TERRY'S TAKES

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

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February 19-25, 2023

NEW ONLINE DOCKETS FOR ALL FLORIDA APPELLATE COURTS

The changes keep coming! Starting March 6, 2023, Florida's appellate courts will retire the highly functional and user-friendly e-DCA dockets and institute a new Online Docket called the Appellate Case Information System (ACIS). Attorneys of record on a case must register in the new system, and non-attorneys are also allowed to register for case-specific information. Public access, however, will not require a registration. A link to the new docket will be posted at supremecourt.flcourts.gov on March 6.

HOUSE BILL 837—TORT REFORM

HB 837, the anti-plaintiff tort reform law being considered by the Legislature, went before the Civil Justice Subcommittee on February 24, 2023. A large number of proponents and opponents spoke during the hearing. The bill was reported upon favorably by the committee with five amendments, the substantive changes being as follows:

- ***Amend section 95.11 to change the statute of limitations for actions founded on negligence from four years to two years;***

- Add to section 624.155, Fla. Stat., a new subsection that would provide that no bad faith action involving a failure to settle a liability insurance claim, including any such action brought under the common law, shall lie if the insurer tenders the lesser of the policy limits or the amount demanded by the claimant either: (a) Before a complaint asserting such claim, accompanied by sufficient evidence to support the amount of the claim, is filed, or (b) Within 90 days of service of such complaint upon the insurer;

- Clarifies that language about a common-law bad faith claim does not create a common-law bad faith claim;

- Create a new statute that provides that notwithstanding section 768.81(4), Fla. Stat., concerning the applicability of the comparative fault statute, in an action for damages against the owner, lessor, operator, or manager of commercial or real property brought by a person lawfully on the property who was injured by the criminal act of a third party, the trier of fact must consider the fault of all persons who contributed to the injury.

On February 25, 2023, at 11:03 a.m., however, the bill was "laid on the table" under House Rule 7.18(a) that refers to needing a quorum. A "CS"—a committee substitution form—was filed. I an no expert on house rules, but this appears to mean that the bill has been tabled due to a lack of a quorum, which constitutes an unfavorable report. I cannot tell if this was done by the Civil Justice Subcommittee (which had reported it favorably the day before) or by the Judiciary Committee, the other committee scheduled to review the bill, because the "Committee" section is currently blank. The bill appears to be on hold as of 12:41 p.m. on 2/27/23.

Supreme Court of the United States

Cruz v. Arizona—(J. Sotomayor; SCOTUS; 2/22/23).

This is not a personal injury case; it's a criminal case. Nevertheless, it deserves a quick mention because a rare coalition of the three liberal justices joined by C.J. Roberts and J. Kavanaugh came together to grant relief to a convicted murderer on death row and also because the Supreme Court invoked and applied a rare exception to the general rule that federal courts cannot intervene under federal question jurisdiction when there is an independent state-law ground upon which to resolve a case. This exception could prove useful in civil cases.

The facts are simple: Cruz was denied his right under Simmons v. South Carolina, 512 U.S. 154 (1994), to inform the jury at his trial that if they opted not to impose the death penalty, he would receive a life sentence without possibility of parole. The rationale behind this strategy is that the jurors may not have impose death if they are assured that a murderer would never be released.

Arizona courts persisted in interpreting Simmons as not applicable in their state until the Supreme Court intervened in Lynch v. Arizona, 578 U.S. 613 (2016).

Cruz applied for postconviction relief under Lynch per an Arizona rule that allows a successive or untimely postconviction motion if there has been a "significant change" in the law that, if applicable, would overturn the defendant's judgment or sentence. The Arizona court denied relief after concluding that Lynch was not a significant change in the law because it was only a change to how the law was *applied*. Simmons existed at the time of Cruz's trial, so the Arizona Supreme Court said it was not "new" even though Arizona courts mistakenly did not apply it until Lynch.

Normally, the Arizona courts' interpretation of its own rule of procedure would preclude a federal court from taking jurisdiction because it would be viewed as an **adequate and independent state-law ground for the judgment**. This 5/4 majority held, however, that the independent state ground in this case was not "adequate" because "an unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude" the Supreme Court's review of a federal question. That rare exception dates back over a century.

Arizona courts had always held that overturning precedent or any clear break from the past constituted a change in the law sufficient to satisfy their procedural rule for postconviction relief. Arizona's decision in Cruz's case departed from established Arizona law for when the postconviction motion

should have been permitted in light of the 180 degree turn under Lynch. Lynch reversed previously binding Arizona Supreme Court precedent holding that Simmons did not apply in Arizona. The Arizona Supreme Court was not free to foreclose federal review by adopting a "'novel and unforeseeable'" approach to Rule 32.1(g) that lacks "fair or substantial support in prior state law."

