TERRY'S TAKES

May 21-27, 2023

Eleventh Circuit Court of Appeals

Wade v. McDade

11th Circuit Court of Appeals
5/22/23, Judge Newsom
Topics: 1983 (Eighth Amendment)

Over a four-day stretch during his incarceration at Walker State Prison in Georgia, David Henegar failed to receive his prescribed seizure medication. On the fourth night, Henegar had two seizures that permanent brain damage. Proceeding under 42 U.S.C. § 1983, Henegar sued five prison employees—Lieutenant John Stroh and Sergeant Jerome Scott Keith, as well as nurses Sherri Lee, Julie Harrell, and Cindy McDade—alleging that they were deliberately indifferent to his medical needs in violation of the Eighth Amendment.

The district court granted summary judgment to all five defendants on the ground that they were entitled to qualified immunity. Shortly thereafter, Henegar died from causes unrelated to the seizures that he suffered while in prison. His sister, Betty Wade, now pursues his claims on appeal as the personal representative of his estate.

The Eleventh Circuit, for the first time, held that a plaintiff must demonstrate "more than ***gross*** negligence" in making out an Eighth Amendment medical neglect case. Under that standard, the Eleventh Circuit affirmed the qualified immunity findings. The Court wrote 29 whole pages on how the simple facts of failing to give the decedent his required medication—which undoubtedly caused his brain injury—wasn't "more than gross negligence."

The Court explained that 1983 deliberate indifference medical claims have "evolved in the years" (i.e. courts have added more and more preconditions to plaintiffs just proving a violation) to require both an objective (objectively serious medical need) and a subjective component. The subjective component entails three subparts: The plaintiff must prove that the defendant (1) actually knew about a risk of serious harm; (2) disregarded that risk; and (3) acted with more than _____ negligence. The court stated that the blank line was intentional because for

> more than 25 years now, our case law regarding a deliberate-indifference claim's mens rea element has been hopelessly confused, resulting in what we'll charitably call a "mess." We've tried to clean up that mess at least twice, but seemingly to no avail, as panels continue to flip-flop between two competing formulations: "more than mere negligence" and "more than gross negligence."

The panel opted to take the more defendant-friendly of the two standards, noting that the harsher standard was "dispositive with respect to two of our defendants" who neglected the plaintiff's need for his anti-seizure meds with "more than mere negligence," something the panel decided was worthy of legal protection sufficient that the case should never go to a jury.

Defendant #1 was excused because he didn't know it was that serious. His son was epileptic and could safely miss doses of his meds. (NOTE: This interpretation of the subjective requirement is devastating. So now anyone who doesn't understand why a drug was prescribed can deny a prisoner a prescribed medication and claim they are not a doctor and don't understand why it's serious).

Defendant #2 was excused because while he notated the lack of the Rx and may have failed to pass along this information to the nurses, the fact that he made the notations and kind of hoped someone would read them and see that the inmate never received his meds meant he wasn't more than grossly negligent.

Defendants #3 and #4 were a "closer call." They were nurses who knew that Plaintiff was not getting his meds and that it could be serious. They staffed the "pill call"—the process of handing out the meds. They disregarded the risk of serious harm. They knew about a backup of a supply of the required drug, had access to it, and could have ordered it. Their statements that more of the drug was "on order" was more than merely negligent because they checked to see that more pills would be arriving soon. The fact that there was a serious risk of missing any of the pills and that missing three or four days caused brain damage and death did not, in the court's view, push the negligence into the more-than-grossly-negligent realm because, hey, pills were on order and would arrive someday. This was more than "mere" negligence, but not more than "gross" negligence.

Defendant #5 was, admittedly, a justified summary judgment. She was alleged to be have been a supervisor who did not directly participate. Section 1983 does not, under court-made case law, permit vicarious liability, and while plaintiff argued that she directly was to blame because of improper training of the staff (failing to train the officers to contact a nurse if they encountered a medication issue) rather than just making a mark on a form, the policy was not deliberately indifferent on its face.

JUDGE NEWSOM CONCURREED SPECIALLY to opine that medical neglect should not even be considered a valid cause of action under 1983 because medical neglect shouldn't be considered "punishment" under the text of the Eighth Amendment. He does not think prison officials can "punish" inmates by failing to provide care. He opines, "Maybe it makes sense to hold prison officials liable for negligently or recklessly denying inmates appropriate medical care. Maybe not. But any such liability, should we choose to recognize it, must find a home somewhere other than the Eighth Amendment…. [Punishment] occurs only when a government official acts intentionally and with a specific purpose to discipline or deter."
https://media.ca11.uscourts.gov/opinions/pub/files/202114275.pdf

Third DCA

State Farm Mutual Automobile Insurance Company v. Central Therapy Center, Inc.

