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

April 9-15, 2023

Appellate Case Information System (ACIS)

TheACIS is now online, but it still only contains dockets and information for the Supreme Court of Florida and the First DCA, not the other DCAs. The user guide is here: https://www.flcourts.gov/content/download/861390/file/ACIS-User-Guide.pdf

Eleventh Circuit Court of Appeals

Aspen American Insurance Company v. Landstar Ranger, Inc.

11th Circuit Court of Appeals
4/13/23, Judge Brasher
Topics: Preemption

This is a preemption case. I know. Boring. But a Florida plaintiff tried to sue a transportation broker for negligence based on the broker's selection of a motor carrier. The transportation broker argued that the negligence claim was preempted by the Federal Aviation Administration Authorization Act. Yeah, that's right. It's called the **FAAAA** for short. Also at issue in the case was whether, if the FAAAA applied, plaintiff could wriggle through a "safety exception" to preemption codified at 49 U.S.C. § 14501(c)(1)–(2).

So what sounds like a boring case does actually get a bit spicy. Tessco Technologies, Inc. hired Landstar Ranger, Inc., as a "transportation broker" to secure a "motor carrier" to transport an expensive load of cargo across state lines. But like something out of a movie, a "thief posing as a Landstar-registered carrier" showed up, Landstar turned the shipment over to the thief, and the thief "ran off with Tessco's shipment," presumably never to be seen again.

Tessco presumably filed an insurance claim for the lost cargo, and Aspen American Insurance Company, the insurer, sued Landstar, claiming that Landstar was negligent under Florida law in selecting the carrier.

The Middle District of Florida granted Landstar's motion to dismiss, finding that the claim was preempted by the FAAAA. That statute expressly bars state-law claims "related to a price, route, or service of any motor carrier…, broker, or freight forwarder with respect to the transportation of property." That's pretty broad. The Middle District also held that the so-called "safety exception,"

which states that the preemption provision "shall not restrict the safety regulatory authority of a State with respect to motor vehicles,"—was inapplicable to negligence claims against a broker based on stolen goods. Because this case is sort of in the weeds, and the warning to practitioners is simply that a claim like this was preempted, we will simply leave it at this: the Eleventh Circuit affirmed. Game over for the plaintiff. Maybe they can sell the movie rights. Sounds like a good heist film.
https://media.ca11.uscourts.gov/opinions/pub/files/202210740.pdf

David Williams v. Reckitt Benckiser, LLC

11th Circuit Court of Appeals
4/12/23, Judge Marcus
Topics: Class Action; Products Liability

This was a products liability class action against the manufacturers of "Neuriva," a purported brain performance supplement. The class consisted of anyone who purchased Neuriva. The class alleged false and misleading statements that gave the impression that the product had been clinically tested and proven, which violated Florida, California, and New York consumer protection laws.

The parties agreed to an $8 million settlement and injunctive relief. The validity of the settlement was not in question. Judge Marcus wrote that the "appeal comes to us because one unnamed Class member, and attorney and frequent class-action objector, Theodore Frank, objected in district court and subsequently appealed the district court's approval order," arguing that the settlement was structured to maximize attorney's fees, give the class members almost nothing, and minimize the payout by the manufacturers.

Setting aside the merits of Frank's arguments, the panel concluded that the named plaintiffs lacked standing to pursue claims of injunctive relief because none of them stand to suffer "actual or imminent," not "conjectural or hypothetical," injury in the future. Instead, all of them indicated that they would never purchase Neuriva again. The money is fine, but injunctive relief was not. Thus, the settlement was vacated and remanded.
https://media.ca11.uscourts.gov/opinions/pub/files/202211232.pdf

Deborah Laufer v. Arpan LLC

11th Circuit Court of Appeals
4/12/23
Topics: Rehearing En Banc

Okay, this isn't really a "case." It's just a denial of a request to go *en banc*. I summarize this because the Eleventh Circuit has decided to air its thoughts on a particular type of plaintiff, and the comments may be relevant in some other plaintiff's case.

The issue before the court was whether to grant rehearing *en banc* in Laufer's case, and the court ultimately decided not to do so. The panel decision held that "serial plaintiff Deborah Laufer has Article III standing under a theory of 'stigmatic injury' because she felt 'frustration and humiliation' and a 'sense of isolation and segregation' when she saw that a hotel—one that she admittedly did not intend to visit—was not complying with ADA regulations on its website."

The Supreme Court is going to hear her case on the issue of whether a self-appointed Americans with Disabilities Act "tester" has Article III standing to challenge a place of public accommodation's failure to provide disability accessibility information on its website, even if she lacks any intention of visiting that place of public accommodation.

CHIEF JUDGE WILLIAM PRYOR wrote separately to note that he thought the panel was incorrect in granting standing, but he saw no point in rehearing the case en banc now that the SCOTUS had granted cert.

