**TERRY’S TAKES**

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

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**Eleventh Circuit**

Kordash v. United States of America—(C.J. Pryor; 11th Cir.; 10/21/22). Daniel Kordash sued the United States of America for actions of federal officers conducting airport security whom he alleged detained him for so long that it amounted to a constitutional violation. Because the officers are federal employees, the proper claim is a “Bivens claim,” a court-created civil cause of action for violations of constitutional rights similar to a 1983 claim (the difference being that 1983 applies to state actors, while Bivens pertains to federal employees). Specifically, Kordash alleged that the officers violated his Fourth Amendment search and seizure rights, his First Amendment rights to free association, and his Fifth Amendment right of travel. The Southern District of Florida examined each claim and held that the officers did not violate any federal right. The district court found that the officers were protected by qualified immunity and it dismissed the Complaint. Instead of appealing, Kordash amended his Complaint to allege violations of the Federal Tort Claims Act for false imprisonment, battery, assault, intentional infliction of emotional distress, and negligence. This Complaint was also dismissed, but for failure to state a claim.. This time, Kordash appealed. The USA argued that the first dismissal for qualified immunity collaterally estopped the second claims under the Federal Tort Claims Act because it had adjudicated that the officers acted lawfully. Also, the USA argued that the federal officers were not subject to state-law tort liability in light of the Supremacy Clause. On appeal, the Eleventh Circuit noted that under Rule 12(b)(6), the court had to accept the allegations of the Complaint as true. The Federal Tort Claims Act waives the federal government’s sovereign immunity for state-law tort claims. See 28 U.S.C. §§ 1346(b), 2671. The Supremacy Clause enshrines the basic principle that federal law supersedes state law whenever they conflict. It applies not only to constitutions or statutes, but to suits under state law against federal officials carrying out their executive duties. Liability is barred where state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress. The test for whether the Supremacy Clause bars state-law liability is whether the federal official’s acts have some nexus with furthering federal policy and can reasonable be characterized as complying with the full range of federal law. Customs and Border Protections officer’s actions bear a substantial relation to the valid interest of protecting borders. The order dismissing the Bivens claims concluded that the officers acted lawfully to further federal policy. They were acting in the scope of their discretionary duty for purposes of qualified immunity, which also satisfied the fest for a nexus between their conduct and furthering a federal policy. Thus, the tort claims were barred under the Supremacy Clause. (NOTE: The court did not square its holding that that the officers were furthering a federal policy with Congress’s express waiver of tort immunity under the Federal Tort Claims Act). For reasons that are unclear, after finding that the claims were barred under the Supremacy Clause, the Eleventh Circuit then conducted analysis of whether the claims were also barred under the doctrine of collateral estoppel. To show collateral estoppel, the defendant must demonstrate that : (1) the issue at stake is identical to the one involved in the prior litigation; (2) the issue was actually litigated in the prior suit; (3) the determination of the issue in the prior litigation was a critical and necessary part of the judgment in that action; and (4) the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the issue in the earlier proceeding. Again, the Eleventh Circuit found that the test for a nexus between the actions and furthering federal policy was interchangeable with the holding in the order dismissing the Bivens claim finding that the officers were acting within their discretionary authority and that their actions complied with federal law. The issues were actually litigated because they were raised, submitted for determination, and determined by an order dismissing with prejudice. The determination of the legality of the officer’s actions was critical and necessary for evaluating the Bivens claim. Kordash had a full and fair opportunity to litigate the issue because he brought the claims. Thus, the court held that he was barred from relitigating the issues under the doctrine of collateral estoppel. The order dismissing the claims was affirmed. <https://media.ca11.uscourts.gov/opinions/pub/files/202112151.pdf>

