TERRY'S TAKES

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

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Eleventh Circuit

Dream Defenders v. Governor of the State of Florida—(J. JILL PRYOR; 11th Cir.; 1/10/23). This is not a personal injury case, but it is a matter of public importance and also will set up (or foreclose) civil rights claims such as 1983 claims in Florida once decided. The opening of the opinion summarizes the 2020 civil rights protests following the death of George Floyd that eventually resulted in murder convictions and other criminal convictions for the officers involved. Florida Governor Ron DeSantis, however, characterized the related protests as disorder and tumult and promised to have a "ton of bricks rain down" on those who engaged in violent or disorderly protest. The governor urged the Florida Legislature—which complied—to pass a bill cracking down on protests. Dream Defenders and other organizations concerned with civil rights (including a Broward County Black Lives Matter organization and a Florida branch of the NAACP) brought suit, arguing that the new law is unconstitutional under the First and Fourteenth Amendments. The groups also sought a preliminary injunction to bar the law from being enforced while the constitutional challenge was pending. The Northern District of Florida agreed with the civil rights groups that the new law was unconstitutionally vague and therefore likely to chill or deter exercise of First Amendment rights, and the judge entered the preliminary injunction. The governor and the sheriff of Jacksonville appealed. The case turns on this issue: for a long time, engaging in a "riot" has been a felony under Florida law, but the term "riot" was never defined by the Legislature. Therefore, Florida courts had applied the common law definition of "riot," which passes constitutional muster. Florida courts held that people could only be guilty of riot if they act "with a common intent to mutually assist each other in a violent manner to the terror of the people and a breach of the peace." In the DeSantis-backed 2020 law, however, Florida's Legislature tossed out this common law definition of riot and substituted a new statutory definition, and the courts must now decide if the new definition withstands constitutional challenge or, instead, violates the First Amendment rights of speech assembly, and to petition the government for redress of grievances. The Eleventh Circuit verified that the district court was correct in finding that Plaintiffs had standing to challenge the laws even though the governor and sheriff argued that they should not have standing in light of the fact that their members had not been charged with anything under the new law yet. The threat of prosecution was enough. But the court decided not to determine the meaning of "riot" under Florida law. The court cited precedent for the notion that federal courts should not be the first courts to interpret new state law. The court certified to the Supreme Court of Florida the following question:

> What meaning is to be given to the provision of Florida Stat. § 870.01(2) making it unlawful to "willfully participate[] in a violent public disturbance involving an assembly

> of three or more persons, acting with a common intent to assist each other in violent and disorderly conduct, resulting in . . . [i]njury to another person; . . . [d]amage to property; . . . or [i]mminent danger of injury to another person or damage to property"?
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> To assist the Florida Supreme Court in answering our question, we ask the Court to consider:
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> 1. What qualifies as a "violent public disturbance"? Is it something more than "three or more persons[]acting with a common intent to assist each other in violent and disorderly conduct resulting in injury to another person, damage to property, or imminent danger of injury to another person or damage to property"?
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> 2. What conduct is required for a person to "willfully participate in a violent public disturbance"? Can a person "willfully participate in a violent public disturbance" without personally engaging in violence and disorderly conduct or advocating for violence and disorderly conduct? If so, what level of "participat[ion]" is required?
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> 3. To obtain a conviction, does the State have to prove beyond a reasonable doubt that the defendant intended to engage or assist two or more other persons in violent and disorderly conduct? If not, what must the State prove regarding intent?
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> 4. May a person be guilty of the crime of riot if the person attends a protest and the protest comes to involve a violent public disturbance in which three or more people acting with a common intent to assist each other engage in violent and disorderly conduct and the violent disturbance results in injuries to another person, damage to property, or imminent danger of injury to another or damage to property, but the person did not engage in, or intend to assist others in engaging in, violent and disorderly conduct?

