TERRY'S TAKES

Your Weekly Florida Federal and State Appellate Caselaw Update for Personal Injury Lawyers

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Important News

As of January 1, 2023, Florida has created a new district court of appeal, the SIXTH DCA, in the Tampa area. This is the first new DCA created since 1979. There have been changes to the boundaries of the First, Second, and Fifth DCAs, so only the Third and Fourth remain unchanged. A major change is that the east coast is carved out of the First DCA so that Jacksonville is now in the 5th DCA. The Second DCA is reduced to the greater Tampa Bay area, forfeiting the middle of the state from around Lakeland to Ft. Myers to the new 6th DCA. Seven new appellate judge seats were created. The new law:

- decreases the number of appellate judges in the First District court from 15 to 13;
- decreases the number of appellate judges in the Second District court from 16 to 15;
- leaves the number of appellate judges in the Third District court at 10;
- leaves the number of appellate judges in the Fourth District court at 12;
- increases the number of appellate judges in the Fifth District court from 11 to 12;
- provides the newly created Sixth District court with nine appellate judges.

Judges who reside within the jurisdiction of a different court from the one they served on in 2022 will be transferred to their newly-local DCA. There are eight judges affected by the change in territorial boundaries:

- Judges Harvey L. Jay III and Scott Makar will move from the First District to the Fifth District;
- Judge John K. Stargel will move from the Second District to the Sixth District; and
- Judges Jay P. Cohen, Mary Alice Nardella, Meredith L. Sasso, Dan Traver, and Carrie Ann Wozniak move from the Fifth District to the Sixth District.

With these changes, there will be four vacancies to fill in the Fifth District and three vacancies to fill in the Sixth District.

For you practitioners in the new 6th DCA, what decisions are "binding?" The committee report suggests that the newly created Sixth District be controlled only by caselaw as established in rule of the Supreme Court. As Florida has no horizontal *stare decisis*, some action would be needed by either the Supreme Court or the Sixth District itself or there will be no binding precedent within that district. While a rule setting precedent for the new Sixth District court may be adopted, the territorial changes may prove more difficult for the trial courts and the practitioner to navigate. The Supreme Court has

clearly established that "decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this [c]ourt." And further "in the absence of inter-district conflict, district court decisions bind all Florida trial courts." Trial courts must follow the decisions of the district court in which the trial court is located. If "the only case on point on a district level is from a district other than the one in which the trial court is located, the trial court [is] required to follow that decision." So for now, EVERY DCA opinion is binding on circuit courts within the Sixth DCA. If there's a conflict, you'll have to note that and use it as a basis to take a decision up on appeal.

Consider the Fourth Judicial Circuit, formerly housed in the First District and now housed in the Fifth District. Applying these principles, where there is conflict between the First District and the Fifth District, the law of the Fifth District will now control the trial court's decision. If the Fifth District has not considered the issue, and there is First District precedent, the decision of the First District will still control. But if there no decision from the Fifth District, and there is conflict between the First District and another district, the trial court will be free to apply whichever "foreign" district's precedent it chooses.

Read more about the changes at https://www.floridabar.org/the-florida-bar-journal/navigating-with-a-new-map-impact-of-changes-to-the-district-courts-of-appeal-territorial-boundaries/

You also need to register with the eDCA portion of the new Sixth DCA website!! https://www.flcourts.gov/6DCA

Eleventh Circuit

American Builders Insurance Company v. Southern-Owners Insurance Company—(J. Marcus; 11th Circuit; 1/4/23). Judge Marcus did a brilliant job in summarizing the case.

> Ernest Guthrie fell from a roof and became paralyzed from the waist down, never to walk again. Within months, his medical bills climbed past $400,000, and future costs projected into the millions. Three insurance companies potentially provided coverage for Guthrie. This appeal is a battle between two of them.
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> The primary insurer for Guthrie's company was SouthernOwners Insurance Company. At the time of the accident, Guthrie was performing subcontracting work for Beck Construction, which had a policy with American Builders Insurance Company and an excess policy with Evanston Insurance Company. American Builders investigated the accident, assessed Beck Construction's liability, and evaluated Guthrie's claim. Southern-Owners, in contrast, did little to nothing for months. When push came to shove, SouthernOwners refused to pay any amount to Guthrie to settle the claim, and American Builders and Evanston ponied up a million dollars apiece instead.
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> American Builders then sued Southern-Owners for common law bad faith under Florida's doctrine of equitable subrogation. Along the way, Southern-Owners moved for summary judgment, but the district court denied the motion. A federal trial jury heard the case and found in favor of American Builders. After the entry of final judgment, Southern-Owners sought judgment as a matter of law, or, in the alternative, a new trial. The district court denied those motions, too. On appeal, Southern-Owners

challenges the denials of its summary judgment and post-trial motions.

