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RECENT LEGAL DEVELOPMENTS

By Esther E. Galicia

SUPREME COURT DECISIONS

1. Is certiorari review available when the trial court denies a motion to dismiss which argues that the plaintiff's corroborating affidavit was not authored by a qualified medical expert?

The Florida Supreme Court in *Williams v. Oken*, 62 So. 3d 1129 (Fla. 2011), found that the district court exceeded its authority by granting defendant's petition for writ of certiorari and quashing the trial court's order denying defendant's motion to dismiss the plaintiff's medical malpractice action on the basis that the corroborating affidavit was not authored by a qualified expert. Whether the trial court erred in finding that the physician was a qualified expert was an issue of mere legal error that is insufficient to merit certiorari review.

2. When is it appropriate to direct a verdict in favor of plaintiff on the permanency issue?

In *Wald v. Grainger*, 64 So. 3d 1201 (Fla. 2011), the Supreme Court held that it is not improper to direct a verdict on the permanency of an injury issue in favor of the plaintiff where the evidence of injury and causation is such that no reasonable inference could support a jury verdict for the defendant. In other words, a jury is not free to ignore or arbitrarily reject medical evidence on permanence that is undisputed, unimpeached or not otherwise subject to question.

3. Does a plaintiff have to serve process on the Department of Financial Services in a suit against a public hospital?

The Supreme Court in *The Public Health Trust of Miami-Dade County v. Acanda*, 36 Fla. Law Weekly S289 (Fla. June 23, 2011), stated that service of process on the Department of Financial Services, pursuant to Section 768.28(7), is not a condition precedent to a plaintiff's cause of action against a public hospital and is not an element of the plaintiff's burden of proof. Thus, the defendant hospital was not entitled to a directed verdict where DFS was not served until after the motion for directed verdict, DFS was not a party and the hospital failed to demonstrate prejudice. The Supreme Court also emphasized that a defendant must plead with specificity a plaintiff's noncompliance with Section 768.28(7), and must properly raise the issue of noncompliance in a pretrial motion.

4. Is any filing during the Rule 1.420(e) 60-day grace period sufficient to preclude dismissal for lack of prosecution?

In *Chemrock Corp. v. Tampa Electric Co.*, 36 Fla. Law Weekly S318 (Fla. June 30, 2011), the Florida Supreme Court held that any record filing by a plaintiff during the 60-day grace period set forth in Rule 1.420(e), without regard to whether the filing is intended to affirmatively move the case toward resolution on the merits, meets the Rule's requirement for record activity and is sufficient to preclude dismissal for lack of prosecution.

5. When do NICA-compensable birth-related neurological injuries need to occur? Who is the beneficiary of the compensable rebuttable presumption?

The Florida Supreme Court in *Bennett v. St. Vincent's Medical Center, Inc.*, 36 Fla. Law Weekly S366 (Fla. July 7, 2011), found that the requisite "birth-related neurological injury" under the NICA plan must occur during "labor, delivery or resuscitation in the immediate postdelivery period" for the claim to be presumed compensable. The required injury time-frame does not encompass an additional "extended period of time when a baby is delivered in a life-threatening condition" unless there are ongoing and continuous resuscitation efforts. In that regard, both the incident of oxygen deprivation and brain injury resulting therefrom must occur within that period of time. The district court therefore incorrectly interpreted the phrase "immediate postdelivery period" to

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mean "an extended period of days when a baby is delivered with a life-threatening condition and requires close supervision." Furthermore, the Supreme Court held that only the individual seeking compensation under NICA is entitled to the statutory presumption and the district court therefore incorrectly held that the rebuttable presumption of coverage under NICA applied to benefit the defendants, even though the plaintiffs were not making a claim for compensation under NICA. Thus, the plaintiffs were not precluded from filing suit for damages nor required to pursue NICA's limited compensation in an administrative proceeding.

