TERRY'S TAKES

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

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

February 5-11, 2023

Second DCA

G&G In-Between Bridge Club Corp. v. Palm Plaza Associates Ltd.—(J. Rothstein-Youakim; 2DCA; 2/8/23).

This is not a personal injury appeal, but the case contains important language about the burden of production on affirmative defenses.

This was a dispute between a shopping center landlord and the tenant, a bridge club (a club existing around the card game, bridge) located in the center. After years of occupancy, the landlord tried to change the parking rules in a way that would destroy the bridge club's business because it takes longer to play a game than the parking rules would allow someone to be parked. Both parties sought declaratory judgment about the authority to change the parking rules under the lease. The trial court granted summary judgment in favor of the landlord on its right to set parking rules. The DCA reversed, finding that whether the change was "reasonable" in light of the facts of the case presented a fact issue for a jury, not an issue of law for the judge to resolve.

While the bridge club won the bulk of the appeal, the DCA did devote discussion to affirming summary judgment against the club on some of its affirmative defenses, and that is the portion of the appeal that could apply to personal injury or other civil cases. The DCA opined that the bridge club misapprehended how affirmative defenses work in the summary judgment context.

The bridge club argued that it was not obligated to put forth any argument or evidence on its affirmative defenses (estoppel, waiver, failure of conditions precedent, public policy, unlawful restraint of trade, laches, and tortious interference) because the landlord failed to disprove the affirmative defenses or demonstrate their legal insufficiency.

Under the new summary judgment standard that mirrors the federal rule, a summary judgment movant need not presumptively tackle all of the nonmovant's affirmative defenses. Where a plaintiff moves for summary judgment on its **claims**, the defendant bears the initial burden of showing that an affirmative defense is applicable. Only upon such a showing does the burden shift back to the plaintiff regarding that affirmative defense. This is because the defendant bears the burden of proof on his or her affirmative defenses at trial. The bridge club put forth no evidence or argument, so it did not carry this initial burden. Reversed in part, affirmed in part, and remanded.
https://supremecourt.flcourts.gov/content/download/859616/opinion/213402_DC08_02082023_084514_i.pdf

Third DCA

<u>Staniclas v. Bogran</u>—(Per Curiam Hendon, Gordo & Lobree; 3DCA; 2/8/23).

This citation collects authorities that stand for the proposition that the default of one defendant does not establish and admission of liability against a contesting defendant even if the non-defaulting defendant's liability was just based on a vicarious liability theory for the defaulting defendant's negligence. Collateral estoppel does not establish the elements of the defaulting defendant's liability because that doctrine requires that the matter be fully litigated and that there be a final decision. (NOTE: One wonders if this could be circumvented by suing the negligent party first, obtaining the default, and then suing the second defendant for vicarious liability).
https://supremecourt.flcourts.gov/content/download/859631/opinion/220820_DC05_02082023_095949_i.pdf

Fifth DCA

<u>Baker Family Chiropractic, LLC v. Liberty Mutual Insurance Company</u>—(J. Edwards; 5DCA; 2/6/23).

This 27-page decision is shockingly long considering its first paragraph, which states:

> The underlying litigation and this second appeal to the Court began as a dispute over how to calculate the amount of interest owed by an insurer for failing to timely pay a health care provider who treated an insured pursuant to a Personal Injury Protection ("PIP") policy issued by Appellee, Liberty Mutual Insurance. The net difference between the interest calculated and paid by Liberty Mutual and the amount claimed by the health care provider, Baker Family Chiropractic, LLC, ("Baker Chiro"), Appellant, was $1.48.

That's right, dear reader. The appeal was a fight over $1.48. Interest was owed because Liberty did not pay the medical bill within 30 days of submission. Liberty also failed to take advantage of a safe-harbor provision shielding them from litigation if they paid the amount, penalties, and interest within 30 days of the demand letter. They paid on the 41st day, and, of course, paid $1.48 less than demanded. Even if Liberty had just paid the principal within 30 days of the demand, it would have been shielded from attorney's fees, though not shielded from a lawsuit to recover the penalties and interest. Baker won its argument in the trial court, and Liberty appealed, hoping the DCA would adopt its method of calculating PIP interest and reverse the $1.48 judgment. After Baker filed its answer brief, however, Liberty dismissed its appeal, "effectively conceding that it had lost the dispute." The DCA granted attorney's fees and costs and remanded to the county court.

