TERRY'S TAKES

June 4-10, 2023

Eleventh Circuit Court of Appeals

Marquez v. Amazon.com, Inc.

11th Circuit Court of Appeals
6/7/23, Judge Branch
Topics: Summary Judgment Standard

In this 25-page opinion, the Eleventh Circuit shot down a class action on behalf of Amazon Prime members against Amazon.com. The theory of the case is that one of the benefits of annual "Amazon Prime" membership is "Rapid Delivery," which is set out on the Amazon.com website. The most common form is 2-day shipping.

During the COVID-19 pandemic, Amazon—without notice or warning to subscribers—suspended Rapid Delivery while still charging full price for membership. The company explained that it did so in order to prioritize certain important shipments over others.

The district court granted Amazon's motion to dismiss for failure to state a claim. The Eleventh Circuit disagreed with the trial court that there was no duty to provide Rapid Delivery under the contract, but the court looked to the Terms & Conditions, where Amazon reserved to itself the authority to add or subtract from the list of Prime Membership benefits, and that included the right to "limit" Rapid Delivery." The court also held that Amazon's significant discretionary authority over Rapid Delivery did not render the contract unconscionable. First, the terms and conditions stated: "Amazon may choose . . . to add or remove Prime membership benefits." Second, the Conditions of Use reiterated that "AMAZON SERVICES . . . ARE PROVIDED BY AMAZON ON AN 'AS IS' AND 'AS AVAILABLE' BASIS." AFFIRMED.
https://media.ca11.uscourts.gov/opinions/pub/files/202114317.pdf

Third DCA

Infinity Auto Insurance Company v. Miami Open MRI, LLC

3d DCA
6/7/23, Judge Lobree
Topics: Examinations Under Oath, Summary Judgment Standard

While I do not summarize every PIP (personal injury protection) appeal because they usually only involve billing disputes between insurance companies and medical providers, this one is notable.

The insured, Mr. Amador, allegedly suffered personal injuries in a motor vehicle accident back in 2015. Infinity Auto was his insurer. The insurance company set up two dates for him to submit to Examinations Under Oath (EUOs), but he no-showed both dates. After that date, he sought treatment

at Miami Open MRI, and Miami Open MRI (MRI is already an acronym, but can we just call Miami Open MRI "MOM" for short? I mean…yeah, I'm gonna call them MOM) billed Infinity Auto.

Infinity Auto denied payment on the ground that Mr. Amador had failed to report to his EUOs. As Mr. Amador's assignee, MOM sued Infinity Auto for breach of the insurance policy. Per the policy and section 627.736(6)(g), the requirement to sit for EUOs is a condition precedent to receiving benefits.

MOM moved for summary judgment. MOM argued that the non-appearance at the EUOs was "ineffective" because Infinity Auto did not send the notice of the EUOs to Amador's "retained attorney." Infinity Auto countered that it did not receive a notice of representation from the attorney until after the dates for the two EUOs and after the date that Amador received medical care from MOM. MOM argued that Amador had told the insurance investigator that he had an attorney before both EUO dates, but the investigator had expressly told Mr. Amador that the attorney had to send a letter of representation to the insurance company and that none had yet been received.

Finding that there was no notice to the attorney and no prejudice to Infinity Auto, the trial court denied Infinity Auto's affirmative defense concerning the EUO requirement and granted summary judgment for MOM.

On appeal, the DCA decided that with no formal letter of representation being received by the insurance company, Mr. Amador's statement to the investigator that he had an attorney did not require the insurance company to coordinate EUO dates with the attorney. Amador's failure to attend the two EUOs meant that he failed to satisfy a condition precedent to receiving benefits. So the DCA not only reversed summary judgment in MOM's favor, it remanded with instructions to enter summary judgment for the insurance company.
https://supremecourt.flcourts.gov/content/download/870411/opinion/220948_DC13_06072023_101116_i.pdf

Pacheco v. Samardjich

3d DCA
6/7/23, Per Curiam (Logue, Miller, and Gordo)
Topics: Personal Jurisdiction

This is a rare motor vehicle accident case where a defendant apparently contested personal jurisdiction under provisions of the Hague Convention. The Defendant apparently lived in Florida at the time of the wreck but then moved abroad and tried to hide from service. It's just a citation PCA, so here's the whole thing:

