TERRY'S TAKES

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

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Announcements

Judge Daniel Sleet was elected chief judge of the Second District Court of Appeal for a 2-year term that begins this July. He will succeed Chief Judge Robert Morris in that role. Read more at: https://2dca.flcourts.gov/About-the-Court/Court-News/Daniel-H.-Sleet-Named-Chief-Judge

The Fifth DCA has four new judges: Joe Boatwright, Paige Kilbane, John MacIver, and Jordan Pratt.

Judge Joe Boatwright is a former assistant state attorney who also practiced in the private sector handling family, real property, tax, and local government cases. He was a Putnam County judge for 10 years and acted as a circuit judge on some cases. He also has taught part time at four different law schools. He is a member of the Federalist Society and a number of service organizations. https://5dca.flcourts.gov/Judges/Judge-Joe-Boatwright

Judge Paige Kilbane appears to have been fast-tracked. Since being admitted to the bar in September 2008, she served as an assistant state attorney, then because a private practitioner handling complex commercial and intellectual property litigation. Then she became in-house counsel for an insurance company handling auto and property matters. In November 2018, Governor Scott appointed her to the Palm Beach County Court. Less than two years later, in June 2020, Gov. DeSantis appointed her to serve as a Palm Beach Circuit Judge. Now, less than two years later, Gov. DeSantis has elevated her to the DCA. She is also a member of the Federalist Society. To read more: https://5dca.flcourts.gov/Judges/Judge-Paige-Kilbane

Judge John MacIver was a law enforcement officer with the Florida Department of Lottery and the Florida Division of Insurance Fraud. In 2002, he began serving as legislative assistant to Senator Bill Posey. In 2007, the graduated from the University of Central Florida. He then graduated from Northwestern University School of Law in 2011. He served as general counsel to the Florida Department of Financial Services where he was the primary legal advisor to CFO Jimmy Patronis. He also served as deputy general counsel for Governors Scott and DeSantis. He was the director of Florida's Office of Fiscal Accountability and Regulatory Reform. He served as Florida's Chief Administrative Law Judge. He has never been a county or circuit judge. He is a member of the Federalist Society. https://5dca.flcourts.gov/Judges/Judge-John-MacIver

Judge Jordan Pratt was admitted to the bar in November 2012 as a graduate of UF's law school. Pratt clerked for Judge Harvey Schlesinger at the U.S. District Court for the Middle District of Florida and for Judge Jennifer Elrod at the U.S. Court of Appeals for the Fifth Circuit. He then served as Deputy General Counsel for the U.S. Small Business Administration, Senior Counsel for the U.S. Department of Justice, and Deputy Solicitor General for the Florida Office of the Solicitor General. Pratt served as Senior Counsel for First Liberty Institute from 2021 until his appointment to the DCA. The First Liberty Institute First Liberty Institute's website describes itself as "the largest legal organization in the nation dedicated exclusively to defending religious liberty for all Americans." He has never been a county, circuit, or administrative law judge.
https://5dca.flcourts.gov/About-the-Court/Court-News/Governor-Ron-DeSantis-Appoints-Jordan-Pratt-to-the-Fifth-District-Court-of-Appeal

Eleventh Circuit Court of Appeals

State Farm Mutual Automobile Insurance Company v. Spangler

11th Circuit Court of Appeals
4/3/23, Judge Jill Pryor
Topics: Negligence, Summary Judgment Standard

While driving, Mrs. Spangler's car was struck by the uninsured driver of an electric motorized scooter, which resulted in injury to her. The Spanglers made a claim against State Farm under their car insurance policy's uninsured motorist ("UM") coverage.

State Farm denied coverage, taking the position that the scooter was neither a motor vehicle nor an uninsured motor vehicle nor a land motor vehicle.

State Farm took the step of filing a declaratory judgment action to confirm the lack of coverage. Both parties moved for summary judgment. The district court denied the Spanglers' motion for summary judgment and granted partial summary to State Farm, holding that Florida's statutory definition of a motor vehicle resolved the dispute in State Farm's favor.

On appeal, the Spanglers argued that the definitions of uninsured motor vehicle and land motor vehicle in the policy trump the more defense-friendly language of the statute because the policy is a contract. The circuit court agreed, finding that the policy definition was broader and applied instead of statutory language.

