TERRY'S TAKES

May 7-13, 2023

Announcements

Some counties (and I'm sure ALL of them in the not-distant future) are accepting PROPOSED ORDERS on the efiling portal. There's a quick (and actually easy to understand) video here: https://www.youtube.com/watch?v=jRWyEHbQQvI

Eleventh Circuit Court of Appeals

Graves v. Brandstar, Inc.

11th Circuit Court of Appeals
5/9/23, Judge Newsom
Topics: Americans With Disabilities Act; Family Medical Leave Act; Summary Judgment

This case arose from Florida. The coordinated care for her ill father, who lived in Pennsylvania. In May, she was notified that her father required emergency brain surgery to attempt to remove a cancerous tumor. She notified the employer by email that she was flying to PA in the morning, and she was gone for two business days and two weekend days.

Weeks later, the company discovered that Graves had clocked in on the two days she was gone. They did not inform her of any right to Family Medical Leave Act ("FMLA") leave. They asked her to correct her timecard.

She also emailed the employer to pitch a show idea and request time to film the conversion of her garage into a living space for her father for a home makeover show focusing on veterans like her father.

The company asked her to transition to freelance work, she declined, the company denied that the change had to do with her father, and then they terminated her. Her history as an employee was imperfect.

Graves sued under the FMLA for failing to offer medical leave and also under the Americans With Disabilities Act ("ADA") for associational discrimination. The Southern District of Florida granted summary judgment to the employer, and Graves appealed.

On appeal, Graves argued that the employer violated her right to notice of the right, under the FMLA, to 12 weeks of unpaid leave to care for her father. Graves was definitely eligible for FMLA protection, having worked for more than 12 months prior to her father's surgery.

Employers have to provide notice of FMLA rights if 1) the employee requests leave or the employer acquires knowledge that an employer's leave may be for an FMLA-qualifying reason. The

court agreed that there was evidence that triggered the employer's obligation to inform Graves of her FMLA rights.

The court, however, disagreed that there was any evidence that the failure to inform her caused her harm. She was given the leave to travel to PA and even accidentally paid for it.

In regard to the subsequent request to use a film crew to film her converting part of her home to house her father, that message did not actually request time off. She did ask to be staffed locally, but that was not a request for leave; it was a request for accommodation. There was no reason for the employer to interpret her pitching a show as a request for leave. Instead, it was a request for more work.

(NOTE: Frighteningly, the court drops footnote 2 where they clarify that a plan to drive her father down from PA—announced before the firing—did not result in harm because she was fired three months before the planned trip. This seems to open a large loophole where the employer can simply fire the person seeking leave *before* the date of the proposed leave.)

In regard to the ADA claim, a plaintiff can prevail by showing she is associated with someone with significant medical needs. Assuming Graves showed a *prima facie* case of discrimination, the employer offered ample evidence that she was a bad employee based on her work record. She had no evidence that the reasons for termination were pretextual. The mere temporal proximity between her father's problems and her termination is not enough.
https://media.ca11.uscourts.gov/opinions/pub/files/202113469.pdf

Rosell v. VMSC, LLC

11th Circuit Court of Appeals
5/12/23, Judge Grant
Topics: Motion to Dismiss

This is an important case interpreting Rule 41(a)(2), Fed. R. Civ. P. The Eleventh Circuit held that the rule cannot be used to dismiss a single claim or anything less than all pending claims; it can only be used to dismiss an entire action.

Rule 41 governs dismissal of actions, and Rule 41(a) outlines the procedure for voluntary dismissal. Here, the plaintiff tried to dismiss one claim and then appeal the partial summary judgment on other claims. But only an "action" can be dismissed, so the count was not properly dismissed. Thus, the Court held that the appeal was not an appeal of a final judgment, and it dismissed the appeal for lack of jurisdiction until the claim that the plaintiff tried to dismiss is somehow resolved in the district court. The Court clarified that if a plaintiff wants to drop a claim in federal court, they must seek partial final judgment against themselves under Rule 54(b) or amend the complaint under Rule 15. What a colossal waste of time.
https://media.ca11.uscourts.gov/opinions/pub/files/202211325.pdf

Garcia v. Southern Cleaning Service, Inc.

