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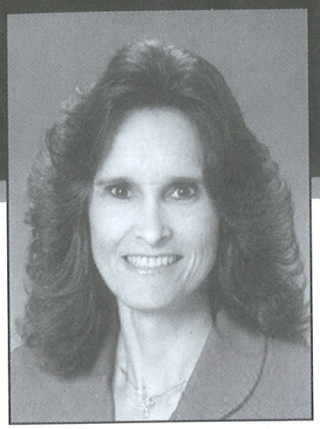
Recent Legal Developments

By Esther E. Galicia



FLORIDA SUPREME COURT DECISIONS

1. **Does the Supreme Court have discretionary jurisdiction to review a district court's unelaborated per curiam dismissal?**

The Florida Supreme Court in *Wells v. State*, 132 So. 3d 1110 (Fla. 2014), clarified that it does not have discretionary jurisdiction to review an unelaborated per curiam decision of a district court of appeal dismissing a petition to invoke the district court's all writs jurisdiction. Additionally, the Supreme Court lacks discretionary review jurisdiction over an unelaborated per curiam dismissal from a district court that is issued without opinion or explanation, or that merely cites to a case not pending review in, reversed or quashed by, the Supreme Court, or to a statute or rule of procedure.

2. **May an insured first apply payments received from a third party towards its self-insured retention under a fidelity policy pursuant to the made-whole doctrine?**

In *Intervest Construction of Jax, Inc. v. General Fidelity Insurance Co.*, 133 So. 3d 494 (Fla. 2014), the Florida Supreme Court found that the general fidelity policy at issue allowed the insured to apply indemnification payments received from a third party towards satisfaction of its one million dollar self-insured retention. Additionally, the court concluded that the transfer of rights provision in the policy did not abrogate the made-whole doctrine, thereby preserving the insured's right of a priority to be made whole before any third party recovery funds are paid to the insurers.

3. **When is an amended complaint which adds a former third-party defendant as a defendant deemed timely-filed?**

Florida's Supreme Court in *Caduceus Properties, LLC v. Graney*, 39 Fla. L. Weekly S93 (Fla. Feb. 27, 2014), held that an amended complaint, filed after the statute of limitations expires, which names a party who was previously a third-party defendant, relates back to the filing of the third-party complaint. However, for the amended complaint to be timely, the third-party complaint must have been filed before the expiration of the limitations period, and the claims in the amended complaint must have arisen from the same conduct, transaction or occurrence as claims which are the subject of the third-party complaint.

4. **Is the section 766.118 cap on noneconomic damages in medical malpractice-wrongful death cases constitutional?**

In *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014), the Florida Supreme Court determined that Section 766.118, which sets forth the statutory cap on noneconomic damages in wrongful death medical malpractice cases, is unconstitutional because it violates the Equal Protection Clause of Florida's Constitution. Currently, no rational basis exists between the statutory cap and any legitimate state purpose.

5. **Does the failure to attend a compulsory medical examination result in the forfeiture of UM benefits?**

The Supreme Court in *State Farm Mutual Automobile Insurance Co. v. Curran*, 135 So. 3d 1071 (Fla. 2014), concluded that an insured's breach of a compulsory medical examination provision in an uninsured motorist ("UM") insurance policy does not result in a forfeiture of benefits unless the insurer pleads and proves the affirmative defense that it was prejudiced. Benefits are not forfeited because the compulsory medical examination provision in a UM policy is a post-loss obligation as opposed to a condition precedent to coverage.

ABOUT THE AUTHOR

ESTHER E. GALICIA is a shareholder with Fowler White Burnett P.A. in Miami. Ms. Galicia specializes in civil litigation support and civil appeals at all levels. She is a member of The Florida Bar and is licensed to practice before the United States Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the United States District Court for the Southern and Middle Districts of Florida. She is also a member of the Appellate Practice and Advocacy Section and Civil Appellate Practice Committee of The Florida Bar, the Dade and Broward County Bar Associations, the Defense Research Institute, and the FDLA. A long-time member of the *Trial Advocate Quarterly* Editorial Board, Ms. Galicia is a member of the Cuban American Bar Association and the Broward County Hispanic Bar Association. Ms. Galicia is AV-rated by Martindale-Hubbell.

