RECENT LEGAL DEVELOPMENTS

By Esther E. Galicia

SUPREME COURT DECISIONS

1. **Under what circumstances may a district court exercise second-tier certiorari jurisdiction? Is attendance at a medical examination required for PIP coverage? Who has the burden of addressing the reasonableness of the insured's failure to attend the medical examination?**

The Florida Supreme Court in *Custer Medical Center v. United Automobile Insurance Co.*, 35 Fla. L. Weekly S640 (Fla. Nov. 4, 2010), held that the district court of appeal improperly exercised certiorari jurisdiction to quash the circuit court's decision where the district court did not sufficiently analyze the requisite finding that the circuit court's decision denied due process or departed from the essential requirements of law resulting in a miscarriage of justice. A district court's mere disagreement with a result reached in the circuit court is not a proper and sufficient legal basis for second-tier certiorari review. Substantively, the district court erroneously held that attendance at a medical examination and testimonial exam without counsel are conditions precedent to PIP coverage, not merely benefits. Furthermore, the circuit court correctly concluded that the insurer had the burden of presenting evidence that the insured unreasonably failed to attend a medical examination without explanation, after having received proper notice, to relieve the insurer of liability for subsequent benefits.

2. **Must a surviving child born out of wedlock obtain a pre-death formal adjudication of his legal relationship to the deceased biological father in order to pursue a wrongful death claim?**

In *Greenfield v. Daniels*, 51 So. 3d 421 (Fla. 2010), the Florida Supreme Court held that a formal adjudication of a legal relationship between a surviving minor child and the deceased biological father made before his death is not a prerequisite for the child, who was born out of wedlock, to bring a claim for wrongful death. If the surviving child proves he was the decedent's biological child for whom the decedent recognized a responsibility for support, the child's survivor's claim would have vested at his father's death, thus obviating the need for a pre-death formal adjudication of a legal relationship.

3. **Is a judgment which reserves jurisdiction to award prejudgment interest an appealable final order?**

The Supreme Court in *Westgate Miami Beach, Ltd. v. Newport Operating Corp.*, 35 Fla. L. Weekly S735 (Fla. Dec. 16, 2010), receded from its holding in *McGurn v. Scott*, 596 So. 2d 1042 (Fla. 1992), and held that a trial court may reserve jurisdiction in a final judgment to award prejudgment interest; such a judgment is a final appealable order. In this regard, the Supreme Court further stated that the trial court does not lose jurisdiction to determine prejudgment interest, despite the appealable nature of the final judgment reserving jurisdiction to award prejudgment interest.

4. **Does a motion for mistrial need to follow a sustained objection in order to preserve an issue of attorney misconduct for purposes of a new trial? What is the standard of review if the issue is not preserved?**

In *Companioni v. City of Tampa*, 51 So. 3d 452 (Fla. 2010), the Florida Supreme Court held that, when a party objects to instances of attorney misconduct during trial and that objection is sustained, the party must also timely move for a mistrial to preserve the issue for a trial court's review of that issue in a motion for a new trial. If the issue is not preserved by a timely motion for mistrial or the request for a curative instruction, the attorney misconduct is then subject to a fundamental error analysis if raised as a ground for a new trial.

ABOUT THE AUTHOR

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FIRST DISTRICT DECISIONS

5. Is a plaintiff entitled to introduce evidence of the gross amount of her past medical bills?

The First District in *Nationwide Mutual Fire Insurance Co. v. Harrell*, 35 Fla. L. Weekly D2873 (Fla. 1st DCA Dec. 21, 2010), found that the trial court did not abuse its discretion in permitting the plaintiff to introduce evidence and request the gross amount of her medical bills, rather than the lesser amount paid by the plaintiff's private health insurer in full settlement of the medical bills. The limited abrogation of the evidentiary portion of the collateral source rule applies where the benefits received to reduce the cost of medical care were not earned (or paid for) in some way by the plaintiff. The plaintiff in this case, without dispute, paid the premiums for her health insurance.