6. When may a district court reverse a judgment entered pursuant to a jury verdict?

In *Cox v. St. Josephs Hospital*, 36 Fla. Law Weekly S357 (Fla. July 7, 2011), the Supreme Court concluded that the district court erroneously reweighed legally sufficient evidence in reversing a judgment for the plaintiff. Plaintiff's expert witness testimony that the administration of tPA, more likely than not, would have mitigated the damages of the plaintiff's stroke did not simply provide a summary conclusion without a factual basis. The expert's opinion was based on her experience, the relevant medical literature, and her knowledge about the facts and records involved in this case, including an in-depth analysis of the plaintiff's CT scan. Moreover, during defense counsel's cross-examination, the expert explained her disagreement with some opposing medical literature. It was therefore within the jury's province to evaluate that expert's credibility and weigh her testimony.

7. Is the Asbestos and Silica Compensation Fairness Act constitutional when applied retroactively?

The Florida Supreme Court in *American Optical Corp. v. Spiewak*, 36 Fla. Law Weekly S435 (Fla. July 8, 2011), found that the Asbestos and Silica Compensation Fairness Act is unconstitutional as applied retroactively to claimants who had an accrued cause of action for injuries allegedly sustained due to asbestos exposure but who did not have an actual physical impairment. In other words, plaintiffs who suffered from actual lung injuries that are consistent with asbestos-related disease have accrued causes of action which constitute a vested property interest right and applying the Act retroactively is thus unconstitutional. Such plaintiffs therefore do not need to plead and prove an existing malignancy or actual physical impairment for which asbestos exposure was a substantial contributing factor.

8. Are owners and lessors of airplanes vicariously liable under Florida's dangerous instrumentality doctrine for injuries occurring on land?

The Supreme Court in *Vreeland v. Ferrer*, 36 Fla. Law Weekly S441 (Fla. July 8, 2011), found that Florida's dangerous instrumentality doctrine, to the extent it imposes vicarious liability upon owners and lessors of airplanes even where the plane is not within their immediate control or possession at the time of loss, conflicts with and is preempted by 49 U.S.C. § 44112 with regard to injuries, damages or deaths occurring on land. However, the plaintiff's wrongful death action was not preempted by Section 44112 because the decedent's death occurred while he was a passenger in a plane that crashed, not on the ground beneath the plane. Florida's dangerous instrumentality doctrine thus applied and the Second District erroneously affirmed the summary judgment entered in favor of the owner of the plane.

FIRST DISTRICT DECISIONS

9. May a plaintiff recover prevailing party contractually-authorized attorney's fees and costs when the defendant served a valid and successful proposal for settlement?

In *Tierra Holdings, Ltd. v. Mercantile Bank*, 36 Fla. Law Weekly D1049 (Fla. 1st DCA May 18, 2011), the First District held that a section 768.79 proposal for settlement does not cut off a prevailing party's claim for contractual attorney's fees and costs incurred after the day of the proposal. The trial court therefore properly awarded defendant attorney's fees and costs after the date of its valid proposal for settlement and properly awarded the plaintiff, which prevailed in its breach of contract action, all of its attorney's fees and costs through trial pursuant to the prevailing party attorney's fees provision in the contract.

10. When is worker's compensation immunity available to the temporary employer of a help supply company's employee?

The First District in *Fossett v. Southeast Toyota Distributors, LLC*, 60 So. 3d 1155 (Fla. 1st DCA 2011), found that the trial court did not err by entering summary judgment against plaintiff on the ground that defendant had immunity from suit under section 440.11(2). Defendant entered into a contract with a help supply services company which plainly stated that the services to be performed by the company's employees would be performed under the direction, supervision, and control of the defendant. The defendant's legal right or power to control the details of the work was dispositive.

SECOND DISTRICT DECISIONS

11. Is the district court's conditional award of appellate attorney's fees a prerequisite to an actual award of those fees, if appropriate, in a subsequent bad faith action?

In *Government Employees Insurance Co. v. King*, 36 Fla. Law Weekly D969 (Fla. 2d DCA May 6, 2011),

the Second District held that the plaintiff was not entitled to a conditional judgment of appellate attorney's fees pursuant to a proposal for settlement in the amount of $100,000.00 where the jury returned a verdict for over $1,000,000.00 but judgment was entered against the UM insurer for only the $25,000.00 in insurance coverage. The district court stated that if, in a subsequent bad faith action, the trial court determines that the earlier appellate attorney's fees are an element of damages or are otherwise awardable, then that award does not require, as a condition precedent, an order from the district court awarding appellate attorney's fees on a contingent basis.

