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Amendment 7 - Patient's Right to Know

Westside Regional Medical Center v. Fain
No. 4D08-4578 (Fla. 4th DCA 8/19/2009)

Art. X, §25 of the Florida Constitution, also known as Amendment 7 or the Patients Right to Know Amendment, allows a patient to discovery records related to adverse medical incidents involving a health care provider. Defendants have raised many objections to compliance with the amendment. Here, the court declined to address most of them, but did hold that Amendment 7 does not violate the Supremacy Clause and is not preempted by the Health Care Quality Improvement Act 0f 1986, 42 U.S.C. §11101 et seq., even though the Amendment abolishes the Florida peer review privilege. The HCQIA encourages peer review, but does not require preservation of the state law peer review privilege. Nor does Amendment 7 violate the federal constitutional prohibition on the impairment of the obligation of contracts, Art. I, §10, U.S. Const. (the Contract Clause). The court also rejects any attempts by the Florida legislature to limit what documents are discoverable under §381.028, Fla. Stat.

West Florida Regional Medical Center v. See
2009 WL 2244472 (Fla. 1st DCA 7/29/ 2009)

The First DCA also rejects multiple challenges to Amendment 7, and declines to address others. The court holds that Amendment 7 does not violate the supremacy clause and is not preempted by the HCQIA. Nor does it violate the Contract Clause. However, the court holds that evidence regarding a doctor's training to perform a particular procedure is not discoverable under Amendment 7 because it is not evidence relating to an adverse medical incident. Moreover, to the extent §381.028 tries to limit what a defendant must provide pursuant to the constitutional amendment, it is unconstitutional.

Florida Eye Clinic v. Gmach
2009 WL 1490838 (Fla. 5th DCA 5/29/2009)

The patient's right to know under Amendment 7 overcomes any fact work product privilege that might otherwise attach to medical incident reports prepared by a risk manager to memorialize the investigation of a surgery-related infection so that the facts would be available to defense counsel in the event a lawsuit were to be filed. The court distinguishes opinion work product, which would include an attorney's thoughts, mental impressions, conclusions, opinions or theories about his client's case. The documents involved in this case were fact work product, not opinion work product, and were never reviewed by counsel.

Lakeland Regional Medical Center v. Neely
8 So.3d 1268 (Fla. 3d DCA), rev. denied, 12 So.3d 752 (Fla. 2009).

Amendment 7 requires production of incident reports prepared by medical professionals in anticipation of litigation. The court certified the question to the Supreme Court, which denied review.

Arbitration - Nursing Home

Carrington Place of St. Pete LLC v. Milo
2009 WL 763607 (Fla. 2d DCA 3/25/2009)

Where a power of attorney did not unambiguously grant the person who signed the admission documents the authority to enter into an arbitration agreement, the nursing home was not entitled to compel arbitration of the claim against it. The power of attorney specifically granted authority only with regard to the patient's property interests. The language of the power of attorney is not specifically set out in the opinion. Compare *Sovereign Healthcare of Tampa LLC v. Estate of Huerta*, 2009 WL 1424011 (Fla. 2d DCA 5/22/2009) (finding language in power of attorney sufficient to grant authority to agree to arbitration; opinion does not set out the language but notes broad language granting authority with respect to hospitalization).

Manorcare Health Services v. Stiehl
2009 WL 2568264 (Fla. 2d DCA 8/21/2009)

Where the arbitration agreement contained provisions that limited the plaintiff's remedies and were contrary to public policy, those provisions could be severed by the arbitrator. The issue of whether they are contrary to public policy may be determined by the arbitrator. Although the agreement contains a nonseverability clause, "language contained within the nonseverability clause anticipates that certain provisions of the Agreement may be deemed invalid and severed, in which case the parties would have the option of either proceeding with arbitration or withdrawing from the Agreement." The court notes contrary rulings by other courts:

> We recognize that courts have, on public policy grounds, invalidated arbitration agreements found to defeat the remedial purpose of a statute on which the suit is based. See, e.g., *Powertel, Inc. v. Bexley*, 743 So.2d 570 (Fla. 1st DCA 1999); see also *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1059 (11th Cir.1998). Additionally, courts in this state have specifically found arbitration agreements containing remedial limitations similar to those presented here to render an agreement to arbitrate void and unenforceable. See *Blankfeld v. Richmond Health Care, Inc.*, 902 So.2d 296 (Fla. 4th DCA), review denied, 917 So.2d 195 (Fla.2005); *Lacey v. Healthcare & Ret. Corp. of Am.*, 918 So.2d 333 (Fla. 4th DCA 2005).

