TERRY'S TAKES

April 30-May 6, 2023

Eleventh Circuit Court of Appeals

Baker v. City of Madison, Alabama

11th Circuit Court of Appeals
5/3/23, Judge Hull
Topics: 1983 (Fourth Amendment); Excessive Force

This is a federal claim under 42 U.S.C. § 1983 wherein Mr. Baker alleged three things: 1) Officer Nunez used excessive force in tasing him at the scene of an automobile wreck; 2) Officer Hose failed to intervene to prevent Officer Nunez from using excessive force; and 3) the City of Madison, Alabama, admitted that the officer's actions were the result of its municipal policy.

The officers and the city moved to dismiss, relying on body camera footage from the officers. After viewing the footage, the district court judge granted the motion to dismiss.

On appeal, Mr. Baker argued that the district court erred in dismissing the case based on bodycam footage without converting the motion to dismiss into a motion for summary judgment and in granting Officer Nunez qualified immunity. And, of course, the claims against the fellow officer and the city are all contingent upon the claim that the tasing was excessive force that was not entitled to qualified immunity.

The short version is that the Eleventh Circuit affirmed, so the key factors in the case were why Officer Nunez's action in tasing Mr. Baker was not "excessive," why he was entitled to qualified immunity, and why the case could revolve around a bodycam video at the motion-to-dismiss stage.

Mr. Baker is an epileptic who has frequent seizures. Mr. Baker was driving his car when he rear-ended the vehicle in front of him. In his Complaint, he alleged that by the time police and first responders arrived on the scene, Mr. Baker he was in the throes of a seizure. He alleged that both the passenger in his car and the paramedics on the scene fully explained to Officers Nunez and Hose that Mr. Baker was having a seizure and that he was not capable of fully understanding or responding to commands. Despite this, the officers ordered Mr. Baker to get on a gurney and to go the hospital. Mr. Baker declined and said he wanted to speak to his mother. He alleged that he was not physically combative. He alleged that even though both the paramedics and Mr. Baker's friends assured the officers that his seizure would pass in a few minutes and that Mr. Baker could not fully understand them, the officers tased Mr. Baker "multiple times" while attempting to get him to lie on a gurney to go to the hospital.

Mr. Baker alleged that he was not combative, that he did not represent a danger to himself or others, and that he was tased simply for not getting on the gurney. He asked the city to discipline the officers, but the city responded that the officers' actions were consistent with the city's policy.

The Eleventh Circuit agreed with the district court that the bodycam footage "tells a different story." First, the audio showed that the passenger was on the phone with someone and he stated he did not know if Mr. Baker "had a seizure or what, but he crossed the lane of traffic and rear-ended somebody." The paramedic told Officer Reyez that there were three possibilities for Baker's confusion: 1) substance abuse; 2) diabetic episode; or 3) a seizure, but he did not think it was a seizure. He planned to check Baker's blood-sugar. Baker did not comply with the paramedic's attempts to get him to lie on the stretcher or submit to a blood test for blood-sugar levels. He continually asked questions, told people to get off of him, threatened legal action, and then attempted forcibly to reenter his vehicle. Officer Nunes tried blocking his re-entry and tried to remove him from the set using his arm. He displayed the taser, but did not use it. When Officer Nunez pulled Baker out of the driver's seat, Baker resisted, and the officer tased him in the stomach. Baker continued to try to get into his car, so the officer tased him again. Officer Hose (who had been sued for failure to intervene) was not on the scene at the time of the tasing, arriving about two minutes later. Three officers handcuffed Baker. Baker's mother arrived on the scene, and the officers allowed Baker to leave with his mother.

So how does this stuff come in at the motion-to-dismiss stage? Generally, a judge can only consider the pleadings taken as true at the motion-to-dismiss stage. If the parties present, and the court considers, evidence outside the pleadings, the motion to dismiss generally must be converted into a motion for summary judgment. There are two exceptions to this "conversion rule": **(1) the incorporation-by-reference doctrine and (2) judicial notice.** Both exceptions permit district courts to consider materials outside a complaint at the motion-to-dismiss stage. Only the incorporation by reference exception was at issue here. Evidence referred to in the complaint may be considered as incorporated by reference where (1) "the plaintiff refers to certain documents in the complaint," (2) those documents are "central to the plaintiff's claim," and (3) the documents' contents are undisputed. Evidence is "undisputed" in this context if its authenticity is unchallenged. Baker's complaint referenced the bodycam footage, alleging that the video recording was a display of what happened. Also, Baker's counsel asked the judge to allow him to put the video recording into evidence. Because the complaint incorporated the bodycam footage by reference and averred that it showed what really happened, the judge could consider it. The Eleventh Circuit briefly discussed whether the bodycam footage qualified as a "document," and without truly explaining why it did, it just applied the three part test and found that the footage satisfied all three prongs, so they did not dwell on the fact that it was not something one would traditionally call a "document."

