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 22-28, 2023

Supreme Court of the United States

Arellano v. McDonough, Sec'y of Veteran's Affairs—(J. Barrett).

A veteran tried to claim VA disability benefits dating back 30 years to the date of his discharge from the military due to PTSD from service on an aircraft carrier. The VA accepted his disability claim, but dated it back only 10 years earlier to the date that he filed his claim. The law held that the date of disability could be the date of discharge if it was filed within one year of that date. The veteran admitted that his claim came 20 years too late for that, but he argued that the deadline should be equitably tolled because he was too ill to understand he could file for benefits until 30 years later. A unanimous court held that the 1-year deadline could not be equitably tolled because Congress had the power to preclude equitable tolling by writing the law that way, and the law specifically provided that the deadlines were binding.

Third DCA

Florida Dept. of Highway Safety and Motor Vehicles v. Fortes—(Per Curiam Logue, Scales & Hendon; 3DCA; 1/25/23).

This is a wrongful death case about sovereign immunity. In Florida, a governmental entity is not immune from liability where a member of its police force fails to use reasonable care in the performance of an operational level function. It is immune, however, if the action was due to a "planning level function," which is a function requiring basic policy decisions. Operational level functions are those that merely implement or carry out existing policy. Without further explanation, the DCA affirmed the lower court's holding that the police officer's action in question constituted operational acts, not planning acts, and so the department did not enjoy sovereign immunity. The DCA also noted that it would not review the portion of the same order denying summary judgment on the element of duty. Even though the sovereign immunity part of the order was reviewable, the portion of the order denying summary judgment on the element of duty was an interlocutory order that could not be appealed prior to a final order. Affirmed in part, dismissed in part.
https://supremecourt.flcourts.gov/content/download/858699/opinion/220483_DC05_01252023_101811_i.pdf

Gomez v. R.J. Reynolds Tobacco Co.—(J. Logue; 3DCA; 1/25/23).

This is an Engle-progeny tobacco wrongful death case. The decedent's wife was declared personal representative ("PR") of his estate, and she filed a complaint seeking non-economic pain and suffering

for herself or, in the alternative, for the decedent's three children from a prior marriage. All three children had reached adulthood.

Under Florida's wrongful death statute, adult children can only recover for wrongful death of a parent if there is no surviving spouse (§ 768.21(3)), so the tobacco companies (RJ Reynolds and Philip Morris) moved to dismiss the claims seeking benefits for the adult children. There is a conflict between the Fourth and Fifth DCAs on whether the surviving spouse had to be married to the decedent prior to the injury in order to be considered a surviving spouse under the wrongful death statute. The PR married the decedent after the date of injury in this case, so the decedent's children say they—not their mother-in-law—should be the ones to claim wrongful death benefits.

There's an additional problem. Since the PR is the only entity that can bring a wrongful death suit, the children were never actually parties. Despite this, the trial court allowed the children to appear with an attorney and the hearing on the motion to dismiss. The trial court granted the motion to dismiss. The children appealed and alternatively challenged the order of dismissal by a petition for a writ of certiorari.

The Third DCA rejected the argument by the children that the order was a partial final judgment that is appealable under Rule 9.110(k). While that rule permits an appeal of an order that disposes of an entire case as to any party, the children of the decedent are not entitled to join the wrongful death action as parties. § 768.20, Fla. Stat. The estate's PR has to bring the suit. Survivors cannot bring their own suits. The order dismissing the children's non-economic compensatory damages claims remains an interlocutory order at this point. Dismissed.
https://supremecourt.flcourts.gov/content/download/858694/opinion/210622_DA08_01252023_100813_i.pdf

Publix Super Markets, Inc. v. Blanco—(J. Lindsey; 3DCA; 1/25/23).

This is a slip-and-fall case where Blanco slipped on something wet on a Publix floor. He filed a 15-page notice of deposition of Publix's corporate representative ("corporate rep") that listed 52 main areas of inquiry, but it was more like 150 when you counted the subsections. Publix filed a motion for a protective order for some of the areas of inquiry.

There was a TWO-DAY hearing on the motion. Though the trial court granted Publix's motion in part, Publix was still unhappy with four areas of inquiry, particularly the request for corporate-wide documents relating to: (1) flooring materials; (2) safety committee meetings; (3) root cause analysis and development of risk management policies and procedures; and (4) workers' compensation claims. Publix filed a petition for a writ of certiorari.

The DCA summarized the standard for seeking cert to quash a discovery order. Publix had to demonstrate 1) a material injury 2) that could not be corrected on appeal and 3) a departure from the essential requirements of law.