The court clarified that the scope of the question was only a suggestion, and it was up to Florida courts to consider anything necessary to deciding the issue. Until the court can consider the court's response, the injunction will remain in place. No one dissented.
https://media.ca11.uscourts.gov/opinions/pub/files/202113489.cert.pdf

Second DCA

AJ Therapy Center, Inc. Imperial Fire & Casualty Insurance Company—(J. Casanueva; 2DCA; 1/13/23). The plaintiff's victory in this appeal is likely to be short-lived. AJ Therapy Center provided benefits to an insured person after a motor vehicle accident and received an assignment of benefits ("AOB"). After payment was denied, AJ sued the insurer in a declaratory judgment action. The insurer countered that the underlying insurance policy had already been declared void *ab initio* in a consent final judgment due to the insured's attempted insurance fraud. The trial court dismissed the dec action. AJ appealed. The DCA held that it was error to rely on facts outside the Complaint in a motion to dismiss, so it reversed. Of course, on remand, the insurer is simply going to file for summary judgment, and it's hard to imagine how they won't prevail, so one wonders why AJ bothered.
https://supremecourt.flcourts.gov/content/download/857899/opinion/213264_DC13_01132023_095421_i.pdf

R.B. v. B.T., (Assoc. Snr. Judge Matthew Stevenson; 2DCA; 1/13/23). The DCA wrote a short opinion reversing a family law decision based on the doctrine of "unclean hands" because the parties did not raise that issue; the judge raised it *sua sponte*. The DCA cited some memorable language from Justices Ginsberg and Scalia.

> Reiterating the well-recognized principle of "party presentation," Justice Ginsberg, writing for the United States Supreme Court, observed that "as a general rule, our system 'is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.' " United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020) (alteration in original)(quoting Castro v. United States, 540 U.S. 375, 386 (2003)(Scalia, J., concurring in part and concurring in judgment)). Justice Ginsberg went on to note that courts, with certain unusual exceptions, "do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them] and when [cases arise, courts] normally decide only questions presented by the parties." Id. (alterations in original) (quoting United States v. Samuels, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in denial of reh'g en banc)).

Here, the circuit court abused its discretion in relying on an unpled, unraised, and unargued "unclean hands" defense, and the error was worse because the magistrate failed to address several issues that were actually argued by the parties. Reversed and remanded.
https://supremecourt.flcourts.gov/content/download/857893/opinion/210747_DC13_01132023_091453_i.pdf

Third DCA

MGA Insurance Company, Inc. v. New Vista Diagnostic Imaging Services, LLC—(Per Curiam Emas, Hendon, and Gordo; 3DCA; 1/11/23). This citation PCA reminds us of the standards for transferring venue. A trial court's ruling on a motion to transfer venue under section 47.122 is reviewed for an abuse of discretion. When venue is proper in more than one county, the choice rests with the plaintiff and should not be disturbed without a showing of substantial inconvenience or the likelihood of injustice. In order to successfully challenge that selection, the burden is upon the defendant to show either substantial inconvenience or that undue expense requires a change for the convenience of the parties or witnesses. In order for a court to consider the convenience of the witnesses, the court must know who the witnesses are and the significance of their testimony. Affidavits in support of a motion to transfer venue are insufficient if they are little more than a laundry list of witness, their places of residence and the conclusory statements that it would be inconvenient for them to travel to the venue.
https://supremecourt.flcourts.gov/content/download/857718/opinion/221093_DC05_01112023_095845_i.pdf

MSP Recovery Claims, Series LLC v. Coloplast Corp.—(C.J. Fernandez; 3DCA; 1/11/23). This is a Medicare reimbursement case involving pelvic surgical mesh products. Coloplast, a foreign corporation, manufactured and sold the products to various Medicare patients. The mesh was defective and had to be removed or otherwise treated. MSP was assigned benefits from a number of the Medicare recipients who had to undergo additional treatment because the mesh was defective. Medicare paid for medical care and treatment received by their Medicare enrollees in Florida to treat injuries resulting from the implantation of pelvic surgical mesh products that occurred in Florida. MSP, the assignee, filed its Second Amended Complaint for a Pure Bill of Discovery against Coloplast seeking reimbursement of the claims paid by Medicare. The circuit court granted Coloplast's motion

