**TERRY’S TAKES**

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

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**Eleventh Circuit**

Carson v. Monsanto Company—J. Tjoflat. Plaintiff’s claim under Georgia state law for failure to warn is not preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) or the Environmental Protection Agency’s (“EPA”) actions pursuant to it. The failure to warn claim related to Plaintiff’s regular use—for 30 years—of Roundup on his lawn, which he believes caused his malignant fibrous histiocytoma due to the ingredient glyphosate. In his four-count complaint, Carson alleged strict liability for a design defect under Georgia law (Count I); strict liability for failure to warn under Georgia law (Count II); negligence under Georgia law (Count III); and breach of implied warranties under Georgia law (Count IV). The district court granted partial judgment on the pleadings for the failure to warn count, agreeing with Monsanto that the claim was preempted under FIFRA because the EPA had classified glyphosate as not likely to be carcinogenic to humans and because the EPA approved the Roundup packaging label. The preemption argument rested on the fact that 1) the EPA has a registration process for pesticide manufacturers seeking to market their pesticides; and 2) FIFRA’s lays out statutory labeling requirements and consequences for failing to properly label. Only federal action with the force of law has the capacity to preempt state law, and answering the question of whether federal ac has the force of law is analyzed under United States v. Mead Corp., 533 U.S. 218, 230–31, 121 (2001). The Eleventh Circuit reasoned that FIRFA only preempts state laws “for labeling or packaging.” EPA’s registration process is not sufficiently formal to carry with it the force of law under Mead. EPA registration only creates a rebuttable presumption of compliance with FIFRA’s registration process and nothing more. Juries are free to rebut that presumption and conclude that a label violates FIRFA. The FIRFA labeling requirement to disclose dangerous ingredients has force of law, but it is more onerous than the Georgia law version and is not preempted.

Huggins v. Lueder, Larkin & Hunter, LLC—The Eleventh Circuit clarified that a Rule 11 motion for sanctions for frivolous litigation (similar to Florida’s 57.105, Fla. Stat. including a 21-day safe harbor provision) can be filed within 30 days after judgment. If a party fulfills the safe harbor requirement by serving a Rule 11 sanctions motion at least 21 days **before** final judgment, then she may file that motion **after** the judgment is entered. Lueder, Larkin & Hunter satisfied this rule. It served the homeowners with sanctions motions early enough that the homeowners’ attorney had months to reconsider their complaints before the court granted summary judgment. Delaying filing of the motion until after judgment did not matter, and the district court erred in holding to the contrary.