Reversed.
https://media.ca11.uscourts.gov/opinions/pub/files/202112062.pdf

Turner v. Williams

11th Circuit Court of Appeals
4/7/23, Judge Tjoflat
Topics: 1983 (First Amendment), Amendment of Pleadings; Florida Civil Rights Claim, Summary Judgment Standard

Turner was a deputy sheriff who retired from Nassau County's sheriff's office in 2008 and then accepted a similar position at the Jacksonville Sheriff's Office ("JSO").

When the sheriff of Nassau County announced his intention to retire, Turner began feeling out the possibility of running to succeed him. In 2017, Turner was working undercover and training another cop in undercover work. They planned to buy a small amount of cocaine from a known drug dealer. The sale seems to have been a setup by the drug dealer, as right after the dealer left cocaine in the car, another man approached from around a corner and pointed a handgun at Turner's head. Turner pretended to see someone over the gunman's shoulder, and when the gunman turned to look, Turner drew his own weapon and shot the gunman multiple times, killing him.

All three cops started sweeping the area for other potential gunmen, and the young trainee was recording on his iPhone. He urged the other two men to "get all the beer" out of the car, which they did. The court noted that beer was ordinarily kept in undercover cars as a prop.

When Turner was asked by responding officers if he had been drinking, he said no, but stated that there was beer in the car. The other two cops denied drinking but also said nothing about beer in the car or that they had removed beer from the car.

The sheriff of the JSO arrested the three-man team for tampering with evidence. Shortly after this, Turner was visited by a retired firefighter who told Turner that he was close friends with Sheriff Williams and essentially explained that the arrest was concocted to derail Turner's candidacy for sheriff of Nassau County, as Sheriff Williams favored another candidate, Henderson, whom Williams thought would lose to Turner in an election.

The assistant state attorney announced he was dropping the charges against Turner, and Turner returned to work from administrative leave, but was told he was essentially being confined to a desk job for that point on. In response, Turner resigned.

Turner sued Sheriff Williams in his official and personal capacity, filing the civil suit in state court. Williams removed the case to the Middle District of Florida. Turner amended his complaint twice after the removal.

After dismissal of the Complaint for "shotgun pleading," the Amended Complaint alleged (1) a 1983 First Amendment claim against Sheriff Williams in his official capacity alleging retaliation for engaging in speech against Sheriff Williams; (2) an identical claim against Sheriff Williams in his personal capacity; (3) a similar claim against the sheriff of Nassau County; (4) a Florida common-law civil conspiracy claim against both sheriffs as individuals for allegedly violating Turner's First Amendment rights; (5) a Florida common-law false imprisonment/arrest claim against Sheriff Williams in his official capacity; and (6) the same claim against Williams in his individual capacity.

Both sheriffs again moved to dismiss, arguing that the complaint failed to satisfy the requirements of Twombly and Iqbal, again being replete with conclusory allegations that also failed to give the defendants fair notice of the claims and grounds upon which the claims rest as required by Fed. R. Civ. P. 8(a).

At that point, Turner dismissed all claims against the Nassau County sheriff, leaving only the claims against Williams.

The district court dismissed the complaint with prejudice, and Turner appealed.

On appeal, Judge Tjoflat reminds us that while factual allegations in a complaint must be taken as true at the motion-to-dismiss stage, the same is not true of legal conclusions alleged in the complaint. The facts, after stripping away all legal conclusions, must make a claim for relief plausible, not merely possible. Labels, conclusions, and recitals of elements supported by conclusory statements are insufficient.

Judge Tjoflat held that the complaint was riddled with conclusory statements. He stated that where a district court faces an amended complaint containing multiple claims for relief based on conclusory and ambiguous allegations, the court has two options. After disregarding legal conclusions and conclusory statements of fact, it can dismiss the amended complaint with an explanation of why it is deficient and grant the plaintiff leave to amend, or it can convene a conference of counsel, explain why the amended complaint is deficient, determine whether the pleader can cure the amended complaint's deficiencies, and, if he can, have the pleader replead the amended complaint accordingly and without delay.

He then observed that when a complaint makes it to the appellate record and, "without additional work, is practically unreviewable," the appellate court also has two options. It can remand the case to the district court for further proceedings" or the judges can "reframe the pleading ourselves, using the non-conclusory factual allegations and applying the law to the well-pled facts to determine if the pleader has stated a claim for relief." Here, they opted for the latter course.