1st DCA
5/10/23, Judge Lewis

Topics: Negligence; Premises Liability; Summary Judgment Standard, Transitory Foreign Substance, Vicarious Liability; Writ of Certiorari; Writ of Prohibition; Writ of Quo Warranto; Wrongful Death

Southern Cleaning contracted with Winn-Dixie Stores, Inc., a grocery store chain, to provide janitorial services. Then, Southern Cleaning subcontracted that work to PAM Cleaning, Inc., an independent contractor.

Garcia was an employee of a Winn-Dixie store, and she suffered a fall while at work. She sued Southern Cleaning in negligence for failing in a duty to warn employees and invitees of unreasonably slippery floors.

Southern Cleaning moved for summary judgment, arguing that it was not liable for the acts of an independent contractor like PAM. Its contract with PAM contained language where Southern Cleaning would not be liable for damages caused by PAM.

Garcia argued that Southern Cleaning could not delegate its duty, but the trial court held that Southern Cleaning had no duty to Garcia, so it granted summary judgment.

On appeal, the DCA recognized that a party who hires an independent contractor may be liable for the contractor's negligence where a nondelegable duty is involved. Such a duty may be imposed by statute, contract, or the common law. In determining whether a duty is nondelegable, the question is whether the responsibility at issue is so important to the community that an employer should not be allowed to transfer it to a third party.

Garcia relied upon cases wherein the injured party was also a party to the contract. Following a 3d DCA case, the First DCA held that Southern Cleaning's contract with Winn-Dixie did not create a nondelegable duty on Southern Cleaning to Garcia, a non-party to the contract.

The First DCA noted that Garcia argued on appeal that the type of work involved entailed a peculiar risk, which created a duty, but the DCA did not reach that issue because it was not preserved. Notably, CHIEF JUDGE ROWE CONCURRED IN RESULT ONLY.
https://supremecourt.flcourts.gov/content/download/868437/opinion/download%3FdocumentVersionID=94a42bdd-b1b0-4a35-880d-39b1c8bd6362

White v. Discovery Communications, LLC

1st DCA
5/10/23, Judge Bilbrey
Topics: Defamation, Internet Service Provider Liability, Libel, Motion to Dismiss, Personal Jurisdiction, Summary Judgment Standard

Okay, here's a fun one. Nathaniel White shares a name with a serial killer from New York. A reality/crime TV show entitled "Evil Lives Here" aired an episode called "I Invited Him In" that featured the serial killer, Mr. White. But—DOH!--the show actually used a picture of the ***plaintiff*** taken decades ago by the Department of Corrections when he was incarcerated in Florida. He sued for defamation by libel, alleging that the episode defamed him by making people believe—through use of his picture—that ***he*** was the serial killer discussed in the episode.

Several of the defendants moved to dismiss the Complaint based on lack of personal jurisdiction. Mr. White alleged that the long-arm statute, section 48.193(1)(a)(2), Fla. Stat., provided personal jurisdiction because the defendants committed "intentional torts expressly aimed" at him that were "calculated to cause injury in Florida."

A plaintiff has the burden of pleading a basis for jurisdiction, and quoting the operative statute even without supporting facts is sufficient. To challenge this initial allegation, defendants have to file affidavits, not just make argument. The affidavits alleged that these defendants did not broadcast or distribute any defamatory statement in Florida, meaning that none of the defendants committed the tort of defamation in Florida. One of the defendants, Red Marble, a television production company, swore that it did not have any activity in Florida and that it does not distribute or license television shows for distribution.