JUSTICE BARRETT DISSENTED, with JUSTICES THOMAS, ALITO, AND GORSUCH JOINING HER. The dissent actually agrees that the basis for finding an independent state ground to be inadequate was a well-established exception to the general rule precluding review of state-law questions, but the exception can only be applied where the state court's decision reveals hostility to federal rights, and the dissenters did not agree that that was what was going on here even though Cruz's right under Simmons was denied.
https://www.supremecourt.gov/opinions/22pdf/21-846_lkgn.pdf

Eleventh Circuit

MSPA Claims 1, LLC v. Covington Specialty Insurance Company—(C.J. Pryor; 11th Cir. 2/22/23).

When multiple insurers are liable for a Medicare beneficiary's medical costs—for example, when the beneficiary is entitled to recover from both Medicare and a tortfeasor's liability insurer—liability must be allocated between Medicare and the primary plan. Under the Medicare Secondary Payer Act, private insurers are "primary" payers, and Medicare or a Medicare Advantage Organization is the "secondary" payer. Here, a Medicare Advantage Organization paid benefits up front and then sued the primary private insurer under the Medicare Secondary Payer Act (the "Act") to recoup their costs.

The private insurers (in two consolidates cases) argued that the Medicare Advantage Organization was barred from recouping its costs because it waited more than a year to make a claim (and the policy required claims to be filed within a year), and because the Florida Motor Vehicle No-Fault Law statute requires that a presuit demand be made prior to filing suit.

The Medicare Advantage Organization did not deny that it violated the policy by filing a claim after the one-year deadline, and it did not deny failing to make a presuit demand ordinarily required under Florida law. Instead, it argued that both the policy requirements and Florida's presuit demand statute were preempted by the cause of action under the Act, so it didn't have to comply with either.

The district court agreed with the private insurers and granted summary judgment. The Medicare Advantage Organizations appealed.

On appeal, the Eleventh Circuit noted that the Medicare Secondary Payer Act provides a three-year claims-filing period, two years longer than the deadline for filing a claim under the policy at issue in the case. The text of the law only applies that 3-year deadline to claims by the government, not a Medicare Advantage Organization, so the preemption argument fails.

The Eleventh Circuit also agreed with the lower court that Florida's presuit demand requirement under the Florida Motor Vehicle No-Fault Law was not preempted. There are three classes of preemption: field preemption exists "when a congressional legislative scheme is so pervasive" that we can reasonably infer "that Congress left no room for the states to supplement it"; express preemption,

which arises when the text of a federal statute explicitly manifests Congress's intent to displace state law; and conflict preemption may occur "when it is physically impossible to comply with both the federal and the state laws" or "when the state law stands as an obstacle to the objective of the federal law." Put simply, none of these applied. Florida's pre-suit demand requirement does not meet make it impossible to comply with federal law. The statutory notice requirement and corresponding 30-day cure period are procedural requirements that may result in a brief delay. But the Florida law does not prevent or meaningfully impede the reimbursement of Medicare Advantage Organizations that Congress sought to facilitate. Affirmed.
https://media.ca11.uscourts.gov/opinions/pub/files/202112439.pdf

First DCA

Debose v. State—(J. Tanenbaum; 1DCA; 2/22/23).

The First DCA's war on supplementing the record continues. Judge Tanenbaum wrote a lengthy order in regard to a motion to supplement the record in a criminal direct appeal. The Appellant/Defendant entered a plea, and he reserved his right to appeal the denial of his dispositive motion to suppress. The public defender identified the suppression issue as an appellate issue and filed a motion to transcribe the suppression hearing, which was granted and then included in the record on appeal.

The public defender, on appeal, took the full 60-days permitted for an agreed extension after the expiration of the ordinary deadline for the initial brief. On the day the brief was again due, counsel moved to supplement the record with several items. The first set were three exhibits from the suppression hearing that should have been included in the record on appeal but were not. Two were search warrants and one was a video of the victim's interview that was played at the hearing. The DCA allowed supplementation with these items. Fla. R. App. P. 9.200(a)(1) requires the lower-court clerk, in a criminal appeal, to transmit "all exhibits that are not physical evidence" and a copy of any CD, DVD, "or similar electronically recorded evidence," but the clerk failed to do that with the exhibits in question.

The DCA denied counsel's request to supplement with transcripts of three hearings that were not previously mentioned in any designation to the court reporter or filed with the clerk.

