TERRY'S TAKES

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

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Eleventh Circuit

Sosa v. Marin County, Florida, et al—(C.J. William Pryor; 11th Cir.; 1/20/23). This lengthy opinion involved a claim of wrongful arrest against a Florida county, the county's sheriff, a deputy sheriff, and unknown "John Doe" deputies. The Martin County Sheriff's Department arrested David Sosa for crimes committed by a different man with the same name. Not only that, they've done it twice. The first time was in 2014 when an officer giving a traffic ticket was informed by his computer about a Texas warrant for "Davis Sosa" from 22 years earlier. Sosa pointed out, by the way, that he was too young to be the man who was subject of a warrant 22 years earlier, and the date of birth, height, and weight were different, too. The officer arrested him anyway, his fingerprints were taken, and then he was released three hours later when the police confirmed that they had arrested the wrong David Sosa. Four years later, in 2018, the same exact thing happened during another traffic stop, and Sosa informed the officer about the 2014 debacle. He was arrested anyway, and he was taken to jail. This time, he was kept for three days because two of the days were on a weekend. On the following Monday, they again confirmed that they had the wrong guy and let him go. This time, he sued. He raised claims under 42 U.S.C. § 1983 alleging 14th amendment violations for arrest and detention without probable cause, that they took an unconstitutionally long time to check his identity, and that the sheriff and county did not have adequate policies to train or supervise the deputies properly. A panel of the Eleventh Circuit affirmed in part and reversed in part, explaining that the arrest was reasonable under the Fourth Amendment and that Sosa's claims against the County and the Sheriff were not viable. The panel majority also concluded that Sosa stated a valid claim for violating his "substantive due-process right to be free from continued detention after it should have been known that [he] was entitled to release," but there was a dissent that opined that a supreme court decision foreclosed relief. The court voted to rehear the case *en banc*, and it vacated the panel opinion purely in regard to the over-detention claim. The full court opined that the holding in Baker v. McCollan, 443 U.S. 137 (1979), that detention due to mistaken identity "gives rise to no claim under the United States Constitution" when it lasts only "three days" and is pursuant to a warrant conforming to the requirements of the Fourth Amendment, forecloses relief for Sosa's over-detention claim. JOINING C.J. PRYOR'S OPINION WERE JUDGES NEWSOM, BRANCH, GRANT, LUCK, LAGOA, AND BRASHER.

JUDGE JORDAN FILED A SPECIAL CONCURRENCE IN WHICH JUSTICES WILSON AND JILL PRYOR JOINED. The concurrence reads a bit like a dissent. These three judges opined that Baker did not foreclose relief. Judge Jordan wrote that the Supreme Court's 2021 qualified immunity decisions, however, broadened qualified immunity to now require that the facts of prior cases be "very, very close to the ones at hand to give officers reasonable notice of what is prohibited." While the inquiry does not require a "case directly on point," it requires that the factual similarity place the

statutory or constitutional issue "beyond debate." While there was a prior Eleventh Circuit case that appeared to provide a right to sue, Baker muddied the waters to the point that a fictional officer reading both cases would not know for certain that three days of detention was unlawful. He wrote that the concurrence was a "reluctant one," because qualified immunity does not jibe with the law at the time of the adoption of section 1983 in the 1870s. He called upon the Supreme Court to do away with qualified immunity (setting the stage, of course, for Sosa to try to take this issue to the Supreme Court).

JUDGE NEWSOM, WHO WAS IN THE MAJORITY, WROTE A CONCURRENCE JOINED BY THE CHIEF JUDGE AND JUDGE LAGOA, ALL OF WHOM WERE IN THE MAJORITY. The three judges—including the chief judge who wrote the majority opinion—all seem to lament the outcome. The concurrence notes that Sosa "must have felt like he had been dropped into a Kafka novel." Judge Newsom added that what happened to him was "awful." He opined without deciding that locking him up for three days while he kept insisting they had the wrong man "might even have been tortious." The concurrence opined that Baker foreclosed relief and the Eleventh Circuit case holding that a cause of action existed applied to a detention that was more than twice as long. The detention in Baker was three days, just like Sosa's detention. The concurrence added, "It really is as simple as that." The judge opined that incorporation theory of substantive due process should be chucked out in favor of reviving the Privileges or Immunities Clause and that substantive due process is a silly constitutional right that should not support 1983 claims.