**Supreme Court of Florida**

In Re: Amendments to Florida Rules of Civil Procedure, Florida Rules of General Practice and Judicial Administration, Florida Rules of Criminal Procedure, Florida Probate Rules, Florida Rules of Traffic Court, Florida Small Claims Rules, and Florida Rules of Appellate Procedure—The revolution will be televised. On Zoom. As one can tell from the title of this case, the Supreme Court of Florida has enacted sweeping rule changes that boil down to this: Florida courts have stepped firmly into the remote appearance camp. The opinion is 59 pages. **Changes will go into effect October 1.** There were also similar opinions changing the rules of criminal procedure, family law procedure, juvenile procedure, and the related forms. Essentially, the court was satisfied that the remote procedures adopted at the height of the COVID-19 pandemic work well and should continue. A general authorization for court proceedings through communication technology now appears in Florida Rule of General Practice and Judicial Administration 2.530 (Communication Technology). The substantially rewritten rule 2.530 defines communication technology and allows a court official to authorize its use upon a party’s written motion or at the discretion of the court official. A party may file an objection in writing within 10 days or within a period directed by the court official. Notably, Rule 2.530(b)(1) states that a **court official must grant a motion to use communication technology for a nonevidentiary proceeding scheduled for 30 minutes or less unless the court official determines that good cause exists to deny the motion**. *NOTE: Perhaps the best practice is to add a standard paragraph near the end of each non-evidentiary motion additionally moving that the hearing be via Zoom or other AV platform. Alternatively, perhaps courts or litigants will ask for standing orders or inclusion in the case management order that non-evidentiary hearings will be conducted remotely.* As far as trials or evidentiary hearings go, Rule 2.530(b)(2)(A) flips that presumption and provides that a written motion by a party to present testimony through communication technology **must set forth good cause why the testimony should be allowed** in the specific form requested **and must specify whether each party consents** to the form requested. In determining whether good cause exists, the court official may consider, without limitation, the technological capabilities of the courtroom, how the presentation of testimony through communication technology advances the proceeding or case to resolution, the consent of the parties, the time-sensitivity of the matter, the nature of the relief sought and the amount in controversy in the case, the resources of the parties, the anticipated duration of the testimony, the need and ability to review and identify documents during testimony, the probative value of the testimony, the geographic location of the witness, the cost and inconvenience in requiring the physical presence of the witness, the need to observe the demeanor of the witness, the potential for unfair surprise, and any other matter relevant to the request. The rule also allows oaths (swearing in of witnesses) to be administered through audio-video communication technology by a person not physically present with the witness. Shockingly, it appears that voir dire and jury participation can also be by Zoom. The rule allows prospective jurors to participate through communication technology to determine whether they will be disqualified, be excused, or have their service postponed. And rule 2.530 allows prospective jurors to participate in voir dire and empaneled jurors to participate in a trial through audio-video communication technology when authorized by another rule of procedure. Florida Rules of General Practice and Judicial Administration, rule 2.516 (Service of Pleadings and Documents) is amended to require non-represented parties to designate an e-mail address for service unless they are in custody or the clerk certifies that they do not have an email address or regular internet access. For cases governed by the Florida Rules of Civil Procedure, a new rule, Fla. R. Civ. P. 1.430(d) (Juror Participation Through Audio-Video Communication Technology), allows prospective jurors to participate in voir dire and empaneled jurors to participate in civil trials through audio-video communication when stipulated by the parties in writing and authorized by the court if a written motion is filed with the court within 60 days of the demand for jury trial. Depositions can be taken via communication technology under Florida Rule of Civil Procedure 1.310 (Depositions Upon Oral Examination) when ordered by the court or without leave of court if stipulated by the parties. And the use of communication technology is authorized in mediation and arbitration by stipulation of the parties or by court order under Florida Rule of Civil Procedure 1.700 (Rules Common to Mediation and Arbitration). Rule 1.310 replaces videotaping depos with audiovisual recordings without leave of court or stipulation as long as it’s disclosed in the notice. Rule 1.451 requiring physical presence of witnesses is gone. Rule 1.700 allows online mediation or arbitration either by stipulation OR by an order of the court. Rule 2.451 was amended to allow jurors/venire to use electronic devices solely to participate in court. Rule 2.515 was amended to essentially standardize the use of both a primary and secondary email address in all pleadings, though it’s not mandatory unless the court orders it**. Rule 2.530 does not standardize any platform; it defines “audio-video communication technology” as “electronic devices, systems, applications, or platforms that permit all participants to hear, see, and speak to all other participants in real time.”** The full opinion is here:

<https://www.floridasupremecourt.org/content/download/843197/opinion/sc21-990.pdf>

**First DCA**

Fiberoptics Technology, Inc. v. Sunoptic Technologies, LLC—**Discovery of trade secrets is tricky**. When faced with a discovery request for alleged trade secrets, trial courts must 1) determine whether the information requested includes trade secrets, which usually requires the court to conduct an *in camera* review of the documents; 2) determine whether the party seeking production can show a reasonable necessity for the information, which is a fact-specific analysis that generally requires the court to decide whether the need for production outweighs the interest in maintaining confidentiality; and 3) determine what safeguards should be put in place to protect the information. Failure to apply the three-part test constitutes a departure from the essential requirements of law, and the First DCA granted the petitioner’s petition for certiorari, quashing a discovery order concerning its fiberoptic cable.

