TERRY'S TAKES

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

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Announcements

ANTI-LAWYER BILL HB 837

https://www.myfloridahouse.gov/sections/bills/billsdetail.aspx?BillId=77575
The tort reform bill passed and was signed by Gov. DeSantis on March 24, 2023. The official summary is that the bill:

- creates rebuttable presumption that lodestar fee is sufficient & reasonable attorney fee in most civil actions
- reduces statute of limitations for negligence actions
- provides standards for bad faith actions;
- provides for distribution of proceeds when two or more third-party claims arising out of single occurrence exceed policy limits
- limits applicability of provisions relating to attorney fees in certain actions against insurers
- provides standards for evidence to prove damages for medical expenses in certain civil actions
- requires certain disclosures with respect to claims for medical expenses for treatment rendered under letters of protection; requires trier of fact to consider fault of certain persons who contribute to an injury
- provides that owner or principal operator of multifamily residential property which substantially implements specified security measures on that property has presumption against liability in connection with certain criminal acts that occur on premises
- revises provisions relating to immunity from liability for injury to trespassers on real property; specifies applicability of provisions relating to offer of judgment & demand for judgment.

SERVICE AND SUPPORT ANIMALS RULE CHANGE

In lighter news, Rule 2.540 regarding accommodations for persons with disabilities has been amended regarding the presence of service animals and emotional support animals in the courtroom. In regard to emotional support animals, those are untrained animals who simply comfort the person.

The individual must notify the court in advance under subsection (d), and the court "may" permit the presence of such animals.

And in regard to service animals (animals actually trained to perform services for disabled person), there are two kinds of service animals authorized to accompany someone to court. Dogs….and…***miniature horses***!!! Lil' Sebastian fans rejoice. Parties "should" let the court know in advance when they are bringing a dog or miniature horse service animal, but failure to give advance notice does not preclude the court from allowing the use of a service animal, and the rule says that the court "shall" allow use of service animals subject for Florida law and the ADA. The process for notifying the court is under sub(d) of the rule. So the race is on. Which one of us will be the first to bring a miniature horse to court!!

Supreme Court of the United States

Perez v. Sturgis Public Schools

3/21/23, Judge Gorsuch (unanimous)
Topics: Americans With Disabilities Act

Petitioner Miguel Luna Perez, who is deaf, attended schools in Michigan's Sturgis Public School District (Sturgis) from ages 9 through 20. When Sturgis announced that it would not permit Mr. Perez to graduate, he and his family filed an administrative complaint with the Michigan Department of Education alleging (among other things) that Sturgis failed to provide him a free and appropriate public education as required by the Individuals with Disabilities Education Act (IDEA), codified at 20 U. S. C. §1415. They claimed that Sturgis supplied Mr. Perez with unqualified interpreters and misrepresented his educational progress. The parties reached a settlement in which Sturgis promised to provide the forward-looking relief Mr. Perez sought, including additional schooling.

Mr. Perez then sued in federal district court under the Americans with Disabilities Act (ADA) seeking compensatory damages. Sturgis moved to dismiss. It claimed that 20 U. S. C. §1415(l) barred Mr. Perez from bringing his ADA claim because it requires a plaintiff "seeking relief that is also available under" IDEA to first exhaust IDEA's administrative procedures. The district court agreed and dismissed the suit, and the Sixth Circuit affirmed.

The Supreme Court unanimously held that the IDEA exhaustion requirement does **not** apply to allow dismissal for failure to exhaust because compensatory damages are not available under IDEA, so such relief is not "also available" under that law. There is no need to exhaust.
https://www.supremecourt.gov/opinions/22pdf/21-887_k53m.pdf

Third DCA

Ernesto Suarez v. Roberto Guzman

3d DCA
3/x/23, Judge Emas
Topics: Personal Jurisdiction

Suarez lives in California. Guzman sued Suarez to partition an E-Trade investment account where both were listed as joint tenants with right of survivorship. Suarez moved to dismiss the lawsuit, arguing that Florida courts lacked personal jurisdiction over him.

Along with his motion to dismiss, Suarez attached an affidavit where he contested the claim of personal jurisdiction in the Complaint including his minimum contacts with Florida.