When a defendant's affidavit contains factual allegations that, taken as true, show that his or her acts do not subject the defendant to long-arm jurisdiction, "the burden shifts back to the plaintiff to prove by affidavit or other sworn proof that a basis for long-arm jurisdiction exists." Sadly for Mr. White, it looks like the law may be on his side, but he still screwed up. The long-arm statute is satisfied "when the nonresident makes allegedly defamatory statements about a Florida resident by posting those statements on a website, provided that the website posts containing the statements are accessible in Florida and accessed in Florida." White stated in a response that by broadcasting the allegedly defamatory episode into Florida, Red Marble and its named employees committed a tort here. But Mr. White did not submit an affidavit about viewing the show in Florida, so the trial court was correct to grant the motion to dismiss.

Also, in regard to the corporate officers of Red Marble, Florida's long-arm statute does not apply to persons merely acting on behalf of a corporation and for the benefit of the corporation without personally committing acts described in the long-arm statute). You sue the corporation, not the people who work for it. "The corporate shield doctrine provides that personal jurisdiction cannot be exercised over a nonresident corporate employee sued individually for acts performed in a corporate capacity." So there was a separate reason to dismiss the case against the individuals who work for Red Marble.

Because of these principles, the court did not even reach the question of whether the defendants had minimum contacts with Florida.

Also, other defendants won on summary judgment. White alleged that other defendants including Microsoft Corporation are information content providers as defined in 47 U.S.C. § 230(f)(3), and that those defendants made the episode available through the internet or any internet service. But we all know where this is headed. A claim that a search engine or online search provider is responsible for a third party's defamatory content is barred by 47 U.S..C. § 230, a part of the Communications Decency Act. Section 230(c)(1) states, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Section 230(e)(3) provides in part, "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."

Notably, the court held that requests for discovery served a month before the summary judgment hearing were too late to be considered as a basis for extending the time for the summary

judgment hearing because even if Mr. White been satisfied with all discovery responses from Microsoft, they could not have been filed at least 20 days before the summary judgment hearing as required by rule 1.510(c)(5). Thus, there was no abuse of discretion in the trial court's denial of the motion to postpone since the responses could not have been used in opposition to Microsoft's motion. (NOTE: This reason is somewhat circular. If the hearing were postponed as requested, the discovery would not be received less than 20 days before the hearing. Certainly, the late request justified affirming the denial of a motion to continue a hearing, but stating that it would be pointless to move the hearing because the discovery was so close to the hearing simply does not make sense. If the hearing were postponed 60 days, the discovery would be received well prior to the reset hearing). https://supremecourt.flcourts.gov/content/download/868433/opinion/download%3FdocumentVersionID=fec84c6e-728f-4eb0-a129-070dd39380e4

Second DCA

Halsey v. Hoffman

2nd DCA

7/x/23, Judge

Topics: Medical Malpractice, Motion to Dismiss; Petition for Certiorari, Writ of Certiorari

Ms. Hoffman sued Dr. Halsey and two medical businesses for defamation *per se*, slander *per se*, and negligent and intentional infliction of emotional distress. Hoffman alleged that Dr. Halsey, an asthma, allergy, and immunology specialist, falsely and maliciously "imputed" to her and "labeled" her with "factitious disorder." Referring to a medical diagnosis code and information from the Mayo Clinic, Hoffman described "factitious disorder" as a serious mental or psychiatric disorder that is "characterized by physical or psychological symptoms that are intentionally produced"; a person suffering from this condition "deceives others by appearing sick, by purposely getting sick, or by self-injury." Yikes.

Ms. Hoffman alleged that Dr. Halsey was not qualified to diagnose her with "factitious disorder" because he's not a psychiatrist and he hadn't tested her since 2013. She alleged that putting that diagnosis in her medical records, which were shared with other doctors, was tortious defamation.

Dr. Halsey filed a motion to dismiss, arguing that because the claims arose out of provision of medical care and the allegation of an improper diagnosis, the claims were essentially claims of medical negligence. He argued that Ms. Hoffman's failure to comply with the presuit requirements for a medical malpractice claim under section 766.106, Fla. Stat., barred the defamation action.