The first and most significant issue in this appeal is whether American Builders proved a bad faith claim and did not breach the contract, which might have relieved Southern-Owners of its contractual duties. Under controlling Florida law, "the critical inquiry in a bad faith [action] is whether the insurer diligently, and with the same haste and precision as if it were in the insured's shoes, worked on the insured's behalf to avoid an excess judgment. Additionally, any "damages claimed by an insured in a bad faith case 'must be caused by the insurer's bad faith.'" That is, the bad faith conduct must "directly and in natural and continuous sequence produce[] or contribute[] substantially to producing such [damage], so that it can reasonably be said that, but for the bad faith conduct, the [damage] would not have occurred." The bad faith inquiry "is determined under the 'totality of the circumstances' standard," and we focus "not on the actions of the claimant but rather on those of the insurer in fulfilling its obligations to the insured." That said, a claimant's actions—such as a decision not to offer a settlement -- remain relevant in assessing bad faith. Insurers have obligations "to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid [the] same," as well as to "investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so." These "obligations…are not a mere checklist," however, and, as the Florida Supreme Court has explained, "[a]n insurer is not absolved of liability simply because it advises its insured of settlement opportunities, the probable outcome of the litigation, and the possibility of an excess judgment." Moreover, insurance companies occasionally have an affirmative duty to offer settlements. "Bad faith may be inferred from a delay in settlement negotiations which is willful and without reasonable cause." Thus, "[w]here liability is clear, and injuries so serious that a judgment in excess of the policy limits is likely," the insurer must "initiate settlement negotiations." "In such a case, where '[t]he financial exposure to [the insured] [i]s a ticking financial time bomb' and '[s]uit c[an] be filed at any time,' any 'delay in making an offer under the circumstances of this case even where there was no assurance that the claim could be settled could be viewed by a fact finder as evidence of bad faith.'" Southern-Owners' delay in investigating and settling led to its inability to tender a timely offer. As a result, a reasonable jury could find (as it did) that American Builders' damages stemmed directly and naturally from Southern-Owners' bad faith. Southern-Owners argued that American Builders breached its contract by failing to obtain Southern-Owners' consent to settle. The Florida Supreme Court requires an insurer to establish three things in order to succeed on a lack-of-consent affirmative defense: (1) a lack of consent; (2) substantial prejudice to the insurer; and (3) diligence and good faith by the insurer in attempting to receive consent. The first element has a few exceptions. The insured may settle without obtaining consent if the insurer "wrongfully refused to provide [the insured] with a defense to a suit," or offers a conditional defense that the parties cannot agree upon. Moreover, even if the insured was obliged to obtain consent, the failure to do so is not an affirmative defense unless the insurer also establishes substantial prejudice and evinces good faith in bringing about the cooperation of the insured. As the Florida Supreme Court put it, the lack of cooperation must be material and the insurance company must show that it was substantially prejudiced in the particular case by failure to cooperate. Furthermore, the insurer must show that it has exercised diligence and good faith in bringing about the cooperation of its insured and must show that it has complied in good faith with the terms of the policy. Southern-Owners failed to satisfy the test in light of its lack of diligence. The court rejected the claim that the trial court abused its discretion in denying the motion for new trial, and the court actually declined to entertain a third argument because the Eleventh Circuit has a rule that a party may not appeal an order denying summary judgment—even if it is a pure issue of law—after a jury trial.

The case was affirmed.
https://media.ca11.uscourts.gov/opinions/pub/files/202113496.pdf