12. Are postage and photocopy expenses taxable costs?

The Second District in *Lewis v. Thunderbird Manor, Inc.*, 60 So. 3d 1182 (Fla. 2d DCA 2011), held that the trial court erred in awarding plaintiff nontaxable costs for postage and photocopies.

13. Should jurors be interviewed when they failed, during voir dire, to disclose their car insurance claims history?

In *State Farm Mutual Automobile Insurance Co. v. Lawrence*, 65 So. 3d 52 (Fla. 2d DCA 2011), the Second District held that the trial court abused its discretion by denying the insurer's motion to interview three jurors based on the alleged failure to disclose their personal automobile insurance claims histories during voir dire. The Insurance Services Organization claims history reports were sufficient to provide reasonable grounds to believe that the jurors may have concealed relevant and material information during voir dire and to justify juror interviews.

14. Can an insurer be required to produce the results of its medical expert's prior medical examinations without notice to those personal injury plaintiffs/patients?

The Second District in *USAA Casualty Insurance Co. v. Callery*, 66 So. 3d 315 (Fla. 2d DCA 2011), held that the trial court departed from the essential requirements of law when it required the defendant insurer to produce the results of the last 20 medical examinations performed by its medical expert of personal injury plaintiffs without the notice to those patients required by section 456.057. It was error to order disclosure of the results of those medical examinations without notice even though the patients' identities were to be redacted.

15. Is a CME physician required to bring CME reports regarding non-parties and to testify regarding those reports, without notice to the third parties?

The district court in *Crowley v. Arthur Lamming*, 66 So. 3d 355 (Fla. 2d DCA 2011), determined that the trial court departed from the essential requirements of law in requiring a physician who performed a compulsory medical examination of the plaintiff to bring the CME reports of nonparties to his deposition and to testify regarding some of the information contained in those reports without notice to the nonparties.

THIRD DISTRICT DECISIONS

16. When is it error to grant a new trial based on the interview of a juror who allegedly failed to disclose prior litigation?

The Third District in *Simon v. Maldonado*, 65 So. 3d 8 (Fla. 3d DCA 2011), held that the trial court erred in granting a new trial where the affidavit supporting the motion for post-trial juror interview was facially insufficient because it only alleged the possibility of juror misconduct and was based on speculation. Furthermore, even if the juror was properly interviewed, it was error to grant a new trial based on the juror's failure to disclose prior litigation where that prior litigation was not relevant or material, the juror did not conceal the information and plaintiff's failed to show that the juror's nondisclosure was not attributed to plaintiff's lack of diligence.

17. Are UM insureds with stacked coverage entitled to recover additional UM benefits from another vehicle's insurance policy that did not have UM coverage?

In *Swan v. State Farm Mutual Automobile Insurance Co.*, 60 So. 3d 514 (Fla. 3d DCA 2011), the district court concluded UM insureds were not entitled to recover additional UM benefits from the policy insuring a vehicle which was not involved in the accident. While the insureds had purchased stacked UM coverage on the vehicle involved in the accident, they had expressly rejected UM coverage on the other vehicle, insured under a separate policy, and had not paid a premium for UM coverage.

18. Is certiorari available to review an order permitting a premature bad faith claim or premature bad faith discovery?

The district court in *State Farm Florida Insurance Co. v. Seville Place Condominium Association, Inc.*, 36 Fla. Law Weekly D1558 (Fla. 3d DCA July 20, 2011), stated that an order permitting an amendment to add an allegedly premature bad faith claim does not satisfy the irreparable harm requirements for certiorari review. The

Third District therefore receded from decisions which had granted a petition for writ of certiorari when irreparable harm seemed possible rather than imminent and which broadly held that certiorari is available to challenge a premature bad faith claim or premature bad faith discovery.

FOURTH DISTRICT DECISIONS

19. May a third-party who injures a child enforce the parent's agreement to indemnify that third party?

The Fourth District in *Claire's Boutique, Inc. v. Locastro*, 36 Fla. Law Weekly D1001 (Fla. 4th DCA May 11, 2011), held that a parent's agreement to indemnify a third party for that party's negligent conduct which causes injury to the parent's child violates Florida's public policy and is void and unenforceable.