The trial court denied the motion to dismiss, and Dr. Halsey filed a petition for a writ of certiorari. A court may grant certiorari relief from the denial of a motion to dismiss only if the petitioner establishes (1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on postjudgment appeal. An allegation that chapter 766 presuit requirements were not met satisfies the "irreparable harm" test.

So did this defamation case have to jump through the presuit medical malpractice requirements? Yes. Negligence claims are subject to presuit requirements if the wrongful act is directly related to the improper application of medical services and the use of professional judgment or skill.

The key inquiry is whether the action arises out of any medical, dental, or surgical diagnosis, treatment, or care. The case unquestionably arises out of the allegation of an improper diagnosis.

The DCA distinguished a 1st DCA 1997 case that held that a defamation case did not need to go through the medmal presuit process because, in that case, the doctor passed along a diagnosis of dementia to the patient's employer (who fired her) not because the doctor was trying to impart medical information, but because the doctor was calling the employer to locate a family member to take care of the patient.

Here, though, the doctor shared the diagnosis with the patient's other medical providers as part of his "medical diagnosis, treatment, or care." The court opined that Hoffman would have to call a medical expert to rebut the diagnosis or standard of care. Thus, the claims are subject to the medmal presuit requirements, the trial court departed from the essential requirements of law in denying the motion to dismiss, the petition for cert was granted, and the order was quashed.
https://supremecourt.flcourts.gov/content/download/868590/opinion/223399_DC03_05122023_083713_i.pdf

Mt. Hawley Insurance Company v. Russo

2nd DCA
5/10/23, Judge Rothstein-Youakim
Topics: Discovery; Writ of Certiorari

The parties were involved in an insurance coverage dispute in federal court, but no coverage dispute was pending in the trial court. The trial court granted a motion by Russo that discovery in state court should proceed. The trial court's order also compelled certain discovery relating to coverage matters from the insurance company. Finally the order partially denied Mt. Hawley's motion to stay the case pending the outcome of the coverage dispute in federal court, apparently staying everything except the discovery on coverage matters.

Mt. Hawley filed a petition for a writ of certiorari, and the DCA granted the petition and quashed the trial court's order in part. The discovery was improper because it related to coverage, coverage was an issue in federal court, and coverage was not at issue in the state court proceeding.

Even though the opinion expressly stated that it was quashing only the part of the order that permitted discovery on coverage matters.
https://supremecourt.flcourts.gov/content/download/868386/opinion/222471_DA16_05102023_083752_i.pdf

Westpark Preserve Homeowners Association, Inc. v. Pulte Home Corporation

2nd DCA
5/10/23, Judge Casanueva
Topics: Statute of Repose

The issue in this appeal involves the interpretation and application of Florida's statute of repose as set forth in section 95.11(3)(c), Florida Statutes (2018). Because it has nothing to do with personal injury, only the discussion of the statute of repose is included.

Some may need a reminder of what a statute of "repose" is. A statute of repose eliminates the underlying legal right; it precludes a right of action after a specified time rather than establishing a time period within which the action must be brought measured from the point in time when the cause of action accrued. A statute of repose results in the cessation of a cause of action upon the conclusion of the repose period. Thus, a statute of repose establishes an absolute bar to the filing of any claim after the expiration of the repose period and as being immune to the efforts of claimants to avoid it.

The statute of repose in this case pertained to actions founded on the design, planning, or construction of improvements to real property. Such actions must be commenced within 10 years of possession of the property by the owner, the date of the issuance of a certificate of occupancy, or other specific methods of showing a handoff of the property. The claim was brought more than 10 years after a certificate of occupancy in the case, so summary judgment against the plaintiff was affirmed.
https://supremecourt.flcourts.gov/content/download/868376/opinion/212084_DC05_05102023_083421_i.pdf

Third DCA

Pet Supermarket, Inc. v. Eldridge

3d DCA
5/10/23, Judge
Topics: Class Action; Motion to Dismiss; Standing

Eldridge visited a Pet Supermarket store in December 2017 in Miami, Florida. During the visit, Eldridge learned about the store's promotion in which customers could text the word "PETS" to the short code "65047" and be entered into a contest to win free dog food for a year. Eldridge gave his phone to one of Pet Supermarket's employees, who texted "PETS" from Eldridge's phone to the short code. He began receiving ads for the business via text, and all the texts included "Reply STOP to end."