> Affirmed. See Hague Convention, art. 1, 20 U.S.T. 361 (1969)("This Convention shall not apply where the address of the person to be served with the document is not known."); Delancy v. Tobias, 26 So. 3d 77, 79–80 (Fla. 3d DCA 2010)(finding plaintiff demonstrated requisite diligence in attempting to locate defendant where affidavit of diligent search delineated substantial "honest and conscientious" efforts to locate defendant); Fernandez v. Chamberlain, 201 So. 2d 781, 785 (Fla. 2d DCA 1967)("[W]hen a…resident [motor vehicle] owner . . . who subsequently becomes a non-resident[,]…accepts the privilege of the public highways of the state and is involved in an accident, he [or she] has a duty not to conceal his [or her] whereabouts

and to let his [or her] whereabouts be known so that any one [sic] involved in such accident and sustaining injury or damage may come into court and seek redress. If such an owner…conceals his [or her] whereabouts and makes it impossible for an aggrieved party to serve him [or her] with notice by registered mail as provided by the statute and such aggrieved party shows that he has used due diligence in endeavoring to make service, this will not prevent the [c]ourt from obtaining jurisdiction over such owner….")

https://supremecourt.flcourts.gov/content/download/870401/opinion/221845_DC05_06072023_100055_i.pdf

Fourth DCA

Seminole Tribe of Florida v. Manzini

4th DCA
6/7/23, Judge Conner
Topics: Motion to Dismiss, Sovereign Immunity (Florida), Writ of Prohibition

Manzini is the plaintiff in a negligence action against the Seminole Tribe of Florida. The tribe is federally recognized, so it is entitled to sovereign immunity over all claims that are not abrogated by CONGRESS or waived by the tribe itself.

In 2010, the tribe entered into a gaming compact with the State of Florida wherein the tribe did enter into a limited waiver of sovereign immunity for claims alleging injury at a gaming facility, but potential plaintiffs have to follow a strict set of procedures laid out in the compact.

The first requirement is that a patron who claims to have been injured at one of the tribe's casinos must provide written notice to the tribe's risk management department or the facility where the injury occurred in a reasonable and timely manner, but in no event later than three years after the incident.

The compact gives the tribe 30 days to respond to notice, and if there is no response, the patron may file suit. The tribe is required to provide the notice to its insurance carrier, which then handles the claim. If the patron and insurance company cannot resolve the claim within one year after notice of the claim, the patron may bring suit. The notice and one year of good faith attempt at resolution are conditions precedent to filing suit.

The tribe agreed to waive its sovereign immunity to the same extent that the State of Florida does so under section 768.21(1) and (5).

Mr. Manzini notified the tribe of a claim in August 2021 and then he did so again using the tribe's approved form in September 2021. He attached a drafted complaint alleging Florida Deceptive and Unfair Trade Practices Act and Florida Civil Rights Act claims.

The tribe forwarded the notice to its insurance carrier. The carrier denied the claim in October 2021. Manzini filed suit four days later.

In February 2022, Manzini filed another notice of claim with the tribe alleging that the tribe had not been following COVID-19 protocols and alleging false advertising for alleging a "safe and healthy" program of "good clean fun," which Manzini called an illusory promise that was a deceptive and unfair trade practice. On February 25, 2022, the tribe acknowledged receipt and said it would review the allegations.

Manzini amended his complaint, and the tribe moved to dismiss. The trial court granted the motion to dismiss the deceptive trade practices ("FDUTPA") count with prejudice, but allowed Manzini to file an amended Florida Civil Rights Act count.

In June, Manzini filed the second amended complaint. He reasserted the civil rights claim and added two additional causes of action—one for common law negligence for having contracted COVID-19 at the tribe's casino, and the other for intentional infliction of emotional distress. Before the hearing on the motion to dismiss, Manzini dismissed the civil rights claim, leaving intact only the two claims raised for the first time in the second amended complaint.

Manzini moved for reconsideration before a written order was entered. After hearing further arguments, the trial court maintained the ruling on emotional distress, but the trial court granted reconsideration and decided that even though the negligence count was premature, it would abate it instead of dismissing it. The trial court held that the count would be abated for the remainder of the one-year period that started on February 21, 2022, when Manzini had provided written notice to the tribe of that claim.