3d DCA
5/24/23, Per Curiam (Logue, Lindsey, and Lobree)
Topics: Amendment of Pleadings

Amendment of pleadings is pretty freely given in Florida, but the Third DCA affirmed an insurance company's denial of a motion to amend to add nine new affirmative defenses. The motion

came seven years after commencement of the case. The case was filed in 2013, and Central Therapy moved for summary judgment in relation to payment of PIP bills under an assignment of benefits. Apparently they forgot to set that for hearing, and nothing happened for three years. The trial court issued a notice of lack of prosecution, Central Therapy issued a notice of trial, and then the case was set for trial…for February 2020. Oops. The COVID 19 pandemic shut everything down again until September, and then State Farm filed its motion to amend to add nine affirmative defenses. The trial court found that the amendment would be prejudicial to the Plaintiff. Citing cases where there was both 1) a long delay between the original pleading and the request to amend; and where 2) the motion to amend came close to the time for trial or summary judgment, the DCA affirmed.
https://supremecourt.flcourts.gov/content/download/869405/opinion/211758_DC05_05242023_100257_i.pdf

Gonzalez v. State of Florida

3d DCA
5/24/23, Judge
Topics: Corporate Representative; Discovery

This criminal case is likely to be of more interest to civil practitioners than it is to criminal lawyers. Citing Supreme Court precedent that goes back to 1974[1], the Third District has reaffirmed that the records custodian of a corporation cannot claim 5th Amendment privilege against self-incrimination on behalf of the corporation. While corporations have some Constitutional rights, they are not protected by the Fifth Amendment. An unincorporated sole proprietorship can claim privilege, but not a corporation—not even if it only has one member.
https://supremecourt.flcourts.gov/content/download/869412/opinion/212369_DC05_05242023_101418_i.pdf

Fourth DCA

Domnin v. Domnina

4th DCA
5/24/23, Judge Gerber
Topics: Disqualification or Recusal of Judge; Writ of Prohibition

In this family law case, the trial court burned through the time for one hearing and then a second hearing. What took so long? Well, there were the husband's trial counsel's arguments at the hearing's outset on whether and how a foreign judgment affected the circuit court's consideration of the wife's motion; detailed witness examinations during the wife's case-in-chief by both the wife's trial counsel and the husband's trial counsel; and the difficulties inherent in conducting a Zoom hearing requiring interpreters.

At the end of the second hearing, the judge asked both parties for written closing arguments, but the husband's attorney objected, noting that only the wife's case-in-chief had been presented and that he had not been permitted to present his own case-in-chief. The judge essentially stated the hearing that gone on long enough. The judge later issued an order holding for the wife. Two days later, the husband filed a motion to disqualify the judge for ruling without allowing him to present his

[1] Hey. Watch it. 1974 wasn't that long ago.

case. The judge denied the motion. The husband filed a petition for a writ of prohibition, and the DCA granted the writ, finding that while the judge's frustration was understandable, not being allowed to present one's case-in-chief before a ruling was sufficient basis to give a reasonably prudent person a fear of not receiving a fair hearing.
https://supremecourt.flcourts.gov/content/download/869444/opinion/230412_DC03_05242023_102038_i.pdf

Lornamead, Inc. v. Fleemin

4th DCA
5/24/23, Judge
Topics: Motion to Dismiss; Personal Jurisdiction

Lornamead is a Delaware corporation with its principal place of business in New York. The Plaintiffs, the Fleemins, filed a products liability action against several defendants alleging that Joanne Fleemin contracted mesothelioma from exposure to asbestos via her use of talcum powder between 1978 and 2015.

The Fleemins argued that based on Mrs. Fleemin's testimony that she bought Yardley Talcum powder in Florida, Lornamead directly or indirectly allowed its products to be sold by intermediaries in Florida. Because the affidavit admitted to distributing to Walgreens during the operative period, the trial court denied the motion to dismiss.

On appeal, the DCA stated that Lornamead sufficiently rebutted the claim that it conducted business ventures in Florida by submitting an affidavit

> that only six bottles of Yardley powder were sold to Walgreens stores in the United States, not specifically Florida, and no Yardley powder was sold to the other stores where Joanne shopped. Although the trial court found that Lornamead "conceded" to having sold the product in Florida, the only mention of Florida within the Lornamead V.P.'s affidavit is that Lornamead does not maintain an office in Florida, has no operations in Florida, is not registered to do business in Florida, and does not own or lease any real property in Florida.
>
> Joanne[Fleemin]'s vague deposition testimony that she might have purchased some of the powder at Walgreens is insufficient to meet her burden to establish personal jurisdiction. Moreover, because of the limited number of sales, if any in Florida, minimum contacts are not established. Evidence that a defendant may have predicted its goods would reach the forum state does not suffice to demonstrate personal jurisdiction, nor is the fact that a defendant merely sold products that ended up in a state sufficient.