Eldridge filed a putative class action against Pet Supermarket in the Southern District of Florida alleging a violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(b), which is a federal statute prohibiting use of "automatic telephone dialing systems to call residential or cellular telephone lines without the consent of the called party."

The federal district court dismissed Eldridge's complaint for lack of standing, finding that under binding authority from the United States Eleventh Circuit Court of Appeals in Salcedo v. Hanna, 936 F.3d 1162, 1166 (11th Cir. 2019), Eldridge's allegations of loss of privacy, wasted time, and intrusion upon seclusion did not constitute a concrete injury in fact for Article III standing purposes.

Eldridge refiled in state court, filed as a class action, and alleged that the texts essentially destroyed his "domestic peace" and peace of mind with their frequency. Pet Supermarket opposed the class certification and moved for summary judgment based on lack of standing. Eldridge responded that Florida's standing requirements had a lower bar than the Eleventh Circuit's and that

his new allegations—the allegations of disruptions to domestic peace—would even pass the federal test.

The trial court denied summary judgment, and Pet Supermarket appealed. The DCA agreed that Florida does have lower standing requirements than federal court even when addressing a federal statute. The DCA disagreed, however, that a plaintiff does not need to allege an actual injury to have standing in Florida court.

The DCA observed that there are three requirements that constitute the "irreducible constitutional minimum" for standing. First, a plaintiff must demonstrate an "injury in fact," which is "concrete," "distinct and palpable," and "actual or imminent." Second, a plaintiff must establish "a causal connection between the injury and the conduct complained of." Third, a plaintiff must show "a 'substantial likelihood' that the requested relief will remedy the alleged injury in fact."

The DCA then stated that Florida courts look to three familiar concepts—injury, causation, and redressability—to assess a plaintiff's standing. Under these concepts, a plaintiff first must identify an actual or imminent injury that is concrete, distinct, and palpable. Furthermore, within the context of a class action claim, the class representative must illustrate that a case or controversy exists between him or her and the defendant, and that this case or controversy will continue throughout the existence of the litigation. A case or controversy exists if a party alleges an actual or legal injury. If it is shown that the plaintiff who seeks class certification suffered no injury and, thus, has no cause of action against the defendant, the class should not be certified.

The DCA then stated that when a defendant merely violates a statute but the violation does not result in actual harm, there is no standing. Instead, for a statutory violation to matter, plaintiffs apparently have to prove that the statutory violation would ALSO violate some well established tort.

Eldridge argued that if violation of the statute was not enough to confer standing, his allegations that the texts intruded upon his seclusion were sufficient to allege an injury. The tort of "intrusion upon seclusion" or "invasion of privacy" requires that there is a reasonable expectation of privacy either physically or electronically. The intrusion must invade a private place, not just a private activity. The intrusion also must be one that would be highly offensive to a reasonable person. It must involve unacceptable conduct to a person with ordinary sensibilities. It has to go beyond all possible bounds of decency.

Here, there was only one allegation that could constitute an intrusion on his private space, but there were no facts that could constitute "highly offensive" instruction. Eldridge's receipt of one text message while at home, during the weekend, simply does not rise to the level of outrageousness required for an invasion of privacy, i.e., that it is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency," and therefore, Eldridge's alleged statutory injury was not akin to Florida's common law harm of intrusion upon seclusion. Thus, Eldridge had not alleged a concrete injury, and does not have standing on this basis either. Reversed and remanded with instructions to decertify the class and dismiss the complaint.
https://supremecourt.flcourts.gov/content/download/868396/opinion/211174_DC13_05102023_100750_i.pdf

Sixth DCA

Lancheros v. Burke

6th DCA
5/12/23, Judge Traver
Topics: Causation, Directed Verdict, Negligence

Burke alleged that Lancheros and VL Auto Transport, Inc., were liable for injuries that he suffered in a car accident. Defendants conceded fault, and the trial went forward on causation and damages.