6. When may someone be held liable for injuries caused by a third party?

In *Dorsey v. Reider*, 39 Fla. L. Weekly S163 (Fla. March 27, 2014), the Supreme Court of Florida held that the district court misapplied Supreme Court precedent in concluding that the defendant whose tomahawk was taken from his truck by a third party did not owe a duty to the plaintiff who was attacked by the third party with the tomahawk. In the Florida Supreme Court's view, the totality of the circumstances in the case, which included the defendant's presence at the scene, his positioning to block the plaintiff's escape, and his constructive control over the tomahawk, took the case out of the general rule that one is not liable for injuries caused by a third party. The judgment in favor of the plaintiff was thus ordered to be reinstated.

7. Is a joint title owner of a vehicle exposed to vicarious liability pursuant to the dangerous instrumentality doctrine?

The Florida Supreme Court in *Christensen v. Bowen*, 39 Fla. L. Weekly S214 (Fla. April 10, 2014), held that a person whose name is on a car's certificate of title as a co-owner cannot avoid vicarious liability under the dangerous instrumentality doctrine by asserting that he/she never intended to be the owner of the vehicle and relinquished control to the co-owner. A joint title holder has the legal right to encumber, sell or take possession of the vehicle, and the mere fact that the joint title holder does not act on these legal rights does not alter or diminish the existence of the rights. The co-owner is therefore subject to vicarious liability for the negligent operation of the vehicle under the Dangerous Instrumentality Doctrine.

FIRST DISTRICT DECISIONS

8. Should the law firm representing a plaintiff be disqualified when an attorney who represented the defendant joins that law firm?

The First District in *Rombola v. Botchey*, 39 Fla. L. Weekly D263 (Fla. 1st DCA Feb. 4, 2014), found that the trial court departed from the essential requirements of law when it failed to disqualify the firm representing the plaintiff from the entire case and instead limited the scope of disqualification to "further issues at the trial level regarding the trial in this case." Factually, while post-trial motions were pending, the attorney who had been representing the defendant resigned from his firm and began working for the firm which represented the plaintiff, thereby requiring the attorney's new firm to be disqualified from the case.

SECOND DISTRICT DECISIONS

9. Does presuit notice to an individual radiologist, pursuant to the medical malpractice notice requirements, constitute notice to the LLC and contractor with whom that radiologist had a legal relationship?

The Second District in *Young v. Naples Community Hospital, Inc.*, 129 So. 3d 456 (Fla. 2d DCA 2014), held that plaintiff's timely notice of intent to the defendant radiologist who had contracted with the defendant hospital was effective as to the limited liability corporation which performed night time radiology services for the hospital and its independent contractor because of their legal relationship with the radiologist. The trial court accordingly erred in entering a final summary judgment in favor of the LLC and its contractor based on plaintiff's alleged failure to provide them with a timely notice of intent.

10. May the rear-end collision presumption be rebutted by the sudden loss of consciousness defense?

In *Marcum v. Hayward*, 136 So. 3d 695 (Fla. 2d DCA 2014), the Second District stated that the trial court should have directed a verdict for the defendant in a rear-end collision case where it was undisputed that the defendant lost consciousness while driving as a result of a cryptogenic seizure. In support of the sudden loss of consciousness from an unforeseen cause defense, the defendant established that she had never experienced the seizure before this accident and that she was not on notice of being at risk for a seizure. Additionally, the defendant and her passenger established that there was insufficient time between the onset of the seizure and the impact with plaintiff's vehicle for the defendant to take any evasive maneuvers.

11. When may a physician be sued for damages as a result of his patient's suicide?

The district court in *Granicz v. Chirillo*, 39 Fla. L. Weekly D400 (Fla. 2d DCA Feb. 19, 2014), held that the trial court erred in granting the defendant's motion for summary judgment in a medical malpractice suit against the primary care physician who treated plaintiff's decedent for depression. The allegations in the plaintiff's complaint were sufficient to give rise to a legal duty to prevent the decedent's suicide, where the complaint alleged that the defendant had a duty to exercise reasonable care in his treatment of the decedent, and the plaintiff provided expert testimony setting forth the applicable standard of care for a physician treating a patient with depression, how the standard of care was breached, and how the breach proximately caused the decedent's suicide. The Second District certified conflict with the First District's decision in *Lawlor v. Orlando*, 795 So. 2d 147 (Fla. 1st DCA 2001).

12. Are private arbitration agreements enforceable in medical malpractice cases notwithstanding section 766.207's provision for binding arbitration?

In *Santiago v. Baker*, 135 So. 3d 569 (Fla. 2d DCA 2014), the Second District stated that section 766.207, Florida Statutes, which provides for statutory binding arbitration in medical malpractice cases, does not preclude the enforcement of a private arbitration agreement. Accordingly, the trial court did not err in granting the defendant physician's motion to compel arbitration pursuant to the private arbitration agreement between the physician and patient. The agreement provided for the parties to share arbitration expenses equally, and the plaintiffs never requested voluntary binding arbitration pursuant to section 766.207.

