

CASE LAW

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Update

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Amendments to Florida Rules of Civil Procedure and Florida Standard Jury Instructions

On September 27 and October 4, the Florida Supreme Court announced amendments to the Florida Rules of Civil Procedure and Florida Standard Jury Instructions. Here are some of the significant changes

Rule 1.120 – Pleading Special Matters – The age of a minor must be specifically pled in the initial pleading on behalf of the minor.

Rule 1.140 – Defenses – “Unless a different time is provided by statute,” an answer is to be served 20 days from the date of service, except that the state, state agencies, officers and employees have 40 days to answer except when sued under § 768.28, Florida Statutes; when sued under §768.28, they have 30 days. The forms for summonses are amended accordingly.

Rule 1.221 – Homeowners associations are added to the rule on actions by condominium associations brought on behalf of members. The rule specifies the kinds of actions that may be brought consistent with amendments to §720.303(1), Florida Statutes.

Several rules were amended to provide that a minor has a right to be accompanied by a parent or guardian, notwithstanding invocation of the rule of sequestration under §90.616. **Rules 1.380(b)(8) (Depositions)** and **1.410 (Subpoenas)** allow an exception only on a showing that it would be likely to have a material negative impact on credibility or accuracy, or of an actual or potential conflict of interest. **Rule 1.360(a)(1)(C) (Examination of Persons)** and **Rule 1.650 (Med Mal Presuit physical examination)** do not include the conflict of interest exception.

Rule 1.351 – Production of Documents and Things Without Deposition – A party seeking documents may request a hearing on objections or proceed pursuant to Rule 1.310. Documents are not to be produced pursuant to a notice of deposition of nonparty pending a ruling on objections.

Rule 1.820 Nonbinding Arbitration — In general, the arbitration decision becomes enforceable if no party files a motion for trial within 20 days of service of the decision. Under the amendment, if a motion for trial is filed by any party, any party having a third party claim at issue at the time of arbitration may file a motion for trial within 10 days of service of the first motion for trial.

The court also adopted a number of suggestions from the Jury Innovations Committee of the Judicial Management Council.

New Florida Rule of Civil Procedure 1.452 requires a court to permit jurors to submit written questions directed to witnesses or the court and provides the procedure for doing so. The questions are to be written, not signed, and handed to the bailiff. The court will review them with counsel and give the parties an opportunity to object before using them. **New FSJI Civil 1.13** explains the procedure to the jury.

Revised FSJI (Civil) 1.8 advises jurors that they may but are not required to take notes during the trial, gives guidance on the use of notes, and advises the jurors that their notes will be destroyed once the trial is completed. The Court also revised **FSJI 7.2** regarding the use of notes during deliberations.

New Fla. R. Jud. Admin. 2.430 (I) requires the court, at the conclusion of the trial and promptly following discharge of the jury, to collect juror notes and immediately destroy them.

New Fla. R. Civ. P. 1.455—Juror Notebooks – provides for court discretion in the use of juror notebooks containing copies of documents and exhibits that may assist the jurors. **Fla. R. Civ. P. 1.200(b)** is amended to add the potential use of juror notebooks to the list of issues to be addressed at the pretrial conference.

Rule 1.470(b) now requires the court to provide the jury with a written set of instructions to use during deliberations. In addition, it allows a trial judge to orally instruct the jury either before or after closing arguments and provide appropriate instructions during the trial. If instructions are given prior to final argument, the amended rule directs the trial judge to give final procedural instructions after final arguments and before deliberations.

FSJI (Civil) 7.3(a)—Answers to Juror Inquiries During Deliberations, provides a format for judges to follow in recognizing and answering or, where appropriate, not answering juror questions. **FSJI 7.2** is amended to state: “If any of you need to communicate with me for any reason, write me a note and give it to the bailiff. In your note, do not disclose any vote or split or the reason for the communication.”

New FSJI (Civil) 7.3(b) provides a framework for acknowledging and either granting, deferring, or denying a jury’s request for a read-back of testimony.