6. Should a trial court enter a proposed order without giving the non-drafting party a chance to comment?

In *Justice Administrative Commission v. Taylor*, 50 So. 3d 753 (Fla. 1st DCA 2010), the First District determined that the trial court erred in adopting a verbatim draft of a proposed order without allowing the non-drafting party an opportunity to comment. Additionally, the transcript of the pertinent hearing revealed that the proposed order did not mirror the trial court's oral findings and instead exceeded the scope of the court's findings at the evidentiary hearing.

7. Does a judge's skepticism regarding a party's compliance with discovery warrant the judge's recusal?

The district court in *Tallahassee Memorial Healthcare, Inc. v. Alexander*, 51 So. 3d 644 (Fla. 1st DCA 2011), granted a petition for writ of prohibition where the defendant's motion to recuse the trial judge was both timely and legally sufficient. At a hearing on the plaintiff's motion for sanctions, the judge commented she had faith "as long as my finger nail" that the defendant produced the documents sought by plaintiff.

SECOND DISTRICT DECISIONS

8. When is an insured entitled to section 627.428 attorney's fees?

The Second District in *Beverly v. State Farm Florida Insurance Co.*, 50 So. 3d 628 (Fla. 2d DCA 2010), reversed a summary judgment in favor of an insurer which held that the insured was not entitled to section 627.428 attorney's fees. The district court concluded that the insurer's post-suit payment of additional policy proceeds would entitle the insured to section 627.428 attorney's fees if the insurer wrongfully caused its insured to file suit to resolve a claim under the policy.

9. Is a proposal for settlement invalid when it does not summarize or attach the release the offeree is required to sign?

In *Darrow v. Heitman*, 46 So. 3d 184 (Fla. 2d DCA 2010), the district court found that the trial court did not err in denying the defendant's motion for attorney's fees based on her two previously filed proposals for settlement. The defendant did not satisfy the specificity requirement of Rule 1.442(c)(2)(C) when she conditioned settlement upon signing of "a Release" but failed to provide either a summary of the release or a copy of the proposed release.

10. Does a defendant's motion for section 57.105 attorney's fees waive the lack of personal jurisdiction defense?

The Second District in *Two Worlds United v. Zylstra*, 46 So. 3d 1175 (Fla. 2d DCA 2010), held that the defendant did not waive the defense of lack of personal jurisdiction by filing a motion for attorney's fees under section 57.105. That motion for attorney's fees was defensive and did not seek affirmative relief.

11. May a corporation be served at the UPS store where it has a private mail box?

The district court in *TID Services, Inc. v. Dass*, 35 Fla. L. Weekly D2515 (Fla. 2d DCA Nov. 17, 2010), stated that substitute service of process on a corporation by leaving a copy of the summons and complaint with the owner of a UPS store where the corporation maintained a private mail box was not authorized. The plaintiff failed to establish that the only address discoverable through the public records for the corporation, its officers, directors, or registered agent was the private mail box. The trial court therefore erred in denying the defendant's motion to vacate the default final judgment for lack of jurisdiction.

12. When is a "verified" complaint insufficient to support a motion for summary judgment?

In *Ballinger v. Bay Gulf Credit Union*, 51 So. 3d 528 (Fla. 2d DCA 2010), the Second District held that the plaintiff's complaint was not sufficiently verified to support summary judgment. The verification section of the complaint merely stated that the facts were "true to the best of my knowledge and belief." Rule 1.510(e) required the verification to be based on personal knowledge and "show affirmatively that the affiant is competent to testify to the matters stated therein."

13. Does seeking a stay waive a defendant's lack of personal jurisdiction defense?

The Second District in *Faller v. Faller*, 51 So. 3d 1235 (Fla. 2d DCA 2011), held that the defendant did not waive his defense of lack of personal jurisdiction when he sought a stay, based on comity, because a similar law suit was pending in a Maryland federal court. The request for a stay was defensive and did not seek the affirmative relief required to waive the personal jurisdiction defense.

THIRD DISTRICT DECISIONS

14. What evidence regarding an escalator's problems must a plaintiff who fell due to the escalator stopping short present to defeat a motion for directed verdict? Does the plaintiff's treating physician have to be an expert back surgeon in order to testify that plaintiff needs back surgery in the future?