The DCA balanced two competing strains of caselaw. When courts uphold these orders, they tend to state that an overbroad discovery order is not a sufficient basis for cert. When courts want to quash these orders, they note that orders that grant *carte blanche* to obtain irrelevant discovery cause

irreparable harm. If courts are convinced that the ordered discovery is not relevant and cannot lead to the discovery of relevant information, courts can grant the petition for cert.

The first problem with the discovery order in this case was that the plaintiff wanted slip-and-fall reports for the entire corporation—over 1,300 stores. Section 768.0755, Fla. Stat., governs premises liability for transitory foreign substances in a business establishment, and that statute requires plaintiffs to show that the business establishment had 1) actual or constructive knowledge of the dangerous condition and 2) should have taken action to remedy it. Constructive knowledge can be demonstrated by showing that the condition existed long enough that they should have known of it or that the condition occurred so regularly that it was foreseeable. The DCA agreed that slip-and-falls that happened at other Publix locations were not relevant to show actual or constructive knowledge of a danger in the store involved in this case. The plaintiff argued that he was pursuing a "negligent-mode-of-operation" theory where actual or constructive knowledge was not an element, but the DCA noted that the Legislature had deleted the negligent-mode-of-operation statute that allowed suits on the basis of "negligent maintenance, inspection, repair, warning, or mode of operation." In 2010, the Legislature replaced that statute with the current actual-or-constructive-knowledge statute. (NOTE: The DCA still did not explain why slip-and-falls at other Public locations would not provide constructive notice if the transitory surface was due to some cause that was common to all Publix locations.)

After noting that negligent mode of operation is not a proper theory of relief, the DCA quashed the discovery order to the extent that it permitted corporate-wide discovery.
https://supremecourt.flcourts.gov/content/download/858701/opinion/220852_DC03_01252023_102000_i.pdf

Fourth DCA

Cleveland Clinic Florida Health System Nonprofit Corporation v. Oriolo—(C.J. Klingensmith; 4DCA; 1/25/23).

All wrongful death claims in Florida must be brought by the estate's personal representative ("PR"). The PR in this case alleged that healthcare providers were grossly negligent when intubating the decedent because the intubation caused fatal brain injuries. The PR sued a corporation and the clinic for vicarious liability, but the PR **did not** sue the healthcare providers (the doctors and nurses) who actually intubated the decedent. After filing the complaint, the PR filed a motion to amend the complaint to allow a claim for punitive damages for the gross negligence of the healthcare providers. While the plaintiff alleged—and the trial court found—that there was a reasonable showing of gross negligence by the medical staff, the DCA disagreed. The DCA noted that the "reasonable showing" requirement was a matter of law, so it reviewed the conclusion *de novo* with no deference to the trial judge.

First, the DCA disagreed that the factual allegations rose to a level of gross negligence as opposed to simple negligence. Punitive damages can be imposed only where there is a showing of either intentional misconduct or gross negligence. Only gross negligence was alleged here. Gross negligence is conduct so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of person exposed to such conduct. It's basically the same level of culpability as criminal manslaughter. The conduct has to be so outrageous that a member of the community would shout, "Outrageous!" (Yes, it says this).

When trying to pin gross negligence punitive damages on an employer, principal, corporation or some other entity based on vicarious liability for acts of other persons, a plaintiff cannot just demonstrate gross negligence by the agent and then pin punitive damages on the defendant on a theory of vicarious liability. Instead, section 768.72, Fla. Stat. requires that the plaintiff show proof that the defendants themselves knowingly condoned, ratified, or consented to the gross negligence.

The trial court had ruled that the proffered evidence showed the doctors and other health care providers were grossly negligent by—contrary to the emergency room physician's recommendation—placing the decedent on a floor level with fewer observation checks, failing to attend to the decedent during the various emergency calls, and beginning intubation without proper supervision, causing the delayed intubation that led to the decedent's death. To support the punitive damages claim against the hospital, the trial court found a jury could conclude that the hospital's response to the incident reflects its "condonement and ratification of the [provider's] gross negligence." And essentially, the DCA didn't feel the urge to shout, "Outrageous!!" So they more or less summarily stated that the facts just didn't meet the standard as a matter of law.

The DCA then said it would have reversed for a second reason even if the doctors had been grossly negligent. The DCA held that there was no evidence that the actual defendants ratified or condoned or approved the conduct. The standard is that the principal was fully informed. Constructive knowledge would not be enough. The DCA notes that "willful ignorance" would be enough, but the DCA brushed by that separate basis for proving "ratification" without analyzing it.

The plaintiff argued that "after the fact" evidence could show ratification, condonement, or consent. The DCA disagreed, noting that comments by the physician after the death, failure to preserve evidence, failure to report or investigate the death, and failure to conduct remedial training could not be relied upon—as a matter of law—to show ratification.
https://supremecourt.flcourts.gov/content/download/858710/opinion/221398_DC13_01252023_100244_i.pdf