**Supreme Court of Florida**

Suarez Trucking FL Corp. et al v. Souders—(Per Curiam; FLSC; 10/20/22). The Supreme Court of Florida has issued a lengthy opinion. Justice Labarga filed a lengthy dissent, Justices Canady and Polston filed a special concurrence, and Chief Justice Muniz and Justices Couriel and Grosshans concurred with the majority without joining the concurrence. Newly-minted Justice Francis did not participate. The opinion deals with offers and acceptances of settlement in tort actions under section 768.79, Fla. Stat., the offer-of-judgment statute. So let’s dive in. Section 768.79(4) gives a party 30 days to file an acceptance of an offer, but an offer can be voided and withdrawn in writing at any time. Rule 1.442(f)(1), Fla. R. Civ. P., provides that no oral communication shall constitute an acceptance, rejection, or counteroffer. “Once a proper acceptance—that is, an unqualified acceptance—is filed as specified in the statute, that’s it: a settlement contract has been entered to resolve the litigation. All that remains is for performance of the settlement terms to be carried out.” Here, Plaintiff made a $500,000 demand conditioned on payment within 10 days. A condition of acceptance would require that Plaintiff enter a dismissal with prejudice. Just prior to 30 days later, the plaintiff filed a notice of acceptance. The acceptance simply cited the statute and the rule and the date of the proposal for settlement, and the Supreme Court of Florida stated that it was “hard to imagine a form of acceptance that could be more clear or effective.” Nevertheless, the trial court denied the Defendant’s motion to enforce the settlement agreement, holding that the written notice of acceptance was not sufficient to form a binding contract and the settlement check was deficient because it included as a payee the carrier that held a worker’s compensation lien in the case. On appeal, the Second District Court of Appeal affirmed. Defendant then invoked the discretionary jurisdiction of the FLSC, arguing that the Second DCA’s opinion expressly and directly conflicted with a Fourth DCA decision that held that a settlement agreement is complete when the offer and acceptance are filed and that performance is not necessary to show formation of the contract. The FLSC took jurisdiction. In discussing the merits, the FLSC stated that the Second DCA was “avoiding…reality” when it found that the acceptance did not create a binding settlement contract. The Second DCA applied common-law rule called the “mirror image” rule that required the acceptance to be identical to the offer. The majority stated that the “Second District denigrates Suarez Trucking’s acceptance as ineffectual ‘boilerplate’ that ‘lacked specificity,’ holding that under the mirror-image rule, Suarez Trucking could only manifest its acceptance of the offer by reciting back the terms of the offer.” The FLSC stated that the Second DCA failed to cite a “single case in which the mirror-image rule has been applied in a similar way.” (NOTE: By the way, if you’re wondering which judges the FLSC was roasting with the harsh language, the Second DCA opinion was written by Judge Sleet and joined by Judge Casanueva over the dissent of Judge Atkinson.) The FLSC did not stop at lambasting Judge Sleet’s opinion. They also took aim at the dissent for agreeing with the majority that the statute and rule fail to specify requirements for formation of settlement agreements. The FLSC took the majority and dissent to task for buying in to the idea that oral communications could affect or alter the terms of the offer and acceptance or that performance was necessary for formation of the contract. The FLSC recognized that in order to have a meeting of the minds and a valid contract, the parties need to agree to the same thing, but the FLSC states that this “is a rule of consistence. It is not—as the Second District would have it—a rule of regurgitation.” The acceptance accepted the settlement demand without any qualification or modification, and that is all that was required for acceptance. The majority was unbothered by “acceptance and payment” being included as terms in the settlement demand. That did not mean that payment was required to show acceptance. It actually distinguishes between acceptance and payment by using different words for both. JUSTICE CANADY CONCURRED SPECIALLY, noting that he did not dissent from the majority’s decision not to get into the issue of whether the Defendant had breached the settlement agreement because it was beyond the scope of the conflict. Despite this statement, Justice Canady decided to lay out why he thought it was “doubtful” that the Defendant breached the settlement agreement. Workers compensation statutes allow an injured worker to accept comp benefits from the employer but also sue a third-party tortfeasor. When that happens, the employee represents him or herself and also the interests of the employer/carrier, and the employer/carrier get lien rights. If it files a written notice of the lien, it can be awarded a share of any judgment or settlement against the tortfeasor. Including the employer/carrier along with the plaintiff and plaintiff’s attorney as payees on the settlement check was standard practice, the Defendant claimed. The law does not permit plaintiffs to settle their third-party claims without involving the employer/carrier if they have filed a notice of lien. Plaintiff was not entitled to a disbursement of funds prior to an agreed or judicially determined resolution of the workers’ comp lien. Justice Canady wrote that it was “hard to see” how putting the Employer/Carrier’s name on the settlement check could constitute a material breach of the settlement agreement. Justice Polston joined the concurrence. JUSTICE LABARGA, however, DISSENTED. He agreed with the majority that the Second DCA improperly applied the mirror image rule, but he opined that the majority “glossed over a significant factual component that impeded” the conclusion that the defendant accepted the settlement demand. The dissent found no meeting of the minds because the Defendant contacted the Plaintiff after the offer and before the acceptance and asked that the agreement provide that the workers’ comp lien be paid from the proceeds of the settlement check, and the plaintiff’s attorney refused, but the Defense still named the employer/carrier as a payee on the check. The majority “glossed over” this because of the rule that oral communications cannot alter offer or acceptance, but Justice Labarga cites the Second DCA’s opinion for the proposition that offer-of-judgment statute does not require the trial court to enforce a contract simply because the written acceptance has been filed; the trial court still had to evaluate whether acceptance showed a meeting of the minds. Justice Labarga would have held that Rule 1.442(f)(1) did not preclude a trial judge from considering oral communications in evaluating the enforceability of the agreement. Where there is a disagreement on the identity of the payees, there was no meeting of the minds in Justice Labarga’s view. Allowing the Defendant to decide whom to pay over the plaintiff’s objection was incompatible with a finding of meeting of the minds. If there was no meeting of the minds, there was no contract, and the trial court would not have erred in declining to enforce the settlement agreement.

