**TERRY’S TAKES**

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

**Terry P. Roberts**

[**Terry@FRTrialLawyers.com**](mailto:Terry@FRTrialLawyers.com)

**Director of Appellate Practice**

**Fischer Redavid PLLC**

**2022 Week 31 (July 25-29, 2022)**

**Eleventh Circuit**

Butler v. Gualtiere—J. Marcus. This is an excessive force claim, and the appeal involves whether the sheriff in Pinellas County, Florida and the former officer accused of excessive force are entitled to sovereign immunity. The female officer pushed the female arrestee to the floor in the jail after stating that the arrestee pulled away from her, and Butler’s arm was broken by contact with the floor. The officer was fired over the incident. The sheriff agreed that the officer’s “use of force was unnecessary; unreasonable; excessive; without just cause; intentional; and without provocation.” Butler’s Second Amended Complaint featured state law battery (Count I) and negligence (Count II) claims against Sheriff Gualtieri in his official capacity, along with excessive use of force claims in violation of the Fourth and Fourteenth Amendments against Gee in her individual capacity, pursuant to 42 U.S.C. § 1983 (Counts III-IV), and a § 1983 claim of excessive force against the Sheriff in his official capacity

(Count V). Only the state law battery claim was involved in the appeal. The district court denied defendants’ motion for summary judgment. On appeal, the Eleventh Circuit affirmed. As stated in last week’s summary, the Eleventh Circuit has the power to review a denial of summary judgment on sovereign immunity grounds under the “collateral order doctrine” (it’s essentially the equivalent of what Florida appellate courts would call an appealable non-final order) because sovereign immunity under Florida law would not merely provide a defense, but it also is supposed to provide immunity from an entire suit. Qualified immunity summary judgment rulings can be reviewed under the collateral order doctrine, too. Under Florida law, there are three exceptions to sovereign immunity: conduct taken 1) “in bad faith,” ; 2) “with malicious purpose,” or 3) “in a manner exhibiting wanton and willful disregard of human rights, safety, or property.” While the statute does not define those terms, ‘bad faith’ has been ‘equated with the actual malice standard. Second, the term “‘malicious purpose’ has been interpreted as meaning the conduct was committed with ‘ill will, hatred, spite, or an evil intent.’ The phrase “wanton and willful disregard of human rights [or] safety,” has been interpreted as “conduct much more reprehensible and unacceptable than mere intentional conduct,” and “conduct that is worse than gross negligence. Furthermore, under Florida’s standard jury instructions, “wanton” behavior is defined as acting “with a conscious and intentional indifference to consequences and with the knowledge that damage is likely to be done to persons or property,” and “willful” conduct is defined as acting “intentionally, knowingly and purposely.” Reasonable factfinders could disagree over whether Gee’s conduct was wanton and willful, malicious, or exhibitive of bad faith. The level of force and whether techniques were improperly executed was the subject of disagreement. Also, whether Butler was pulling away from Gee is disputed. Gee’s state of mind was at issue.

Drazen and Godaddy.com, LLC v. Pinto—J. Tjoflat. Drazen sued GoDaddy for violating the Telephone Consumer Protection Act of 1991 by texting her to market itself via a prohibited automatic telephone dialing system. Her case was consolidated with two others, and then the three plaintiffs purported to bring a class action. In 2019, the Eleventh Circuit held that receiving a single text was not enough of an injury to trigger standing. The class definition included plaintiffs who had received only one text, and these plaintiffs made up about 7% of the class. The District Court held that only the named plaintiff needed standing to represent the class. The District Court noted that some of the one-text plaintiffs would have standing under the law in their circuits, as there was a split of authority on the question of standing via a single text. The District Court ruled that GoDaddy could settle the entire claim even though some of the individual claims would lack standing outside of the class action. Just before the date to object, one of the class members, Pinto, objected to the settlement on the basis that because class members could receive either $35 or $150 in GoDaddy credit, the credit constituted a “coupon,” and coupon settlements required additional scrutiny under the Class Action Fairness Act. On appeal, after fully summarizing that argument, the Eleventh Circuit did not reach it. The Eleventh Circuit held that one-text plaintiffs could not be part of the class, and the case was remanded to redefine the class to exclude plaintiffs who lacked standing. They left open the question of whether a single phone call (as opposed to a text) could constitute an injury.