Judge Altenbernd, concurring states that, while the decision is consistent with the law of that district, he thinks it is wrong, and that the decision of whether provisions are contrary to public policy should be made by the trial court, not by the arbitrator. He expresses special concern because nursing homes are using the contracts to take away substantive rights.

Attorneys Fees

Amerus Life Ins. Co. v. Lait
2 So.3d 203 (Fla. 2009)

Rule 1.525, Fla. R. Civ. P., requires a motion for attorneys fees and costs to be filed within 30 days after entry of final judgment. The Supreme Court holds that the 30 day requirement does not apply once the court has determined entitlement to fees and costs. If the final judgment states that the losing party is liable for fees and costs, and reserves jurisdiction to determine the amount, the motion for determination of the amount does not have to be filed within 30 days. The losing party is already on notice of their liability for fees and costs, so there is no prejudice or unfair surprise.

Attorneys Fees - Sanctions

Rosenberg v. Gaballa
1 So.3d 1149 (Fla. 4th DCA 2009)

The trial court properly awarded attorneys' fees as a sanction personally against defendant's attorney for "inequitable conduct" during discovery. Section 57.105, Fla. Stat. is supplemental to other provisions for sanctions, and does not supplant the court's authority to award fees for misconduct under *Moakley v. Smallwood*, 826 So.2d 221 (Fla. 2002)

Graves Amendment

Vargas v. Enterprise Leasing Co.
993 So.2d 614 (Fla. 4th DCA 2008)

The court en banc held that the Graves Amendment, 49 U.S.C. §30106, preempts §324.021(9)(b)(2), Fla. Stat., and precludes vicarious liability in a short term vehicle rental situation. The court certified the question to the Florida Supreme Court. The Court accepted jurisdiction. Briefing is complete. Amicus briefs have been filed by Roy Wasson on behalf of the Florida Justice Association, and by me on behalf of a client involved in a long-term lease case. The Court has accepted both. The Court has stayed other *Graves* cases pending before it, both short term and long term cases. To the best of my knowledge, it has stayed all of them.

Hospital Liens

Mercury Ins. Co. of Fla. v. Shands Teaching Hosp.
2009 WL 2151903 (Fla. 1st DCA 7/21/2009)

This is an action by Shands against an insurance company for impairment of its lien, which it was asserting pursuant to Ch. 88-539, Laws of Florida, as well as the Alachua County hospital lien ordinance. The court holds that both the statute and the ordinance violate Article III, §11(a)(9), Fla. Const. That constitutional provision provides that: "[t]here shall be no special law or general law of local application pertaining to ... creation, enforcement, extension or impairment of liens based on private contracts, or fixing of interest rates on private contracts." The court holds that the statue is a special law which creates a lien based on a private contract between Shands and its patient. The Second District reached the opposite result with respect to a lien in favor of a public hospital in *Hospital Board of Directors of Lee County v. McCrary*, 456 So.2d 936 (Fla. 2d DCA 1984).

Intoxication Defense

Griffis v. Wheeler
2009 WL 234722 (Fla. 1st DCA 7/31/2009)

Section 768.36, Fla. Stat., provides that, in certain circumstances, the plaintiff's intoxication at specified levels will bar all recovery if, as a result of the influence of the alcohol or drugs, "the plaintiff was more than 50% at fault for his or her own harm." The court holds that this defense applies in wrongful death cases, even though they are not mentioned in the statute.

Limitations

Ramirez v. McCravy,
4 So.3d 692 (Fla. 3d DCA 2009)

The Florida Supreme Court's tolling orders tolling the time for all statutes and rules because of a number of hurricanes, are narrowly construed so that they do not provide extra time under the statute of limitations unless the plaintiff shows that he relied on the orders or that his attorney's ability to file timely was somehow impeded by the weather. In this case, the plaintiff's suit was not filed until more than six months after the last hurricane.

Litigation Funding

Khatib v. Wyatt,
998 So.2d 673 (Fla. 4th DCA 2009)

A litigation funding company was not entitled to an order requiring the plaintiff's settlement funds in his attorney's trust account to be deposited into the court registry, where the trial court had already entered a final judgment that did not reserve jurisdiction, and the litigation funding company had not been granted intervenor status in the case.