to dismiss MSP's second amended complaint with prejudice. This decision had been a PCA, but both parties moved for a written opinion, and the granted their wish. The trial court's two bases for dismissal were 1) the lack of personal jurisdiction over the defendants and 2) the failure to state a cause of action for a pure bill of discovery. The DCA held for the Coloplast, the manufacturer, on the jurisdiction issue, so it wrote no opinion concerning the failure to state a cause of action. MSP cited three different provisions of Florida's long-arm statute that it argued should rope Coloplast in to Florida courts. First, MSP alleged that Coloplast caused personal injury in Florida. Second, it argued that Coloplast committed torts in Florida. Third, it argued that Coloplast engaged in a business or business venture in Florida. The DCA began by noting that the cause of action was key. This is a Medicare reimbursement case, not a personal injury case. MSP was suing only for damages related to the assignment of benefits, not suing for the actual injuries to the patients. The alleged damages were only financial—reimbursement for the costs associated with the treatment of the injuries. The basis of the cause of action is reimbursement of Medicare, in MSP's words, "damages sustained by the Assignor's [sic]." The activity in the state is injury to persons within Florida arising from Coloplast's defective products. MSP's cause of action does not substantively connect to the personal injury. **The "arising from" language in section 48.193 means that there must be a substantive connection between the basis of the cause of action and the activity in the state.").** Thus, whether or not the torts have a basis in fact, they do not create jurisdiction to sue for something else. Coloplast did not commit any torts against Medicare individually. MSP has admitted that it will not seek recovery for personal injury claims on behalf of the Enrollees. Therefore, there is no substantive connection between the basis of the cause of action and the activity in the state, which would be any alleged torts committed against individuals in Florida. As to the business venture provision of the long-arm statute, MSP failed to provide facts to demonstrate personal jurisdiction on this ground in its second amended complaint. Affirmed.
https://supremecourt.flcourts.gov/content/download/857726/opinion/220191_NOND_01112023_101259_i.pdf

Perez v. Gallego, (J. Bokor; 3DCA; 1/11/23). Gallego served as the president of Hammocks Community Association. On October 26, 2020, Gallego filed a six-count complaint alleging defamation and tortious interference with a business relationship against Perez and Luffi, two officers. Subsequently, the State pursued criminal charges resulting in her arrest and active, ongoing criminal proceedings. During discovery in the civil suit, Gallego failed to timely respond to Perez and Luffi's discovery requests, resulting in orders granting motions to compel responses to their discovery requests. Subsequently, instead of complying with the orders compelling discovery, and despite previously indicating that she would not be seeking a stay, Gallego's counsel indicated to Perez and Luffi's counsel that Gallego would invoke her Fifth Amendment right against self-incrimination and sought a stay of proceedings based thereon. The trial court granted Gallego's motion to stay pending the resolution of the criminal case. The trial court granted the stay, and the officers filed a petition for a writ of certiorari. Perez and Luffi argue that: (1) the trial court's ruling causes irreparable harm because it indefinitely delays their right to assert official immunity from suit under section 768.28(9)(a), Florida Statutes; and (2) Gallego improperly used her Fifth Amendment privilege against self-incrimination as both a sword and a shield in contravention of applicable case law resulting in a departure from the essential requirements of law. Gallego argues that: (1) Perez and Luffi are not entitled to certiorari relief because they have shown no irreparable harm; and (2) the trial court did not depart from the essential requirements of law. The cited form of immunity shields officers, employees, and agents of the State of Florida and any of its political subdivisions unless the person acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. Immunity must be determined at the earliest possible stage of a legal

