TERRY'S TAKES

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

Terry P. Roberts
Terry@FRTrialLawyers.com
Director of Appellate Practice
Fischer Redavid PLLC

January 29-February 4, 2023

Eleventh Circuit

Sabal Trail Transmission, LLC v. 18.27 Acres of Land in Levy County—(J. Rosenbaum; 11th Cir./2/3/23).

This non-personal-injury opinion will be my new go-to language when I am arguing that a prior Eleventh Circuit decision is binding authority in an appeal to the Eleventh Circuit. The opening paragraph states:

> This case is all about our prior-precedent rule. As any practitioner before our Court knows, once a panel—or in this case, the en banc Court—has decided an issue in a published decision, that decision is binding on all future panels. That is so because, as a court of law, we aim for rules to be clear, consistent, and predictable. So when our prior-precedent rule applies, it doesn't matter whether we agree with our earlier decision or not. It doesn't matter whether the prior panel or en banc Court missed an argument or overlooked a reason. It doesn't matter if the current panel thinks the earlier decision was wrong. The current panel must follow the earlier decision.

The case also stated that because a relevant case "applies here, it's game over…"
https://media.ca11.uscourts.gov/opinions/pub/files/202111995.pdf

Supreme Court of Florida

In Re: Amendments to Florida Rule of General Practice and Judicial Administration 2.320—(Per Curiam; FLSC; 2/2/23).

The Supreme Court of Florida has amended the rule on the judicial ethics CLE requirements, deleting the statement that courses on "fairness and diversity" can be used to fulfill that requirement.

JUSTICE LABARGA DISSENTED, noting that the move "paves the way for a complete dismantling of all fairness and diversity initiatives in the State Courts System." As recently as 2020 and 2021, the court had seen a need for more training in this area, but now, without public comment, it is sweeping away references to fairness or diversity.
https://supremecourt.flcourts.gov/content/download/859291/opinion/sc23-114.pdf

In Re: Amendments to Rules Regulating the Florida Bar-Chapters 6 and 21—(Per Curiam; FLSC; 2/2/23).

The Florida bar had asked the Supreme Court of Florida to amend several rules, most of which were minor technical changes. The one notable change is that the court has deleted the procedure for certification in antitrust and trade regulation. It is now impossible to pursue board certification for that area in Florida. The reason for this is that there have "not been any new applications for the certification for the past 12 years," and Rule 6-3.14 provides for a sunset of certification areas if there is insufficient interest. Also, when the court sought public comment, there were zero comments.
https://supremecourt.flcourts.gov/content/download/859289/opinion/sc22-1291.pdf

Third DCA

Brown & Brown of Florida, Inc. v. Tzadik Acquisitions, LLC—(J. Gordo; 3DCA; 2/1/23).

This is a breach of fiduciary duty and negligence claim, but the appeal is mostly about a motion to transfer venue.

> In 2017 Tzadik Acquisitions, LLC, ("Tzadik"), was sued in a wrongful death claim after Alfred Lance III, was shot and killed while present as a business invitee on Tzadik's Kings Trail Apartments property in Duval County. Tzadik had previously hired Brown & Brown, which represented itself as an insurance expert, to plan and manage Tzadik's insurance requirements…. As the wrongful death action proceeded, Tzadik learned Kings Trail was not covered by the insurance policies it had previously obtained with assistance from Brown & Brown. As a result, Tzadik was forced to pay the wrongful death suit out of pocket.