JUDGE ROSENBAUM WROTE THE LONE DISSENT, but he made up for being alone by writing 59 pages. He opined that Baker did not foreclose the cause of action, and the majority was essentially on the wrong side since everyone agreed that Sosa was mistreated. The proper standard, he opined, was that a cause of action existed where the officers knew or should have known that Sosa was entitled to release. Judge Rosenbaum felt that the Fourth Amendment should not tolerate detention for days when jail deputies have the means available to definitively and easily determine that they have the wrong person. The detention was "unreasonable" and, therefore, unconstitutional.

https://media.ca11.uscourts.gov/opinions/pub/files/202012781.enb.pdf

Supreme Court of Florida

Fried v. State of Florida—(J. Polson; FLSC; 1/19/23). This is a quick summary of a case of public importance. Florida Agricultural Commissioner Nikki Fried and the City of Weston both sued the State of Florida to attempt to prevent the State from punishing local government officials and local governments for violating section 790.33, Fla. Stat. (2021). The new statute preempts local firearm regulations and provides punishment for local government decisions that are more restrictive on firearms than the state statute. The fines can be up to $5,000 for officials and up to $100,000 for local governments. The argument that survived to the appellate level was that enforcement of the penalty against officials would violate legislative immunity, and enforcement against local governments would violate the immunity for discretionary government functions. The trial court agreed with the challengers, but both the First District and the Supreme Court of Florida agreed with the governor and legislature that the fines were permissible and that the two types of immunity did not prohibit enforcement. As with many recent opinions, JUSTICE FRANCIS DID NOT PARTICIPATE, and JUSTICE LABARGA DISSENTED, arguing that courts cannot punish for legislative processes.
https://supremecourt.flcourts.gov/content/download/858250/opinion/sc21-917.pdf

In Re: Amendments to Florida Rules of Civil Procedure 1.070 and 1.650—(Per Curiam; FLSC; 1/19/23). This is a fast-tracked amendment to the rule on service of process and the rule for medical malpractice presuit screening in light of 2022 amendments to chapters 48 and 766 of Florida Statutes. On January 2, 2023, chapter 2022-190, Laws of Florida, took effect. The new laws made sweeping changes to the manner of service of process under sections 48.061, 48.062, 48.071, 48.081, 48.091, 48.101, 48.102, 48.111, 48.161, 48.181, 48.184, 48.194, 48.197, 89.011, 495.145, and 605.0117, 607.17101, 607.1520, 617.0504, 617.1510, 620.1117, and 620.1907. There are also important and extensive changes to the medmal presuit procedures under section 766.106. http://laws.flrules.org/2022/190 is a must-read for anyone who initiates civil suits. In regard to the medmal change, service need not be by certified mail any longer. Now, you can serve by certified mail, USPS with a tracking number, an interstate commercial mail carrier or delivery service, or a process server. Proof of service to an address on file with the Department of Health, Secretary of State, or ACHA creates a rebuttable presumption that service was received by the prospective defendant. If service is challenged, the trial court must hold a hearing to find out whether the prospective defendant "or a person legally related to the prospective defendant" was provided the notice and the date of the service. Service must be challenged in the FIRST response to the complaint, and if the court determines that service was made but neither the prospective defendant nor a person legally related to the defendant knew or should have known of the service, the court must stay the case for a presuit investigation period, and the statute of limitations and statute of repose is tolled from the time of service until the end of the conclusion of the presuit investigation, and the stay of litigation shall automatically end at the conclusion of the presuit investigation period. Consequently, the Supreme Court of Florida immediately amended Rule 1.070, and it made sweeping amendments to Rule 1.650. The new language in the rule incorporates the four options for service. The new rule deletes the option for challenging service by a motion to dismiss or abate and clarifies that service must be challenged by the first response to the complaint, and that the court must conduct an evidentiary hearing following such a challenge. The Rule incorporates section 766.106(2)(a)(1-4) in regard to time for service and tolling.
https://supremecourt.flcourts.gov/content/download/858251/opinion/sc22-1715.pdf