proceeding. The DCA held that delay in the immunity determination caused by the indefinite stay constitutes irreparable harm, irremediable on appeal. Also, Gallego provided no case law in the trial court or DCA supporting an indefinite state based on invocation of the Fifth Amendment right to remain silent. Florida's sword-and-shield doctrine states that the Fifth Amendment cannot be used as both a sword and shield, which is what Gallego was attempting to do by using it offensively in the civil suit to obtain a stay. (NOTE: There was no real analysis of why a "stay" constitutes an affirmative attack—a "sword"—as opposed to something neutral. When a case is stayed, the defendant need do nothing. Thus, it is hard to see what harm is caused, and it is surprising to see a DCA determine that a party having to wait a long time for a result in a civil case constitutes irreparable harm given the amount of time many cases take to decide. The motto of the Supreme Court of Florida and all of the district courts of appeal, adopted in 1950, The present seal was officially adopted in 1950, is the Latin phrase Sat Cito Si Recte (pronounced as saht see-to see rayk-tay), which means "Soon enough if done rightly." The phrase indicates the importance of taking the time necessary to achieve true justice.). The DCA noted that there was a well-established exception where "special circumstances" warranted a stay where a person, "who is a defendant in both a civil and criminal case, is forced to choose between waiving his [or her] privilege against self-incrimination or losing the civil case on summary judgment," and those "special circumstances" require a stay "in the interest of justice," citing United States Supreme Court and Eleventh Circuit precedents. Gallego is a plaintiff, not a defendant, so that circumstance does not apply. Also, the DCA stated, "It's entirely unclear how she would be incriminated in a criminal proceeding by answering discovery pertaining to the claims she brought." Gallego is free to take the Fifth, but the trial court, under the sword-and-shield doctrine, was entitled to "make the appropriate inference, or strike pleadings to the extent such an assertion." (NOTE: This makes for a compelling federal issue. The statute of limitations for the civil case is not tolled by the criminal case, so counsel may have been forced to choose between allowing the statute to run or filing suit before resolution of the criminal case. If plaintiff was really forced to choose, there could be an interesting federal issue).
https://supremecourt.flcourts.gov/content/download/857730/opinion/220267_DC03_01112023_101821_i.pdf

Deotscj v/ Certain Underwriters at Lloyds of London, (J. Gordo; 3DCA; 1/11/23). This is an attorney's fee case where section 626.9373 was the basis for the fees. That statute provides for prevailing party fees "upon the rendition of a judgment or decree by any court of this state against a surplus lines insurer in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer on or after the effective date of this act, the trial court or, if the insured or beneficiary prevails on appeal, the appellate court, shall adjudge or decree against the insurer in favor of the insured or beneficiary…." The DCA expressly dropped a footnote, however, stating:

> "Because section 626.9373 is patterned after section 627.428, the confession-of-judgment doctrine applicable to section 627.428 applies equally to section 626.9373." Bryant v. GeoVera Specialty Ins. Co., 271 So. 3d 1013, 1019 n.1 (Fla. 4th DCA 2019); see also Capitol Specialty Ins. Corp. v. Ortiz, 2019 WL 383868, at *3 (S.D. Fla. Jan. 15, 2019) (noting that sections 627.428 and 626.9373 "are nearly identical" and "that courts apply the two fee provisions in the same way").

Apparently, there was a loss or destruction of property, and Lloyds was the insurer. They agreed to pay out, but undervalued the item, and the plaintiff sued, wanting more of a payout based on the true value of the time. Lloyds conducted an appraisal and then paid out more money, resolving the suit. The plaintiff moved for attorneys' fees, and Lloyds of London opposed the motion because it paid

out after conducting the appraisal, and the matter never went to court. The DCA expressly ruled that because the lawsuit "was a necessary catalyst to resolve their claim and force Lloyds to proceed with the appraisal process," the lower court had erred in denying plaintiff's motion for attorney's fees. The suit was not filed solely for the purpose of the fee award; there was a legitimate dispute. The suit was filed to force the defendant to satisfy its obligations under an insurance contract. When an insurer pays policy proceeds after suit is filed but before judgment has been rendered, payment of the claim constitutes the equivalent of a confession of judgment in favor of the insured, entitled the plaintiff to attorney's fees. Reversed and remanded to award fees. Compare this with the Fourth District's decision in People's Trust Insurance Company v. Polanco summarized below, however!
https://supremecourt.flcourts.gov/content/download/857725/opinion/220128_DC13_01112023_100847_i.pdf