There was no evidence Lornamead targeted Florida for sales or purposefully directed any commerce toward the state. Placing a product into the stream of commerce, without more, is insufficient. Reversed with directions to dismiss Lornamead from the case.
https://supremecourt.flcourts.gov/content/download/869443/opinion/223385_DC13_05242023_101841_i.pdf

Wolf v. Peter M. Habashy, P.A.

4th DCA
5/24/23, Judge Warner
Topics: Default Judgment; 1.540 Motion

Dr. Habashy's corporation sued Mr. and Mrs. Wolf, a married couple, for paying for dental services with a worthless check. On the same day that a default was entered against them, their attorney filed a notice of appearance and a motion for extension of time. The following day, the attorney filed a motion to vacate the default judgment. A few days later, the attorney filed an answer with 28 affirmative defenses. The main thrust of the defense was that the Wolfs stopped payment on the check because the work was substandard and Mrs. Wolf had to obtain extensive additional dental work somewhere else. (NOTE: With a wolf disputing a dental charge, there's got to be a good joke in there somewhere. "All the better to sue you with," something like that. I'll keep working on it.)

The trial court set aside the default judgment and set the case for trial. But then the Wolf's lawyer missed a case management conference, and the trial court entered ANOTHER default and then a default final judgment the following day.

Six days later, a new attorney filed a notice of appearance on behalf of the Wolfs and filed a motion to set aside the second default. The motion sought relief under Rule 1.540(b), alleging excusable neglect and a meritorious defense. The prior attorney filled out an affidavit making his case for excusable neglect. First, he said that he didn't receive the hearing notice because his credentials on the statewide e-filing portal had lapsed. Second, he claimed he and his family were dealing with a serious medical issue. Third, he claimed that he had an extreme caseload and staff shortages. Fourth, he claimed that the dentist's attorney "had caused confusion, because another attorney had filed a second suit on the same worthless check charge against appellants, and prior counsel had discussions with appellee's attorney with respect to this second suit, believing that appellee would be dismissing the first suit." The Wolfs also filed an affidavit stating that they sought new counsel as soon as they learned of the default and their prior lawyer's failure to attend the case management conference.

The dentist offered no evidence, but argued that a second default was cause for a crackdown. The trial court agreed and found no excusable neglect. The Wolfs appealed.

The DCA noted that in order to set aside a default final judgment under Rule 1.540(b), the trial court must find excusable neglect, a meritorious defense, and due diligence in seeking relief.

The DCA held that excusable neglect had been shown for the reasons provided by the lawyer. Also, there was a meritorious defense, as intent to defraud—not intent to dispute the charges—is required for the cause of action.

The trial court did not address due diligence, but the motion was filed within six days of the default, which constituted due diligence.
https://supremecourt.flcourts.gov/content/download/869439/opinion/223122_DC13_05242023_101221_i.pdf

Smith v. Lyles
6th DCA
5/26/23, Judge Mize
Topics: Biomechanical Expert; Motion for New Trial

This was a motor-vehicle accident personal injury case. When Lyles was making a right-hand turn at a red light, he saw a truck approaching the intersection, and he hit his brakes. Smith, the driver behind him, rear-ended him. Neither party reported injuries or took their cars for repairs.

Lyles claimed that later that day, he started to feel achy. He went to the hospital, and they found no evidence of recent injuries, but they found preexisting conditions. Lyles claimed that he suffered head, neck, left shoulder, back, and knee injuries. Doctors ultimately recommended spinal and shoulder surgeries.

Lyles sued Smith, and Smith countered that 1) the accident was Lyles' fault for stopping so abruptly for no good reason and 2) his health conditions were preexisting and not caused by the low-speed collision.

Lyles moved to exclude Smith's biomechanical expert via a motion *in limine*, but the trial court allowed the expert to testify. The judge noted that the expert could not testify about whether Lyles was actually injured or permanently injured in the traffic accident.

During *voir dire*, Lyles' attorneys, Morgan & Morgan, explored possible bias against trial attorneys and their firm in particular, and the trial court excluded every juror challenged by Lyles.