<https://www.floridasupremecourt.org/content/download/851316/opinion/sc21-369.pdf>

**Second DCA**

Marvel Martin and Jeffrey Martin v. City of Tampa and Columbia Food Service Co., Inc.—(J. Atkison; 2DCA; 10/19/22). This is a slip-and-fall case. Marvel Martin had lunch with her sister at the Columbia Restaurant in Tampa, and while exiting the restaurant, she tripped on a “paver” and suffered injuries. (NOTE: As a native of Tampa, I feel compelled to share that the Columbia Restaurant in the Ybor (ee-bore) City section of Tampa, is the oldest continuously operated restaurant in Florida, the oldest Spanish restaurant in the USA, and the largest Spanish restaurant in the world. It has 15 dining rooms with 1,700 seats. It was founded in 1903 and renamed the Columbia in 1905. They have seven locations. It’s one of my dad’s favorite places to go.) Anyway, as Mrs. Martin was leaving the restaurant, she tripped on an “uneven hexagonal paver located directly beneath the awning that Columbia owns and maintains.



The awning is attached to the Restaurant and is supported by pillars that are affixed atop the hexagonal pavers. For those who do not know what “pavers” are, they are the tile-like stones set in to the sidewalk. The paver at issue apparently stuck up about a quarter of an inch. The city owns the sidewalk The restaurant had an encroachment agreement with the City of Tampa to allow them to encroach on the sidewalk. The Columbia Restaurant employees (porters) check the area daily for debris, and the restaurant has the parking lot and sidewalk pressure-washed weekly. The porters were instructed that if they saw anything outside that was “not okay,” they should inform management, and management would inform the City of Tampa. You know where this is headed. While the sidewalk was a city sidewalk, Martin alleged that the Columbia was so involved with the sidewalk that they were responsible for the hazard of the uneven paver. Mrs. Martin and her husband sued both the city and the restaurant, alleging that the two had joint and shared responsibility to maintain the sidewalk free from hazards. The Columbia moved for summary judgment, arguing that it was a city sidewalk, and they had no duty to the customer to keep city sidewalks free of hazards. The circuit court agreed. The Martins appealed. The DCA recited the well-established elements of a negligence claim (duty, breach of duty, causation, and damages) and homed in on the duty element. Notably, the court stated that whether a business owes a duty to a business invitee is a question of law even though the courts must make some inquiry into the factual allegations to determine whether a foreseeable general zone of risk was created by the defendant’s conduct. The DCA noted that duty may arise from four general sources: (1) legislative enactments or administration regulations; (2) judicial interpretations of such enactments or regulations; (3) other judicial precedent; and (4) a duty arising from the general facts of the case. The DCA held that there was no legislatively-imposed duty of care because a city ordinance provided that it was the city’s job to inform businesses of defective or dangerous sidewalks outside their places of business and that the city was supposed to give the business 15 days to fix the sidewalk and only then would the business be guilty of maintaining a public nuisance and liable for repairs and fines. (NOTE: There was zero consideration of whether the fact that the ordinance placed the onus on the business to fix the adjoining sidewalk meant that it actual possession or control. In fact, there was no discussion of why adjoining businesses would be responsible for fixing city-owned sidewalks.) Presumably under the “other judicial precedents” source of duty, the DCA noted that nonowners may owe a duty of care to their invitees where they are “in actual possession or control” of a piece of property. A party that has the ability to exercise control over the premises owes a duty of care to keep the premises in repair. The DCA noted that just because people had to walk on the sidewalk to enter the restaurant, that did not confer control or mean that the restaurant created risk; it just meant that the business was “adjacent” to the property, not in control of it. The DCA found that there was no difference between a paver directly in front of the restaurant’s door (like the one in this case) and a paver a few feet down or a block away. In order to trigger a duty, the restaurant