In regard to the excessive force claim, there was not a clearly established right to not be tased when physically resisting officers and trying to reenter a car after causing a crash. Though Baker argued that the footage was open to interpretation, the courts disagreed, finding the video clear and finding that it contradicted Baker's pleadings.

Officer Nunez was clearly within the scope of his authority (he was acting as a cop), so the burden was on Baker to show that qualified immunity did not apply. The officer used a taser a single time and did not inflict serious injury. He did it in the context of an investigation into a car accident. (1) Baker repeatedly ignored instructions from Officer Nunez and the paramedics to sit down on the stretcher, (2) Baker failed to provide Officer Nunez with his driver's license when requested, instead attempting to smoke a broken cigarette, (3) Baker ignored an instruction from one of the paramedics to lean against a concrete barrier on the road or against his vehicle, (4) Baker cursed at Officer Nunez, (5) Baker broke free from Officer Nunez's grip, and (6) Baker got back into the driver's seat of his vehicle despite Officer Nunez's commands not to do so. The use of the taser was deemed objectively reasonable.

The video showed that Hose was not on the scene, so even if the taser use had been excessive, Officer Hose would not have had the opportunity to intervene.

To establish municipal liability, a plaintiff must show that (1) his constitutional rights were violated, (2) the municipality had a policy (or custom) that constituted deliberate indifference to that constitutional right, and (3) the municipal policy (or custom) caused the violation. There was no constitutional violation, so the claim has to fail.
https://media.ca11.uscourts.gov/opinions/pub/files/202210732.pdf

First DCA

Whitten v. Clark

1st DCA
5/3/23, Judge B.L. Thomas
Topics: Discovery; Petition for Certiorari

The First District issued an exceedingly short opinion denying a petition for certiorari that is, nevertheless, chilling. The opinion is short on facts, but it appears that a trial court ordered a civil litigant to surrender his smartphone passcode and allow a search of his cellphone for discovery purposes. The First District appears to have held that no civil litigant can meet the test for certiorari relief in such cases.

The case is civil in nature, as Whitten is involved in a suit with three natural persons, one of whom is a party both individually and as a personal representative for a fourth natural person's estate. My guess is that the three people are suing Mr. Whitten for something like wrongful death pertaining to the death of the person whose estate is represented in the suit, but these facts are not made clear.

The DCA offered two citations as the basis for dismissing Mr. Whitten's petition for a writ of certiorari. They are both criminal cases. The first is a 2022 Supreme Court of Florida opinion that held that a criminal defendant could be compelled to surrender his cellphone passcode because he could adequately remedy any harm by appealing after trial. The phone was seized by a warrant. The second case, a First DCA case from 2021, is cited for the proposition that a defendant failed to show he was irreparably harmed by an order compelling him to turn over his smartphone's passcode because he could raise his arguments in a direct appeal or motion to suppress. But, again, that case involved a warrant.

In this civil case (where it is hard to imagine that the other private party has a warrant and where the litigant cannot move for suppression based on search and seizure or self-incrimination constitutional principles and where there has been no finding of probable cause for a search in a warrant), the First DCA holds that the petition could not show irreparable harm sufficient to qualify for certiorari relief because "Petitioner has not even been charged and may never be charged." The DCA did not mention anything about privacy or the multitude of cases granting cert relief in civil cases (where no one was charged with a crime) where a discovery order to surrender a cell phone or other social media data was deemed an irreparable harm that departed from the essential requirements of law. The DCA did not address whether the data was relevant to any civil claim or defense. It simply

seems to hold that neither criminal nor civil litigants can suffer irreparable harm from an order to surrender one's cellphone passcode either pursuant to a warrant or a discovery order in a civil case. https://supremecourt.flcourts.gov/content/download/867909/opinion/download%3FdocumentVersionID=1d511040-4db6-49c3-9018-c8e1b5b64e62

Beyond Billing, Inc. v. Spine and Orthopedic Center, P.C.

2nd DCA
5/3/23, Judge Silberman
Topics: Arbitration; Writ of Mandamus

The parties attended non-binding arbitration. The arbitrator entered an award in Beyond Billing's favor. Less than 20 days later, the parties executed and filed a joint stipulated motion to amend the case management order. The joint motion acknowledged that arbitration had occurred, and it stipulated that the parties required additional time to conduct discovery and to add new claims to the case. It also stated that the case would be "ready for trial" at the projected trial date previously set by the court.

