**TERRY’S TAKES**

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

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**2022 Week 39 (Sept. 19-23, 2022)**

**Supreme Court of Florida**

In Re: Amendments to Florida Rule of Criminal Procedure 3.790 (SC22-1033)—(Per Curiam; FLSC; 9/22/22). Dystopian-Future alert! The Supreme Court of Florida amended Rule 3.790 to align with new statutory amendments that allow private companies—not just the Department of Corrections—to supervise misdemeanor probationers.

**First DCA**

Bicking v. State of Florida—(Per Curiam; 1DCA; 9/22/22). Bicking appealed the denial of his postconviction motion, and the court per curiam affirmed without comment on the merits. Judge Brad Thomas, however, wrote a 24-page concurring opinion for two unusual reasons meriting a comment. First, Judge Thomas’s only stated reason for writing a special concurrence was this: “I write to acknowledge the barbarity and cruelty of Appellant’s aggravated armed rape (sexual battery) and kidnaping that inflicted permanent trauma and suffering on his victim.” Second, Judge Thomas devoted half of his opinion to this thought: “In Coker v. Georgia, the United States Supreme Court decided forty-five years ago that the states no longer possessed the legal authority to sentence rapists to death. 433 U.S. 584 (1977). This decision merits further review given the hundreds of thousands of rape victims tortured and violated since that erroneous decision. Just as importantly, the dissenting justices correctly stated the decision was not based on the text of the United States Constitution but rather on the policy preferences of the majority….” He calls upon the Supreme Court to restore to states the right to impose the death penalty for rape.

Rhoden v. State of Florida—(Per Curiam; 1DCA; 9/21/22). This is a reminder of what a petition for writ of mandamus is for: forcing an official to perform a ministerial duty where there is no discretion but to do so. In this case, the sheriff in Baker County, Florida, took the odd step of releasing a jail inmate sentenced to 60 days for battery after serving only four days. The sheriff put the man on electronic monitoring. The State of Florida obtained a writ of mandamus from the trial court forcing the sheriff to put the guy back in jail. The sheriff appealed to the DCA, and the DCA held that the trial court was correct. The sheriff is a constitutional officer within the executive branch of government, and he had a ministerial duty to implement the sentence imposed by the court. Only courts can impose sentences, and the executive lacks the power to add or delete sentencing conditions.

<https://www.floridasupremecourt.org/content/download/849720/opinion/212714_DC05_09212022_141436_i.pdf>

**Second DCA**

All My Sons Moving & Storage of Southwest Florida, Inc. v. A&E Truck Service, LLC—(J. Rothstein-Youakim; 2DCA; 9/23/22). A&E wanted to sue All My Sons (“AMS”) for failure to pay for truck repairs. The specifics of the claims don’t matter. A process server served an AMS sales associate with the summons and complaint. AMS didn’t answer, and A&E filed a motion for a clerk’s default, but the motion lacked a certificate of service. The clerk entered the default, and then A&E moved for a default final judgment. Five days later, AMS moved to set aside the default, claiming excusable neglect. Under Rule 1.540(b), a party can ask a court to vacate a default judgment within one year of that judgment if it can show excusable neglect. Excusable neglect is proven by establishing a meritorious defense and due diligence. Dubberly, the registered agent, testified that she had been out of the office since the beginning of the COVID-19 pandemic because she was especially vulnerable due to some medication condition, she first learned of the lawsuit on the day of the default judgment, and she discovered that the newly-hired office staff had never forwarded her the summons and complaint in violation of company policy. AMS had meritorious defenses to the lawsuit that are not worth detailing here. The trial court held that the office disorganization constituted gross negligence, not excusable neglect, and it denied the motion to vacate. On appeal, the DCA reminded us that Florida has a strong preference for lawsuits to be determined on the merits and courts should liberally set aside defaults under appropriate circumstances. All reasonable doubts should be resolved in favor of setting aside the default. To set aside a default judgment, a party must show excusable neglect and a meritorious defense and must move diligently to vacate the default. The DCA found excusable neglect. The employee who accepted service did not deny that there was an office policy to forward documents to Ms. Dubberly, though she wasn’t familiar with the policy herself. Accommodating an employee’s medical need was not disorganization or gross negligence. It constituted an isolated breakdown in established procedures. The company had meritorious defenses. AMS moved to vacate the default after only five days. Thus, the company showed excusable neglect by demonstrating due diligence and a meritorious defense. The denial of the motion to vacate was reversed and remanded.