The tribe filed a petition for a writ of prohibition. The DCA began by recounting the long history of sovereign immunity enjoyed by federally-recognized Indian tribes including canons of construction that weigh heavily against waiver of sovereign immunity unless that waiver is unequivocal with any ambiguities being construed in favor of the tribe.

The February 2022 notice of claim alleged false advertising about COVID-19 safety, but it did not allege that Manzini became ill. He had not yet contracted COVID-19 at the time of the February 2022 notice. There was no pre-suit notice of the claim of illness. Without strictly following the notice procedures, sovereign immunity was never waived.

Manzini's argued that sovereign immunity could not be decided by a motion to dismiss because it involves matters outside the four corners of the complaint. The DCA expressly stated that sovereign immunity is "properly decided by a motion to dismiss and it is proper to consider matters outside the four corners of the complaint" because tribal sovereign immunity is a question of subject matter jurisdiction.

As a procedural note, because the trial court abated and did not actually *deny* the motion to dismiss, there was no jurisdiction to entertain the merits as an authorized appeal of a motion to dismiss on sovereign immunity grounds. Thus, the petition for a writ of prohibition was proper.

The DCA granted the petition, stating:

> Having determined the record does not show the Seminole Tribe waived sovereign immunity as to the respondent's common law negligence count, we grant the petition and prohibit the trial court from proceeding further in the suit below as to that count

> or any amended count asserting negligence regarding COVID-19. We do not address in this opinion the Seminole Tribe's argument that a negligence suit related to the respondent's claim that he was injured by contracting COVID-19 at a facility operated by the Tribe is forever barred.

https://supremecourt.flcourts.gov/content/download/870425/opinion/223077_DC03_06072023_100457_i.pdf

Water's Edge Dermatology, LCC v. Christopherson

4th DCA
6/7/23, Judge Forst
Topics: Venue

Ms. Christopherson is a plaintiff who sued her dermatologist and the provider LLC. A year after treating with Doctor Montie, Christopherson ("Plaintiff") discovered that she had skin cancer. She sued in Broward County for medical negligence/malpractice and against the LCC for vicarious liability.

The Plaintiff resided in Indian River County, but she alleged that Broward County was a proper venue because one or more of the defendants and their officers were in Broward. Dr. Montie actually resided in Martin County, which, like Indian River County, is located in the 19th Judicial Circuit. Broward County is the only county in the 17th Judicial Circuit, and its principal judicial complex is 120 miles sound of the LLC's Vero Beach office.

Dr. Montie and the LLC moved to transfer venue to the 19th Judicial Circuit, arguing *forum non conveniens*. Dr. Montie argued that Broward was inconvenient because neither the doctor nor his staff resided in or practiced in Broward. All of Plaintiff's treatment occurred in the Vero Beach office in the Nineteenth Judicial Circuit. Defendants later amended the motion to specify Indian River County as the preferred county within the 19th Judicial Circuit. After Dr. Montie died, his estate became the substitute defendant, and his widow attested that the case remaining in Broward County would pose a hardship to her as the single parent of a young child.

Plaintiff countered the motion with six affidavits from friends and family and her oncologist who swore that testifying in Broward County would not be inconvenient for them, though none of the affidavits stated that Broward County was connected to Plaintiff's treatment.

The trial court denied the motion to transfer, citing "insufficient evidence." Defendants appealed. Nonfinal orders that "concern venue" are appealable under Rule 9.130(a)(3)(A), Fla. R. App. P.

The DCA noted case law that states that a plaintiff's selection of venue will not be disturbed as long as it is justifiable under the venue statute, but then the DCA stated that courts should consider, under section 47.122, (1) the convenience of the parties, (2), the convenience of the witnesses, and (3) the interests of justice, with the convenience of the witnesses being the most important. The DCA also cited caselaw that stated that the plaintiff's selection of venue "is no longer the factor of over-riding importance."

The DCA then stated that while the standard of review is abuse of discretion, a trial court abuses its discretion in denying a transfer of venue based on forum *non conveniens* where "there is only an attenuated connection to a venue that bears no relation to the lawsuit's critical events." The DCA held that Indian River County was the "more appropriate and convenient venue over Broward County" because all of the Defendants, staff, and treatment occurred there. The only connection to Broward was that the LLC "transacts business there, but its business in Broward County bears no relation to Patient's treatment by" the LLC or the doctor. Plaintiff's law firm was located in Broward, but "the convenience of the attorneys 'is usually accorded very little, if any, weight."