Raik v. Dept. of Legal Affairs, Bureau of Victim Compensation—J. B. Thomas. Mr. Raik was killed in a criminal act: vehicular homicide. He and his wife, Mrs. Raik, had been married for thirty-one years. They had two children. She applied for victim compensation under the “Florida Crimes Compensation Act.” §§ 960.01–.28, Fla. Stat. The statute requires that “aid, care, and support be provided by the state, as a matter of moral responsibility,” for victims of crimes. § 960.02, Fla. Stat. (emphasis added). The criminal act in question resulted from a driver going 70 mph in a 45-mph speed zone, losing control of his car, and causing fatal injuries to Mr. Raik. He was charged with vehicular homicide. The Bureau denied Mrs. Raik’s claim, interpreting the Florida Crimes Compensation Act to exclude compensation for claims from the families of deceased victims of vehicular homicide unless the perpetrator left the crime scene or intentionally caused the victim’s death. In interpreting the Florida Crimes Compensation Act, Judge Thomas noted that Art. V, § 21, Fla. Const. forbids courts from deferring to executive agencies’ interpretation of statutes. Judge Thomas wrote that “every section of the Florida Crimes Compensation Act, and every amendment to it, must be read and interpreted to effectuate the Legislature’s explicit intent to financially aid the victims of crime.” “Victim” means “a person who suffers personal physical injury or death as a direct result of a crime.” § 960.03(14)(a), Fla. Stat. And “[a] surviving spouse… of a deceased victim” shall be eligible for awards under the Act. § 960.065 (1)(c), Fla. Stat. The Bureau had read the definition of crimes, and determined that an accidental vehicular homicide was not covered. The Act defines as **crimes any felony or misdemeanor by an adult or juvenile that results in physical injury or death**, any violation of six different statutes that results in physical injury or death, and an act involving the operation of a motor vehicle which results in another person’s injury or death that is intentionally inflicted through the use of the vehicle. The portion of the statute concerning operation of a motor vehicle states, however, that “no other act involving the operation of a motor vehicle…constitutes a crime for purposes of this chapter.” But the First DCA held that the plain text of the Act meant that a non-intentional vehicular homicide was a covered crime. First, the statute’s definition of a crime does not require a conviction of a “felony or misdemeanor offense committed by an adult or a juvenile which results in physical injury or death” before a victim of an “offense” is eligible for compensation under the Act. Second, the history of the Act showed that the definition of “crime” has been continually expanded. Third, “every” crime that results in physical injury or death was included, and vehicular homicide is a second-degree felony. Fourth, eliminating all non-intentional crimes involving motor vehicles—including manslaughter—would lead to an absurd result. Fifth, the three methods of proving crimes should be read as three different ways to fall under the statute; claimants to not have to satisfy all three ways. Thus, any crime that satisfies section 960.03(3)(a)—compensability for any crime that results in physical injury or death—is not constrained by the motor vehicle language of § 960.03(3)(c). Judge M.K. Thomas concurred, but Judge Makar DISSENTED WITH AN OPINION. He reasoned that section 960.03(3)(c) “clearly indicates that the Legislature intended to limit victim compensation for injuries or deaths arising from the operation of motor vehicles to only those where the injuries or deaths were ‘intentionally inflicted through the use of the vehicle.’ Importantly, the last sentence of subsection (3)(c) states an unequivocal legislative intent that ‘no other act involving the operation of a motor vehicle…constitutes a crime for purposes of this chapter’ other than intentional ones.” NOTE: THE DIVISION OF OPINION HERE SUGGESTS THAT THE CASE IS A LIKELY CANDIDATE FOR FLSC REVIEW. **SECOND NOTE: YEARS AGO, SECTION 690.19 ALLOWING FOR ATTORNEY’S FEES IN CASES UNDER CHAPTER 690 WAS DELETED. MRS. RAIK REPRESENTED HERSELF IN THE APPEAL. THE PLAINTIFF’S BAR SHOULD CONSIDER WHETHER PEOPLE INJURED OR KILLED BY CRIMES SHOULD BE LEFT UNREPRESENTED WHEN MAKING CLAIMS FOR COMPENSATION AND WHETHER THERE IS A METHOD BY WHICH ATTORNEYS CAN BE FAIRLY PAID FOR WORK IN THIS AREA.**

**Second DCA**

Coursen v. Watrous—J. Rothstein-Youakim. A trial court’s decision to strike a request for a jury trial "is a non-appealable, non-final order not subject to mandamus review"). Thus, a petition for writ of mandamus was dismissed without prejudice to Coursen's right to raise the denial of her motion for a jury trial, if necessary, on direct appeal.

Lang v. Fallang Family Limited Partnership, et. al—J. Northcutt. Monetary sanctions order against a lawyer under section 57.105 was reversed and remanded. In this case, the trial court made no findings specifying the bad faith conduct for which it was imposing sanctions. It found that the case failed to state a valid cause of action, but that finding was insufficient to show “bad faith.” The fact that the trial court dismissed without prejudice showed that the trial court thought that the claim could possibly be amended to validly state a cause of action. On remand, the court will be permitted to reimpose sanctions, but it will have to make detailed findings if it does so.

Valente v. Raissi—J. Lucas. An order determining an entitlement to attorney's fees and costs without setting the amount is a nonfinal, nonappealable order. “The circuit court may yet revisit the entitlement decisions it had previously reconsidered. But until such time as the court either awards or declines to award an amount of attorney's fees, we cannot pass upon the merits of this case.”