Hay v. State of Florida—(J. Smith; 2DCA; 9/21/22). The Second DCA granted a petition for a writ of certiorari. A public defender alleged that she had a conflict of interest requiring her to withdraw as appointed counsel. The PD alleged that she learned of a conflict between Mr. Hay and another client of the PD’s office during a discussion with the client, but she could not give any more information without violating privilege. The trial judge denied the motion. The defendant filed a petition for a writ of certiorari, and the DCA granted the petition, citing authority that the courts cannot rake lawyers over the coals about conflict when the comments are protected by privilege. Interestingly, the opinion noted that the judge made findings that there might have been other less worthy reasons for the lawyer to withdraw, but only the comments about the conversation between Mr. Hay and the PD were attached to the cert petition. Rather than finding the attachments insufficient in some way, the DCA noted that it was bound to review only what was attached, and if there were other reasons for denying the motion to withdraw that are not in the attached record, the DCA was not saying that the trial court could not again deny the motion to withdraw. Based on what it had before it, it quashed the order denying the motion to withdraw.

Martinez v. Ortiz—(J. Smith; 2DCA; 9/23/22). After undergoing nasal surgery to remove nasal polyps, Ms. Martinez presented to her doctor with swelling and pressure behind and around her left eye. The doctor referred her to Dr. Oritz, a board certified ophthalmologist working at the Perez Eye Center. He allegedly misdiagnosed the condition and prescribed inadequate treatment, and she suffered permanent eye damage. Martinez sued both the doctor and the eye clinic for medical malpractice and negligent hiring, training, and retention. When she served her notice of intent to sue, she did not attach the required sworn written medical corroboration to the notices. Before the statute of limitations passed, however, she did provide both the doctor and the clinic with an affidavit from an expert named…and I’m just gonna say it…Dr. Harry Hamburger, M.D. Nothing wrong with that name. Harry Hamburger is not a funny name for a doctor, and I’m not 10 years old. It’s not funny in the slightest, and you shouldn’t snicker either. A name is a name. I’m sure he’s fine. Maybe the best in the business. Anyway, the DCA discussed, in footnote, its calculation of the statute of limitations. The SOL for medical malpractice is two years per section 95.11(4)(b), Fla. Stat. and 766.106(4), but there are statutes that toll the statute of limitations to allow for presuit investigation. Those statutes are sections, 766.104(2) and (4). Despite receiving Dr….Harry Hamburger’s opinions…(it’s not funny. Stop. This is serious)…the defendants moved to dismiss for failure to consult an expert in the “same specialty” as the doctor who is the target of the malpractice suit. Since the statute of limitations had passed, the defendants argued that Martinez could not now seek out another doctor in the same specialty as Dr. Ortiz, so her complaint should be dismissed with prejudice. The trial judge agreed with the defendants. In regard to specialty, the trial judge found that Dr. Perez-Ortiz is a General Ophthalmologist; Dr. Hamburger is board[-]certified in ophthalmology, but is also a Neuro-Ophthalmologist. Because Dr. Hamburger had additional neurologic training and practiced in the field of neuro-ophthalmology, the trial court found that he was not of the “same specialty” as Dr. Ortiz. On appeal, the DCA discussed both the presuit notice and the “same specialty” holdings. First, while the presuit requirements of Chapter 766 are conditions precedent to a malpractice suit, the provisions of the statute were not intended to deny access to the courts on the basis of technicalities. The fact that Dr. Hamburger’s affidavit was not served at the same time as the presuit notice did not matter. Yes, section 766.203(2) requires that the opinion be provided “at the time the notice of intent to initial litigation is mailed,” but there was prior precedent showing that failure to attach the opinion to the notice could be cured by providing it prior to the expiration of the statute of limitations. That is exactly what happened here. Second, in regard to the “same specialty” requirement, the DCA agreed that the legislature amended the statute in 2013 to change “similar specialty” to “same specialty,” a more rigid test, but here, it is apparent that Dr. Hamburger is a qualified board-certified ophthalmologist. He just also has an *additional* fellowship in neuro-ophthalmology. It’s like how a cheeseburger is still a hamburger…it just has cheese on top. But he’s still a hamburger…er, an ophthalmologist, which is the same specialty. The order dismissing the complaint was reversed, and the case was remanded to reinstate the complaint.