Supreme Court of Florida

Coates v. R.J. Reynolds Tobacco Company—(J. Polston; FLSC; 1/5/23). This is a major opinion limiting punitive damages. This was a wrongful death case that is not an Engle-progeny case even though it pertains to wrongful death from smoking brought against a tobacco company. The version of the wrongful death statute analyzed was the 1997 version. The decedent died from smoking R.J. Reynolds cigarettes, and the estate filed claims of (1) negligence, (2) strict-liability design defect, (3) fraud, and (4) conspiracy. The jury found for the plaintiff only on the strict liability claim, not negligence, fraud, or conspiracy. The jury awarded $100,000 to each of the decedent's three children for loss of parental companionship, pain and suffering, etc. The jury found the decedent 50% responsible, however, so that reduced the amount from $300,000 to $150,000. The evidence at the punitive damages portion of the trial demonstrated significant reprehensibility by Reynolds in designing its cigarettes. It used a tobacco curing process designed to make the smoke "smoother" and manipulated the levels of nicotine and other additives to make its product easily inhalable and addictive. Its advertising efforts, particularly those advertisements produced in the early years of the decedent's addiction, were intended to entice young people to begin smoking and to suggest, if not convince, consumers that smoking was safe. But it was well established that the inhalation of cigarette smoke is not safe. The jury awarded $16 million in punitive damages. R.J. Reynolds challenged the punitive damages in a motion for remittitur, the trial court denied the motion, and R.J. Reynolds appealed. Back in 2020, the 5th DCA reversed for reasons not discussed in the FLSC opinion. The DCA, however, certified a question of great public importance, and the Florida Supreme Court exercised jurisdiction and only took 2 or 3 years to weigh in. The specific question was, **"When other factors support the amount of punitive damages awarded, but the award is excessive compared to the compensatory award, does the amount of punitive damages that may legally be imposed for causing the death of a human being depend on the actual amount of compensatory damages awarded to the decedent's estate, even when that compensatory award is modest and the punitive award would be sustainable compared to awards in other cases for comparable injuries caused by comparable misconduct?"** The court led their opinion by noting that while the trial court has broad discretion in ruling on a motion for remittitur, that discretion is constrained by statutory criteria that have to be applied to determine whether an award is excessive. The court expressly declined to address any Florida or federal constitutional questions and simply analyzed the issue as one of statutory interpretation because the statute requires that punitive damages in a wrongful death case be reasonably related to the amount of damages proved and the injury suffered by beneficiaries. The court then rephrased the certified question to one with a laughably obvious answer, **"Does the trial court in a wrongful death action abuse its discretion by denying remittitur of a punitive damages award that does not bear a reasonable relation to the amount of damages proved and the injury suffered by the statutory beneficiaries?"** Their answer was, of course, yes, and so it approved the DCA's reversal of the trial court's denial of the motion for remittitur on the basis that the punitive damages bore no reasonable relation to the compensatory damages. Sections 768.73 and 768.74, Florida Statutes (1997), govern punitive damages. The court noted that the former was substantially amended in 2021, but the latter remains the same. Section 768.73 (the 1997 version) creates a presumption that punitive damages that exceed a ratio of 3:1 in relation to compensatory damages except in class actions are excessive. Section 768.74, the remittitur and additur statute, requires the trial court, upon a party's motion, to evaluate whether an award is excessive, and it requires the court to examine five criteria. The fourth of the five—whether

there was a reasonable relation to the amount of damages proved and the injury suffered—is the one at issue here. Reading the statutes together, all punitive damages awards challenged by a motion for remittitur must bear a reasonable relationship to the compensatory damages. The court clarified that the rule applies to wrongful death cases. While the decedent's beneficiaries argued that the $16 million was compensation for their mother's death, the court clarified that the death itself is not compensated by the wrongful death statute. Rather, it's just the impact on the statutory beneficiaries, which was compensated at $150,000. The statute compensates the living, not the dead. The Supreme Court recognized the trouble with allowing huge verdicts for injuries in torts, but then barring compensation if the tort actually kills you, but they say that's the way the statute is written. They literally state in regard to the wrongful death statute, "Nowhere does the statute authorize recovery on behalf of the estate for the decedent's death." (NOTE: In brushing aside the constitutional issues, the Court does not make clear whether the plaintiff argued that the limitation on punitive damages was challenged as unconstitutional either facially or as applied to a wrongful death case. While the court stated that it was dodging the constitutional issue because the case could be resolved by statutory interpretation, that should not be true of the statutory language itself is unconstitutional). The court then analyzed the specific ratio in this case, stating:

> Although we cannot say it was unreasonable to conclude that the facts and circumstances support departing from the 3:1 cap of section 768.73(1)…that is not the end of the inquiry. Rather, section 768.74(5)(d) imposes a further check against an excessive punitive damages award that turns on "[w]hether the amount awarded bears a reasonable relation to the amount of damages proved and the injury suffered." Looking to the undisputed facts in this record, no reasonable trial court could have concluded that the $16 million punitive damages award survives that check.

The Court noted that the $150,000 in

> damages findings in this case sit in stark contrast to other wrongful death cases where the proof of more significant injury to the statutory beneficiaries resulted in much larger compensatory damages awards that, in turn, supported higher punitive damages awards. See, e.g., Schoeff, 232 So. 3d at 299, 308-09 (holding the trial court did not abuse its discretion by denying remittitur of a $30 million punitive damages award where the jury found the tobacco company liable for the decedent's wrongful death on multiple claims, including fraudulent concealment, and awarded $10.5 million in compensatory damages).