Rule 9.200(f)(1), Fla. R. App. P. allows for correction of the record if there is an error or omission, and the court cannot decide the case based on an incomplete record until the opportunity to supplement has been given. Judge Tanenbaum states that this rule can be used to supplement with something that should have been there all along or, instead, to supplement with something that counsel, in good faith, determines to be necessary for a legal argument in the case.

The motion to supplement with transcripts of three hearings did not explain how the hearings were relevant to the issues on appeal except that counsel wanted to review the hearings to determine if any appellate issues exist.

The Court essentially accused counsel of using the supplementation as a back-door extension. The court, instead, suggests that no order is needed from the appellate court to order more transcripts. Rule 9.140(f)(2)(B) allows either party to file motion in the lower tribunal to reduce or expand the transcripts. And a public defender's office (this case involved a PD attorney) has authorization under

sections 27.51(6), and 27.58, 29.006(2), to order transcripts. And requests for additional transcripts can be made in the trial court. If counsel does that and then spots an issue relevant to the appeal, at that point, counsel could file a motion to include it in the appellate record under Rule 9.200(f). There is no comment on whether the DCA would approve a motion for extension in order to do so.

The court noted that reviewing the record in advance takes "planning and diligence," which was not present in the instant case.

The court then gave the clerk of court 30 days to transmit the exhibits and gave the PD 15 further days after transmission to complete and file the Initial Brief.

JUDGE KELSEY CONCURRED IN PART AND DISSENTED IN PART, as she would have granted the motion to supplement in full. She stated, "We've made too much out of a simple and extremely common unopposed motion to supplement the record on appeal, and thereby we have **injected untenable delay in this case**." (NOTE: Judge Kelsey's complaint about the "untenable delay" is well taken. It is hard not to comment on the confusing standard the DCA employs for timely action. The two judges in the majority take the public defender to task for not identifying the three denied transcripts sooner. They lambast counsel for not moving to supplement the record until 90 days after the appellate appointed her office to handle the appeal. She was supposed to review the entire record earlier in the process. But the three-judge panel (presumably with its nine law clerks in addition to the staff attorneys on the motions panel) took a whopping **141 days** to issue the order on what Judge Kelsey calls a "simple and extremely common" motion to supplement. The disparity between the majority's expectations for itself and its battery of lawyers versus its expectations for counsel acting alone is hard to understand.)

Judge Kelsey backs up appellate attorneys in their basis for sifting through the record even when trial counsel doesn't mention a hearing in its statement of judicial acts, as those "too often" consist of boilerplate statements about challenging the "judgment and sentence." Judge Kelsey places the burden on trial counsel to "do better at the outset," and defends appellate counsel's ability to "make up for trial counsel's failures and omissions."

She does agree that "a lot of lawyers seem to be abusing" motions to supplement as back-door extensions, and urges all lawyers to make perfecting the appellate record as early as possible a higher priority, but she would have granted the supplementation with the three hearing transcripts.
https://supremecourt.flcourts.gov/content/download/860723/opinion/221490_NOND_02222023_143429_i.pdf

Third DCA

Comprehensive Health Center, LLC v. Star Casualty Insurance Company—(J. Gordo; 3DCA; 2/22/23).

In December 2013, Angela Cooper, a Star insured, was injured in a motor vehicle accident. CHC provided medical treatment to Cooper. In exchange, Cooper assigned her right to receive personal injury protection (PIP) benefits to CHC. CHC submitted bills to Star for services rendered to Cooper. Between March 2014 and April 2015, Star mailed four checks to CHC in fulfillment of its payment of the bills submitted.

There were two issues that cropped up. In 2015, CHC demanded more money to pay the amounts in full, but Star told CHC that the full policy limits had been exhausted. Then, in 2016, CHC returned two checks to Star because they objected to some language on the checks (perhaps because the checks stated they were payment in full and CHC thought that acceptance of the checks would be taken as a stipulation that it was payment in full). Star did not reissue the checks.

CHC sued for breach of the insurance policy, and Star answered and asserted an affirmative defense that it had fully exhausted the policy limits. CHC disagreed that the benefits were exhausted because it had never cashed the two checks that it had returned.

The trial court agreed with Star and granted summary judgment. CHC appealed.

"The purpose of PIP benefits is to provide up to $10,000 for medical bills and lost wages without regard to fault." Pursuant to section 627.736(1), Florida Statutes, PIP benefits are due to an insured, limited to $10,000 for injuries arising out of ownership, maintenance or use of a motor vehicle. Once the full $10,000 of PIP benefits are "exhausted through the payment of valid claims, an insurer has no further liability on unresolved, pending claims, absent bad faith in the handling of the claim by the insurance company."