The Third District in *Greenberg v. Schindler Elevator Corp.*, 47 So. 3d 901 (Fla. 3d DCA 2010), held that the trial court erred in directing verdicts in favor of the defendants based on insufficient evidence of negligence. The plaintiff, who was injured when an escalator at the airport stopped short and caused her to fall, presented evidence that the defendants were notified that the subject escalator stopped running earlier that day and there was no evidence that any work was performed on the escalator, allowing a jury to reasonably infer that the defendants negligently failed to determine what was causing the escalator to stop running and correct the problem. Additionally, the plaintiff's treating physician was not required to be an expert back surgeon in order to testify that, in his opinion, the plaintiff would need surgery in the future. The nature and extent of the treating physician's expertise was a proper subject for cross-examination, not for determining whether he could testify.

15. When voluntary binding arbitration is accepted pursuant to Chapter 766, does the statutory cap on non-economic damages apply per incident or per defendant?

In *Deno v. Lifemark Hospital of Florida, Inc.*, 45 So. 3d 959 (Fla. 3d DCA 2010), the Third District held that the statutory cap on non-economic damages when voluntary binding arbitration in a medical negligence claim is accepted is $250,000 per claimant per incident. The arbitration panel properly rejected the plaintiff's claim that section 766.207 allows an award of $250,000 in non-economic damages per claimant per defendant.

16. When is a proposal for settlement not invalidated by a subsequent demand letter? May the attached release's definition of plaintiff include affiliates?

The district court in *Jessla Construction Corp. v. Miami-Dade County School Board*, 48 So. 3d 127 (Fla. 3d DCA 2010), determined that the trial court properly awarded the defendant school board attorney's fees pursuant to its section 768.79 and Rule 1.442 proposal for settlement. The defendant's subsequent demand letter, which did not withdraw the proposal, but did state the defendant would not seek attorney's fees if the plaintiff dismissed the action, did not invalidate the proposal for settlement. Additionally, the attached general release, which defined the plaintiff as including past, present and future affiliates, did not invalidate the proposal. That language was not too broad and is "typical of the language contained in many general releases."

17. Are treating physicians entitled to be paid expert witness fees when deposed?

The Third District in *Comprehensive Health Center, Inc. v. United Automobile Insurance Co.*, 36 Fla. L. Weekly D54 (Fla. 3d DCA Dec. 29, 2010), denied second-tier certiorari review because the circuit court, in its appellate capacity, did not violate a clearly established principle of law when it determined that plaintiff's treating physicians were not expert witnesses entitled to fees for their depositions. The circuit court reasoned that the treating physicians did not obtain their information for the purpose of litigation but, rather, in the course of treating the patient.

18. When do circuit and county courts have jurisdiction over actions for declaratory relief?

In *United Automobile Insurance Co. v. Kendall South Medical Center & Dailyn Medical Center, Inc.*, 36 Fla. L. Weekly D142 (Fla. 3d DCA Jan. 19, 2011), the Third District affirmed the circuit court's dismissal for lack of subject matter jurisdiction of a PIP insurer's action seeking declaratory relief where the action was based on a PIP claim of less than the jurisdictional amount of $15,000.00. There is no concurrent circuit and county court jurisdiction for claims seeking declaratory relief, unlike other matters in equity. Thus, a circuit court has jurisdiction of a declaratory action only if the amount in controversy exceeds $15,000.00, where as a county court has jurisdiction over such an action if the amount in controversy is less than $15,000.00.

FOURTH DISTRICT DECISIONS

19. May a defendant who takes his alcohol-impaired brother's car keys be held liable for the fatal collision that occurred when his brother found the keys and drove the car?

The Fourth District in *Cantalupo v. Lewis*, 47 So. 3d 896 (Fla. 4th DCA 2010), affirming a summary judgment, held that a defendant cannot be liable for negligent entrustment or negligent undertaking where

the defendant took his alcohol-impaired brother's car keys and then put the keys in a place where his brother easily found the keys, resulting in his brother causing a fatal collision. The defendant brother did not supply the keys, much less the car, to his impaired brother.