had to exercise control or undertake activities that create the foreseeable zone of risk in the area of the injury, and the DCA did not think that happened in this case. The DCA was satisfied by evidence submitted by the Columbia that the city, not the restaurant, had control of the pavers. Columbia’s encroachment agreement with the city “permitted Columbia to erect a structure atop the pavers, but it did not permit Columbia to occupy the area below the awning.” A case with the opposite holding was distinguishable because the city allowed that restaurant to have outside dining on the sidewalk and erect signage on the sidewalk, and it required the restaurant to maintain the sidewalk. (NOTE: Again, it’s unclear why the ordinance requiring that the adjacent business, not the city, repair any damage to the sidewalk was not controlling).

<https://www.floridasupremecourt.org/content/download/851205/opinion/210372_DC05_10192022_090634_i.pdf>

**Third DCA**

Adjei et al v. First Community Insurance Company—(J. Miller; 3DCA; 10/19/22). This is yet another opinion about the new statutory limitations on assigning benefits under an insurance contract, but this opinion has a bit more meat on the bone. The homeowner’s policy in this case was issued in 2016. In 2019, the legislature enacted section 627.7152 and it went into effect on July 1 of that year. The statute contains a “checklist” of terms that must be included in any assignment of benefits (“AOB”) “seek[ing] to transfer insurance benefits from the policyholder to a third party.” The statute applies to any assignment of post-loss benefits “to or from a person providing services to protect, repair, restore, or replace property or to mitigate against further damage to the property” executed on or after July 1, 2019. Noncompliant AOBs are deemed unenforceable. Three months after the 2019 statute was passed and became effective, and following some hurricane damage, Mr. and Mrs. Adjei assigned their benefits to their children (who are presumably adults, but will be called “children” for purposes of clarity). The children/assignees filed a suit against the insurer. It was dismissed based on the trial court holding that the AOB statute applied and that benefits were not assigned. The parents then tried to file suit in their own names, but the court dismissed that claim, too. The children filed a petition for declaratory relief to determine their rights and remedies under the policy. The AOB does not qualify as valid under the statute, but the children argued that the statute did not apply because they were not service providers and applying the AOB statute was unconstitutional under Florida’s right to contract. The trial court did not buy it and ordered the case dismissed. The Adjei assignees appealed. Unfortunately for the assignees, the AOB expressly provided that they were to insure maintenance repairs and maintain, repair, or otherwise take responsibility for the various obligations of ownership. Thus, it triggered the service-provider aspects of the statute due to the obligation to “restore and repair” the property. Then the court turned to the constitutional issue. Article 1, section 10, of the United States Constitution prohibits any state from passing a law impairing a contract. Article I, section 10, of the Florida Constitution contains similar language. The Supreme Court of Florida has construed contractual impairment as a “wall of absolute prohibition.” Procedural statutes apply retroactively, but substantive statutes only apply retroactively if 1) there is clear evidence of legislative intent that the statute apply retroactively and; 2) whether retroactive application is constitutional. Laws that impair rights a party possessed when the statute was enacted or increase a party’s liability for past conduct or impose new duties for transactions already completed are substantive. Statutes that only involve the means and methods to apply and enforce duties and rights are procedural. Under section 627.422, Fla. Stat.,, and long-established caselaw, a Florida policyholder can freely assign a post-loss insurance claim by assigning those rights even if the policy contains an anti-assignment clause. But the “checklist” for AOBs under the statute don’t really restrict the right to assign. Instead, you just have to put certain information in the AOB. Applying the 2019 statute to a 2016 policy, then, was permissible because the AOB statute is procedural. Thus, the lower court was affirmed.