After 20 days had passed following the arbitration award, Beyond Billing moved the trial court to enter a final judgment in its favor per the arbitration award, but the trial court declined.

Beyond Billing filed a petition for a writ of mandamus that asked the DCA to compel the circuit court to a final judgment on the arbitration award. Beyond Billing argued that the court had a ministerial duty to enter the award because no one filed a motion for a trial *de novo* within 20 days after the service of the arbitration award on the parties, as provided in section 44.103(5), Fla. Stat., and Rule 1.820(h), Fla. R. Civ. P.

The DCA denied the petition, finding that a formal motion for trial *de novo* is not required to satisfy Rule 1.820. It found that the joint stipulated motion to amend the case management order "sufficiently indicated the parties' mutual desire and intent to proceed to trial." https://supremecourt.flcourts.gov/content/download/867831/opinion/223228_DC02_05032023_082317_i.pdf

Second DCA

Venus Concept USA, Inc. v. The Angelic Body, LLC

2nd DCA
5/3/23, Judge Smith
Topics: Forum

Angelic Body, LCC, does business as The Ultimate Image Cosmetic Medical Center, a cosmetic medical practice. Angelic Body is owned by Dr. Todd Besnoff, M.D.

In March 2021, Angelic Body purchased a robotic hair transplant system manufactured and sold by Venus Concept USA, Inc. The hair transplant machine is called the iX Artas System with Implantation. The machine was intended for use as part of the cosmetic medical practice.

Dr. Besnoff signed a Sale and Purchase Agreement between Angelic Body and Venus Concept. Paragraph 38 of the sale and purchase agreement contained a forum selection clause stating that Angelic Body consented to jurisdiction of any state or federal court in Broward County, Florida, waived objection to jurisdiction and venue, agreed not to assert lack of jurisdiction or venue including forum *non conveniens*, and that venue of any action brought to enforce or relating to the Agreement shall be brought exclusively in state or federal court in Broward County, Florida.

Both Angelic Body and Dr. Besnoff ended up suing Venus Concept for negligence, claiming that the machine did not work and that it caused damage to the scalps of patients and on Dr. Besnoff himself. Venus refused to refund any of the purchase price. Angelic Body and Dr. Besnoff filed the complaint in Pinellas County. They alleged that Venus Concept's product was defective in materials and workmanship, that the company made material misrepresentations about the device, and that Venus breached an implied warranty of fitness. Dr. Besnoff separately sued for negligence and personal injury for the injuries he allegedly sustained during the botched hair restoration procedure.

Venus moved to dismiss based upon the forum selection clause. The plaintiffs answered that because Dr. Besnoff was not a party to the agreement and he had an independent claim of negligence, the forum selection clause did not apply. The place of the wrong was Pinellas County, and a plaintiff gets to choose the venue. The trial court agreed with the plaintiffs, and Venus appealed.

The DCA noted that review of a forum selection clause is *de novo*. Section 47.011 normally allows a plaintiff to choose where to file a civil suit in any county where 1) the defendant resides; 2) where the cause of action accrued; or 3) where property involved in the litigation is located. Despite this, parties can contract out of this right by entering into a forum selection agreement and forum selection agreements will be honored by courts unless a party can show that enforcement would be unreasonable or unjust.

The first question was whether the forum selection clause was mandatory or permissive. The DCA held that it was mandatory due to the use of the words "venue," "shall," and "exclusively."

The second question was whether the fact that one party—Dr. Besnoff—was not technically a party to the agreement would allow both plaintiffs to disregard the forum selection clause. He owned the business that entered the contract, but the contract was technically only between the two companies, not any natural person.

The test for whether to apply a forum selection clause where some plaintiffs are bound by it and others are not was whether 1) there is a close relationship between the signatory and non-signatories; 2) the nonsignatory's interest is derivative of the signatory's interest; and 3) the claims involving the nonsignatory arises directly out of the agreement. Here, there was a significant relationship between Dr. Besnoff's personal negligence claim and the Agreement. He is the sole owner and operator of Angelic Body. He was technically a patient himself. Joinder of his claim could not override the mandatory forum selection clause between Venus and Ultimate Image. All claims had to be dismissed for improper venue with instructions to transfer the case to the Broward County circuit court.