20. Is the issue of plaintiff's comparative negligence for a jury when she failed to wait for the physician's advice as to whether she could drive after having been given Ativan?

In *Drew v. Tenet St. Mary's, Inc.*, 46 So. 3d 1165 (Fla. 4th DCA 2010), the trial court properly denied the plaintiff's motion for a directed verdict on the issue of comparative negligence where the plaintiff alleged that, after having been administered Ativan at the hospital, she crashed her car into a tree and sustained serious injuries. The evidence raised a reasonable question regarding whether the plaintiff exercised reasonable care for her own safety where the plaintiff had prior knowledge and experience regarding the effects of Ativan and she proceeded to drive home without awaiting clarification from the physician, as a nurse had suggested, regarding the safety of driving while using the drug.

21. Does a plaintiff's failure to disclose similar injuries sustained over a decade earlier warrant dismissal of her claim for fraud on the court? Should the evidence of those prior injuries be admitted at trial?

The district court in *JVA Enterprises, LLC v. Prentice*, 48 So. 3d 109 (Fla. 4th DCA 2010), found that the trial court did not abuse its discretion in denying the defendant's motion for fraud on the court based on the plaintiff's failure to disclose injuries she sustained 12 and 13 years before the subject incident, based on the policy favoring adjudication on the merits. However, the trial court did reversibly err in excluding evidence of those prior injuries from the trial. That error was exacerbated when plaintiff's counsel, who had succeeded in excluding the evidence, commented on the lack of evidence supporting the defendant's claims that the plaintiff had sustained prior bad neck or shoulder injuries.

22. Should a bad faith action against an insurer and the corresponding discovery be abated when the liability and damages issues in the underlying action are still pending?

The Fourth District in *State Farm Mutual Automobile Insurance Co. v. Tranchese*, 49 So. 3d 809 (Fla. 4th DCA 2010), stated that the trial court erred in denying the defendant insurer's motion to abate the insured's bad faith failure to settle claim where there was no determination of liability and the amount of damages with regard to the underlying cause of action. By the same token, the trial court erred in compelling the insurer to respond to requests for admissions regarding its claims handling procedures and business practices given the pendency of the coverage and damages issues in the underlying action.

23. May an automobile insurance policy require the insured to sue the uninsured tortfeasor in order to trigger uninsured motorist coverage? Must an argument that a policy provision is against public policy be raised at the trial court level in order to be preserved?

In *Saris v. State Farm Mutual Automobile Insurance Co.*, 49 So. 3d 815 (Fla. 4th DCA 2010), the Fourth District found that the provision in an automobile insurance policy requiring the insured to sue the owner or driver of an uninsured motor vehicle in order to obtain uninsured motorist coverage is void as against the public policy of Florida's uninsured motorist statute, section 627.727(1), Florida Statutes (2007). Moreover, enforcement of such a policy provision is fundamental error which must be corrected on appeal, even though the insured did not raise the public policy argument below.

24. Does the "substantially" similar test apply to discovery requests in tire tread separation product liability actions?

The Fourth District in *Alvarez v. Cooper Tire & Rubber Co.*, 35 Fla. L. Weekly D2630 (Fla. 4th DCA Dec. 1, 2010), held that the trial court abused its discretion in restricting plaintiff's discovery regarding defendant's passenger-light truck tire design and production to the subject tire and "substantially" similar tires in a products liability action arising from an accident caused by unexpected tire tread separation on the rear wheel of a light truck. The general nature of passenger-light truck tire production was standard for all models of defendant's tires and records of tread separation in any of them could lead to admissible evidence at trial. The trial court incorrectly applied the "substantial similarity" test for the requested discovery.

25. When is it improper to enter a summary judgment in favor of the driver of the second vehicle in the line of a four vehicle collision?

In *Tolan v. Coviello*, 50 So. 3d 73 (Fla. 4th DCA 2010), the district court held that the trial court erred in entering a summary judgment in favor of the driver immediately behind the plaintiff, on the ground that this driver's vehicle was pushed into plaintiff's vehicle by the third car in the line. The record evidence showed that the driver of the vehicle immediately behind plaintiff's vehicle was negligent in placing her car abruptly between the plaintiff's vehicle and the third vehicle immediately prior to impact, thereby causing the third driver to slam on the brakes and stop short before he was rear-ended by the fourth car.