Mediation - Settlement

Dean v. Mulhall
2009 WL 2601630 (Fla. 4th DCA 8/26/2009)

A mediation agreement signed by the defendant's attorney, but not by the defendant himself, was not enforceable against the defendant. Rule 1.730(b) requires the agreement to be signed by the parties. Absent signature of all parties, it is not enforceable.

Mastec v. Cue
994 So.2d 494 (Fla. 3d DCA 2008)

A mediated settlement agreement was not enforceable where it was not signed by the plaintiff. Rule 1.730(b) requires a settlement agreement to be reduced to writing and signed by the parties and their counsel. The court distinguishes *Jordan v. Adventist health System / Sunbelt, Inc.*, 656 So.2d 200 (Fla. 5th DCA 1995), in which the court upheld an agreement signed by the parties but not by counsel.

Pleading – Federal

Ashcroft v. Iqbal
129 S.Ct. 1937 (2009)

Those who practice only occasionally in federal court need to learn about the new rules of pleading. In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), an antitrust case, the Supreme Court abrogated *Conley v. Gibson*, 355 U.S. 41 (1957), and held that it is no longer the defendant's burden, on a motion to dismiss for failure to state a cause of action, to demonstrate "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." It was not clear at that time whether the decision applied only to antitrust cases.

Now, in *Iqbal,* a *Bivens* civil rights action with an immunity defense, the court explains that a plaintiff must plead "more than an unadorned, the-defendant-unlawfully-harmed-me accusation. . . . A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' ... Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'"

> a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. ... The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. ... Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.' " ...

Some lower federal court judges are questioning whether *Twombley* and *Iqbal* apply to all cases, or only to the kinds of claims involved in those cases, or to complex litigation. See, e.g., *Smith v. Duffey*, 2009 WL 2357872 (7th Cir. 2009) (Posner, J.).

Proximate Cause

Cooke v. Nationwide Mut. Fire Ins. Co.
2009 WL 1741370 (Fla. 1st DCA 6/22/2009)

This case involves two accidents, the first of which blocked the road and the second of which occurred when a driver rear-ended the car in front of him, which had slowed for the first accident. Reversing a summary judgment, the court holds that whether the driver's failure to brake when the car in front of him slowed was a foreseeable result of the negligence that cause the first accident was for the trier of fact, and was not a superseding intervening cause as a matter of law.

Settlement – Evidence

Saleeby v. Rocky Elson Const. Co.
3 So.3d 1078 (Fla. 2009)

Both § 90.408, Florida Statutes, and §768.041, Florida Statutes, prohibit the admission of evidence of a settlement with another tortfeasor. Section 768.041(3) provides: "(3) The fact of such a release or covenant not to sue, or that any defendant has been dismissed by order of the court shall not be made known to the jury." Section 90.408 provides, "Evidence of an offer to compromise a claim which was disputed as to validity or amount, as well as any relevant conduct or statements made in negotiations concerning a compromise, is inadmissible to prove liability or absence of liability for the claim or its value."

The statutes "promote Florida's public policy favoring settlement by excluding such prejudicial evidence at trial." The court holds that introduction of such evidence, even for impeachment, is reversible error.

In this case, the plaintiff settled with one defendant after deposing its corporate president. The plaintiff called the settling defendant's corporate president as a witness at trial. The court held it was reversible error to allow the defense to impeach him with the fact that his company had previously been a defendant in the case.

The court found *Dosdourian v. Carsten*, 624 So.2d 241 (Fla. 1993) inapplicable. In *Dosdourian*, the court held that, in the case before it, the jury should hear evidence of the *Mary Carter* agreement between the plaintiff and the former defendant. (In a *Mary Carter* agreement, a defendant settles with the plaintiff but remains in the case through trial). *Dosdourian* was unique because, in *Dosdourian*, the court prohibited *Mary Carter* agreements, but only prospectively, so it was necessary to limit the prejudicial effect of the agreement by letting the jury hear about it. The court now limits that aspect of *Dosdourian* to its facts.

The court rejected the defendant's argument that the plaintiff invited the error by eliciting on direct that the witness had been a party in the case, to limit the prejudicial effect after the court already had ruled that the evidence would come in. See *Sheffield v. Superior Ins. Co*., 800 So.2d 197 (Fla. 2001). The court also rejected the defendant's contention that an exception should be made where the former defendant is, in effect, testifying as an expert witness.