**Second DCA**

Marvin Harris v. State of Florida—J. Lucas. This odd case may have implications for civil cases. Harris was pulled over by a police officer for a traffic stop. For reasons not explained in the opinion, the officer seized his iPhone. At some point, the police obtained a search warrant for the phone. The warrant may have been issued before the traffic stop, and the traffic stop might have been executed solely to execute the warrant. At some point, he was ordered to provide the passcode to the phone. He refused. The circuit court held him in civil contempt. He has not been charged with any crime related to the phone. He raised Fourth Amendment issues, challenging the traffic stop and the warrant to seize and search his phone. He appealed the civil contempt order, but the DCA affirmed. The DCA noted that because he had not been charged with anything, his Fourth Amendment arguments were “premature at this point.” In other words, even assuming that the State violated the Fourth Amendment in seizing the phone and obtaining a warrant to search it, the DCA was fine with him being held in contempt for failing to provide the passcode. The DCA seems to think that the proper course is for Harris to provide the code, let the police search his phone, and then move to suppress any evidence they find after they find it. The DCA expressly stated that it was not ruling on any of the Fourth Amendment issues, and that he could raise all State and Federal search and seizure protections when and if the state charged him with anything connected to evidence found on his phone. In a footnote, the DCA stated that Harris has specifically not raised the argument that civil contempt constituted compulsion of potentially testimonial evidence, and the DCA cited several cases that would support that argument. This seemed to be a hint to Harris to raise the issue in the trial court.

**Third DCA**

Bulk Express Transport Inc. v. Diaz—J. Hendon. In this liability action, Bulk Express opposed Diaz’s motion for leave to amend the complaint to add a claim for punitive damages under section 768.72. The trial court granted leave to amend, and Bulk Express filed a petition for certiorari. The Third DCA, however, stated that certiorari review of such an order was limited to whether the plaintiff proffered evidence in support of the punitive damage claim and whether the trial court found that the evidence was sufficient. The DCA lacked any authority to reweigh that evidence by a cert petition. The petition was denied.

Miami-Dade County v. Perez—J. Emas. Javier Perez (plaintiff below) sued Miami-Dade County for injuries he suffered while attending his son’s little league game in Tamiami Park, after a drunk driver crashed through a chain-linked fence and onto the baseball field, pinning Perez to the ground. Both of Perez’s legs had to be amputated. The complaint alleged Miami-Dade County was negligent in constructing the baseball field in an unapproved location, creating an unreasonably dangerous condition (Count I) and in failing to warn of the dangerous condition (Count II). The County moved to dismiss Perez’s complaint, asserting entitlement to sovereign immunity. The trial court entered an order denying the motion, and the county appealed. The appeal came down to the difference between planning-level decisions (which are entitled to sovereign immunity) and operational-level actions (which are not). Planning-level functions are policy decisions, and operational-level functions are the implementation of the policy. Based on the facts as alleged, the DCA held that the case involved operational-level functions (the key fact appears to be that the baseball field was built in an unapproved location as opposed to a chosen site for policy reasons), and, thus, summary judgment had been denied and the denial was affirmed.

New Horizons Condominium Master Association, Inc. v. Robert Harding and Fifth Horizons Condominium, Inc.—C.J. Fernandez. New Horizons appealed a trial court order awarding Appellees attorneys fees and costs for litigating the amount of fees and costs. There had been, however, another appeal in the same underlying case, and the Third DCA had partially reversed the final judgment and remanded for further proceedings. This changed the basis for awarding fees in the trial court to being with. The appeal of the fees was filed while the appeal in the main case was pending. Because the case had been remanded, the identity of the prevailing party could change. Also, piecemeal appeals are not appropriate “where claims are interrelated and involve the same transaction and the same parties remain in the suit.” Thus, the Third DCA reversed the fee order without prejudice to filing an appeal on a new final judgment on attorney’s fees after the trial court concluded its labor. You are not reading that incorrectly. They reversed. From the discussion, it seemed like the appeal should have been dismissed and the fee order should have been allowed to stand until the “trial court concluded its labor.” Perhaps a motion for rehearing is on the way.