<https://www.floridasupremecourt.org/content/download/851245/opinion/211348_DC05_10192022_103657_i.pdf>

Bal Harbour Tower Condominium Association, Inc., v. Bellorin—(J. Lobree; 3DCA; 10/19/22). Mr. Bellorin was a valet employed by American Parking Systems, Inc. Bal Harbour Tower Condo. Assoc. (“Bal Harbour”) did not allow residents to self-park. They condo association hired American Parking Systems to run a valet service. APS was required to maintain workers’ compensation coverage, which it did. Part of a valet’s duties was to carry luggage. While Bellorin was delivering luggage in a service elevator, a plastic panel fell from the ceiling of the elevator and hit his head, injuring him. Bellorin sued the Condo Association for negligence based on premises liability. The condo association moved for summary judgment on the basis of workers’ compensation immunity, which immunizes employers from most civil lawsuits by employees. Bellorin countered that the condo association was not his employer; APS was. The trial court held that just because the condo had a declaration and bylaws requiring it to provide valet services, that was not a contract between Bellorin and the condo association, so it denied summary judgment. An order denying workers’ compensation immunity is one of the listed non-final orders that can be immediately appealed, and the condo association did so. On appeal, the DCA examined whether the condo association was a statutory employer by virtue of being a contractor that sublets part of its contract work to a subcontractor. To be considered a contractor, the primary obligation of performing a job has to arise out of a contract. The condo association owes a contractual obligation to unit owners to provide valet services. A declaration in a condo operates as a contract among the owners for the benefit of the owners and invitees, servants, or agents. (NOTE: This sounds uncomfortably like the condo owners having a contract with THEMSELVES). There is no statute requiring that condos provide valet services; that duty sprang from a contractual obligation. Thus, because the condo association was a contractor, APS was its subcontractor, and Bellorin was an employee. Denial of summary judgment was reversed. There is no word on whether Bellorin’s workers’ compensation claim is now untimely.

<https://www.floridasupremecourt.org/content/download/851244/opinion/211314_DC13_10192022_103504_i.pdf>

The Personal Injury Clinic v. Allstate Property & Casualty Ins. Co.—(Per Curiam; 3DCA; 10/19/22). This is a citation PCA reminding us that if an insurance policy states that it will reimburse services at the statutory fee schedule, that is sufficient notice that they will do so. But if the record at summary judgment is devoid of evidence that the insurer actually *paid* pursuant to the fee schedule, the DCA will reverse summary judgment in the insurer’s favor and remand for further factfinding into whether payment actually occurred.