Burke said that the accident caused a permanent injury to his back, whereas Defendants argued that the back condition was a pre-existing condition.

Burke had rowed crew competitively from his teen years (he was 24 at the time of the accident), and he had seen a chiropractor twice before due to back pain either from rowing or weight training. He did not seek treatment for his back on the date of the accident, and he did not complain of back pain at the ER later that day. He did not obtain x-rays or MRIs of the back right after the accident. He sought treatment with a chiropractor 18 days after the accident, stating that he was having lingering pain in his back after the initial soreness from the crash faded.

Each side called experts. Defendants' orthopedic surgeon expert testified that the car crash did not cause Burke permanent injury. He testified that the most Burke would have suffered in the crash was a sprain or strain that would resolve after a few weeks of chiropractic treatment. On cross-examination, he agreed that this short course of treatment would be related to the crash.

After both parties rested, Burke moved for directed verdict on causation, and the trial court granted it on the basis that the jury could not reject uncontradicted expert findings by multiple doctors.

The jury form did not have any questions related to causation, only questions about how much the damage was.

The DCA reversed, finding that despite the uniform medical testimony as to the cause of at least the temporary back soreness, Defendants offered evidence that "rebutted" the claim of causation by showing the back injury "could have occurred for another reason." The DCA cited United Servs. Auto. Ass'n v. Rey, 313 So. 3d 698, 703 (Fla. 2d DCA 2020), for the proposition that a jury can reject an expert's testimony on permanency.

(NOTE: Let's examine Rey. The general rule that juries cannot reject unrebutted medical testimony is a solid rule. For instance, Campbell v. Griffith, 971 So. 2d 232, 236 (Fla. 2d DCA 2008), states that when medical evidence on permanence or causation is undisputed, unimpeached, or not otherwise subject to question based on other evidence presented at trial, the jury is not free to simply ignore or arbitrarily reject that evidence and render a verdict in conflict with it. Campbell, 971 So. 2d at 236 (emphasis added). In Rey, the Second DCA cited Wald v. Grainger, 64 So. 3d 1201, 1205-06 (Fla. 2011), for the proposition that a jury may reject an expert's testimony on permanency where there is "**conflicting medical evidence, evidence that impeaches the expert's testimony or calls it into question, such as the failure of the plaintiff to give the medical expert an accurate or**

complete medical history, conflicting lay testimony or evidence that disputes the injury claim, or the plaintiff's conflicting testimony or self-contradictory statements regarding the injury"). In Rey, for instance, there was substantial evidence of a preexisting knee condition prior to the accident, there was conflicting testimony about whether the knee healed prior to the accident (the plaintiff said it had but then said it was still having significant symptoms right up to the date of injury), the jury was permitted to question the doctor's bias because he treated under a letter of protection, and the evidence permitted the jury to conclude that the plaintiff had not reported her knee condition accurately to her doctor or that the doctor forgot about the significant prior injury). Here, the DCA found that the jury could disbelieve Burke's testimony that his back was sore due the accident because he did not seek treatment for the back even though he went to the ER, and he first complained of back pain 18 days after the accident. Thus, the jury could have concluded that Burke's soreness was due to the preexisting back injury.

The DCA admitted that given the weight of the evidence, "perhaps this would not have been a likely outcome," but it was enough to make a directed verdict error. (NOTE: This opinion seems to leave intact the rule that judges cannot disregard *uncontested* medical evidence. That rule simply has exceptions if a doctor is impeached or there is some evidence that the plaintiff lied or provided incomplete patient history).
https://supremecourt.flcourts.gov/content/download/868608/opinion/231144_DC13_05122023_093214_i.pdf