20. Does a dismissal without prejudice entitle a defendant to prevailing party attorney's fees per section 57.105(7)?

The district court in *Nudel v. Flagstar Bank*, 60 So. 3d 1163 (Fla. 4th DCA 2011), found that defendant was entitled to attorney's fees as a prevailing party under section 57.105(7) after the entry of a dismissal without prejudice where the defendant had not yet filed a responsive pleading. A plaintiff's voluntary dismissal makes a defendant the prevailing party even when the plaintiff later refiles the case and prevails.

21. Is a long-term vehicle lessor entitled to reimbursement of paid settlement monies from the lessee's agents who failed to make sure the lessee procured the statutorily-prescribed liability limits?

In *DaimlerChrysler Insurance Co. v. Arrigo Enterprises, Inc.*, 63 So. 3d 68 (Fla. 4th DCA 2011), the Fourth District held that the lessor's subrogee's cause of action against the lessee's insurer, insurance broker and insurance agent for equitable subrogation, seeking reimbursement of the settlement amount paid to an injured claimant, failed as a matter of law. In providing insurance to the lessee, the defendants owed no legal duty to the lessor to make sure that the lessee obtained the statutorily-mandated $100,000/$300,000/$50,000 policy limits in order to immunize the lessor from vicarious liability.

22. When is a UM insurer entitled to attorney's fees pursuant to a $100 proposal for settlement?

The district court in *Allstate Insurance Co. v. Staszower*, 61 So. 3d 1245 (Fla. 4th DCA 2011), found that the UM insurer was the prevailing party and entitled to its costs when it was joined as a party defendant and the verdict did not exceed the tortfeasor's liability limits. Additionally, the trial court erred in denying the insurer's motions for section 768.79 attorney's fees where the insurer made a good faith proposal for settlement in the amount of $100.00, and the verdict in favor of the plaintiffs to whom the proposal was made was less than the liability limits.

23. May an investigating police officer testify regarding which vehicle involved in the accident caused the first impact? When is a plaintiff entitled to present evidence of the full amount of his medical bills?

The Fourth District in *Durse v. Henn*, 36 Fla. Law Weekly D1472 (Fla. 4th DCA July 6, 2011), determined that the trial court abused its discretion in allowing an investigating officer to testify as to which car caused the first impact where the officer did not perform any kind of test to determine the first impact, but instead relied primarily on statements taken at the scene. The officer's testimony violated the section 316.066 accident report privilege and there was conflicting testimony as to which impact was the first. Additionally, the trial court erred in excluding plaintiff's medical bills showing the full amount of the charges where, although the plaintiff did not have health insurance, the plaintiff's successful negotiations to lower those bills equated to having earned the reductions and entitled plaintiff to present the full amount to the jury.

FIFTH DISTRICT DECISIONS

24. Does an insurer's voluntary dismissal of its action for additional premiums entitle the insured to section 627.428 attorney's fees?

The Fifth District in *Guarantee Insurance Co. v. Worker's Temporary Staffing, Inc.*, 61 So. 3d 1233 (Fla. 5th DCA 2011), determined that the insured was not entitled to section 627.428 attorney's fees where the insurer voluntarily dismissed its action against the insured seeking payments of additional premiums owed under a Worker's Compensation policy. The insurer's voluntary dismissal is neither a judgment nor the functional equivalent of a confession of judgment.

25. Is a plaintiff's claim alleging negligent entrustment of a vehicle subject to the vicarious liability caps set forth in section 324.021(9)(b)3?

In *Trevino v. Mobley*, 63 So. 3d 865 (Fla. 5th DCA 2011), the Fifth District held that the trial court erred in directing a verdict in favor of the defendant vehicle owners on plaintiff's claims for negligent entrustment. Section 324.021(9)(b)3, which limits a vehicle owner's vicarious liability, does not apply to the owner's direct liability for its own negligence; a claim for negligent entrustment thus subjects an owner to liability above the statutory vicarious liability caps.