<https://www.floridasupremecourt.org/content/download/849839/opinion/210653_DC13_09232022_081728_i.pdf>

Ruiz et al Wendy’s Trucking LLC—(C.J. Morris; 2DCA; 9/23/22). Ruiz was severely injured while working on a truck owned by a third party, Cabrera, which was parked on commercial parking lot owned by the Garcias. The lot contained was used as a parking lot for commercial trucks. Truck owners entered lease agreements allowing them to park there. The leases forbade oil changes or engine work from being performed on the lot, though emergency repairs such as tire or battery changes were permitted. Mr. Garcia visited the lot periodically to make sure that only leaseholders were parking on the lot, though he had a middle-man who handled the leasing and ran the lot. Some mechanical work was being done on the lot despite the prohibition. Ruiz knew nothing about any prohibition and did not see any signs that the lot owner said was posted about not performing maintenance. After performing maintenance on Cabrera’s truck, the truck broke loose and ran over Mr. Garcia causing horrific injuries. Ruiz and his wife brought negligence and loss of consortium claims against the Garcias, alleging that Garcia had a duty to monitor the lot to prevent maintenance from being performed on the lot. The trial court granted the Garcias summary judgment, holding that the lot owed no duty to Ruiz to keep him safe from harm from performing maintenance. On appeal, the DCA noted that Florida law recognizes the following four sources of duty: (1) statutes or regulations; (2) common law interpretations of those statutes or regulations; (3) other sources in the common law; and (4) the general facts of the case. When the duty is based on the fourth prong, the factual inquiry into the existence of a duty is limited to whether the defendant's conduct foreseeably created a broader zone of risk that poses a general threat of harm to others. Where a defendant's conduct creates a foreseeable zone of risk, the law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses. A duty of care may arise regardless of whether it has been expressly addressed in statutes or case law. Defendants who create a risk must exercise prudent foresight if others could be injured as a result of the risk created by the defendants. Thus, trial and appellate courts cannot find a lack of duty if a foreseeable zone of risk more likely than not was created by the defendant. Ruiz never alleged that the lot itself was dangerous; he alleged a failure to implement safeguards to keep the lot safe for those who entered. The DCA distinguished ordinary negligence cases (where the accident arises from actions of the party and could have arisen anywhere) from premises liability cases (which relate to the property). In a premises liability case, the defendant’s duty is dependent on the plaintiff’s status to the land. Plaintiff could only have sued the Garcias if the accident happened on their lot, so it was a premises liability case. The DCA also distinguished active negligence (doing something dangerous) from passive negligence (failure to do something), and it observed that this was a passive negligence case. There are three categories of entrants onto land: (1) trespassers, (2) licensees, and (3) invitees. Invitees to land are owed a duty by the landowner to maintain safe conditions. The DCA assumed that because Ruiz was invited by a lessor of the land, he was an invitee. In the context of premises liability claims, invitees are owed the following: (1) the duty to use reasonable care in maintaining property in a reasonably safe condition; and (2) a duty to warn of concealed dangers that the landowner knows about or should know about and which are unknown to the invitee and cannot be discovered by him through the exercise of due care. There was no failure to warn. Ruiz knew the dangers much better than the Garcias. As far as maintaining the property in reasonably safe condition, a landowner is not an insurer of the safety of persons, and there is not strict liability or liability *per se* for injuries resulting from dangerous conditions on the property. The issue is whether the harm is foreseeable and whether the party has the ability to exercise control over the premises. Ruiz’s argument would require property owners to employ safeguards to prevent all sort of injury and presume that lessees will violate rules established by the landowners. The harm was not foreseeable, and the Garcias had no ability to control the actions taken that resulted in injury here. They have no duty to hire someone to keep an eye out for people violating the lease and then tell them to stop and leave the property. (Control was also not an issue in the trial court, so the appellate court declined to rule on control and whether that was a jury issue).