**Third DCA**

Karenza Apartments, LLP, v. City of Miami—J. Hendon. The facts of the case relate to the City of Miami’s decision to exclude a property with a history of hosting billboards that face I-95 from the areas of the city that allow for such murals. The case is summarized to make sure all PI attorneys are familiar with Florida’s Bert J. Harris Act, section 70.001(1), Florida Statutes (2017), which provided the cause of action in the case. The Bert J. Harris Act provides compensation to property owners for damages caused by government regulation even where it does not necessarily rise to the level of a constitutional taking. A Bert J. Harris Act claimant does not have to prove the local government acted nefariously, only that the regulation inordinately burdened an existing use or vested right. The elements are that 1) the claimed “existing use of real property” or the claimed “vested right to a specific use of real property” actually existed and 2) the government action “inordinately burdened the property.”

Perez v. Saima Group Corp.—Perez filed a 1.540 motion that was deemed successive by the trial court, and he tried to appeal the denial. The Third DCA dismissed the appeal, finding that the court lacked appellate jurisdiction to review an order denying a successive rule 1.540(b) motion where, as here, the grounds asserted in the successive motion were known to the movant at the time the movant filed the first rule 1.540(b) motion. If appellants are dissatisfied with a trial court’s ruling on their first rule 1.540(b) motion, their remedy is to appeal, not file a successive motion to vacate containing the same general grounds or even new ones, which could have been raised in the first motion. They could not view the second motion as a motion for rehearing that tolled the time to appeal the first 1.540 motion because no rule authorizes motions for rehearing of denial of a 1.540 motion, and the order denying the unauthorized rehearing motion was not separately appealable.

**Fourth DCA**

Infinity Auto Insurance Company v. Metric Diagnostic Testing, Inc—J. Gerber. A reminder: Moakley v. Smallwood, 826 So. 2d 221 (Fla. 2002) held that trial courts have an inherent power to impose sanctions on attorneys, but in order to do so, the order “must be based upon an express finding of bad faith conduct and must be supported by detailed factual findings describing the specific acts of bad faith conduct that resulted in the unnecessary incurrence of attorneys’ fees.” A trial court’s finding that insurer’s allegation of a mistaken affirmative defense “probably cost [the provider’s counsel] quite

a bit of time and money,” but the inability to characterize the insurer’s mistaken affirmative defense as “bad faith conduct” prohibited the imposition of any such sanction. Sanctions reversed.

Southham-Red Wing Shoe Company—J. Levine. The 4th DCA has found that **plaintiffs lack standing to sue where the plaintiff suffered no injury** **even if the statute contains presumed damages**. Southam was the name plaintiff in a class action suit against Red Wing Shoe Company for violation of the Fair and Accurate Credit Transactions Act (“FACTA”). That federal law prohibits companies from printing more than 5 digits of a 10-digit credit card number on receipts as an effort to prevent identity theft. The law creates a cause of action and civil liability and specifically provides that plaintiffs can claim “any actual damages sustained by the consumer as a result of the failure **or damages of not less than $100 and not more than $1,000**….” All plaintiffs in the class conceded that they had not suffered actual damages such as identity theft. They only maintained that the defendant printed their full credit card numbers on sales receipts and, thus, they were entitled to “not less than $100 and not more than $1,000” for each violation. *Of key importance in the present case is the first prong of the three-part test for standing, requiring the alleged injury to be “concrete,” “distinct and palpable,” and “actual or imminent.” In the present case, where appellant kept the credit card receipt with the ten digits listed, no actual damages occurred since nothing was alleged to have been charged to appellant’s account. Nor was there an imminent possibility of injury, since appellant retained possession of the receipt. A material risk of harm may be sufficient in certain circumstances to meet the concreteness requirement; however, there is no risk of harm at all here as appellant has possessed and retained his receipt.* The presence of presumed damages did not change the court’s opinion. The court found that a purely illegal action in the absence of resulting harm—a threatened or actual injury—does not confer standing on an individual. *In summary, we find appellant did not demonstrate an injury in fact that was “concrete,” “distinct and palpable,” and “actual or imminent.” Failing this test, the trial court correctly granted Red Wing’s motion to dismiss.*