Attorneys Fees – 57.105

Salazar v. Helicopter Structural & Maintenance, Inc.
Case No. 2D07-33 (Fla. 2d DCA Nov. 7, 2007)

The court of appeal reversed the award of 57.105 fees against the plaintiff. The case involved a helicopter crash. Based on an invoice of the repair company showing that the company had done work on the part that failed, plaintiff sued the repair company, among others. The repair company stated it had never worked on anything but the cabin skin of the helicopter, and threatened 57.105 fees.

Plaintiff offered to drop the repair company if the other defendants would agree not to make it a *Fabre* defendant, and if the repair company would agree to waive the statute of limitations in case evidence later showed it had worked on the defective part. Instead of responding to the offer, the repair company moved for summary judgment. The plaintiff did not oppose the motion, because it would also preclude the *Fabre* defense, and the plaintiff was “happy not to have another defendant in the case.” The trial court granted summary judgment and then granted 57.105 fees.

The Second DCA reversed the award of fees. Summary judgment does not automatically entitle the prevailing party to 57.105 fees. The plaintiff had an adequate basis to bring the suit, and some evidence contradicting the defendant’s summary judgment affidavit. Furthermore, plaintiffs did not force the repair company to the hearing but expressed willingness to dismiss the case if the repair company would waive the statute of limitations and help plaintiff get agreements from the other defendants not to make it a *Fabre* defendant.

“By filing a motion for summary judgment, HSM put Plaintiffs in the classic Catch-22 situation. Plaintiffs did not want to oppose summary judgment, but there was a possibility that discovery would reveal some liability on HSM’s part. A voluntary dismissal would leave Plaintiffs with no recovery if the statute of limitations expired. A summary judgment, however, could at least preclude HSM from being found liable as a *Fabre* defendant. Plaintiffs should not have been forced to unnecessarily oppose summary judgment to avoid section 57.105 sanctions.”

Compulsory Examinations

Bacallao v. Dauphin
963 So.2d 962 (Fla. 3d DCA 2007)

The Third District granted certiorari and quashed an order requiring the plaintiff to attend a compulsory neuropsychological evaluation without the presence of counsel and without videotaping or audiotaping. A party seeking to exclude a third party observer from a compulsory medical examination must (1) provide a case-specific reason why their presence would disrupt the examination and (2) prove at an evidentiary hearing that no other qualified physician can be located in the area who would be willing to perform the examination under such circumstances.

Here, the defendant satisfied the first prong for excluding the attorney by presenting a case-specific reason to exclude the plaintiff’s counsel from attending the examination, because he had disrupted a previous examination in this same case by objecting to the CME examiner’s questions and instructing the plaintiff not to answer certain questions. However, the defendant did not satisfy the second prong. The CME examiner herself testified that she was aware of other doctors in the area who, despite violating ethical obligations, would perform the examination with an attorney present.

With regard to the video or audio taping, the defendant did not satisfy either prong. The defendant offered only general reasons, not case specific ones. The reasons offered included a neuropsychologist’s standards of practice, references to text, and general statements that a third party, such as a videographer, would invalidate the examination results and interfere with the examination. Nor did the defendant show that no other doctor would perform the examination if it were taped.

Impact Doctrine

Willis v. Gami Golden Glades, LLC
Case No. SC04-1929 (Fla. Oct. 18, 2007)

Answering one of four questions certified by the Third District, the Supreme Court holds that the Plaintiff’s claim is not barred by the impact rule, but declines to abolish the impact rule, and clarifies the doctrine.

The plaintiff was robbed in a parking lot where she was directed to park her car by the security guard at the Holiday Inn where she was staying. The robber held a gun to her head; she heard it click. The robber also lifted her clothes and patted her down. As a result, the plaintiff suffers anxiety, depression, panic attacks and post traumatic stress disorder. She is under treatment by a psychologist, a psychiatrist and a general practitioner, and had to take several medications. She experiences sexual dysfunction, peripheral temperature changes, muscle

tightening increased sweat gland activity. She is afraid everywhere she goes.

Under prior Third District precedent, this was not enough to prevent the claim from being barred by the impact rule. The Supreme Court overrules *Ruttger Hotel Corp. v. Wagner*, 691 So. 2d 1177 (Fla. 3d DCA 1997), which had held the impact rule barred the plaintiff's claim under similar facts.