<https://www.floridasupremecourt.org/content/download/849838/opinion/210485_DC05_09232022_081523_i.pdf>

State of Florida v. Waiters—(J. LaRose; 2DCA; 9/23/22). This criminal law opinion is almost exclusively about the concept of “but for” causation, and is, thus, relevant to personal injury practice. Judge LaRose waxes poetic, beginning this opinion with some verse from Benjamin Franklin’s *Poor Richard’s Almanac*.

For want of a nail the shoe was lost.

For want of a shoe the horse was lost.

For want of a horse the rider was lost.

For want of a rider the message was lost.

For want of a message the battle was lost.

For want of a battle the kingdom was lost.

And all for the want of a horseshoe nail.

The judge cited the tale for the proposition that an attenuated chain of events highlights the pitfalls of employing "but for" causation in the context of criminal liability and, as relevant here, immunity from prosecution. Mr. Waiters used crack cocaine and began acting so erratically that his sister called 911. The police responded, too, to see if he needed to be hospitalized under the Marchman Act for posing a danger to himself. After Waiters calmed down, he signed a release declining further medical attention, and EMS concluded that he did not need to be hospitalized. All of this, however, caused the police to realize the Mr. Waiters had an outstanding felony warrant, and they arrested him. He also had a crack and a crack pipe on him, which resulted in a new charges. He claimed that he was immune from prosecution for the new possession charges because the contraband was obtained as the result of him seeking medical assistance. Section 893.21(2) does provide immunity if evidence of an offense was obtained **“as the result of”** a person seeking medical assistance after experiencing or having a good-faith believe that he or she is experiencing an alcohol-related or drug-related overdose and is in need of medical assistance. The DCA held that the intervening warrant was an intervening cause that broke the causal chain, and the contraband was found “as a result” of the warrant, not the call for medical care. The court opted to apply principles of proximate cause, not just “but-for” or actual cause. The medical concerns were resolved and he was being released when the police discovered the warrant. Because he is not immune from prosecution, the case was reversed and remanded for further proceedings.

<https://www.floridasupremecourt.org/content/download/849844/opinion/211477_DC13_09232022_081840_i.pdf>

**Fourth DCA**

Tower Radiology Center v. Direct General Insurance Company—(Per Curiam; 4DCA; 9/21/22). This is yet another case where a trial court dismissed a complaint brought under an assignment of benefits (“AOB”). The underlying case involved a car accident, and the insured obtained services from Tower Radiology Center and then assigned Personal Injury Protection (“PIP”) insurance benefits to Tower. Tower sued Direct General to collect under the policy. Direct General filed a motion to dismiss, attaching a declaratory judgment from another district wherein the court had found the insurance policy to be void *ab initio* due to material misrepresentations by the insured. The trial court dismissed the complaint, and Tower appealed. And…yep, you guessed it. The DCA held that at the motion to dismiss stage, the court cannot look beyond the four corners of the complaint, the declaratory judgment was not mentioned in (or incorporated by reference) the complaint, and it could not be considered In fact, the policy number was not even mentioned in the complaint. Interestingly, where usually AOB cases talk about how the assignee steps into the shoes of the assignor, the DCA also stated that it agreed with Tower that section 86.091, governing declaratory judgments, states that non-parties’ rights cannot be affected by a declaratory judgment action. Instead of stepping into the insured’s shoes, the DCA appears to be holding that the dec action will not be admissible even at summary judgment and the insurer will have to re-litigate the material misrepresentation issues if it wants to again demonstrate that the policy was void *ab initio*. Reversed and remanded.

<https://www.floridasupremecourt.org/content/download/849704/opinion/213119_DC13_09212022_100323_i.pdf>

**Fifth DCA**

Smith v. Carlton—(J. Edwards; 5DCA; 9/23/22). This case is not summarized. I just think you deserve to read the first sentence of the opinion because you made it this far. Good job. Okay, so this opinion begins, “This case involves tons of trash, purloined gates, missing fences, and broken promises.” Is that not a great first line of a terrible country song? Congratulations, you finished this week’s summary. Go forth and litigate.