Case Law Update

October 2003

Barbara Green, P.A.
Attorney at Law
(305) 669-1994

Caselaw Update on the Internet

Issues of *Case Law Update* since January 1995 can be found at the new Case Law Update website. The hypertext versions you'll find there are searchable by any text string and you can download to disk or print any portions you desire for your personal use.

www.caselawupdate.com

Creditors' Rights

Friedman v. Heart Institute of Port St. Lucie, Inc.

28 Fla. L. Weekly S715 (Fla. 2003)

A transfer of property by a debtor is fraudulent if it is made "without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation." §726.106(1), Florida Statutes. Section 726.108 provides a number of remedies that a creditor who has a claim may seek to prevent the fraudulent transfer of assets. The court holds that a creditor may pursue those remedies even if the claim has not yet been reduced to judgment. "In this state contingent creditors and tort claimants are as fully protected against fraudulent transfers as holders of absolute claims." quoting *Money v. Powell*, 139 So.2d 702, 703 (Fla. 2d DCA 1962).

Evidence – Hearsay

Donshik v. Sherman

28 Fla. L. Weekly D2114 (Fla. 3d DCA 2003)

It is improper to use a study published in the Journal of the AMA to bolster an expert's opinion. A learned treatise is hearsay if offered as substantive evidence. A learned treatise may be used for impeachment if it is demonstrated to be authoritative.

Invasion of Privacy

Allstate Ins. Co. v. Ginsberg

28 Fla. L. Weekly S710 (Fla. 2003)

A personal umbrella policy did not provide coverage under its invasion of privacy coverage for unwelcome touching in a sexual manner and sexually offensive conduct. Those acts do not constitute invasion of privacy. Invasion of privacy involves one of four issues: (1) unauthorized use of a person's name or likeness to obtain some benefit; (2) physical or electronic intrusion into one's private quarters; (3) public disclosure of private facts; (4) publication of facts which place a person in a false light.

Med Mal – Presuit

Vincent v. Kaufman

28 Fla. L. Weekly D2186 (Fla. 4th DCA 2003)

Plaintiff had some difficulty during presuit in gathering all of plaintiff's medical records from various locations, and therefore was late in responding to defendant's presuit discovery request. Plaintiff's counsel testified he had communicated with defendant's adjuster to advise her of the problem and allegedly was told it was not a problem, and the discovery response was delivered a few days later, after the presuit period had run and defendant had rejected plaintiff's claim. Dismissal of plaintiff's complaint was error. The court notes that there was no prejudice to the defendant, where the plaintiff complied with the presuit discovery request before the statute of limitations ran and before plaintiff filed suit. See *Kukral v. Mekras*, 679 So.2d 278 (Fla. 1996) (presuit requirements must be construed to preserve a litigant's constitutional right of access to court; compliance before statute of limitations runs is sufficient.) Compare *Cohen v. West Boca Medical Center*, 28 Fla. L. Weekly 2181 (Fla. 4th DCA 2003) (affirming dismissal where plaintiff offered no reasonable explanation for failure to comply with presuit requirements, and did not comply until after statute of limitations ran).

Med Mal – Statute of Limitations

Florida Hospital Waterman v. Stoll
28 Fla. L. Weekly D2287 (Fla. 5th DCA 2003)

The defendant hospital moved to dismiss before the statute of limitations expired, but did not raise any allegations of deficiencies in the presuit affidavits. After the statute of limitations ran, the hospital raised for the first time technical deficiencies in the presuit notices. The court held that the hospital waived any defects in the affidavits by failing to timely raise the issue in its motion to dismiss. See *Ingersoll v. Hoffman*, 589 So.2d 223 (Fla. 1991).

Nehme v. Smithkline Beecham
28 Fla. L. Weekly S719 (Fla. 2003)

The statute of repose may be tolled by "fraud, concealment or intentional misrepresentation of fact." §95.11(4)(b), Florida Statutes. The Court holds that concealment requires knowledge and does not encompass negligent misdiagnosis by a medical provider. Although the Court disagreed with the Third District's conclusion in *Hernandez v. Amisub*, 714 So.2d 539 (Fla. 3d DCA 1998), that intent is not required for concealment, it does not entirely overrule *Hernandez*. In *Hernandez*, the court held that the plaintiff proved concealment or intentional misrepresentation of fact when the defendant reported that it had performed an accurate count of lap pads at the conclusion of the plaintiff's operation when it had not. "Not only was the count not properly performed, as evidenced by the pad left inside Hernandez' body, but the Hospital demonstrated reckless disregard for the truth by its false report indicating that the count had been properly performed." The *Nehme* Court stated, "We state no opinion about whether the facts in *Hernandez* proved either fraud or intentional misrepresentation of fact."

Negligence – Duty

Florida Power & Light v. Goldberg
28 Fla. L. Weekly D2262 (Fla. 3d DCA 2003) (en banc)

A power utility company owes no common law duty to maintain a current in a traffic light. The court reverses a judgment in favor of the family of a girl killed in an intersection collision that occurred when the power company cut power to a traffic light.