Fourth DCA

People's Trust Insurance Company v. Polanco—(J. Levine; 4DCA; 1/11/23). This case is the other side of the coin from Deotscj v/ Certain Underwriters at Lloyds of London, summarized above. This was another attorney's fee dispute where the question what whether attorney's fees were owed under the standard that litigation was a necessary catalyst to resolve the dispute or there was a "breakdown in the claims-adjusting process." This was a homeowner's claim about alleged hurricane water damages. The insurer accepted part of the claim, but they denied coverage for the roof because their investigation concluded that Hurricane Irma was not the cause of the roof damage. People's Trust also denied coverage for the interior water damage, because the investigation concluded that this damage was caused by age related "wear, tear, and deterioration," which was not a covered loss under the insured's policy. People's Trust did admit coverage for damage to the insured's soffit and fascia. However, since the cost of repair did not exceed the insured's deductible, no repairs were commenced on the property. The homeowner sued, People's Trust moved to compel an appraisal, and the appraisal came out in the insured's favor to the tune of over $55,000 including finding the previously-denied portion of the claim to be covered losses. The insurer agreed to pay, and then the trial court approved prevailing party fees and costs of $10,500. People's Trust appealed the fee award. Startlingly, the DCA found that the litigation was **not** a catalyst to resolve the dispute. Despite the fact that there was a claim and a denial of the claim prior to the filing of the suit, the DCA found there was really no dispute prior to filing of the suit because the insured never informed People's Trust that he disputed its estimate or coverage determination, and he did not send People's Trust a competing estimate or a completed sworn proof of loss. Instead, the insured filed a suit for breach of insurance contract. An insured moving for attorney's fees must prove that "the suit was filed for a legitimate purpose, and whether the filing acted as a necessary catalyst to resolve the dispute and force the insurer to satisfy its obligations under the insurance contract." For attorney's fees to be awarded, there must have been "some dispute as to the amount owed by the insurer" before the insured filed suit. For some reason, the claim and denial of the claim did not satisfy this test in the DCA's view. The DCA cited its own case from last year (in favor of the same exact insurer) where fees were denied when an insured's claim was denied, the parties provided each other competing estimates, the insurer demanded an appraisal, and the insured then sued instead of waiting for the appraisal. The DCA observed that fees were not appropriate in that case because the dispute between the parties did not showcase "a breakdown in the claims-adjusting process." Thus, the lawsuit was not a "necessary catalyst" to resolving the insurance dispute, entitling the insured to attorney's fees. Similarly, in this case, the DCA held there was no breakdown in the claims-adjusting process because the insurer was never informed of a potential dispute until suit was filed. The insured must show that he "attempted to resolve any differences without resorting to formal legal action" for an award of attorney's fees to be appropriate.

It did not matter that the lawsuit came before the appraisal in this case. In the DCA's view, the insurance company could not compel an appraisal until after it was informed that a dispute existed. (NOTE: Again, the insurance company **denied a claim**. The DCA does not explain why an insured must disagree with the insurance company's disagreement with the insured's claim for a "dispute" to exist. The insured requested a payout, and the insurance company refused. Why this is not a "dispute" remains unclear. Why the insurance company did not seek an appraisal **before** denying the claim is also unclear.) The DCA left intact prior holdings that allow for an immediate suit (and fees) where an insurer **completely** denies a claim. That allows the insured to sue immediately. Here, though, because the insurer accepted coverage for the soffit and fascia (even though it didn't pay out a cent because that damage did not exceed the deductible and even though $55,000 was the ultimate award), the DCA held that because the insurer had not **completely** denied coverage, the insured had to address the discrepancy in the coverage determination before filing suit.
https://supremecourt.flcourts.gov/content/download/857739/opinion/220559_DC13_01112023_100012_i.pdf