The court holds that the impact rule applies only to "cases in which the plaintiff claims mental or emotional damages but has not sustained any physical impact or contact, unless the claim falls within one of the recognized exceptions to the rule. . . . When an impact or touching has occurred, the rule has no application." Any touching, "no matter how large or small, visible or invisible, and no matter that the effects are not immediately deleterious," is sufficient.

Only if there is no touching does the impact rule apply to require that the "mental distress must be 'manifested by physical injury,' the plaintiff must be 'involved' in the incident by seeing, hearing, or arriving on the scene as the traumatizing event occurs, and the plaintiff must suffer the complained-of mental distress and accompanying physical impairment 'within a short time' of the incident." quoting in *Eagle-Picher Industries, Inc. v. Cox*, 481 So. 2d 517 (Fla. 3d DCA 1985).

There are multiple concurring and dissenting opinions, comprising 69 pages. But the bottom line is, if there is any touching of the plaintiff, the impact rule does not bar the claim. If the plaintiff was not touched, the claim is barred unless one of the other exceptions to the rule applies.

It was my privilege to represent Mrs. Willis, the plaintiff in this case, along with trial counsel David Lister.

Florida Dept. of Corrections v. Abril Case No. SC04-1747 (Fla. Oct. 18, 2007)

An entity that negligently and unlawfully violates a patient's right of confidentiality and privacy in disclosing the results of the patient's HIV testing may be held responsible in a civil negligence action for damages caused to the patient by the unlawful disclosure. The claim is not barred by the impact rule.

The plaintiffs asserted a common law negligence claim, and used §381.004(3)(f) as evidence of the defendant's negligence. The statute prohibits the disclosure of the results of an HIV test in a manner that reveals the identity of the person tested. The statute created a standard of care and established the defendant's duty to the plaintiff. However, the court notes that more than one statute may have been breached in the disclosure of the plaintiff's HIV results, and that there are "multiple sources" for the plaintiff's right of confidentiality and privacy.

In *Gracey v. Eaker*, 837 So.2d 348 (Fla. 2002), the Court held that a plaintiff's claim against a therapist for breach of a statu-

tory duty of confidentiality was not barred by the impact rule. Citing *Gracey*, the Court holds that the impact rule does not bar a cause of action for a breach of confidentiality in negligently disclosing the results of HIV testing.

"Because the only reasonable damages arising from a breach of section 381.004(3)(f) are emotional distress, and because this emotional damage would be akin to that suffered by victims of defamation or invasion of privacy," the Court concludes that the claim should not be barred by the impact rule. The Court notes that, as in *Gracey*, "[t]he emotional distress that [plaintiffs] allege they have suffered is at least equal to that typically suffered by the victim of a defamation or an invasion of privacy" and that "[i]mposition of the impact rule in this context would render the legislative intent and its statutory implementation meaningless and without substance".

Insurance – Coverage – Additional Insured

Garcia v. Federal Ins. Co.

Case No. SC06-2524 (Fla. Oct. 25, 2007)

A homeowner's insurance policy provided coverage to "any other person or organization with respect to liability because of acts or omissions" of the named insured. The person claiming coverage in this case was an employee who worked as a caregiver for the named insured. Because the victim sued the employee for her own negligent acts, not for any acts or omissions of the employer, the insurer contended that she did not qualify as an additional insured. The Supreme Court agreed. The Court held that the clause was not ambiguous and "should be enforced according to its terms whether it is a basic policy provision or an exclusionary provision." The Court concluded that a clause covering "any other person with respect to liability because of acts or omissions" of the named insured covers only vicarious liability for the negligence of the named insured.

Insurance – Valued Policy Law

Florida Farm Bureau Cas. Ins. Co. v. Cox, 2007 WL 2727072 (Fla. Sept. 20, 2007)

Overruling *Mierzwa v. Florida Windstorm Underwriting Assoc.*, 877 So.2d 774 (Fla. 4th DCA 2004), the court holds that the 2004 version of the Valued Policy Law, §627.702, did not require an insurer to pay the policy limits if the property was destroyed by a combination of wind, which was a covered peril, and water, which was not a covered peril. The statute provided that "[i]n the event of the total loss of any building ... insured by any insurer as to a covered peril ..., the insurer's liability, if any, under the policy for such total loss shall be in the amount

of money for which such property was so insured as specified in the policy *and for which a premium has been charged and paid.*” (Court’s emphasis). The court holds that the intent of the statute is only “that an insurer is liable for a loss by a peril covered under the policy for which a premium has been paid.” The insurer may not contest the value of the property, but it may contest causation of the loss.