JUDGE NEWSOM concurred with the denial of rehearing. He wrote to address Judge Grant's dissent. He announced that he shares with her a "pretty profound skepticism" of Deborah Laufer's "litigation program" and decision to ask as a "tester" or test-case plaintiff, noting that she was "most definitely acting like a 'roving attorney[] general.'" He noted that Laufer and two other plaintiffs "most conspicuously represented by the same lawyers" had filed more than 1000 ADA suits against hotels in recent years, alleging a lack of ADA compliance. He stated that "the whole thing stinks to high heaven," and he agreed with Judge Grant that Laufer's "aggressive litigation tactics transgress constitutional limitations." He differed with Judge Grant on the source of the lack of standing. While Judge Grant grounds her lack-of-standing opinion in Article III, Judge Newsom grounds his in Article II. He decries Laufer's "proactive exercise of enforcement discretion—selecting her targets, willingly suffering the necessary injury, and then suing…." He thinks that constitutes an "impermissible exercise of Executive Power in violation Article II. Maybe because he thinks his metaphor of her acting like a "roving attorney general" actually makes her part of the executive branch. While he hints that he'd hold against her on the merits, he admits that he is "just not convinced that Article III itself distinguishes between online and in-person 'discrimination.'"

JUDGE GRANT, joined by JUDGES BRANCH, LUCK, AND LAGOA, all dissented from the denial of en banc rehearing. Judge Grant wrote that the panel's decision in favor of standing is precluded by a 1984 Supreme Court case, which she views as disallowing claims of stigmatic injury or cases where the person witnesses, but does, herself, experience discrimination. She essentially wrote a lengthy opinion about how the case lacks merit and dissented from the decision not to rehear it.
https://media.ca11.uscourts.gov/opinions/pub/files/202014846.1.pdf

Shiloh Christian Center v. Aspen Specialty Insurance Company

11th Circuit Court of Appeals
3/13/23, Judge Newsom
Topics: Contract Interpretation

This is another case that doesn't have too much impact on injury cases, but it does set out an important precedent for the interpretation of insurance contracts. Rather than summarizing the entire case, I simply quote—in its entirety—Judge Newsom's introductory section:

> This is an insurance case. Fear not, keep reading. In determining whether a pair of insurance policies cover losses resulting from "named windstorms," we have to decide an important and (as it turns out) interesting question about the interpretation of written legal instruments: What is a court to do when all the surest proof of contracting parties' subjective intentions and expectations flatly contradicts the surest indicators of an agreement's objective legal meaning?

> At the risk of oversimplifying, Aspen Specialty Insurance Company, a billion-dollar insurance conglomerate, has essentially all of the subjective-intent evidence on its side: The records of the contracting parties' course of dealing, contractual negotiations, and policy applications strongly suggest that the parties intended and expected that the policies would exclude damage caused by named windstorms. But Aspen's policyholder—Shiloh Christian Center, a small Florida church—has the text: However clear the parties' subjective intentions or expectations, the policies do not, by their plain terms, exclude named-windstorm-related losses.
>
> What, then? The district court found the evidence of the parties' subjective intent overwhelming and accordingly granted summary judgment to Aspen. We hold, to the contrary, that, under Florida law—as in the law more generally—in the event of a conflict between clear text, on the one hand, and even compelling evidence of extra-textual "intent," on the other, the latter must give way to the former Cf. CRI-Leslie, LLC v. Comm'r, 882 F.3d 1026, 1033 (11th Cir. 2018). We therefore reverse the district court's decision and remand for further proceedings.

https://media.ca11.uscourts.gov/opinions/pub/files/202211776.pdf

First DCA

Emerald Coast Utilities Authority v. Thomas Home Corp.

1st DCA
4/12/23, Judge M.K. Thomas
Topics: Sovereign Immunity (Florida)

Thomas Home Corporation ("THC") sued the Emerald Coast Utilities Authority ("ECUA") for allegedly misrepresenting the capacity of a sewer lift station. The ECUA is a governmental agency tasked with regulating water, wastewater, and sanitation in Escambia County. It is an independent special district created by the Florida Legislature.

THC relied on representations from the ECUA when it bought property with plans to develop it. After THC bought the property and applied for a sewer permit, the ECUA denied the permit based on a lack of capacity. They literally said the were not taking crap from THC. THC sued for $10 million in damages, presumably because its plans to build a housing developments have gone down the drain.

ECUA moved for partial summary judgment based on the limited wavier of sovereign immunity under section 768.28(5), which caps liability at $200,000 "per person." ECUA also alleged affirmative defenses that it had no duty to provide factually accurate information to THC about its lift stations. It argued that determinations of the necessary safety margins were discretionary decisions for governing for which they could not be held liable.