Guzman filed an affidavit supporting the jurisdictional allegations that conflicted with Suarez's "in many respects." Where the affidavits created a question of fact, the trial court is supposed to hold an evidentiary hearing just on the issue of personal jurisdiction. The trial court did not do so because it became convinced that regardless of personal jurisdiction, the court had *in rem* jurisdiction over the investment account. An order denying a motion to dismiss for lack of personal jurisdiction is an appealable nonfinal order under Rule 9.130(a)(3)(C)(i).

On appeal, the DCA did not buy the argument that because the court made its decision based on *in rem*, not personal, jurisdiction, no evidentiary hearing was required. The trial court "adjudicated and denied Suarez's motion to dismiss, which was based on personal jurisdiction," so it necessarily determined the personal jurisdiction question. The Court held that if the lower court, on remand, wanted to hold that it could exercise *in rem* jurisdiction over the property without the need for establishing personal jurisdiction, that was fine. The Court was not commenting on the merits. (NOTE: Honestly, because the circuit court made no findings on the question of personal jurisdiction, it seems that that is exactly what the court already did—essentially find the question of personal jurisdiction moot because it was exercising *in rem* jurisdiction. That said, the plaintiff did file an affidavit and that triggered the need for the evidentiary hearing. Ultimately, this seems like another appeal where the remand will just result in the same outcome).
https://supremecourt.flcourts.gov/content/download/864040/opinion/221388_DC13_03222023_103810_i.pdf

Federal Express Corp. v. Gadith Sabbah,

3d DCA
3/22/23, Judge Lindsey
Topics: Petition for Certiorari, Punitive Damages

Sabbah, the plaintiff below, sued Federal Express for…something. The opinion never gets into it, really. After filing the complaint, Sabbah decided that whatever FedEx allegedly did, he though it warranted punitive damages, so he moved to amend his complaint to all a claim for punitive damages. The trial court granted the motion.

FedEx wanted to challenge the addition of punitive damages, but the central question in this case was whether it was supposed to file an appeal or file a petition for a writ of certiorari. FedEx hedged its bets and filed a petition for cert but also asked the DCA to treat it as an appeal if possible.

The DCA cleared up the question of whether it was an appealable nonfinal order. Because this opinion will not apply to any future cases, you could almost call it a case of LAST impression.

In January 2022, the Supreme Court of Florida amended Rule 9.130(a)(3)(G), Fla. R. App. P. (2023), but the court made the rule change effective April 1, 2022. **The new rule now allows**

interlocutory appeals from non-final orders granting or denying leave to amend a complaint to assert a claim for punitive damages. Prior to that, a cert petition had been the only avenue to challenge such an order.

In this case, the order was rendered on January 7, 2022, and the petition/appeal was filed on February 7, 2022. For some reason, the DCA asked the parties for supplemental briefing on whether the April 2022 rule could apply to allow appellate review instead of cert review. Unsurprisingly, the Court followed cases holding that the case should be handled based on the rules of procedure in effect on the date of the filing of the petition or appeal. And because the petition/appeal was filed before the effective date of the new rule, it had to be handled under the more restrictive standard applicable to a petition for a writ of certiorari, not an appeal. But all similar cases filed after April 1, 2022, will be handled under the new rule.

Handling it as a cert petition was a death knell for FedEx's challenge. The DCA applied an extremely narrow version of cert review. There was no discussion of a departure from the essential requirements of law or irreparable harm to FedEx. Instead, the DCA stated that their review was limited to whether the trial judge's order conforms with the **procedural** requirements of section 768.72, and stated that the court could not review the facts regarding whether the punitive damages claim was "reasonable" Because the judge complied with the procedural requirements, the petition was denied without prejudice to Fed Ex raising the issue in an appeal after entry of a final judgment. https://supremecourt.flcourts.gov/content/download/864035/opinion/220253_DC02_03222023_102526_i.pdf

John Doe 1 v. Archdiocese of Miami, Inc.

3d DCA
3/22/23, Judge Lindsey
Topics: Statute of Limitations (Florida)

John Doe, age 29 at the time of filing his lawsuit, is seeking damages from the archdiocese for its alleged intentional acts related to the sexual abuse by a priest when Doe was under the age of 16. He sued for negligence and intentional infliction of emotional distress. The archdiocese argued that his claims were barred under the statute of limitations. This is a claim of first impression holding that while the negligence claim was barred by the statute of limitations, the intentional tort claim was not.