Med Mal – Blood Banks

Lifesouth Community Blood Centers, Inc. v. Fitchner
2007 WL 3144829 (Fla. 1st DCA Oct. 20, 2007)

Because of the 2003 amendments to §766.202, Florida Statutes, a blood bank is now a health care provider under the medical malpractice act, and must be given presuit notice under §766.106. The two year statute of limitations under §95.11(4)(b) applies.

Med Mal Caps

Cavanaugh v. Cardiology Associates of Orlando
Case No. 06-CA-3814, Div. 40 (9th Circuit, Orange County Oct. 30, 2007)

A circuit judge has held the medical malpractice caps statute, §766.118, Florida Statutes, unconstitutional under Amendment 3 (Art. I, x2126, Fla. Const.). The court found that the constitutional amendment “states in plain language that victims of medical malpractice may recover certain percentages of ‘all damages.’ This Court finds that ‘all damages’ means all of the damages that a jury could potentially award.” Since the amendment specifically states that no implementing legislation is required, the court rejects the defendant’s argument that it could be interpreted to mean only all of those damages according to the scheme set forth by the legislature. The order and memos are available to members on the FJA website.

Med Mal – Concealment

Todd v. Johnson
965 So.2d 255 (Fla. 1st DCA 2007)

In connection with his application for Social Security Disability, plaintiff went to the defendant doctor. Plaintiff signed a form acknowledging that “no treatment would be given.” The defendant doctor had a chest x-ray performed on the plaintiff, but did not tell the plaintiff that the x-ray showed a mass in his lung. The court held that the plaintiff’s complaint, alleging these facts, sufficiently alleged concealment to extend the statute of limitations and repose under §95.11(4)(b). In addition, the complaint alleged sufficient facts to create a factual question about the existence of a doctor-patient relationship sufficient to create a duty where it alleged that the patient had no other

doctor from the period after his x-ray and considered the defendant doctor his only physician during that period and that the patient informed social security evaluators that the defendant was his physician. Therefore, it was error to dismiss the complaint.

Prior Similar Accidents

Ford Motor Co. v. Hall-Edwards
Case No. No. 3D06-1656 (Fla. 3d DCA Nov. 7, 2007)

The court reversed a \$60 million verdict in a wrongful death rollover case, on the basis of erroneous admission of evidence of prior similar incidents. The court states there is a four part test: (1) the evidence may not be offered to prove negligence or culpability, but may be admissible to show the dangerous character of an instrumentality and do show the defendant’s knowledge; (2) the similar accidents must pertain to the same type of equipment under substantially similar circumstances; (3) the similar accident evidence must have a tendency to establish a dangerous condition at a specific place; (3) the accident must not be too remote in time to the accident at issue, thereby causing it to lack sufficient probative value. The requirement of showing substantial similarity is not reduced or eliminated just because the issue of punitive damages is involved.

Products Liability

Liggett Group, Inc. v. Davis,
2007 WL 2935236 (Fla. 4th DCA Oct. 10, 2007)

The plaintiff did not have the burden, in an action against a cigarette company alleging defective design, to prove that there was a safer alternative design. “Florida courts have adopted Section 402A of the Restatement (Second) of Torts as the standard for product liability in *West v. Caterpillar Tractor Co.*, 336 So.2d 80, 87 (Fla.1976). Product liability cases under Florida law require proof of two things. . . . First, that the product is defective; and, second, that such defect caused plaintiff’s injuries.”