THC argued that the Legislature had not specifically designated ECUA as sovereign. Even if it was sovereign, the actions here were operational, not discretionary. And if it was an agency, it must also be covered by Chapter 120, Florida Statutes, the Administrative Procedure Act. It had denied it was covered by the APA, so should be estopped from declaring it was an agency.

The trial judge denied ECUA's motion for partial summary judgment. ECUA then appealed the nonfinal order denying the partial summary judgment on sovereign immunity grounds.

The first question: is this really an order ruling on sovereign immunity? Does the DCA have jurisdiction? This was a matter of first impression in the First DCA, and the answer is, "Yes." Even though it's only a damage cap, not a motion to dismiss, because the damage cap is premised on sovereign immunity, the rule allowing interlocutory appeals for denied sovereign immunity claims does apply.

On the merits, the DCA reviewed the claim of sovereign immunity *de novo*. But the facts were not sufficiently developed below to justify summary judgment, so it affirmed the trial court's denial of summary judgment.

JUDGE LONG CONCURRED SPECIALLY, writing that ECUA' s motion had two parts (the claim that it was entitled to sovereign immunity and the claim about the $200,000 per person cap). He agreed that there was insufficient evidence below to determine whether the ECUA is or is not a sovereign entity. He also agreed with Chief Judge Rowe that the liability caps will attach automatically if it proves its case. But the whole question of whether ECUA is a sovereign entity should be resolved pre-judgment.

CHIEF JUDGE ROWE CONCURRED SPECIALLY, writing, that ECUA was not entitled to pretrial judicial declaration on the application of the statutory damages cap. She writes that the caps can only be imposed after a verdict is rendered. She also writes that deciding the issue of the caps before a verdict ignores the fact that the legislature could pass a claims bill expanding the ECUA's ability to pay higher amounts.
https://supremecourt.flcourts.gov/content/download/865893/opinion/download%3FdocumentVersionID=ebaecc22-1b8a-4e1d-bdc9-9c46c37d895e

K.H. v. Agency for Health Care Administration

1st DCA
4/12/23, Judge Osterhaus
Topics: Medicaid Lien

Appellant settled a lawsuit for more than $350,000 after being seriously injured by a criminal act committed at a commercial property. By the time of the settlement, AHCA had paid over $120,000 for Appellant's medical care under the Medicaid program. ACHA then asserted a statutory lien to recoup the $120,000. There is a statutory formula for this under section 409.910(11)(f), Fla. Stat., though a recipient can show reasons why a lesser amount should be paid if he or she can satisfy the standard under section 409.910(17)(b). The recipient did that, but an Administrative Law Judge denied the petition and applied the normal statutory formula. She appealed.

Her first argument was that a "Letter of Understanding" between herself and the commercial property she sued limited the lien to 5% of the settlement, which would just be $13,000. The agreement was between the parties to the civil suit, not the State, though. Medicaid and AHCA never agreed to a 5% limitation. Thus, the letter did not rob ACHA of its right to seek full reimbursement.

Appellant's second argument was that the ALJ erred by rejecting the *pro rata* method of proportioning medical expenses. The *pro rata* method is a way of reducing the repayment amount of medical expenses from a lawsuit settlement by which an injured party establishes the overall value of the lawsuit compared to the settlement amount and applies that same proportion to the total medical expenses paid with Medicaid funds. The *ALJ* found that the *pro rata* argument wasn't raised at the hearing, thus it wasn't preserved. Even if it had been, the record was insufficient to establish the overall value of the lawsuit because there wasn't a transcript of the hearing.
https://supremecourt.flcourts.gov/content/download/865894/opinion/download%3FdocumentVersionID=2029358e-599d-4163-9a4a-bfc93d1881c7

Second DCA

The City of New Port Richey v. Lamko

2nd DCA
4/12/23, Judge Sleet
Topics: Negligence; Sovereign Immunity (Florida)

Two plaintiffs sued the City of New Port Richey for negligence due to injuries suffered as the result of a high-speed pursuit by the city's police officer.

The officer saw a white Range Rover with windows that looked like they were tinted too dark under Florida law. He had heard that a similar vehicle was used in recent narcotic sales. When he executed a U-turn to pull the Rover over, the Rover sped off, and he chased it. Two other officers joined the pursuit, which turned into something out of a movie with speeds over 100 miles per hour and vehicles driving on the wrong side of the road around other cars. The Rover lost control at a T-intersection, hit two parked cars in front of a house, and one of those cars hit Lamko, pinning her between the car and the closed garage door. The second plaintiff is the homeowner, as Lamko was a renter.

The City moved for summary judgment, arguing that the officers did not cause the Rover to wreck and the decision to initiate high-speed pursuit was a policy-making decision protected by sovereign immunity.