Tzadik then sued Brown & Brown in Miami-Dade for botching the duty to obtain coverage. Brown & Brown moved to transfer venue to Duval County, but the trial court denied the motion. Brown & Brown appealed. The DCA noted that the standard is abuse of discretion. The panel noted that section 47.011, Fla. Stat., provides that actions shall be brought 1) in the county where the defendant resides; 2) where the cause of action accrued; or 3) where the property in litigation is located. The panel also noted that it is the prerogative of the plaintiff to select the venue, and when the choice is based on one of the three statutory alternatives, it will be honored. The representations Brown & Brown made to Tzadik regarding coverage took place in Miami-Dade, the policies were entered in Miami-Dade, and Tzadik made its wrongful death payment from its Miami-Dade office. There was no abuse of discretion, and the motion was denied.
https://supremecourt.flcourts.gov/content/download/859183/opinion/221288_DC05_02012023_102836_i.pdf

Saenz v. Sanches—(Per Curiam; 3DCA; 2/1/23)

The DCA granted a petition for a writ of prohibition after a judge denied a litigant's motion to disqualify the trial judge. The issue was whether the motion was legally sufficient. The motion alleged that the trial court ordered relief that was not sought by either party and also ordered a guardian ad

litem and a party to report acts of two of the other parties' minor children to the police. These actions were sufficient to allege a reasonable fear of bias or prejudice.
https://supremecourt.flcourts.gov/content/download/859173/opinion/221688_DC03_02012023_100821_i.pdf

SMA Behavioral Health Services, Inc. v. Loewinger—(Per Curiam Logue, Miller, Lobree; 3DCA; 2/1/23).

This is a wrongful death action, but it's mostly about an attempt by defendants to transfer venue of the case from Miami-Dade to Volusia County. The facts that gave rise to the claim are simple.

> On October 1, 2018, the decedent, Douglas M. Loewinger, was arrested in Volusia County for a probation violation and admitted to the Volusia County Jail, where he remained for ten days. For years prior to the arrest, the decedent had a history of psychiatric issues and was in the care of a psychiatrist. A few weeks after being released from jail, the decedent was found unconscious on the floor of his bedroom in Volusia County, apparently as the result of a suicide attempt. The decedent was admitted to Halifax Hospital and remained there until his death on December 3, 2018.

The personal representative ("PR") of Loewinger's estate was his father, and the PR filed a wrongful death suit against a private company and another subcontractor that provided medical and mental health services at the jail. He alleged they were negligent or grossly negligent in treating him while he was in custody and that the malpractice essentially led to the suicide.

The PR filed the suit in Miami-Dade on the basis that one of the companies had its corporate headquarters there. The defendants moved to transfer venue back to Volusia. The trial court denied the motion, and the defendants appealed. The DCA noted that courts consider three factors in deciding whether to grant a motion under the doctrine of *forum non conveniens*: (1) the convenience of the parties; (2) the convenience of the witnesses; and (3) the interest of justice.

The standard of review is supposed to be abuse of discretion, but the DCA reversed anyway even though it did not engage in **any** discussion of how the Miami-Dade venue would be "inconvenient" for the defendants or witnesses. Unlike the other panel of the same court in Brown & Brown of Florida, Inc. v. Tzadik Acquisitions, LLC, summarized above, this decision **does not cite** 47.011, Fla. Stat., which Judge Gordo, in the other decision, relied upon to show that actions may be brought 1) in the county **where the defendant resides;** 2) where the cause of action accrued; or 3) where the property in litigation is located. Unlike Judge Gordo, this panel did not cite caselaw stating that it is the **prerogative of the plaintiff** to select the venue and when the choice is based on one of the three statutory alternatives, it would be honored.

Instead, the DCA focused on the fact that Volusia is where all the material facts occurred and the fact that "most" of the witnesses and individual defendants reside "in or near" Volusia County. Volusia is the venue where the decedent was arrested, kept in custody, received the allegedly deficient care, was released from custody, took the actions leading to his suicide, was hospitalized after his actions, and died. (NOTE: Deland, the county seat of Volusia, is around 260 miles from Miami, a 4-hour drive or so. This seems like an extremely low bar for proving "inconvenience.") The DCA opinion essentially stands for the proposition that denial of a motion to transfer will be reversed if the movant can show

that 1) the incident took place in the proposed venue; and 2) the great majority of witnesses or most of the witnesses and parties live in or near the proposed venue). The DCA utterly ignored analysis of inconvenience or the statutory bases for selecting venue or the caselaw that a plaintiff can choose the venue. The DCA did not deny that at least one of the two defendants was headquartered in Miami-Dade; it simply did not factor into their decision.
https://supremecourt.flcourts.gov/content/download/859181/opinion/212320_DC13_02012023_102016_i.pdf

Fourth DCA

Quisenberry v. Bates—(J. Kuntz; 4DCA; 2/1/23).