According to Doe's Complaint, the Archdiocese "employed, retained, supervised, and was otherwise responsible" for the priest who allegedly abused Doe. Under Count II, Doe alleged that the archdiocese committed intentional infliction of emotional distress by "ignoring and concealing credible accusations and physical evidence of child sexual abuse" and allowing the priest to remain in his position with access to children.

The archdiocese cited section 95.11, Fla. Stat., and moved to dismiss based on the statute of limitations ("SOL"). The circuit court granted the motion, and the plaintiff appealed. The DCA dealt with the negligence and intentional infliction of emotional distress claims separately and came to a different result on each.

In regard to the negligence claim, section 95.11(a)(3) provides that a negligence action must be commenced within four years. Section 35.031(1) provides that a claim accrues (and the SOL begins

to run) when the last element constituting the cause of action occurs. In this case, John Doe alleged that the last act of abuse occurred in 2001 when he was nine years old. Thus the SOL ran in 2005.

Doe tried to toll the SOL for the negligence claim under a delayed discovery rule pertinent to child sexual abuse claims, but the Third DCA case that created that rule was later overturned by the Supreme Court of Florida. Thus, nothing saved the SOL from running.

In regard to the intentional infliction of emotional distress, however, the DCA noted that in 2010, the legislature abolished the SOL for actions related to sexual battery on a victim under 16. Section 95.11(9) states that such a claim may be "commenced at any time." Sadly, the statute contains something akin to a grandfather clause that made it applicable only to claims that would not have been time barred on or before July 1, 2010.

The DCA found that the claim "related to an act" constituting sexual battery (even though the claim was not for the battery itself). But did the SOL claim run prior to 2010? Under section 95.11(7), the time limit for an intentional tort based on abuse could be commenced at any time within 7 years after the age of majority or within 4 years after the injured person leaves the dependency of the abuse or within 4 years from the time of discovery by the injured party of both the injury and the causal relationship between the injury and the abuse, whichever occurs later. The DCA had no trouble with the definitions of "abuse" ordinarily applying to acts of individuals but applying to an institution in this case, as the definition is broad (i.e. "any" act). Seven years after John Doe's age of majority was 2017, long after 2010. Thus, his action could be commenced "at any time." The dismissal of the claim, as one that was "related to sexual battery" on a child under 16, was reversed and remanded.
https://supremecourt.flcourts.gov/content/download/864018/opinion/211463_DC08_03222023_101607_i.pdf

Fourth DCA

Vitesse, Inc. v. Mapl Associates LLC

4th DCA
3/22/23, Judge Klingensmith
Topics: Arbitration

In this case, the parties went to nonbinding arbitration and then, for some reason, had a second nonbinding arbitration. Unpleased with the result, Vitesse filed a request for a trial *de novo* under section 44.103(5) and Fla. R. Civ. P. 1.820(h). The rule allows 20 days to file the request for a trial *de novo*, and if a party fails to file it, the judge must enforce the award.

The point of the statute and rule is to require consideration of whether to accept or reject the arbitration and notify the other side of the decision. Nothing in rule 1.820 requires strict compliance regarding the form of the notice. The only mandatory requirement is the time limit. Here, the party sent the notice within 20 days, and it unambiguously expressed the intent to reject the arbitration and go to trial.

There was some sort of scrivener's error in the notice, but it did not affect the party's ability to understand that the party wanted to proceed to trial.

https://supremecourt.flcourts.gov/content/download/864024/opinion/212966_DC13_03222023_095523_i.pdf

Dianardo v. Community Loan Servicing

4th DCA
3/x/23, Per Curiam (Warner, Gross, and Ciklin)
Topics: Service of Process

The DCA affirmed a trial court's order finding personal jurisdiction over appellants **where their lawyer agreed to accept service by mail.** Florida **Rule of Civil Procedure 1.070(i) does not apply** where a defendant's attorney agrees to accept service. Rather, the rule applies where a party defendant is served by mail, without any participation by an attorney.
https://supremecourt.flcourts.gov/content/download/864030/opinion/221093_NOND_03222023_100718_i.pdf