After Lyles testified, a juror tried to ask what date he had retained Morgan & Morgan, but the trial court ruled the question inadmissible.

During Smith's testimony, Lyles' attorney asked Smith if he accepted responsibility for the impact and crash, and after Smith stated that it was a "dual responsibility," he stated that the "cause was him, and I think he looked at the—he looked at the TV a lot and saw that Morgan & Morgan doesn't sue people, they sue companies." Lyles' counsel objected and moved to strike, and the trial court gave a curative instruction. Lyles moved for a mistrial. The court reserved on the motion.

In regard to the biomechanical expert, the judge ultimately ruled:

> based on Maines v. Fox, 190 So. 3d 1135 (Fla. 1st DCA 2016), that Dr. Scott could: (1) determine what forces would have impacted a person in Lyles' vehicle in the accident; (2) provide specific acceleration rates in terms of G forces experienced because of the accident; and (3) equate the amount of force experienced in the accident to other experiences (e.g., dropping something on the floor from a certain height). The trial court prohibited Dr. Scott from testifying: (1) that significantly higher forces than the ones at work in the accident were necessary to cause Lyles' injuries; or (2) that only an extremely fragile human being could have sustained an injury similar to that allegedly sustained by Lyles as a result of the accident.

Scott played a 5-second video simulating a crash, and when he was asked whether the test subject in the video was injured in the 5 mph crash, he answered, "No." The trial court struck the answer. Lyles than moved for mistrial, and the court reserved ruling.

The jury held for Smith, the defendant. Lyles moved for new trial, and the trial court granted the motion on two grounds: 1) Smith's answer that Lyles was at fault for the accident because he'd seen Morgan & Morgan TV ads; and 2) Dr. Scott's testimony that constituted medical causation testimony. The trial court held that the curative instructions were insufficient to remove the prejudice from that testimony.

The trial court also held that the finding of no liability was contrary to the manifest weight of the evidence and was the product of prejudice, sympathy, mistake or other considerations outside the record.

Puzzlingly, the DCA found that the trial court erred in granting new trial about Smith's comment on Morgan & Morgan TV ads because the DCA found that the comment did not actually occur even though the DCA directly quoted the question (relating to who caused the accident) and the answer (which conflated the cause of the accident and Lyles watching Morgan & Morgan TV ads). While it is likely that Smith was complaining about the *motive for the lawsuit* as opposed to an actual *cause* of the accident at the time that it occurred, there is no question that the answer was provided in response to a question about causation. But the DCA seems to simply have held that the trial court made all of this up and the statement does not appear in the record.

In regard to the biomechanical testimony constituting inadmissible medical-causation opinion instead of permissible biomechanical testimony, the DCA held that the answer that the test subject in the 5-second video was not hurt did not violate the order *in limine* prohibiting testimony about whether Lyles was hurt or that only an extremely fragile person could have been hurt by such a low-speed crash. That's it. No elaboration. The DCA just found that it didn't violate the order *in limine*, and there is no explanation about the fact that the testimony was obviously admitted to show that because the *test subject* was not hurt, it was not reasonable to conclude that *Mr. Lyles* was hurt in his similar low-speed accident.

In regard to manifest weight of the evidence, while standard of review was abuse of discretion, Judge Mize found that the trial court did not adequately state reasons that were supported by the record. The DCA seems to mix the standard for summary judgment with the standard for whether the greater weight of the evidence favors a party. The DCA noted that there was conflicting testimony about the reason for the stop, with Lyles claiming he saw a truck heading through the intersection, while Smith said there was no truck coming and Lyles stopped for no reason. The DCA held that Smith's testimony that Lyles stopped so suddenly he could not avoid rear-ending him was **sufficient to create a jury question** with no manifest weight in one direction or the other (which appears to be the summary judgment standard). Nowhere in the opinion is it discussed that Florida law contains a rebuttable presumption that a rear-end driver in a collision is negligent, though, of course, the presumption can be rebutted by a showing that the front driver was negligent. The DCA also did not reference the well-established rule that "it takes a stronger showing of error in order to reverse an order granting a new trial than an order denying a new trial." The DCA did not weigh the evidence or elaborate on the plaintiff-friendly evidence and seems to have treated the motion for new trial like a motion for summary judgment, reversing because there was a genuine issue of material fact.