"Payment" is not defined under the PIP statute, but two statutes within Chapter 627 state that payment is made when the insurer places the check in the mail. Thus, all benefits were exhausted because Star mailed them, and the fact that the checks were returned does not matter. The policy was exhausted. (NOTE: Uhhh…can they get those two "paid" checks back??). Affirmed.
https://supremecourt.flcourts.gov/content/download/860661/opinion/211612_809_02222023_105909_i.pdf

United Automobile Insurance Company v. Family Rehab, Inc.—(Per Curiam Emas, Scales & Lindsey; 3DCA; 2/22/23).

An insured injured person entitled to personal injury protection ("PIP") benefits received medical care from Family Rehab, Inc. and then assigned his benefits to the care provider. The care provider made a demand letter. and United Auto paid all the benefits due but neglected to pay the statutory late payment penalty and the postage. These totaled $10.55. On March 5, 2019, Family Rehab filed the underlying Complaint seeking payment of the late penalty and postage. United Auto paid the late payment and postage on June 29, 2019.

The trial court awarded Family Rehab nearly $5,000 in attorneys fees. United Auto appealed the fee award.

In South Florida Pain & Rehabilitation of West Dade v. Infinity Auto Insurance Co., 318 So. 3d 6 (Fla. 4th DCA 2021), the Fourth District held that an insured's assignee is not entitled to attorney's fees when the insurer timely pays all PIP benefits pursuant to a demand but does not initially pay the late penalty and postage. Everyone agreed that the case was on "all fours," but Family Rehab wanted the Third DCA to reject the holding and certify conflict. Instead, the Third DCA adopted and followed the case and reversed the fee award.
https://supremecourt.flcourts.gov/content/download/860686/opinion/220940_DC13_02222023_101717_i.pdf

Fourth DCA

Neal v. GEICO General Insurance Company—(J. Warner, 4DCA; 2/22/23).

This is a plaintiff-friendly decision in a bad faith case. The plaintiff's car was stolen, and she made a claim with GEICO and reported the theft to the police, but both the police and GEICO became suspicious that Appellant had actually sold the car after they located the car and interviewed the person in possession of it. Evidence ultimately showed, however, that it was the sale that was fake (the title and bill of sale were forged), so the car really ***had*** been stolen. Despite this, GEICO acted on its earlier suspicion and denied the claim for the lost car.

Neal sued for breach of contract, and she also served a civil remedy notice ("CRN") on GEICO and the Department of Financial Services.

GEICO sent a letter to Neal's attorney sticking with its story that the car was sold, not stolen, omitting all information about the subsequent investigation showing that the sale was faked. GEICO did not complain that the CRN was deficient.

GEICO ultimately caved and paid $20,000, and the final judgment gave Neal 30 days to file her section 624.155 bad faith claim. She did so.

GEICO moved to dismiss the bad faith claim for failure to attach the insurance policy and failure to state a proper claim for damages, but again did not complaint about the CRN. The motion was denied, and GEICO filed an answer and affirmative defenses that did not mention the CRN.

The case proceeded well into discovery and a trial was set. Eighteen months into the case—and three months prior to trial—GEICO moved to dismiss based on alleged deficiencies in the CRN. The lower court denied the motion but did allow GEICO to amend its affirmative defenses to add a claim about the deficiency of the CRN. Neal filed a reply that argued that GEICO was estopped from raising a deficiency in the CRN due to waiver. GEICO then moved for summary judgment on the CRN-inadequacy issue, arguing that the CRN failed to adequately describe the violation, failed to cite specific policy language, and failed to articulate curative action sought. The lower court agreed and granted summary judgment. Neal moved for rehearing, but it was denied. Neal appealed.

The DCA did not reach the merits of the whether the CRN was sufficient. It agreed that the insurer waived any objection to the CRN that was not raised in the response to the CRN. "[T]he purpose of the CRN is to facilitate and encourage good-faith efforts to timely settle claims before litigation, not to vindicate continuing efforts to delay." Reversed and remanded for further proceedings on the bad faith claim.
https://supremecourt.flcourts.gov/content/download/860692/opinion/213124_DC13_02222023_095122_i.pdf

Sixth DCA

Danforth v. Danforth—(Per Curiam; 6DCA; 2/24/23).

An order on a Rule 1.540 motion for relief from judgment, degrees, or orders must be appealed within 30 days of the order. A motion for rehearing or similar motion will not toll the 30-day deadline.