Negligence – Nondelegable Duty

Bowling v. Gilman
28 Fla. L. Weekly D2236 (Fla. 2d DCA 2003)

A crane in operation is inherently dangerous, and the owner and operator have a nondelegable duty to use reasonable care in the operation of the crane and in looking out for the safety of workers around the crane. The plaintiff in this personal injury action was entitled to an instruction on the nondelegable duty of the owner of crane, where the instruction was properly requested and was a correct statement of the law. The instruction stated, in part, that "If a crane is operated and reasonable care is not used and if the safety of workers around the crane is not looked out for, the owner and operator of the crane are negligent as a matter of law."

Nursing Home

Romano v. Manor Care, Inc.
28 Fla. L. Weekly D2269 (Fla. 4th DCA 2003)

In order to be invalidated as unconscionable, an arbitration agreement must be both procedurally and substantively unconscionable. An arbitration agreement in a nursing home contract was unconscionable where it deprived the nursing home patient of statutory remedies including punitive damages and attorneys fees. Because the agreement was substantively unconscionable "to a great degree", less of a showing of procedural unconscionability is required. The agreement was procedurally unconscionable due to "some irregularity in the contract formation". The administrator gave it, along with many other documents, to the patient's husband but did not explain it to him; the administrator herself did not understand what the agreement meant. The administrator testified that the patient would not have been ousted from the home if the agreement was not signed, but she did not tell the husband that; she simply told him he had to sign the papers. Compare *Gainesville Health Care Center, Inc. v. Weston*, 28 Fla. L. Weekly D2201 (Fla. 1st DCA 2003) (finding arbitration agreement not procedurally unconscionable under the facts of that case).

Offer of Judgment

Sarkis v. Allstate Ins. Co.
28 Fla. L. Weekly S740 (Fla. 2003)

The supreme court has decided there is no multiplier on fees under the offer of judgment statute or rule.

Restitution

Kirby v. State
28 Fla. L. Weekly S751 (Fla. 2003)

Section 775.089, Florida Statutes, requires a criminal defendant who is convicted to order the defendant to make restitution to the victim for damages caused indirectly or directly by the crime, or related to the criminal episode, unless the court finds clear and compelling reasons not to order restitution. If there has been bodily injury, the defendant is required to pay medical and related professional services and devices, therapy, and loss of income. The statute also gives the conviction a collateral estoppel effect in a civil proceeding. Here, the court holds that, where the defendant has settled with the victim in the civil proceeding and obtained a release, the court is still required to order restitution.

Sanctions

Amato v. Intindola
28 Fla. L. Weekly D2125 (Fla. 4th DCA 2003)

While courts have authority to dismiss a plaintiff's case or enter a default against a defendant for fraud on the court, the issue of credibility is usually for the jury. Here, it was error for the court to dismiss plaintiff's case based on a video allegedly showing plaintiff performing several activities which he testified he was unable to perform. The court points out that a plaintiff may say he can't do something, when what he means is that he can't do it without difficulty, or can't do it without pain. See *Jacob v. Henderson*, 840 So.2d 1167 (Fla. 2d DCA 2003).

Scheduling

Specially set hearings are often set months into the future. If you have a specially set hearing, and your case settles, please remember to contact the judge's office to cancel the hearing. If you cancel the hearing, the judge can give the time slot to someone else. **Judge Genden** recently asked me to mention this, and I have heard the same thing from other judges. If you don't cancel your hearing, that time on the judge's calendar is wasted and we all have to wait longer for hearing dates.

Sovereign Immunity – Scope of Duty

Floyd v. Dept. of Children and Families
28 Fla. L. Weekly D2205 (Fla. 1st DCA 2003)

Plaintiff's child was murdered by the mother's boyfriend after DCF returned the child to the mother in spite of the boyfriend's history of abuse. It was error to enter summary judgment in favor of DCF. DCF was not immune from liability for the actions of its investigator. See *Department of Health & Rehab. Services v. Yamuni*, 529 So.2d 258 (Fla. 1988). The court rejects an argument that §39.203, Florida Statutes, provides "good faith" immunity because that provision was not in effect at the time the cause of action accrued. The court does not address whether the statute would have provided immunity if it were applicable to this case.

Wrongful Death

Niemi v. Brown & Williamson Tobacco
28 Fla. L. Weekly D2227 (Fla. 2d DCA 2003)

In an action by a husband and wife for personal injury and loss of consortium, where the husband died before trial while the action was pending, the trial court should have allowed the husband's personal representative to substitute as a party, and to amend the complaint to assert that the injuries caused the husband's death.

Section 46.021 provides "No cause of action dies with the person. All causes of action survive and may be commenced, prosecuted and defended in the name of the person prescribed by law." Section 768.20 states that "when a personal injury to the decedent results in death, no action for the personal injury shall survive, and any such action pending at the time of death shall abate." Because the pleadings in the personal injury action did not allege that the injuries caused the husband's death, the action did not automatically abate upon his death. The proper procedure is substitution of the personal representative as a party plaintiff, followed by amendment of the complaint.