insurance carrier, but was only intended to provide employers and insurance carriers with immunity for negligent workplace conduct which produced workplace injury."

"The statutes do not contemplate and this Court has never permitted compensation insurance carriers to cloak themselves with blanket immunity in circumstances where the carrier has not merely breached the duty to timely pay benefits, or acted negligently, but has actually committed an intentional tort upon an employee."

I was pleased to represent the AFTL as an amicus in this case.