The court was displeased that the facts, which covered 2008 to 2017, jumped around in time instead of portraying linear events. The facts incorporated into the claim did not identify how they related to the legal claims. "Much like a puzzle, for each count, the Complaint dumps pieces on the ground in the form of nine years of facts. Then it props up a picture of the completed puzzle in the form of" asserted causes of action and recitals of elements. It leaves the defendants and district court the task of putting those puzzle pieces together. The ambiguity would make it difficult for a defendant to intelligently respond.

Boiling down the complaint, the allegations were that Sheriff Williams retaliated against Turner for announcing a plan to run for Nassau County sheriff by having him arrested and condemning him to a lifetime of teleserve desk duties.

To state a claim for First Amendment retaliation under § 1983, a plaintiff generally must plead (1) that the plaintiff engaged in constitutionally protected speech, (2) that the "defendant's retaliatory conduct adversely affected the protected speech," (3) and that the retaliatory action caused the adverse effect on plaintiff's speech. First Amendment retaliation claims are a valid cause of action because "[t]he Amendment protects not only the affirmative right to speak, but also the right to be free from retaliation by a public official for the exercise of that right."

Announcing his intent to run was constitutionally protected speech. A threat of arrest or reassignment would adversely affect the protected speech.

The arrest was conducted by a "large cast of characters," not just Williams. Relevantly, a JSO detective with the Integrity/Special Investigations Unit submitted the affidavit supporting the arrest of all three of the undercover officer team. A different officer with the JSO then served that warrant and arrested Turner. An assistant state attorney approved the arrest warrant. And, most importantly,

a judge signed the warrant, indicating that probable cause existed to arrest Turner. Williams neither personally arrested Turner nor applied for the arrest warrant. Vicarious liability does not apply to 1983 suits. To show a First Amendment retaliation, the plaintiff must show a causal connection between the retaliation and the injury. The Complaint must allege facts that show that if Williams had no animus against Turner, he would not have been arrested. The independent actions of the assistant state attorney and the judge broke any causal chain.

Also, the probable cause for the arrest defeats the claim. Proving a lack of probable cause was necessary for the "but-for" causation element. The evidence showed that the two other cops removed the beer from the car "with at least the tacit approval" of Turner. While proving intent at a criminal trial might have been difficult, "probable cause" is a lower bar. At oral argument, Turner's counsel admitted that the allegation in the Complaint that cops are permitted to use beer as props was false. There was a substantial chance that Turner participated in the evidence tampering. Thus, there was probable cause. Turner's good arguments that he was not guilty of evidence tampering does not negate the finding of probable cause, a much lower bar.

The court briefly analyzed rare exceptions that avoid dismissal even when a plaintiff fails to allege that the arrest was without probable cause, but the exceptions did not apply in this case.

In regard to the assignment to teleserve, the Complaint failed to allege that such a reassignment "was an aberration." In fact, it implied that such a reassignment was "fairly standard discipline." This falls into the crack merely possible claims and plausible claims, falling short of the plausibility standard.

For the official capacity claims, the Complaint fails to allege some policy of retaliation.

Also, the other two police were arrested and had to perform community service, whereas charges against Turner were dropped. While the Complaint alleged that the other two were arrested solely to deflect suspicion about arresting Turner, that statement was conclusory.

In regard to the Florida conspiracy claim, there has to be an underlying tort, and here, no underlying tort has been found.

Affirmed.
https://media.ca11.uscourts.gov/opinions/pub/files/202111255.pdf

Williams v. Correctional Officer Radford, et. al

11th Circuit Court of Appeals
4/4/23, Judge Jordan
Topics: 1983 (Eighth Amendment); 1983 (First Amendment); Summary Judgment Standard

Quincy Williams is a Florida prisoner. He alleges that he tried to mail legal mail on the last day it could be filed, a Friday, but the mail official announced that she was leaving and he would have to wait until Monday. Because that would result in an untimely filing, Williams implored Captain Scarpati to have the mail person return, but he refused. Williams then complained to the assistant warden. When Captain Scarpati saw this, he had Williams handcuffed, told him that he had "disrespected" him by trying to go "over my head," and placed him in solitary confinement for several days without a written report.

Williams filed a written grievance, but no one responded. Williams then stated that Captain Scarpati, flanked by guards, continued to threaten him in retaliation for filing grievances. He alleges that a guard then searched his cell, threw his mattress into the hallway, and scattered his legal papers, telling him to stop complaining about Captain Scarpati.