JUDGE ROTHSTEIN-YOUAKIM CONCURRED IN PART AND DISSENTED IN PART. She agreed that Angelic Body's claims had to be dismissed and transferred under the forum selection clause, but she disagreed that Dr. Besnoff's claim had to suffer the same fate. She noted that he alleged

excruciating personal injuries that could not have been suffered by the company and arose from a breach of common law (negligence), not a contract. She states that any person off the street could have found themselves in the same position as the doctor—who was in the role of patient when he was allegedly injured—and his relationship to the company was not legally relevant in her view. She would separate the claims, send the business's claims to Broward, and keep the doctor's claims in Pinellas.
https://supremecourt.flcourts.gov/content/download/867820/opinion/221276_DC13_05032023_082153_i.pdf

Third DCA

Borgese v. Citizens Property Insurance Corporation

3d DCA
5/3/23, Per Curiam (C.J. Fernandez and Judges Logue and Miller)
Topics: Summary Judgment Standard

This is a citation PCA relying on another case from the Third DCA from earlier this year. In some insurance cases, the failure of the insured to timely report a claim results in a presumption of prejudice against the carrier. That presumption must be rebutted. And in this case, the carrier won the whole case as a result of the presumption of prejudice at the summary judgment stage because the insurer failed to adequately rebut the presumption with summary judgment evidence. Affirmed.
https://supremecourt.flcourts.gov/content/download/867884/opinion/220650_DC05_05032023_104035_i.pdf

Fourth DCA

Blatter v. D.N. Suyte Inc.

4th DCA
5/3/23, Per Curiam (C.J. Klingensmith, and Judges Damoorgian and Levine)
Topics: Default Judgment

D.N. Suite, Inc. sued Mr. Blatter, and he failed to respond to the Complaint. The clerk entered a default against Mr. Blatter, and the Mr. Blatter filed a motion to vacate the default. D.N. Suyte opposed the motion to vacate the default. D.N. Suite also filed a motion seeking a final default judgment.

The trial court held a hearing on both the motion for final default judgment and the motion to vacate the clerk's default, and the trial court sided with D.N. Suyte. The final judgment included some sort of injunction against Mr. Blatter.

Mr. Blatter appealed. The DCA noted that review of a default final judgment is typically done under an abuse of discretion standard, but in this case, because the issues were issues of law, the review was *de novo*.

A trial court cannot enter a default judgment while a motion remains pending that would affect the plaintiff's right to proceed to judgment. If a party is challenging a clerk's default with a motion to vacate, the trial court has to rule on that before ruling on a motion for a final default judgment.

Here, the motion to vacate the default was filed prior to the court's entry of the default judgment, but the trial court granted the motion without addressing the Blatter's motion to vacate the clerk's default. While the parties "almost certainly addressed the motion to vacate at the hearing," there was apparently no transcript of the hearing. And while the lack of a transcript would ordinarily be bad news for the appellant, not the appellee, the order that resulted from the hearing—on its face—did not address the motion to vacate. Reversed and remanded. (NOTE: While this was an issue of law that sprang from the face of the judgment, one wonders if the rule requiring that a party preserve a failure to make findings of fact by filing a motion for rehearing will result in a different outcome in similar cases in the future).
https://supremecourt.flcourts.gov/content/download/867871/opinion/222398_DC13_05032023_100259_i.pdf

Sixth DCA

Bowers v. Orange County

6th DCA
5/5/23, Chief Judge Sasso
Topics: Appealable Order

This appeal involved what Chief Judge Sasso describes as a "jurisdictional quirk" that resulted in the appealed order being considered a non-final non-appealable order.

Bowers was on his fourth amended complaint. He was suing Orange County for trespass, private nuisance, inverse condemnation, and declaratory relief challenging the existence of a prescriptive easement. A series of three "final judgments" were issued by the trial court, but when one examines which counts were resolved by each order, there was at least one count that remained unaddressed.

Bowers, in the trial court, opined that there was no true and valid final, appealable judgment, and he wanted a final judgment (either because he was unsatisfied with something in the "final judgment" or because he was fully satisfied but feared that the trial court had only given him a non-final judgment that might be difficult to enforce). The trial court apparently disagreed and thought that its three final judgments were final enough, so the order for a fourth final judgment was denied. Bowers appealed the denial of the motion for entry of a final judgment.

Orange County argued that the tort claims that were unmentioned in the final orders had been disposed by a final, appealable judgment due to a March 2020 joint pretrial statement and a March 2020 notice of settlement that indicated that the tort claims had been settled.

Bowers disagreed, arguing that a notice of settlement does not equate to a stipulation of dismissal under Rule 1.420, so the tort claims had not been resolved by a final order.