26. Do scars measuring no more than two inches each satisfy the permanent injury threshold requirements for purposes of recovering non-economic damages in an automobile accident case?

The Fourth District in *Geico General Ins. Co. v. Cirillo-Meijer*, 50 So. 3d 681 (Fla. 4th DCA 2010), affirmed the trial court's directed verdict in favor of the UM insurer on the permanency threshold issue. The fact that the insured might require surgery in the future which would leave a 1½ to 2 inch scar above her ear and possibly an abdominal scar of no more than 1 inch was insufficient evidence for the jury to conclude that the insured had sustained an injury resulting in significant and permanent scarring or disfigurement.

27. Is a school entitled to worker's compensation immunity when a teacher is injured while trying to stop a fight between students?

The district court in *Patrick v. Palm Beach County School Board*, 50 So. 3d 1161 (Fla. 4th DCA 2010), held that the teacher who was injured as a result of her decision to put herself at risk and intervene in a fight between two behaviorally challenged students was not entitled to recover from the school board under the intentional tort exception to worker's compensation immunity. The teacher's decision was in contravention of school policy prohibiting physical intervention in student altercations by anyone other than the members of a specially assigned response team.

28. Does a trial court's inadvertent use of the term "defect" while reading the jury instructions in a product liability case constitute improper comment on the evidence or an improper opinion?

In *Mitsubishi Motors Corp. v. Laliberte*, 52 So. 3d 31 (Fla. 4th DCA 2010), the district court determined that the trial court's inadvertent use of the word "defect" when instructing the jury in a products liability case alleging design defects in the passenger seat belt and seat back did not amount to an impermissible comment on the evidence or expression of opinion on the ultimate issue of liability. Moreover, the trial court quickly provided a curative instruction and no juror responded affirmatively that he or she was unable to follow that instruction.

FIFTH DISTRICT DECISIONS

29. When are a nurse's corroborating affidavits sufficient to satisfy the presuit corroborating expert affidavit requirement?

The Fifth District in *Holmes Regional Medical Center, Inc. v. Wirth*, 49 So. 3d 802 (Fla. 5th DCA 2010), concluded that the trial court did not depart from the essential requirements of law in denying the defendant's motion to dismiss for plaintiff's failure to comply with the medical malpractice presuit requirements where plaintiff alleged that the hospital's floor nurse was negligent. The affidavits submitted by plaintiffs fulfilled their presuit requirements. Specifically, the corroborating affidavits of plaintiffs' presuit nursing expert established that she had actively engaged in the practice of nursing and nurse consulting in the preceding three years and that she was qualified to offer an opinion regarding the prevailing professional standards of care for hospital nurses and an opinion on causation, notwithstanding the fact that she had not been a hospital floor nurse for the preceding three years.

30. When are parties who failed to attend court-ordered appellate mediation subject to sanctions?

In *Mash v. Lugo*, 49 So. 3d 829 (Fla. 5th DCA 2010), the Fifth District imposed sanctions against parties who failed to appear for a court-ordered appellate mediation conference. The affidavit of the parties' attorney that the parties' insurer had the exclusive right to decide to defend or settle any claim or suit within policy limits, that the parties did not have authority to bind the insurer to any settlement and that the parties' attorney had full settlement authority on behalf of the insurer, did not satisfy the good cause required by Florida Rule of Appellate Procedure 9.720(b) to excuse the parties' non-appearance.

31. Must a dropped party comply with the 30-day filing requirement of Rule 1.525 when seeking attorney's fees?

The district court in *Siboni v. Allen*, 52 So. 3d 779 (Fla. 5th DCA 2010), concluded that a party dropped from litigation pursuant to Rule 1.250(b) is subject to the 30-day filing requirement set forth in Rule 1.525 in connection with a motion for attorney's fees and costs. The dropped defendant was not entitled to attorney's fees due to his failure to comply with Rule 1.525.