The court quotes with approval from *City of Coral Gables v. Jordan*, 186 So.2d 60 (Fla. 3d DCA), aff'd, 191 So.2d 38 (Fla. 1966) that informing the jury of a settlement is ""immediately and completely destructive to the possibility of a fair trial." Thus, the court finds evidence of a settlement prejudicial not only on the issue of damages, but on the issue of liability, as well.

Sham Pleadings

Herranz v. Siam
2 So.3d 1105 (Fla. 3d DCA 2009)

It is reversible error to strike a pleading as sham without an evidentiary hearing. "As testimony must be taken, notice of the required evidentiary hearing must be provided to the parties to avoid surprise and ensure due process." The notice of hearing did not give any indication that the hearing would be an evidentiary hearing, and appears to have been for the motion calendar. One day before the hearing, the plaintiff served a motion to continue and to set the motion for an evidentiary hearing.

Sovereign Immunity

Wallace v. Dean
3 So.3d 1035 (Fla. 2009)

Where the sheriff performed a safety check at the home of a woman who was ill, and could not awaken her, but did not call for an ambulance, and as a result the woman died, the sheriff owed a duty of care to the woman under the undertaker's doctrine. The activity was operational level, not planning level, and the sheriff was not immune.

Public Health Trust v. Acanda
2009 WL 2762665 (Fla. 3d DCA 9/2/2009)

Section 768.28(7), Fla. Stat., requires service of process not only on the defendant government entity but also on the Department of Financial Services. This is a separate requirement from the presuit notice requirement. Here, the defendant moved for a directed verdict before the plaintiff fully rested (the plaintiffs' counsel said they were going to rest subject to a few pending matters and stipulations). The defendant argued that the plaintiff had not served process on DFS. The court reserved ruling. Plaintiffs' counsel arranged overnight for

service on DFS and filed the proof of service the next morning, also, in an abundance of caution, moving to reopen their case. The jury returned a verdict for the plaintiff and the court denied the renewed motion for directed verdict. Third District held that the trial court correctly denied the motion for directed verdict. It would have been reversible error to grant a directed verdict before the plaintiff rested, or to deny leave to reopen the case. It was my pleasure to assist in the representation of the plaintiffs in this case.

Uninsured Motorist

Metropolitan Cas. Ins. Co. v. Tepper

2 So.3d 209 (Fla. 2009)

Where the uninsured motorist carrier refuses to allow the insured to settle with the uninsured motorist tortfeasor, but instead pays the amount to the insured to preserve its subrogation rights under §627.727(6)(b), Fla. Stat., the insurer's subrogation cause of action against the tortfeasor does not accrue until after the conclusion of the insured's action against the tortfeasor. The UM insurer may not bring a third party action against the uninsured tortfeasor, but must bring a separate action after the conclusion of the case.

Work Product

Ford Motor Co. v. Hall-Edwards

997 So.2d 1148 (Fla. 3d DCA 2008),
rev. denied, 2009 WL 1958664 (Fla. 3/25/2009)

After the Third District reversed a $60 million judgment in this Explorer rollover case, the parties conducted further discovery on other similar incidents. After several hearings, orders and depositions, the trial court, dissatisfied with Ford's affidavits about the search it had conducted for reports of other similar incidents and "suspension orders," communications by Ford's counsel about preservation of documents for pending and anticipated litigation, entered an order requiring Ford to allow plaintiff's expert access to its Litigation Matters Management System (LMMS) database. The Third District quashed the order, holding that the LMMS database is used by in-house and outside counsel to communicate about litigation, containing their opinions and legal advice, and is protected by the attorney-client and work product privileges. The Supreme Court has denied review.

Workers Comp Immunity

Amorin v. Gordon

996 So.2d 913 (Fla. 4th DCA 2008),
rev. denied, 2009 WL 1427438 (5/8/2009)

The Supreme Court has denied review of the first case to interpret the 2004 amendment to workers' comp immunity providing horizontal immunity. §440.10(1)(e), Fla. Stat. (2004). The Fourth District held that the amendment protects subcontractors and sub subcontractors which have not provided workers comp, where the general contractor has provided workers comp. The court also held that the statute is constitutional, because the injured worker still gets workers compensation as an alternative remedy; all that has happened is that the class of defendants who are immune has been expanded.