Rebolledo v. Chaffardet—(J. Miller; 3DCA; 10/19/22). This case is about personal jurisdiction in the age of the internet. Patricia Poleo is a prominent Venezuelan investigative political journalist who uploads clips to YouTube. Joaquin Chaffardet is a resident of Houston, Texas. In 2018, Poleo interviewed Chaffardet in an undisclosed location outside of Florida about events that occurred in Venezuela, Guatemala, and Panama. During the interview, Chaffardet made derogatory comments about Alejandro Rebolledo, an exiled former Venezuelan judge. Rebolledo sued for slander in Miami-Dade circuit court. Poleo’s show is regularly filmed in Miami-Dade county and the primary audience is expatriate Venezuelans living in Florida. The complaint also alleged that the interview was actually seen by viewers in Miami-Dade. Chaffardet moved to dismiss the complaint for lack of personal jurisdiction. Chaffardet stated that he had zero contacts with Florida. Rebolledo did not enter any summary judgment material to refute that affidavit. The trial court found that it lacked personal jurisdiction over Chaffardet and dismissed the complaint. (Why Poleo or her show or broadcaster or employer was not sued is not explained in the opinion; the only defendant in the appeal was the Texan who made the comment). So now we turn to the test for personal jurisdiction over a non-resident. It is a two-prong inquiry: 1) whether the complaint alleges sufficient jurisdictional facts under the long-arm statute and; 2) whether there are sufficient “minimum contacts” to survive due process such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. The long-arm statute is section 48.193, Fla. Stat. The pleading requirements are slight. A plaintiff need plead no facts; he can simply track the language of the statutory basis for jurisdiction under the statute. A defendant wishing to contest jurisdiction by a motion to dismiss must file affidavits, and this shifts the burden of proof back to the plaintiff. If the plaintiff does not file an affidavit, the defendant’s affidavit is treated as true. If a plaintiff files a counter-affidavit, the trial court must hold an evidentiary hearing to resolve any disputed issues of fact relating to jurisdiction. Again, Chaffardet filed an affidavit, and Rebolledo did not. Application of the minimum contacts test involves distinguishing between general and specific jurisdiction. General jurisdiction arises when a defendant maintains systematic and continuous activities with the forum state. Specific jurisdiction exists when the claim relates to conduct purposely directed at the forum state. (NOTE: My quick rule-of-thumb for these concepts is that general jurisdiction is when a non-resident is present enough to generally be considered an honorary Floridian; specific jurisdiction is when a non-resident ***does something*** that has a specifically effect in Florida). The court easily found that general jurisdiction did not apply to this Texan. Again, under my rule of thumb, there was no way to consider him an honorary Floridian. So the question turned to whether his specific derogatory comments had an effect in Florida. And this involves—yes—another test. A three-prong one: 1) whether the claim directly relates to or arises out of the defendant’s contacts with the forum; 2) whether the defendant has fair warning that a particular activity may subject him to the jurisdiction of a foreign sovereign such that the contacts constitute a purposeful availment of the benefits and protections of the forum; and 3) whether it is reasonably fair to exercise jurisdiction over the non-resident. And believe it or not, there’s a special test for proving prong two (purposeful availment) in cases of intentional torts. It is called the “effects test” and is set out in Calder v. Jones by the United States Supreme Court as refined in Walden v. Fiore, a 2014 Supreme Court case. The effects test provides: 1) the relationship must arise out of contacts the defendant—not a third party—creates with the forum state; and 2) the defendant must have contacts with the forum state itself, not simply persons who reside there. A single tortious act is sufficient to create purposeful availment even absent other contacts, but that only applies when (you guessed it…yet another test) the tort was 1) intentional; 2) expressly aimed at the forum state; and 3) caused harm that the defendant should have anticipated would be suffered in the forum state. The effects test distinguishes the requirement of express aiming from the requirement that there be knowledge that harm is likely to be suffered in the forum state. Chaffardet’s contacts with Florida fell short of purposeful availment or the second (express aiming) prong of the effects test. It basically came down to his affidavit making unrebutted statements that he did not make defamatory statements or send defamatory material to anyone in Florida and he did not direct his statements to Floridians or intend harm in Florida. Oddly, the DCA stated that Rebolledo “persuasively asserts” that because most of the audience for the show was in Florida, it was foreseeable that the comments would reach a Florida audience, but that (for some reason) did not equate to knowledge that the brunt of the alleged harm would be felt in Florida in terms of expressly aiming the communication at Florida. The court cited federal authority stating that an internet posting had to manifest an intent to target and focus on an audience in the forum state. In other words, just because someone can access your content on the internet, it doesn’t mean you were aiming it at them. Someone uploaded it in Miami-Dade, but that was a third party, and an act of a third party cannot create personal jurisdiction. The court noted that this is a “dynamic and evolving area,” but the court stated that it imputed no error to the trial court, and it affirmed.