On remand, the parties litigated entitlement to fees, and the county court, for some reason, found no entitlement to fees. Baker appealed. The DCA noted that Liberty paid too late for either safe harbor (the immunity from suit and the protection against attorney's fees) by waiting until 41 days after the demand letter.

The DCA considered the notion that fees should simply not be awarded when the amount in controversy is *de minimis* (its examples were $4.17, $1.48, and 14 cents), but it countered that the PIP statutes are supposed to provide the quick and easy payment to injured insureds in a no-fault system. The point of fee awards is to balance the playing field between individuals and large and powerful insurance companies. No lawyer would take smaller cases without the prevailing party fees. The fee statute is meant to punish insurance companies who force people to litigate something that could have been easily solved. Litigating a small amount like $1.48 takes two to tango. Liberty could have avoided this whole thing by paying out the small amount, so it shouldn't be able to complain that the fight was over a small amount now that they lost the fight they insisted upon. Also, insurers often pick these small fights because they try to create policy that will apply to a large number of claims. The legislature made it clear: an insured will get fees for winning "any dispute" outside the two safe-harbor protections. The court reversed and remanded instructing the lower court to

> take evidence and consider those matters set forth in section 627.736(8) and all relevant factors discussed in controlling case law, including but not limited to, the result obtained, the certainty of payment, and whether the litigation was a test case. The amount of attorney's fees may be nominal or substantial but must in all respects be reasonable based on the unique circumstances of this case.

JUDGE EVANDER CONCURRED SPECIALLY. He offered advice for the remand, stating that if the

> lawsuit was filed without first making a request for the $1.48 and the ensuing litigation was the result of Baker Chiro's insistence on the payment of attorney's fees and costs incurred in the preparation and filing of the lawsuit, then I would suggest that, on remand, the trial court would likely be well within its discretion to award only nominal attorney's fees to Baker Chiro.

On the other hand, if the hearing on remand shows that Liberty consciously decided to "go to the mat" after a demand for the additional $1.48 in interest, he opined that it would be entirely appropriate to order significant fees to discourage insurers from denying payments courts might find *de minimis*.

JUDGE MAKAR CONCURRED SPECIALLY, concurring fully Judge Edwards' opinion for the court. He also agreed with Judge Evander's concurrence, which appears to make the advice about remand binding even though it does not appear in the main opinion.

He agreed with the Fourth District, however, that interest payments are not an insurance benefits, so he disagreed that attorney's fees would not be available in a case that was solely about interest, not principal benefits.

He found that the fees were owed because Liberty did not timely pay the benefits due and then appealed—and dismissed—the appeal of the judgment for $1.48.

He opined that a court **could** deny fees due over a *de minimis* amount of interest, but he declined to opine that the *de minimis* argument in this case because it wasn't raised in the lower court, perhaps because the insurer wanted to use the case as a test case.

He called upon the legislature to clarify whether fees are available in disputes solely over interest payments.

https://supremecourt.flcourts.gov/content/download/859501/opinion/213137_DC13_02062023_165615_i.pdf

Martinez v. Universal Property & Casualty Insurance Company—(J. Evander; 5DCA; 2/9/23).

This is a homeowner's insurance case. I have largely stopped summarizing these, but this one has an issue that could pop up in any plaintiff-vs.-insurer case. The insurer denied the insured's claim because the insured failed to file a sworn proof of loss prior to filing suit against Universal. The insurance policy at issue provided that in case of a loss to covered property, Insureds were required to send Universal "within 60 days after [Universal's] request," a sworn proof of loss. The policy further stated that no action could be brought against Universal under the policy "unless the policy provisions have been complied with."

Because the Insured never sent a sworn proof of loss before filing suit, the trial court granted summary judgment for the insurer. The insured appealed. The DCA reversed. While the insurer did not perform a condition precedent to filing suit, Universal actually denied the claim **prior** to the date upon which the insureds were required to submit that proof of loss. When an insurer denies in advance that it has any liability under the policy coverage, the formal filing of a proof of loss becomes, in the eyes of the law, a useless and unnecessary thing that would accomplish nothing. An Insured may avoid forfeiture resulting from a breach of a proof of loss condition by proving that the insurer was not prejudiced, and here the fact that Universal did not wait for the condition to be satisfied and moved straight to denying the claim shows that they were not prejudiced. Reversed and remanded.
https://supremecourt.flcourts.gov/content/download/859820/opinion/213016_DC13_02092023_160007_i.pdf