(NOTE: It seems like the analysis constitutes a direct conflict with Brown v. Estate of Stuckey, 749 So. 2d 490, 496 (Fla. 1999), which held that the mere fact that "there may be substantial, competent evidence in the record to support the jury verdict does not" demonstrate an abuse of discretion. As recently as 2022, the Fourth DCA cited Brown and also noted that in determining whether the trial court has abused its discretion in granting a new trial, the reviewing court applies a reasonableness test, according to which, if reasonable persons could differ on the outcome, there can be no abuse of discretion in granting a new trial. Polynice v. Burger King Corp., 351 So.3d 619 (Fla. 3d DCA 2022)(citing Ford v. Robinson, 403 So. 2d 1379, 383 (Fla. 4th DCA 1981))

The DCA held that even if Smith was negligent, a jury could also have found that the accident did not cause Lyles' injuries because there was "ample" evidence that causation was due to preexisting conditions. Reversed and remanded with instruction to enter judgment in Smith's favor.
https://supremecourt.flcourts.gov/content/download/869627/opinion/230064_DC13_05262023_095001_i.pdf

Traveler Insurance Facilities, PLC v. Naples Community Hospital, Inc.

6th DCA
5/26/23, Judge Stargel
Topics: Motion to Dismiss; Personal Jurisdiction

The underlying action involves a dispute over allegedly unpaid or underpaid claims for emergency medical services rendered to several foreign patients by Naples Community Hospital, Inc. (NCH). The foreign travelers treated at NCH and assigned benefits to NCH. The hospital sued for payment from TIF, a travel insurance company based in the United Kingdom. TIF served as the managing agent for URV, a German insurance company. TIF disputed the amount of NCH's bills, and NCH sued in Collier County, Florida.

TIF handles hundreds of claims in Florida. TIF and URV moved to dismiss for lack of personal jurisdiction, and they filed affidavits claiming that they

> (1) have no office, telephone listing, or mailing address in Florida; (2) have no officers, directors, agents, or employees in Florida; (3) have no bank accounts or other tangible personal or real property in Florida; (4) do not hold meetings in Florida; (5) have not directed any advertising specifically toward Florida residents; (6) have never underwritten insurance policies in Florida; and (7) are not aware when clients purchase travel insurance that they will be traveling to Florida. TIF's corporate representative also specifically attested that TIF's salespersons "operate exclusively within the United Kingdom and the Channel Islands."

A forum selection clause in the insurance contracts required that the action be brought in the UK, and the businesses claimed that because policies were required to be purchased by people in the UK, not in the USA or Florida, they did not have sufficient contacts with Florida to subject them to personal jurisdiction.

The trial court denied the motion to dismiss and also found that the forum selection clause was merely permissive.

On appeal, the DCA went through the framework for analyzing personal jurisdiction. To establish personal jurisdiction over a nonresident defendant, the plaintiff must show 1) that the long-arm statute is satisfied and that 2) the defendant has minimum contacts with Florida so as to satisfy due process concerns. The plaintiff has the burden, a defendant can contest jurisdiction by filing an affidavit or sworn proof, and then the burden shifts back to the plaintiff to refute the affidavit or sworn proof.

The trial court, in this case, did not address the long-arm statute, which is pretty stunning. The seminal case requiring that the long-arm statute be expressly addressed is Venetian Salami Co. v. Parthenais, 554 So. 2d 499 (Fla. 1989).

While the DCA claimed it was not doing any factfinding, the DCA assumed without necessarily deciding that section 48193(1)(a)(7), the portion of the long-arm statute dealing with breaches of contract in this state, would not apply because if a contract does not specify where the acts are performed, the law ordinarily assumes that the contract performance occurs where the party resides, and all parties lived abroad.

The DCA admitted that the effect of an assignment of benefits (which definitely took place in Florida) was an open question in Florida. Is that a contract that was performed here because the AOB was assigned here? That question will have to wait for another case, however. In this case, it didn't matter because NCH could not satisfy prong two, the due process requirement of minimum contacts. The DCA found the relevant facts to be that

> Appellants have no offices, employees, or property in Florida, do not issue insurance policies in Florida, and do not advertise to Florida residents. The insurance policies at issue were marketed and sold exclusively to residents of the UK. Appellants' contacts with Florida arose when the insureds, after purchasing their insurance policies, subsequently traveled to Florida and received emergency medical treatment.

Unilateral activity by an insured (traveling to and receiving care covered by the contract in Florida) cannot rope a foreign defendant into jurisdiction. It does not matter that it was foreseeable that people buying travel insurance would travel somewhere and use the policy while abroad. Mere access to policies via the internet in Florida did not confer jurisdiction, as the one person who purchased a policy in Florida was required to—and did—provide a home address in the UK, not Florida.
https://supremecourt.flcourts.gov/content/download/869630/opinion/230301_DC13_05262023_100247_i.pdf