Second DCA

Massoud v. Stonehenge Residents, Inc.—(J. Sleet; 2DCA; 1/20/23). Congratulations to a *pro se* litigant who actually won an appeal. A Pinellas County judge dismissed a civil small claims suit by Massoud for lack of prosecution after both parties failed to appear at a pretrial conference. Two days later, Massoud mailed a letter to the court that stated that he called three times during the 10 minutes prior to the hearing and was told each time that the case was dismissed. Mr. Massoud enclosed his record of outgoing calls from his mobile phone provider, stated that he had been denied due process, and asked for a "mistrial" related to the error in dismissing his case due to a "no show." The trial court treated the letter as a motion to set aside judgment under Rule 1.540, Fla. R. Civ. P. and denied the motion. Massoud appealed. The DCA first observed that it was correct to treat the letter as a 1.540 motion to vacate based on caselaw stating that a motion to vacate based on excusable neglect is the proper way to challenge a dismissal or default for nonappearance when the party was disconnected from a remote proceeding due to a technical malfunction or some other reason beyond their control. If such a motion grants a colorable entitlement to relief, the court can either grant the motion or hold an evidentiary hearing; it cannot summarily deny the motion. Reversed and remanded for an evidentiary hearing.
https://supremecourt.flcourts.gov/content/download/858301/opinion/212561_DC13_01202023_082023_i.pdf

Third DCA

Bradley v. Trespalacios—(Per Curiam Emas, Scales & Lobree; 3DCA; 1/18/23). This short opinion affirmed a trial court's decision to dismiss a second amended complaint with prejudice and disallow a third amended complaint, noting that while there is "no magic number" of amendments allowed, amendments beyond the third attempt can generally be dismissed with prejudice, especially where there is support for the notion that another attempt would be futile.
https://supremecourt.flcourts.gov/content/download/858154/opinion/220568_DC05_01182023_102113_i.pdf

Gonzalez v. Nobregas—(J. Bokor; 3DCA; 1/18/23). A defendant prevailed in a civil case regarding the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). That act allows prevailing party fees at the judge's discretion. Here, the record reflects that the trial court granted partial summary judgment as to liability in favor of the plaintiff on the FDUTPA claim, but the jury awarded no damages. Based on the record, the discretionary nature of prevailing party fees under FDUTPA, and the analytical framework (analyzing seven statutory factors), the DCA found no abuse of discretion in the trial court's denial of fees and costs to Gonzalez on the FDUTPA claim. The bulk of the case dealt with the defendant's alternate/additional claim for prevailing party fees under section 768.78, Fla. Stat. That statute entitles a defendant to reasonable attorney's fees and costs where the defendant serves a valid offer of judgment, not accepted by the plaintiff within 30 days, and "(1) the judgment is one of no liability; (2) the judgment obtained by the plaintiff is at least twenty-five percent less than the defendant's offer; or (3) the cause of action was dismissed with prejudice." Nobregas didn't accept the offers within 30 days and Gonzalez received a judgment of no liability. The only question, then, was whether the offer complied with the requirements of the fee statute. The statute requires that the offer:

> (a) Be in writing and state that it is being made pursuant to 768.78;
> (b) Name the party making it and the party to whom it is being made;
> (c) State with particularity the amount offered to settle a claim for punitive damages, if any;
> (d) State its total amount.
>
> The offer shall be construed as including all damages which may be awarded in a final judgment.

Rule 1.442, Fla. R. Civ. P., applies additional requirements, and the offer has to comply with both the statute and the rule. The DCA affirmed the trial court's decision that the defendant's offer was deficient under both the statute and the rule. First, the offer required the plaintiff to execute a release, but the release was neither attached nor described in sufficient detail. All nonmonetary terms have to be described with particularity. The offer also was ambiguous on the question of punitive damages. The plaintiff had moved to amend the complaint to add a claim for punitive damages, but the part of the offer that requires that the party state with particularity the amount offered to settle a claim for punitive damages stated that punitive damages were not sought. This rendered the proposal at least ambiguous. Finally, payment was required on the date of "settlement," but "settlement" was not defined. Any ambiguous proposal renders an offer of judgment unenforceable. The DCA did reverse the denial of costs, however, because section 57.041(1) requires an award of costs for a prevailing party, and a "zero judgment" for a defendant constitutes a judgment in the defendant's favor.

https://supremecourt.flcourts.gov/content/download/858147/opinion/211826_DC08_01182023_101223_i.pdf

Serviquim CA, etc. v. Manuchar NV, etc.—(Per Curiam Fernandez, Emas & Miller; 3DCA; 1/18/23). This citation PCA affirmed a finding of personal jurisdiction over a defendant who was a nonresident corporation who was served by personally serving a director of the corporation who was voluntarily present in Florida. It reminds us that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.' Florida courts have personal jurisdiction over a nonresident defendant when that nonresident defendant is properly served with service of process while that nonresident defendant is voluntarily present in Florida. If the return [of service] is regular on its face, then the service of process is presumed to be valid and the party challenging service has the burden of overcoming that presumption by clear and convincing evidence. Process against any private corporation, domestic or foreign, may be served on any director.