Triple S. Management Corp. et al v. American Clinical Services, LLC—There is no majority opinion in this case. Judges Gerber and Forst affirmed without comment. There is, however, a DISSENT by Judge Warner. Judge Warner’s dissent shows that the issue on appeal was whether the trial court erred in denying a motion to dismiss by the Appellants, the defendant’s in the trial court, on the basis of personal jurisdiction and forum *non conveniens*. The two corporations that are defendants in the personal injury case are located in Puerto Rico. The were sued by American Clinical Solutions, LLC (“ACS”), a Florida lab. ACS, the Florida lab, specializes in drug testing. The Puerto Rican companies cover physicians who collected samples and sent them to ACS in Florida for testing. ACS represents that it tested at least 25,648 samples from Puerto Rico and sought payment from TSS based on TSS insureds’ assignment of benefits. TSS failed to pay ACS, and ACS filed suit in Palm Beach County, alleging that it was owed in excess of $3.5 million for the testing it performed. TSS and TSM moved to dismiss for lack of personal jurisdiction arguing that the actions of a third party (in-network Puerto Rican physicians who sent the samples from Puerto Rico to ACS in Florida) cannot create personal jurisdiction between them and the lab. The trial court rejected their argument and concluded that the lab pleaded both general and specific personal jurisdiction and satisfied “minimum contacts.” The trial court found that ACS established minimum contacts with appellants through the number of its insured who reported Florida addresses, a total of 8,757 insureds from 2012-2016. Judge Warner, however, would have held that there were no minimum contacts, stating:

There is no evidence that TSS or TSM themselves created any contacts with Florida. The connections with Florida seem to me to be the unilateral acts of third parties, whether they be policy holders who moved to Florida or physicians who decided to use a Florida lab to process samples taken from Puerto Rican patients in Puerto Rico…. Because this case involved the unilateral transactions of third parties, defendants could not have anticipated being haled into court in Florida. Therefore, I would reverse and direct dismissal for lack of personal jurisdiction.

**Fifth DCA**

A.L.P. v. State of Florida—A.L.P., a child, sought a writ of prohibition after the trial judge denied a motion for disqualification. The motion to disqualify alleged that the trial judge made specific comments, before evidence was ever introduced in the case, that would put a reasonably prudent person in well-founded fear of not receiving a fair or impartial hearing. While **a trial judge** may form mental impressions and opinions during the course of a hearing, he or she **may not**, as it appears the presiding judge did here, **prejudge the case**. The petition for a writ of prohibition was granted, and the DCA remanded the case for assignment to a different judge.

Papa John’s USA, Inc. and Lorena Gonzalez v. Paula Moore—J. Cohen. In a deposition, you can ask about facts that a deponent learned through conversations with their attorney without violating attorney-client privilege, but you can’t ask about anything else discussed with the attorney. Gonzalez worked as a delivery driver for Papa John’s and was involved in a motor vehicle accident with Moore, a passenger in another vehicle. Moore sued Gonzalez and Papa John’s and deposed the corporate rep for Papa John’s. During that depo, it became clear that while the rep had reviewed Gonzalez’s depo, he had never actually talked to Gonzalez, the driver. When asked why that was, the corporate rep explained that he asked his attorney about Gonzalez and then had no further questions that would have required an in-person conversation. Moore’s counsel then argued that the corporate rep’s statement had the effect of waiving attorney-client privilege, and the attorney asked the rep to state “everything” that the rep had discussed with the defense attorney, and the defense counsel objected based on attorney-client privilege and terminated the deposition. Moore’s attorney sought sanctions for failing to answer, sought to compel the answers to the question, and also sought an order of sequestration that would prevent the defense attorney from communicating with the corporate rep at least until after they were both deposed. The trial court granted the motion in all respects. The defense then filed a petition for a writ of certiorari, and the 5th DCA granted the petition. Attorney-client privilege had not been waived. A person who has a privilege against disclosure of a confidential matter or communication waives the privilege if the person voluntarily discloses or makes the communication when he or she does not have a reasonable expectation of privacy, or consents to disclosure of, any significant part of the matter or communication.” § 90.507, Fla. Stat. (2021). A client does not waive the privilege by testifying generally in the case or testifying as to **facts that were the subject of the consultation with his or her attorney**, but **if the client or attorney testifies as to privileged communications in part, this serves as a waiver as to the remainder of the privileged consultation or consultations about the same subject**. Although the communications between an attorney and client are privileged, **the underlying facts are discoverable**. Thus, **Moore’s attorney can inquire into the factual information the rep gathered during the communication, but cannot ask about anything beyond that.** Because the question sought “everything” discussed, the question was improper, and the trial court departed from the essential requirements of law in requiring the rep to answer the question. The full order—including the portion imposing sanctions and sequestering the rep and attorney, preventing them from speaking with each other—was quashed because the sequestration and sanctions both stemmed from the trial court’s erroneous decision on the attorney-client privilege issue. Judge Nardella CONCURRED IN PART AND DISSENTED IN PART, noting that certiorari jurisdiction is so narrow that the court should only have quashed the portion of the order requiring the rep to divulge attorney-client privileged information, not the sequestration or sanctions part of the order, as that part could have been addressed on appeal.