In the underlying case, Attorney Bates' alleged that Quisenberry, the client, failed to pay the contract amount for his legal representation in a property lien case. The relevant part of the appeal, however, is the discussion on service of process, which is relevant to any civil case. Also, it's notable that this opinion was entered when the DCA denied motions for rehearing and to certify a question, but the court then stated that it was *sua sponte* withdrawing its prior opinion and substituting this opinion in its place.

Attorney Bates attempted to sue Quisenberry, but the process server could not find him, so Attorney Bates submitted a sworn statement alleging constructive service. Attorney Bates claimed that Quisenberry was concealing himself, and there was no one else to serve. The clerk issued a notice of action threatening a default. It was mailed to Quisenberry and published in a newspaper once a week for four weeks. After there was no response, the clerk entered a default.

One year later, Quisenberry filed a motion to vacate the default and quash the service of process, arguing that constructive service by publication does not confer personal jurisdiction in a breach of contract case. (Attorney Bates had sued for breach of contract and unjust enrichment). Quisenberry argued that the proper way to serve someone based on the allegation of concealment is section 48.161, Fla. Stat.

Attorney Bates did not dispute that constructive service was not a proper way to assert personal jurisdiction over Quisenberry, but he argued that an objection to proper service is waived by avoiding personal service and then failing to timely respond to the notice of action. The trial court summarily denied the motion to vacate. Quisenberry appealed.

On appeal, the DCA agreed with Quisenberry that the objection to improper service was not waived. **Constructive service by publication can only be used to confer *in rem* or *quasi in rem* jurisdiction, not personal jurisdiction for purposes of a money judgment**. It simply does not matter whether Quisenberry was concealing himself. **The service by publication in a breach of contract case is void, and so is the default judgment**. Reversed and remanded, but the remand does allow Attorney Bates the opportunity to serve Quisenberry properly.
https://supremecourt.flcourts.gov/content/download/859188/opinion/202252_DC13_02012023_100242_i.pdf

Fifth DCA

DNS Auto Glass Shop, LLC v. State Farm Mutual Automobile Insurance Company—(Per Curiam; 5DCA 2/3/23).

The DCA cited section 47.122, Fla. Stat., and affirmed a trial court's order transferring venue, providing very little detail about the reasoning. The point of writing the opinion was that the court reversed in part with directions that the trial court had to specify in its order—which it had failed to do—that all costs that had accrued in the action including the required transfer fee, a requirement of section 47.191, Fla. Stat.
https://supremecourt.flcourts.gov/content/download/859360/opinion/211894_DC05_02032023_091003_i.pdf

Rhoades v. Rodriguez—(Per Curiam; 5DCA; 2/3/23).

Rodriguez sued Randy Rhoades, III, (no idea if he's related to the dead-at-25 former rock star guitarist for Ozzy Osbourne) after he hit her vehicle with his own vehicle and she suffered injuries. The first trial resulted in a mistrial, and Rodriguez filed a motion for sanctions alleging that Rhoades' attorney, Dale Gobel, had made statements that caused the mistrial that turned out to be misleading and deceptive. She also alleged that Attorney Gobel had used improper methods to obtain her medical records. The trial court ultimately imposed the sanction of striking the defendant's pleadings.

The second trial proceeded to a plaintiff verdict, but the jury imposed far lower damages than she had requested. She moved for additur, and the trial court granted the motion, increasing the damages. The defendant had the choice of accepting the additur or opting for a new trial, and Rhoades rejected the additur and appealed the order granting a new trial and the order granting the sanction of striking his pleadings.