The Plaintiffs also moved for summary judgment, arguing that the sovereign immunity waiver statute, section 768.28(9)(d)(2), required the officer to have a reasonable belief that the driver had committed a forcible felony, and that was not true here. Also, the plaintiffs argued that under 768.28(9)(d)(3), Fla. Stat., the City could not claim sovereign immunity because the decision to engage in a high-speed pursuit under the facts of the case violated the City's policy on vehicle pursuits.

The trial court held that the City owed the plaintiffs a duty of care. The trial court held that the decision of whether to pursue was operational, not a planning function that would be protected by sovereign immunity. And the judge agreed with Plaintiff's two arguments.

The City appealed, as a denial of sovereign immunity is a basis for immediate interlocutory appeal without need to wait for a final judgment.

The DCA agreed with the plaintiffs that the foreseeable zone of risk of a high-speed chase includes vehicular accidents, so the City had a duty to the plaintiffs.

In regard to sovereign immunity, **discretionary** action and basic judgmental or discretionary governmental functions of the executive branch are immune from liability, while **operational** acts are not. Discretionary actions include policy and planning. Operational functions reflect the secondary decisions as to how those policies or plans will be implemented. The trial court was correct that the officer's decision of whether to engage in a high-speed pursuit was operational, not an example of policymaking. The City creating a written policy is discretionary, but the officer's "decision in this case to drive ninety-three miles per hour down a street that he knew would dead end into a residential neighborhood to pursue an offender who was driving 100 miles an hour because that offender may have committed a window tint violation amounted to an operational function."

Finally, section 768.28(9)(d) only protects the City if they can show all three requirements of the statute: 1) that the pursuit was not reckless; 2) that the officer reasonably believed the person fleeing committed a forcible felony; and 3) the pursuit was conducted in the manner prescribed by a written policy on high-speed chases after the officer received training on the policy. Without even reaching the "reckless" prong, the DCA held that the trial judge correctly determined that there was no reason to think the driver committed a forcible felony, and the chase did not comport with the written policy.

The City tried to argue that writing down a policy for high-speed chases did not create a duty, but that argument missed the mark. The foreseeable zone of risk test proved the duty. The written policy was pertinent only to the sovereign immunity statute. And the City did not even challenge the finding about there being no reason to think the driver committed a forcible felony. Thus, the Court affirmed the order granting partial summary judgment on the issues of duty and sovereign immunity. https://supremecourt.flcourts.gov/content/download/865847/opinion/222361_DC05_04122023_093956_i.pdf

Third DCA

GEICO Indemnity Company v. Simply Health Care, Inc.

3d DCA
4/12/23, Judge Bokor
Topics: Amendment of Pleadings

Simply Health Care, Inc., was the assignee of the beneficiary of personal injury protection ("PIP") benefits. Simply Health sued GEICO under the PIP policy and then filed a motion for summary judgment.

While the summary judgment motion was pending, GEICO sought to amend its answer to add *res judicata* and collateral estoppel affirmative defenses. The trial court denied the motion to amend and entered summary judgment against GEICO and also entered a final judgment.

The "refusal to allow amendment of a pleading constitutes an abuse of discretion unless allowing the amendment 'would prejudice the opposing party, the privilege to amend has been abused,

or amendment would be futile.'" There was no showing in the record of any of that, so the court reversed summary judgment and the order denying leave to amend and remanded.
https://supremecourt.flcourts.gov/content/download/865868/opinion/221218_DC13_04122023_100403_i.pdf

Fourth DCA

Toth v. Toth

4th DCA
4/12/23, Judge Gerber
Topics: Motion to Stay; Petition for Certiorari

A Florida court departed from the essential requirements of law in a way that irreparably harmed the petition. Specifically, the petitioner in this case had sued the respondent in Pennsylvania. When the case started going the petitioner's way, the respondent filed an extremely similar case in Florida. Their explanation was that they thought that Florida, not Pennsylvania, should have personal jurisdiction. But the PA court had already held that it had personal jurisdiction, and it had already entered partial summary judgment and other orders in petitioners' favor.

Petitioners moved to stay the Florida case pending outcome of the Pennsylvania case, and for some reason, the Florida judge denied the motion to stay. The petitioners filed a petition for a writ of certiorari.

Absent extraordinary circumstances, the rule of priority (dictating that the second-filed case should be stayed) should be obeyed. Exceptional circumstances might include time-sensitive issues involving child custody, visitation, or support or probate issues. The key to invoking the rule of priority is showing that the second-filed suit has similar parties and issues, though absolute identity of parties and identical causes of action are not required. Here, the issues were similar.

The petition was granted, the order was quashed, and the case was remanded with directions to stay the Florida case until a final judgment is entered and any appeals are exhausted in the PA case.
https://supremecourt.flcourts.gov/content/download/865886/opinion/222628_DC03_04122023_102459_i.pdf