Williams then said that later in that month, four guards game to his cell, told him that Captain Scarpati had sent them to "tear up" Williams' "house," and then they told him that they had found a homemade knife in Williams' pillow that Williams claims was planted by the guards. He was then taken to solitary confinement and told to stop complaining about Captain Scarpati.

Williams then alleges that a group of guards beat him and then denied him medical care for the injuries. An affidavit by a fellow inmate corroborated the injuries, the beating, and the denial of medical care.

Williams then sued Scarpati and other guards under section 1983 for retaliation, excessive force, and (in regard to officers who restrained him while others beat him) failure to intervene.

The defendants moved for summary judgment, and a magistrate sided with the defendants. The magistrate focused solely on the finding that Williams had a knife in his pillow, and he ignored the evidence about the retaliation, intimidation, and violence against Williams.

The district court adopted the magistrate's report and recommendation.

Williams sued under 42 U.S.C. 1983, alleging retaliation against him due to the fact that he filed grievances.

On appeal, Judge Jordan reminds us that summary judgment is warranted "when the evidence, viewed in the light most favorable to the nonmoving party, presents no genuine issue of material fact and compels judgment as a matter of law in favor of the moving party." And while review is *de novo*, the appellate court must "credit the 'specific facts' that" that the nonmovant "testified to, including those set out in his verified pleadings and filings."

To establish a retaliation claim, a prisoner must demonstrate "that the prison official's actions were the result of his having filed a grievance concerning the conditions of his imprisonment." Mr. Williams can prevail on a retaliation claim if "(1) his speech was constitutionally protected; (2) [he] suffered adverse action such that the administrator's allegedly retaliatory conduct would likely deter a person of ordinary firmness from engaging in such speech; and (3) there is a causal relationship between the retaliatory action and the protected speech."

When an inmate "complains to the prison's administrators about the conditions of his confinement," he is exercising his First Amendment right of freedom of speech. Mr. Williams testified that he complained to the assistant warden about the mail, and that he filed grievances against Captain Scarpati based on the disciplinary/segregated confinement he received and the search and trashing of his cell. Search of an inmate's cell and the destruction of his possessions and materials can support a First Amendment retaliation claim. For the first time (!!!!! What the hell???), the Eleventh Circuit joined sister circuits in holding that placing an inmate in disciplinary/segregated confinement constitutes an adverse action for purposes of a First Amendment retaliation claim.

In regard to a causal connection, the repeated statements by guards that the retaliation was done to get Mr. Williams to stop filing grievances meets the test. The court applied a "motivating factor" test and noted that the

> district court seemed to take Captain Scarpati at his word and ignored Mr. Williams' testimony (and the reasonable inferences which could be drawn from it). Viewing the evidence in the light most favorable to Mr. Williams—as we must on summary judgment—we think that a reasonable jury could find that Captain Scarpati was motivated by (and wanted to deter) Mr. Williams' complaints against him. This first retaliation claim therefore survives summary judgment on the "motivating factor" issue.

The court came to the same conclusion in regard to the trashing of Williams' cell. The district court accepted Scarpati's version of events and rejected Williams' version, which it was not entitled to do at the summary-judgment stage. The retaliation was accompanied by threats and instructions to stop filing grievances.

Sadly, the circuit court sided with the district court in regard to retaliation related to the finding of a knife and the punishment related to that alleged infraction. Williams was charged with possession of the knife, received a disciplinary hearing, and was found to have possessed the knife. Despite the allegations that the knife was planted, the circuit court found that under its precedents, where an inmate is found guilty of a disciplinary infraction after being afforded due process and there was evidence to support the disciplinary panel's fact-finding, this is a complete defense to a retaliation claim.

In regard to the Eighth Amendment 1983 excessive force claims, the ultimate question was whether force was applied in a good faith effort to maintain or restore discipline or, instead, to maliciously and sadistically cause harm. The magistrate and district held that because there was a finding that Williams was "disorderly," he could not show that beating him up was not valid discipline. (NOTE: Really?? The allegations include punching to the face, being slammed into a wall, a choking him, which he alleges resulted in him suffering a busted lip, loose teeth, swollen jaw. He alleged that he was handcuffed at the time of the beating).