The DCA noted that an appealable final judgment ends the litigation between the parties and disposes of all issues. Also, in multicount complaints, as long as one count remains for disposition, an appellate court lacks jurisdiction to consider other "interrelated counts."

The DCA stated—without analysis—that the complaint presented "seven interrelated counts," so failing to dispose of even one would render any judgment a non-final non-appealable order.

The DCA agreed with Bowers that the trial court had not filed any order disposing of one or more of the tort claims. Even though the record showed that those claims were settled, no order followed. While Rule 1.420 "provides a past for disposition of claims by way of stipulation, and without the need for court order, the parties also did not file a stipulation of dismissal in this case." The DCA declined the county's argument to look beyond the lack of a formal stipulation of dismissal signed by all parties because that is what is required by rule 1.420 to dispose of the claims by settlement without court order.

Because there was no reviewable final order, Bowers' appeal was dismissed (which may not have been the relief he was looking for since he was the one who appealed; there was no discussion of whether the appeal should, perhaps, be recategorized as a petition for a writ of mandamus requiring the court to enter a final order, but hopefully the DCA's opinion will be all the urging that the parties need to file a stipulation of dismissal of the settled tort claims or to otherwise get the trial court to enter a final order resolving the settled claims).
https://supremecourt.flcourts.gov/content/download/868060/opinion/231179_DA08_05052023_100053_i.pdf

Nelson v. McNeill

6th DCA
5/5/23, Judge Nardella
Topics: Appealable Order; Sanctions

Nelson was sanctioned by the trial court in a probate matter. Entitlement to the sanction was found, but the trial court has not yet determined the monetary amount of the sanction. Thus, because judicial labor remains, that portion of his appeal had to be dismissed. Rule 9.170(b), Fla. R. App. P., permits probate appeals only in regard to orders that finally determine a right or obligation. (The remainder of the appeal simply affirmed the judge's determination on the probate matter under an abuse of discretion standard).
https://supremecourt.flcourts.gov/content/download/868061/opinion/231276_DA08_05052023_100648_i.pdf

Roberts v. State of Florida

6th DCA
5/5/23, Judge White
Topics: Writ of Certiorari; Writ of Prohibition

In this criminal case, a defendant opposed a subpoena issued by the State of Florida to obtain his medical records as part of a criminal investigation. The State filed a motion seeking leave of court to issue the subpoena under sections 395.3025 and 401.30, Fla. Stat.

At the time the State filed the motion, it had not charged Roberts with a crime. The motion alleged that Roberts was the driver of a car involved in multiple accidents and that he was taken from the scene by ambulance. The motion alleged that evidence of intoxication was detected by smell and

seen and heard by a deputy sheriff who met Roberts at the hospital. The motion attached unsworn statements by the deputy and an assistant state attorney showing that the filing of a DUI charge against Roberts was imminent.

At a hearing on the motion, no witnesses testified, and no exhibits were admitted. Roberts argued that the State failed to meet its burden to show relevance or a nexus of the medical records to its investigation, but the trial court granted the motion. Roberts then filed a petition for a writ of prohibition.

The DCA noted at the outset that Roberts was seeking an order quashing the trial court's order, but the appropriate mechanism used to quash an order is a petition for a writ of certiorari, not a writ of prohibition. The DCA opted to treat the petition as a cert petition, not a prohibition petition.

The standard for obtaining a writ of certiorari is that the petitioner must show (1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on postjudgment appeal. The second and third elements (known together as the "irreparable harm" test) are jurisdictional and should be considered first.

The two statutes protect medical privacy, and the DCA quickly determined (through citation to three cases) that alleging a violation of either statute establishes irreparable harm. (Compare this to the First DCA's opinion in Whitten v. Clark where the First DCA implied that no order to divulge the contents of a cell phone could result in irreparable harm because the party could raise the improper search, seizure, or discovery order on appeal, and the DCA specifically noted that the fact that the defendant had not yet been charged with a crime was a factor in finding a lack of irreparable harm).

In regard to whether the trial court departed from the essential requirements of law, the Court found that the State had the burden to present "evidence" showing a nexus between the records it was seeking and a criminal investigation it was conducting. Mere argument is not evidence. Attaching unsworn documents to the motion is not evidence. Thus, the order was quashed. (NOTE: It seems likely, however, that the State will simply set the matter for an evidentiary hearing, and the trial court was already inclined to accept the State's factual assertions even when witnesses didn't testify. Thus, the grant of the petition is likely to result in only a temporary victory).
https://supremecourt.flcourts.gov/content/download/868059/opinion/231028_DC03_05052023_095652_i.pdf