Olsen v. Philip Morris USA Inc.—J. Emas. This is an Engle-progeny case, a tobacco-litigation case bound by several Florida Supreme Court findings. At trial, the jury found for Philip Morris. Olsen challenged questions during her cross-examination that impeached her testimony that suggested her attorney had procured false testimony from her to defeat the defense of limitation and explain errors in her previous testimony. Without providing factual detail (including the questions that prompted the objection), the court affirmed, finding no abuse of discretion.

**Fourth DCA**

Kohler v. State—J. Gerber. This is a fascinating opinion on the hearsay rule. Section 90.801(2)(c), Fla. Stat. provides that a statement is not hearsay if the declarant testifies at trial (or hearing) **and is subject to cross-examination concerning the statement** and the statement is a) Inconsistent with the declarant’s testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (b) Consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of improper influence, motive, or recent fabrication; or (c) One of identification of a person made after perceiving the person. The case was a DUI With Injury criminal case, and the State sought to introduce the statement of the victim to a police officer that Kohler, the defendant, was the driver of the vehicle. The State sought to admit the statement during the police officer’s testimony, and the State relied on the statement of “identification of a person made after perceiving the person” exception to the hearsay rule. The defense argued that the State did not satisfy the requirement that the declarant (the victim) was “subject to cross-examination concerning the statement” because while the victim had testified earlier in the trial, the State had not asked her about the statement, and the defense was not permitted to go outside the scope of the direct examination. The trial court found that the declarant/victim had testified and had been subject to cross-examination and allowed the police officer to repeat the victim’s statement that the defendant had been driving the vehicle in question. The DCA agreed with the defendant, however, that because the victim had not been asked about the statement of identification and because the defense could not go beyond the scope of direct, the declarant **had not been subject to cross-examination “concerning the statement,”** and the trial court erred in denying the hearsay objection. The DCA ultimately found the error harmless because of other evidence identifying the defendant as the driver.

Panettieri v. People’s Trust Insurance Company—J. Conner. The DCA withdrew its opinion from April 20 and substituted a new opinion. It quickly affirmed summary judgment against the homeowner on a water damage claim on one ground, but wrote to explain its basis for affirming on a second ground. The homeowner and insurance company disagreed on whether a $10,000 limitation for “water damage” also applied tear-out costs. The policy was an “all risks” policy that covers all risks except losses from misconduct or fraud unless there is an express exclusion. The court examined the byzantine twists and turns of the policy language and concluded that tear-out costs were also excluded.

Thompson v. GEICO Indemnity Company—This was a lawsuit about Personal Injury Protection (“PIP”) benefits. GEICO paid out $10,000 in benefits, and three months later, Thompson’s attorney sent a pre-suit demand letter to Geico demanding that Geico pay $2,978.88 or, if there was medical

payments coverage, $4,524.28. The letter also asked Geico to advise, among other things, if “the demand letter…[was] defective in any way.” GEICO responded that there were no outstanding bills. Two years went by, and then Thompson sued for PIP benefits “not exceeding One Hundred Dollars.” GEICO moved for summary judgment, arguing that the demand letter from two years earlier failed to include an itemized statement with exact dollar amounts. The demand letter was for over $2,000, but the lawsuit was for less than $100. Despite Thompson’s request that GEICO advise if the demand letter was defective, nothing in the law required GEICO to do that. Summary judgment for GEICO was granted by the trial court and affirmed on appeal due to the insufficient demand letter.

**Fifth DCA**

KC Quality Care LLC v. Direct General Insurance Company—J. Harris. Direct General issued a personal injury protection (PIP) policy to an individual who was injured in a car accident. She then assigned her benefits to KC Quality. KC Quality sued for breach of contract, but Direct General moved to dismiss, arguing that it had already obtained a declaratory judgment against the insured in a separate action, and the result of that dec action was that the insurance contract was declared void *ab initio*, **so there was no contract to be assigned to KC Quality**. The trial court agreed, **but the Fifth DCA reversed**. On a motion to dismiss, the lower court can only look to the four corners of the complaint, not other orders. The order of dismissal was outside of the four corners of the complaint. The facts of the case would appear to indicate that Direct General will instantly prevail at the summary judgment state when it can introduce evidence of the dec action.