JUSTICE LABARGA continues to be the GREAT DISSENTER in the current court, and JUSTICE FRANCIS again did not participate, likely because she was not around for the oral argument. The rest of the justices concurred. JUSTIC LABARGA's DISSENT decried the reduction of the verdict from over $16 million to $150,000, a fraction of what the jury determined was warranted. He opined that the majority opinion "unreasonably concludes that the decedent's death is not a cognizable injury for purposes of punitive damages claims." He opines that while the statute does not provide compensatory damages for the death, that does not mean that the punitive damages should be unable to punish for the death. Punitive damages are supposed to deter conduct, and the conduct to be deterred was the conduct resulting in death. The ruling "guts the impact of punitive damages in wrongful death cases" because the majority finds that the death cannot be considered as an injury suffered. "The majority's interpretation raises the question: when evaluating punitive damages in a wrongful death case, how can a decedent's death not be a cognizable injury?" He then stated, "It is

not hard to imagine a situation under the majority's interpretation where the punitive damages awarded to a living victim will far exceed the punitive damages awarded if a victim dies. Recognizing death as a cognizable injury for punitive damage purposes would maintain the Wrongful Death Act's function of defining available compensatory damages without robbing punitive damage awards of their purpose. Because of the untenable results that will flow from the majority's interpretation, I respectfully dissent."
https://supremecourt.flcourts.gov/content/download/857335/opinion/sc21-175.pdf

Third DCA

Bulte v. Dollar Tree Stores, Inc.—(J. Gordo; 3DCA; 1/4/23). This case is about race-based objections during jury selection in a civil case. In Florida, such cases are governed by the standard set out in Melbourne v. State, 679 So. 2d 759 (Fla. 1996). Bulte sought to use a peremptory strike against a "Hispanic woman juror." Dollar Tree challenged and asked for a race-neutral and gender-neutral reason. Bulte tried to do that, but the trial court found that the reasons were not genuine, and it disallowed the use of the peremptory. The standard of review is whether the ruling was clearly erroneous or an abuse of discretion. In a conclusory fashion, the DCA held that it wasn't going to second-guess the judge, who can observe everyone's demeanor.
https://supremecourt.flcourts.gov/content/download/857225/opinion/220018_DC05_01042023_103513_i.pdf

State Farm Mutual Auto. Ins. Co. v. Best Medical Treatments, Inc.—(Per Curiam Scales, Lindsey, & Bokor; 3DCA; 1/4/23). This peculiar appeal resulted from a car accident case, where State Farm lost at trial. The trial court awarded attorneys fees and costs, and instead of appealing anything substantive about the case, State Farm appealed the issue of who should receive the check for fees—the lawyer or the client. Best Medical is a medical care provider that sued State Farm for $5,000 in past-due PIP benefits provided to three insureds. Best Medical received an assignment of benefits ("AOB") from all three insureds. Notably, Attorney DePrimo sought $600/hr, and State Farm only sought to limit the rate to $550/hr. Only 0.2 of the attorney's hours were disputed. The trial court awarded the amount sought by State Farm, awarding the amount directly to the attorney. On appeal, the DCA agreed with State Farm that attorney fee awards are to be paid to a party, not the attorney. Section 627.428(1) was the applicable fee statute, and the recipient described is the insured or named beneficiary. Reversed and remanded.
https://supremecourt.flcourts.gov/content/download/857213/opinion/211358_DC13_01042023_101935_i.pdf

Fourth DCA

Disorbo v. American Van Lines, Inc.—(J. Gross; 4DCA; 1/4/23). This is a lengthy opinion that does not pertain to personal injury specifically. The opening paragraph, however, is important for any civil practitioner. It states, "Article I, Section 22 of the Florida Constitution guarantees a jury trial as to those issues triable by a jury at common law, before the first state constitution became effective in 1845. Complications arise when legal and equitable causes of action travel in the same complaint; in that situation, a jury must decide common issues of fact to honor the guarantee of Article I, Section 22." In the case, the trial court severed a breach of contract claim and trying various equitable claims first. The court's factual determinations necessarily foreclosed relief on the pending breach of contract claim that had to be resolved by a jury. In other words, do the jury trial first.

https://supremecourt.flcourts.gov/content/download/857236/opinion/212994_DC13_01042023_100803_i.pdf

Rogers v. Griffin Commerce Center, Inc.—(Per Curiam; 4DCA; 1/4/23). This is a citation PCA that cites Goodall v. Whispering Woods Ctr., L.L.C., 990 So. 2d 695, 700 (Fla. 4th DCA 2008) for the proposition that "[w]hen there are conflicts between the allegations of a complaint and the documents attached as exhibits to the complaint, the plain language of the documents control." The DCA affirmed the trial court's ruling that the contract at issue showed no intent to benefit a third party.