13. May a negligent misrepresentation claim against an insurance agent be maintained prior to a determination concerning the existence of coverage?

The district court in *Wells Fargo Insurance Services USA, Inc. v. Blackshear*, 136 So. 3d 1235 (Fla. 2d DCA 2014), stated that an insured's negligent misrepresentation claim against an insurance agent is premature where there has not been a determination of coverage under the policy. The trial court erred by not dismissing the negligent misrepresentation claim without prejudice.

THIRD DISTRICT DECISIONS

14. Should a contractual indemnity claim be resolved against the claimant-indemnitee if the contract's indemnity obligation was never triggered?

The Third District in *Royal Palm Hotel Property, LLC v. Deutsche Lufthansa Aktiengesellschaft, Inc.*, 133 So. 3d 1108 (Fla. 3d DCA 2014), reversed a summary judgment entered in favor of the indemnitee-airline on its cross-claim for contractual indemnification. The court held that the indemnity provision at issue only required indemnification of the airline for the cross-defendant hotel's negligent acts; the underlying claim against the airline was based solely on the airline's vicarious liability for the acts of its employee, and not for the hotel's negligence; and the indemnity obligation thus never arose.

15. Does section 768.79 apply to federal maritime cases?

In *Royal Caribbean Cruises, Ltd v. Cox*, 39 Fla. L. Weekly D740 (Fla. 3d DCA April 9, 2014), the Third District held that Florida's offer of judgment statute, section 768.79, conflicts with and interferes with federal maritime law. Accordingly, the district court found that it was error to award an injured seaman attorney's fees pursuant to the offer of judgment he served in his action against the defendant cruise line for Jones Act negligence, failure to treat, maintenance and cure, unearned wages, and unseaworthiness. Furthermore, on rehearing en banc, the Third District receded from its prior decision in *Royal Caribbean Corp. v. Modesto*, 614 So. 2d 517 (Fla. 3d DCA 1992).

FOURTH DISTRICT DECISIONS

16. Is travel time a recoverable component of attorney's fees awarded pursuant to an unreasonably rejected proposal for settlement?

In *Palm Beach Polo Holdings, Inc. v. Stewart Title Guaranty Co.*, 132 So. 3d 858 (Fla. 4th DCA 2014), the Fourth District affirmed an award of attorney's fees and costs to an insurer where the insured did not accept the insurer's proposal for settlement within the required time-frame and the insurer subsequently recovered a judgment for an amount in excess of 25 percent of the offer. Additionally, the trial court did not err in awarding fees for travel time because fees awarded under section 768.79 are intended as a sanction against the party who unreasonably rejects a settlement offer.

17. When can defendants in a wrongful birth case argue that third-trimester abortions are illegal in Florida?

The Fourth District in *OB/GYN Specialists of the Palm Beaches, P.A. v. Mejia*, 134 So. 3d 1084 (Fla. 4th DCA 2014), concluded that the trial court erred in refusing to give the defendants in a wrongful birth case the opportunity to argue that third trimester abortions are generally illegal in the State of Florida. The plaintiffs had alleged that defendants failed to advise them in a timely manner that the fetus had limb defects, thereby preventing the plaintiffs from making an informed decision as to whether the pregnancy should be terminated, when plaintiff had a Level II ultrasound performed one day into her third trimester of pregnancy. The district court also clarified that the third trimester, defined by statute as the 24th week and beyond in a pregnancy, is based on the gestational age of the fetus, not the date of conception.

18. Does a business owner have a duty to make landscaping areas safe for walking?

The district court in *Wolf v. Sam's East, Inc.*, 132 So. 3d 305 (Fla. 4th DCA 2014), affirmed a summary judgment in favor of the defendant warehouse club where the plaintiff tripped and fell on above-the-ground tree roots in a landscaping area which he knowingly cut through instead of using the concrete walkways designed for that purpose. The *Wolf* court reasoned that the defendant did not have a duty to make the landscaping areas safe for walking when it had already provided concrete walkways for invitees to cross the landscaping areas.