There must have been a default judgment and an order denying a motion to vacate based on excusable neglect, because the citation PCA also noted that a conscious decision to use a defective email system without any safeguards or oversight cannot constitute excusable neglect.
https://supremecourt.flcourts.gov/content/download/858131/opinion/212100_DC05_01182023_095039_i.pdf

Fourth DCA

Affenita v. Storfer—(Per Curiam Klingensmith, May & Conner; 4DCA; 1/18/23). The trial court entered a default judgment against the defendant. While most grounds for the default judgment were affirmed, the DCA reversed the lower court's holding that the defendant had waived a defense of lack of personal jurisdiction. The jurisdictional issue was raised before the defendant filed a motion to vacate, and the defendants did not take any action inconsistent with a lack of personal jurisdiction defense. Though other grounds for default were proper, if the trial court lacked jurisdiction over any of the defendants, that would render the order void as to that defendant, and it could be attacked at any time. Reversed and remanded for the trial court to consider the question of personal jurisdiction on the merits.

Progressive Select Insurance Company v. Ober—(J. May; 4DCA; 1/18/23). Ober purchased an auto insurance policy from Progressive, and while on the phone purchasing the policy, she expressed that she wanted to decline Uninsured/Underinsured Motorist ("UM") coverage. The insurance agent told her that she would need to sign a form to reject that coverage. A few days later—before receiving the rejection form—the insured was in an accident. About a month after purchasing coverage, the rejection form showed up in the mail, and the cover letter informed her that she had to fill out the form in order to decline UM coverage. The cover letter added that if she failed to return the letter, UM coverage would be added to her policy. Well, it turns out the person she was in the accident with qualified as an uninsured or underinsured motorist. She made a claim for UM benefits, and Progressive denied the claim. Ober sued for a declaratory judgment that she had UM coverage, and the jury agreed because she had never filled out the rejection form.

In a prior appeal, the DCA affirmed the holding that verbal waivers of UM coverage are not valid—they must be written per section 627.727.

Ober then sought to amend the complaint to add a claim of bad faith for denial of coverage due to the invalid verbal waiver. Ober also sought to add a claim for punitive damages, arguing that Progressive had a regular business practice of issuing policies without a written rejection of UM coverage, which violated section 627.727. Progressive countered that the evidence failed to show the insurer's acts were frequent enough to be considered a business practice, and that those acts were willful, wanton, malicious, or done in reckless disregard of the insured's rights. The trial court sided with the insured, and Progressive appealed. The DCA reminded us that punitive damages pleadings are unusual in that a judge must first rule that there is a reasonable evidentiary basis before a plaintiff can seek such damages.

Section 624.155(5) requires that before a plaintiff may seek punitive damages against an insurer, the plaintiff must make a showing of a reasonable basis for recovery by demonstrating that the violation occurred with such frequency as to indicate a general business practice and the act or acts are:

(a) Willful, wanton, and malicious;
(b) In reckless disregard for the rights of any insured; or
(c) In reckless disregard for the rights of a beneficiary under a life insurance contract.

There is a difference between bad faith and the claim for punitive damages, and plaintiff failed to show that the act here—accepting verbal instead of written UM waivers—was done so frequently that it constituted a business practice. There was no proof of willful, wanton, or malicious acts or reckless disregard for an insured's rights. The insurer simply took the position that Florida law permitted verbal UM waivers. While it was wrong about that, taking that legal position did not trigger a reasonable basis for punitive damages. In a footnote, the DCA made more clear the plaintiff's basis for thinking she had spotted a business practice. Progressive admitted during the discovery phase that it had essentially done the same thing in 3000 cases—signed up an insured who verbally waived UM coverage and then sent then a UM rejection form. This fell short of demonstrating a general business practice that recklessly disregarded rights for one simple reason: plaintiff failed to show that any of those other cases resulted in a denial of UM benefits without the written waiver.
https://supremecourt.flcourts.gov/content/download/858165/opinion/221134_DC13_01182023_101523_i.pdf

Sixth DCA

NOTE: The Sixth DCA made Florida legal history by releasing its first decisions in history on January 17, 2023. Sadly, the court chose to make its first batch of decisions four per curiam affirmances in criminal cases.