<https://www.floridasupremecourt.org/content/download/851248/opinion/212272_DC05_10192022_104623_i.pdf>

Rosen v. Tiffany of Bal Harbour Condo. Assoc. Inc.—(J. Gordo; 3DCA; 10/19/22). While it is fairly common to see DCAs bar inmates in criminal cases from filing future pleadings due to a history of frivolous litigation, it is unusual to see it happen in a civil case. Samuel D. Rosen is a former New York attorney who had a long history of *pro se* frivolous filings revolving around a dispute with his condo board of directors. Rosen repeatedly called opposing counsel a liar, referred to the trial court judge as vicious and vindictive and twice accused the judge of causing his heart attack. “While Rosen is not a member of the Florida Bar, he was an attorney in New York and therefore should be aware that such unprofessional conduct and offensive commentary towards members of the judiciary and opposing counsel is unacceptable and warrants sanctions.” The DCA dropped a footnote adding, Rosen has stated the members of this Court are “idiots,” “morons,” “dishonest” and “unprincipled.” He even claims, “when I die and go to hell, I want to see the entire 3rd DCA panel there to greet me!” The DCA put out a show cause order, he failed to respond, and the DCA entered an order prohibiting him from appearing before the DCA without a member of the Florida bar representing him.

<https://www.floridasupremecourt.org/content/download/851246/opinion/211603_DC05_10192022_103837_i.pdf>

**Fifth DCA**

Weaver v. Volusia County, Florida—(J. Nardella; 5DCA; 10/21/22). In 2019, the Legislature passed section 112.1816, Florida Statutes, which provides previously unavailable benefits to firefighters who meet certain criteria and are diagnosed with certain cancers, including ovarian cancer. These benefits include a one-time payment of $25,000 and full coverage of the firefighter’s cancer treatment. § 112.1816, Fla. Stat. (2019). The statute took effect on July 1, 2019. Ch. 2019-21, § 1, Laws of Fla. Appellant served as a fulltime firefighter with the County for thirteen years before retiring in 2012. Five years later, in 2017, she was diagnosed with ovarian cancer, which she attributes to her years of service as a firefighter. Despite this diagnosis, Appellant did not file a claim for workers’ compensation benefits. Her retirement and diagnosis both came prior to the effective date of the 2019 statute. After it was passed, however, Weaver sent a letter to Volusia County, requesting the benefits provided by the statute. The County denied the request, and Weaver filed a declaratory action. The County moved for summary judgment, arguing that the statute only applies prospectively, and the trial court agreed. On appeal, the Fifth DCA noted that prior to the enactment of the statute, firefighters could only seek treatments for occupation-related cancer by filing a workers’ compensation claim. The 2019 statute was expressly intended to provide a streamlined alternative to pursuing workers’ comp benefits for firefighters diagnosed with cancer. Specifically, the statute provides that if a firefighter (1) “has been employed by his or her employer for at least 5 continuous years,” (2) “has not used tobacco products for at least the preceding 5 years,” and (3) “has not been employed in any other position in the preceding 5 years which is proven to create a higher risk for any cancer,” then, upon being diagnosed with one of the twenty-one cancers listed in the statute, the firefighter is entitled to a onetime cash payment of $25,000 and full coverage of the firefighter’s cancer treatment. And under the statute, whether or not they met that 3-prong criteria, all firefighters could claim line-of-duty disability due to the diagnosis of cancer or circumstances that arise out of the treatment of cancer and death benefits through an employer’s retirement plan if the firefighter dies as a result of cancer or circumstances that arise out of the treatment of cancer. The first step to determining whether the statute was retroactive was to determine if it was substantive or procedural. Weaver argued that the statute was merely procedural because it was an alternative to her preexisting right to workers’ comp benefits. The DCA did not buy it, however, because this was not a mere change to the procedure for obtaining comp benefits. This was a whole new alternative to comp with a different test and different benefits. The statute is substantive. It is presumed to apply prospectively unless the test provides that it is retroactive and retroactive application is constitutional. The text did not mention retroactivity. Thus, there was no need to examine the constitutional portion of the test. The statute is prospective (applying to cancer diagnoses from July 1, 2019, forward), and summary judgment in favor of the county is affirmed.

<https://www.floridasupremecourt.org/content/download/851383/opinion/211620_DC05_10212022_083120_i.pdf>