The DCA also noted that in terms of the "interests of justice" prong, the avoidance of a crowded docket and the imposition of jury duty on an uninvolved community could be taken into account. The DCA seems to have taken judicial notice, not viewed any record evidence, to conclude that, based on a quote in a prior case, "Broward County is a larger, more populous county, has crowded dockets, and the community has virtually no connection to the case." Thus, the DCA held that the "interests of justice strongly favor change of venue to Indian River County."

(NOTE: The unspoken issue in the case is that Broward County tilts heavily in favor of registered Democrat voters[1], while Indian River County tilts heavily in favor of Republican registered voters, which may have resulted in the plaintiff's attorneys assuming that Broward was a more plaintiff-friendly venue than Indian River).

The DCA found that the Defendants met their burden to show that the venue was inconvenient and that the plaintiff did not meet her burden to show that Broward County was proper. REVERSED AND REMANDED with instructions to grant the motion.
https://supremecourt.flcourts.gov/content/download/870423/opinion/222209_DC13_06072023_100138_i.pdf

Sixth DCA

Bravo v. State of Florida

6th DCA
6/9/23, Judge Stargel
Topics: Writ of Mandamus; Venue

In this short opinion, the DCA reversed a transfer of venue to a different county. The case reminds us that mandamus petitions are subject to the general venue rules, including "home venue privilege," which provides that "venue in civil actions brought against the state or one of its agencies or subdivisions, absent waiver or exception, properly lies in the county where the state, agency, or subdivision, maintains it principal headquarters."
https://supremecourt.flcourts.gov/content/download/870622/opinion/230392_DC08_06092023_093322_i.pdf

[1] https://dos.myflorida.com/elections/data-statistics/voter-registration-statistics/voter-registration-reports/voter-registration-by-county-and-party/

Clarke v. Global Guaranteed Goods and Services, Inc.

6th DCA
6/9/23, Judge Wozniak
Topics: Settlement; Subject Matter Jurisdiction

The parties settled their civil case at mediation and entered a written agreement wherein Global agreed to pay $60,000 with a one-time payment of $5,000 followed by monthly installments of $2,391.30 until the debt was satisfied.

The agreement provided that Clarke would file a stipulation for dismissal with prejudice within 10 days of receiving the final payment. Things were proceeding well, so Clark filed a stipulated dismissal with prejudice eleven months before the anticipated payoff date.

By the date of the payoff, however, Global still owed over $12,000 of the $60,000. Clarke moved to enforce a settlement order. He also sought a $40,000 penalty per a default provision in the settlement agreement. He also sought permission to initiate proceedings supplementary to enforce liens on Global's vehicles (which had been listed as security for the loan in the settlement agreement).

The trial court denied the motion and also provided Global 30 days beyond the original deadline provided in the settlement agreement terms for it to pay a $60,000 settlement. The trial court ordered that if Global failed to pay, then the full default provision of $100,000 would be awarded.

Clarke appealed. At some point within the 30 days, Global paid the $12,351 owed toward the $60,000, but they did not pay the $40,000 under the default provision.

On appeal, Global tried to argue that the court had lacked jurisdiction because Clarke had filed the dismissal with prejudice. They were correct, but that sort of jurisdictional problem, the DCA held, was one that was waived due to Global not immediately raising the lack of jurisdiction in the trial court. It is called lack of "case" jurisdiction, not lack of "subject matter" jurisdiction. And lack of "case" jurisdiction only renders the court's act voidable, not void, and subject to consent, waiver, or estoppel.

On the merits, the trial court was not permitted to change the terms of a settlement agreement. Global was late in paying. That triggered the default provision. The court was not allowed to "tweak" the terms to do equity. While there may have been some sort of force majeure/Act of God preventing timely payment due to the COVID-19 pandemic, there was no force majeure/Act of God provision in the settlement agreement.

REVERSED AND REMANDED with instructions to enforce the agreement and then consider Clarke's request to pursue proceedings supplementary to enforce his liens against Global's construction related vehicles.
https://supremecourt.flcourts.gov/content/download/870619/opinion/230112_DC13_06092023_092122_i.pdf