Citing the highly deferential standard of review for an additur motion, the DCA held that the trial court did not abuse its discretion in ordering a new trial after a rejection of additur.

The DCA also affirmed the finding that the defense attorney made intentionally misleading and deceptive statements and improperly obtained the plaintiff's medical records.

The only question left, then, was whether striking the defendant's pleadings was an appropriate sanction. The court recited the mandatory standard under Kozel v. Ostendorf, 629 So.2d 817, 818 (Fla. 1993), for considering whether to strike a party's pleadings as a sanction. The 6-part test is:

> 1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience;
> 2) whether the attorney has previously been sanctioned;
> 3) whether the client was personally involved in the act of disobedience;
> 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion;
> 5) whether the attorney offered reasonable justification for noncompliance; and
> 6) whether the delay created significant problems of judicial administration.

The trial court also noted Attorney Gobel's extensive history of being sanctioned. Most of these factors weighed heavily in favor of a harsh sanction. Ham v. Dunmire, 891 So. 2d 492, 497 (Fla. 2004), however, commands that sanctions not "punish litigants too harshly for the failures of counsel." The DCA noted that there was no evidence of Rhoades participating in his attorney's misconduct, that there was no evidence of prejudice to the Plaintiff, and that the record showed that the plaintiff's attorney also had a significant role in causing the mistrial. (NOTE: I suppose the plaintiff's attorney's role in helping to cause the mistrial was the basis for the finding of lack of prejudice. Having to try a case twice would seem to undoubtedly cause additional expense and prejudice a party, but not if you're partly to blame). In a footnote, the DCA stated that the holding should not be interpreted to mean that non-involvement by the party in the attorney's misconduct always acts as a bar to striking pleadings; rather, the holding applied only the "the facts of this case."

The DCA specifically authorized the trial court, on remand, to sanction the attorney directly and the court went so far as to suggest specific things the attorney should pay for.

The DCA then stated that for "the benefit of the members of the Bar," they would summarize two of the misdeeds that warranted sanctions. First, after serving notices of intent to issue subpoenas, Attorney Gobel prematurely issued the subpoenas. When plaintiff objected to something in the subpoenas, the attorney waited two weeks to communicate to the subpoenaed party. By that time, he had already received the documents. The court called attention to a recent bar case where the same sort of thing resulted in a suspension from the practice of law for 91 days.

Second, counsel used a prior subpoena to seek updated medical records from one of plaintiff's doctors without plaintiff's knowledge or consent by characterizing them as "missing" records. Subpoenas are not continuing in nature. A request for updated records requires a new subpoena. The attorney used the old subpoena to obtain updated medical records without any notice to the plaintiff.

JUDGE JAY CONCURRED SPECIALLY, but since the concurrence was written solely to respond to the dissent, that will be summarized first.

CHIEF JUDGE LAMBERT CONCURRED IN PART AND DISSENTED IN PART. The chief judge concurred with the part of the majority opinion that affirmed the trial court's actions, but he dissented from reversing the sanction of striking the pleadings. He noted that that the court was forwarding the opinion to the Florida Bar. He stated that in light of Attorney Gobel's history of misconduct, the reversal would embolden him to not to change his tactics and "clients will continue to hire him," resulting in further adverse effects on Florida's courts.

JUDGE JAY's concurrence undercuts the footnote in the majority that attempted to distance itself from setting a precedent that striking pleadings is never justified if the party was not involved in the attorney's misconduct. Judge Jay opined that pleadings should never be stricken when the malfeasance can be adequately addressed through a contempt citation or punishment directed at the attorney. A key fact for Judge Jay was that Mr. Rhoades did not hire Attorney Gobel; his insurance carrier did. Perhaps he would have a different view if the party handpicked an attorney with an unethical reputation.
https://supremecourt.flcourts.gov/content/download/859361/opinion/212295_DC08_02032023_091309_i.pdf