19. Should parents be held liable for the torts of their adult son?

The district court in *Knight v. Merhige*, 133 So. 3d 1140 (Fla. 4th DCA 2014), affirmed the trial court's

dismissal of plaintiff's wrongful death claims arising out of an incident in which the defendants' son shot and killed family members at a Thanksgiving gathering. Plaintiff alleged that defendants had invited their son without informing the party host or other family members despite the fact that defendants were aware that their son had made threats against the attendees. The Fourth District held that the plaintiff's complaint nevertheless failed to state a cause of action because the defendants did not owe any legal duty to their family members given the absence of a special relationship giving rise to a duty to protect those family members from the defendants' son's conduct. Additionally, the defendants were not in actual or constructive control of the firearm used by their son to commit the tort or the premises on which the incident occurred. Furthermore, the defendants were not legally responsible for the conduct of their emancipated adult child.

20. Can section 768.0755, the slip and fall statute, be applied retroactively? When should jurors be interviewed post-verdict regarding involvement in prior litigation? Does section 768.0710 impose a nondelegable duty on business owners?

In *Pembroke Lakes Mall, Ltd. v. McGruder*, 137 So. 3d 418 (Fla. 4th DCA 2014), the Fourth District upheld the trial court's conclusion that section 768.0755, Florida Statutes (2010), which expressly requires a plaintiff who has slipped and fallen on a transitory foreign substance in a business establishment to prove that the business had actual or constructive knowledge of the dangerous condition, does not apply retroactively to an accident that occurred prior to the statute's effective date. The Fourth District certified conflict with the Third District's decision in *Kenz v. Miami-Dade County*, 116 So. 3d 461 (Fla. 3d DCA 2013). Additionally, the district court concluded that the trial court abused its discretion by denying a post-verdict motion to interview jurors who had been involved in prior litigation but denied such involvement in response to clear questions posed by the trial court. Furthermore, the district court also held that it was error to refuse to hold the defendant mall owner liable for negligence attributed to the service and maintenance company, as section 768.0710 imposed a nondelegable duty of care on business owners to maintain their premises in a reasonably safe condition for invitees.

21. When is a jury foreperson subject to a limited post-verdict interview concerning a text message the foreperson received from another juror?

The district court in *Naugle v. Philip Morris USA, Inc.*, 133 So. 3d 1235 (Fla. 4th DCA 2014), found that the trial court did not depart from the essential requirements of law by allowing a limited post-verdict interview of the jury foreperson who had left a voice message intimating that, in the foreperson's view, a text message from another juror showed that "something was done wrong." A limited *in camera* inquiry concerning the text message was proper and did not invade the sanctity of jury deliberations, even though the voice message was vague and defendant's motion for juror interviews was not supported by an affidavit, because the information forming the basis for the court's order came directly to the court.

22. Under what circumstances does the qualified litigation privilege preclude a defamation lawsuit?

The Fourth District in *Pomfret v. Atkinson*, 39 Fla. L. Weekly D726 (Fla. 4th DCA April 9, 2014), affirmed the trial court's directed verdict on a defamation counterclaim based on the counterclaim defendant's conversations with a potential non-party witness. The qualified litigation privilege applied to bar the defamation claim because the allegedly defamatory statements by the counterclaim defendant bore some relation to or connection with the subject of the underlying lawsuit. Moreover, the evidence was insufficient to prove that the statements were false and made with express malice, which would have been necessary to overcome the privilege.

FIFTH DISTRICT DECISIONS

23. Is the fact that a judge's Facebook "friend" request was ignored by a party grounds for the judge's recusal?

In *Chace v. Loisel*, 39 Fla. L. Weekly D221 (Fla. 5th DCA Jan. 24, 2014), the Fifth District held that the trial judge should have recused herself. The motion to disqualify the judge alleged that the judge reached out to the wife in a pending dissolution of marriage case, *ex parte*, in the form of a Facebook "friend" request and the wife did not respond to the request.

24. What acts of negligence are not within the intended scope of a waiver and release?

The Fifth District in *Gillette v. All Pro Sports, LLC*, 135 So. 3d 369 (Fla. 5th DCA 2014), concluded that the trial court erred in entering summary judgment for the defendant, who operated a Go-Kart track, on the basis of a waiver and release form the plaintiff signed. The district court reasoned the plaintiff's allegation that the defendant's employee negligently increased a cart's speed during the race, causing the plaintiff to sustain injuries when she lost control and crashed into the railing, were not clearly within the intended scope of the release.

25. Are the written draft answers to interrogatories a party provides to her attorney discoverable?

The district court in *Montanez v. Publix Super Markets, Inc.*, 135 So. 3d 510 (Fla. 5th DCA 2014), found that the trial court departed from the essential requirements of law in compelling plaintiff to produce the handwritten draft answers to interrogatories which she delivered to her attorney. Those draft answers were privileged attorney-client communications.