Hollywood Park Apartments West, LLC v. City of Hollywood, Florida—(J. Warner; 4DCA; 1/11/23). This is a petition for a writ of prohibition challenging a trial judge's denial of a motion to disqualify the judge. This was a water-billing dispute between the city and an apartment complex after a defective water meter caused underbilling and the city added to future water bills to make up for the prior underbilling. A predecessor judge ruled in the city's favor that doing this was fine, but no final judgment was entered, and the apartment didn't pay the "make up" portion of the bills. The city decided to shut off the apartment's water due to disputed amounts even though current bills were paid and only the back pay was at issue. A different judge was appointed to the case for some reason, and the judge held a status hearing though no motions were pending. She indicated that she intended to appoint a receiver, because she believed the apartments had been collecting rents that included amounts for water but failed to pay City for the water. The judge also commented to Apartments' attorney that, "I'm not going to get into this now, but you may want to talk to your clients about…this, whether eventually--I don't know much more about the case than—than…what you told me--whether the Court needs to refer this case to the state attorney's office for review." The judge made two more threats to refer the apartment complex to the State's Attorney for investigation. After the hearing, the apartment complex moved to disqualify the judge, arguing that the comments created a reasonable fear that the judge was biased or prejudiced and had prejudged the issues so as to create a reasonable fear that a fair trial could not be had. The judge denied the motion. The DCA held that the trial judge's comments, at a hearing at which no rulings were to be made, included threats of criminal prosecution and a unilateral determination that a receiver should be appointed. These comments gave rise to a well-founded fear of bias. The trial judge's consideration of the receiver amounted to a determination on an issue not before the court. Most significantly, however, the trial judge threatened the party with criminal investigation several times. That alone would cause a party to fear that the trial judge was biased against it, and the party could not receive a fair trial. The petition was granted.

Muentes v. Bruce S. Rosenwater & Associates, P.A.—(J. Damoorgian; 4DCA; 1/11/13). This is about an interesting fee dispute. The retainer agreement included an "initial retainer" that was expressly a "non-refundable engagement fee" that was to be "depleted by a $500.00 monthly fee against it." It stated that when the initial retainer was depleted, an additional retainer might be required, and the client would be billed on an hourly basis for work performed. The contract also required the client to dispute any billing on the grounds of unreasonableness within 30 days, and failure to do so waived the right to dispute the billing as incorrect, inaccurate, or unreasonable. The firm reduced the retainer by $500 a month for the first six months but also billed additional amounts. In the end, the firm sought

$6,728.80 in additional fees. The client balked and stated that it was under the impression that billing for that first six months was to be at a flat $500-a-month rate and they should not have to pay additional amounts for those months. The firm answered that the $500-per-month was intended as a payment plan, not a flat fee. The trial court engaged in a clearly flawed analysis. The court found that the contract was "clear and unambiguous" and provided, as the client stated, that the first six months of representation would be covered by a flat fee of $3,000 billed at $500 per month. But then, after finding the contract clear and unambiguous, it resorted to extrinsic evidence—testimony by the firm—that the contract was meant only as a payment plan, and the trial court held that that testimony created a latent ambiguity in the contract. The court then awarded the firm fees as compensatory damages for reasons that are not entirely explained. It is possible that the court invalidated the contract due to the latent ambiguity and then resorted to *quantum meruit* to determine the fees owed. This was just so wrong. Come on. The DCA instantly held that because the trial court held (and the DCA agreed) that the clear and unambiguous language of the contract set out a flat fee for the first six months, the court had no business going beyond the four corners of the contract to determine the intent of the parties or use extrinsic evidence to create a latent ambiguity. The language meant that the clients owed $500 per month, and only when that flat fee was depleted at the end of the six months would hourly billing begin. As for the hourly fees relating to the time period after the initial six month period, however, those amounts were affirmed. The clients had challenged the post-6-months fees under case law standing for the proposition that the court could not enter a fee award unless the law firm introduced expert testimony on the reasonable hourly rate and hours expended, but that case law was not applicable to this kind of case. This is not a "prevailing party" kind of fee. The law firm sued the client for breach of contract. If a party is seeking to recover previously incurred attorney's fees as an element of compensatory damages in a separate breach of contract action, that party is not required to provide an independent expert witness to corroborate the reasonableness of the fees. He only needed to show the existence of a contract and its terms including an oral contract. (Apparently the hourly rate was the result of an oral agreement).
https://supremecourt.flcourts.gov/content/download/857738/opinion/220356_DC08_01112023_095841_i.pdf