The court limits its prior reference to the Restatement (Third) of Torts previously in *Scheman-Gonzalez v. Saber Manufacturing Co.*, 816 So.2d 1133, 1139 (Fla. 4th DCA 2002), stating that it was “merely to make the point that ‘a product is defective in design ‘when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design’ and its omission ‘renders the product not reasonably safe.’” The court holds that, while it might be proper to consider the existence of a safer alternative design as one factor, it would not have been proper to instruct the jury that proof of a safer alternative design was required. “The instruction proposed by Liggett did not accurately state

the law because there is no requirement of an alternative design in a design defect claim.”

The court also holds that plaintiff’s negligence claim that the company continued to manufacture cigarettes after the danger became known was barred by federal law, but that reversal was not required because of the two-issue rule; the verdict for the plaintiff could be sustained on another theory that was also presented to the jury and it was impossible to tell from the verdict form which theory the jury accepted.

Rental Car Liability

The Graves Amendment, 49 U.S.C. §30106, preempts some state law on vicarious liability of rental car owners, but contains exceptions for certain kinds of state financial responsibility or insurance laws, and for actions alleging that the owner of the rental car was actively negligent.

Specifically, the statute does not preempt state law (1) “imposing financial responsibility or insurance standards on the owner of a motor vehicle for the privilege of registering and operating a motor vehicle;” or (2) “imposing liability on business entities engaged in the trade or business of renting or leasing motor vehicles for failure to meet the financial responsibility or liability insurance requirements under State law.”

State and federal trial courts have come down both ways on whether Florida dangerous instrumentality law is preempted, and cases are pending in some of the District Courts of Appeals.

Kumarsingh v. PV Holding Corp.,

No. 3D06-2791 (Fla. 3d DCA 10/3/2007)

The Third District held that the Graves Amendment preempts the Florida short term rental statute, §324.021(9)(b)(2). Recovery is limited to \$10,000, pursuant to §324.021(7), which is not preempted. The opinion expressly states that no negligent entrustment claim was at issue in that case. Nor does the opinion address any constitutional issues. Moreover, despite some broad language, the case does not address long term leases, which are covered separately in §324.021(9)(b)(1).

Vanguard Car Rental, U.S.A., Inc. v. Huchon

Case No. 06-10082-CIV-Moore/Garber (S. D. Fla. Sept. 14, 2007)

and

Vanguard Car Rental U.S.A., Inc. v. Drouin,

2007 WL 2915903 (S. D. Fla. Oct. 5, 2007)

The Graves Amendment is unconstitutional because it exceeds Congress’ power under the Commerce Clause, Art. I, §8, Cl. 3 of the U.S. Constitution. It does not regulate the channels or instrumentalities of interstate commerce; it regulates tort liability

rather than the car itself or its use. It does not regulate an activity that “substantially affects interstate commerce”. Congress made no specific findings about its impact on interstate commerce; the statute does not contain an “express jurisdictional element” limiting the statute’s reach, and the connection between the activity and its effect on interstate commerce is attenuated. The statute is not part of a larger-scale federal involvement with the regulated industry – there is no far-reaching federal scheme to regulate rental cars. Accord, *Graham v. Dunkley*, 827 N.Y.S. 2d 513 (N.Y. Sup. Ct. 2006).

Sanctions

Kubel v. San Marco Floor & Tile

No. 2D06-5514 (Fla. 2d DCA Nov. 7, 2007)

The Second District reversed the dismissal of a case for alleged fraud on the court. The case involved an alleged fall. The original report from one of the treating doctors stated that the plaintiff’s husband said she had tumors in her leg which caused frequent falls. The husband claimed he told the doctor about the tumors but denied saying they caused falls; as a result, the doctor changed his report to mention only the tumors and not the falls. The trial court dismissed for fraud on the court. The court reversed, holding that the standard for dismissal is very high and that these matters should be dealt with on cross examination.

Summary Judgment

Binford v. City of Winter Springs

Case No. 5D07-155 (Fla. 5th DCA Nov. 7, 2007)

The trial court abused its discretion in refusing to consider legal argument contained in an affidavit in opposition to a motion for summary judgment filed on the day of the summary judgment hearing. Under Rule 1.510(c), affidavits opposing summary judgments must be served by mail five days, or delivered two days, before the hearing. However, this rule applies to facts, not legal arguments. The court has discretion to disregard late-filed evidence, but not legal argument.