On appeal, the circuit noted that all the plaintiff had to do was show that there was a reliable inference of wantonness in the infliction of pain. Thankfully, the circuit found summary judgment inappropriate. The circuit court examined two "equally important principles." The first is the chilling statement of law that "unreasonable or unnecessary force does not necessarily constitute excessive force for purposes of the Eighth Amendment." The competing principle, however, is that even though "the Constitution does not require comfortable prisons, it does not permit inhumane ones." So "unreasonable force" and "unnecessary force" is okay. It's just "inhumane" force that is malicious and sadistic that we want to stop.

To determine where force falls along this spectrum between unreasonable and unnecessary force (which is apparently totally fine) and inhumane, sadistic, and malicious (which is unconstitutional), we look to five factors: "(1) the extent of injury; (2) the need for application of force; (3) the relationship between that need and the amount of force used; (4) any efforts made to

temper the severity of a forceful response; and (5) the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of facts known to them."

Thankfully, the court concluded that Williams raising his voice did not "give prison cards carte blanche to use force sadistically and maliciously." The injuries were severe. Disturbingly, the "need for application of force" was deemed to weigh in the officer's favor because the verbal altercation (Williams shouting) warranted use of force to "restore order," and guards do not have to wait until disturbances reach dangerous proportions before responding. (NOTE: I was today-years-old when I learned that guards have a legal right to beat up prisoners for getting mouthy, and I'm nauseous about it. I thought beating people up for getting mouthy was battery and battery that results in permanent injury or disfigurement like the injuries alleged here were felonies that could land you in prison. Silly me.). At least the circuit weighed the level of force in Williams' favor. He was not armed, he was handcuffed, he was restrained, and he did not physically harm anyone or even physically resist. Thus, the threat to safety was low. The guards deny even using force, so there's no allegation that the level of force was justified. A reasonable jury could find that the force was excessive.

Thankfully, the circuit court took the time to partially overrule Bennett v. Parker, 898 F.2d 1530, 1533 (11th Cir. 1990). That case implied that a prisoner's testimony of violence needs objective corroboration to avoid summary judgment. The circuit clarified that to the extent that Bennett suggests (or can be read to hold) that an inmate's first-hand account of excessive force needs corroboration to survive summary judgment, it is no longer good law in this circuit. Sitting *en banc*, the Court held in 2018 that an affidavit which satisfies Rule 56 and is based on personal knowledge "may create an issue of material fact and preclude summary judgment even if it is self-serving and uncorroborated." Also, the Supreme Court has recently held that if guards gratuitously beat a prisoner, but the prisoner has the good fortune to make it through without being seriously injured, the "nature of the force" prong cannot thwart the 1983 excessive force claim. Serious or permanent injuries are not required.

The circuit court also vacated the summary judgment finding on the failure to intervene claims. To survive summary judgment, Mr. Williams had to present sufficient evidence to permit a reasonable jury to find that Officers Babcock and Short were (1) in a position to intervene in an ongoing constitutional violation and (2) failed to do so. Failing to intervene when another officer uses excessive force counts. Because the lower court found no constitutional violation, those officers prevailed below, but because the circuit court reversed, the "failure to intervene claim" was reversed, too.
https://media.ca11.uscourts.gov/opinions/pub/files/202013364.pdf

Second DCA

Concordia Lutheran Ministries v. Wills

2nd DCA
4/5/23, Judge Silberman
Topics: Breach of Fiduciary Duty, Exploitation of a Vulnerable Adult (415.111), Negligence, Personal Jurisdiction; Wrongful Death

The personal representative ("PR") of an estate filed a suit for alleged nursing home negligence with two counts of negligence, one wrongful death count, one count of aiding and abetting the Florida subsidiary's breach of fiduciary duty, and one count of exploitation of a vulnerable adult. It is

important to understand the corporate setup here. Concordia Village of Tampa operates a nursing home in Tampa, Florida. It is a subsidiary that is wholly owned by Concordia Lutheran Ministries, a Pennsylvania not-for-profit. The PR sued both the Tampa nursing home and the Pennsylvania holding company along with two employees of the Tampa nursing home.

The PR alleged that the Pennsylvania parent company could be haled into Florida court under Florida's long-arm state (48.193, Fla. Stat.) because it was doing business in Florida by being the sole owner of the Florida subsidiary. Also, the PR alleged that the parent company conducted and engaged in business activities in Florida and engaged in substantial and not isolated activities in Florida and that it purposely availed itself of the privileges of Florida through its ownership of the Florida subsidiary.

Finally, the PR alleged that the Pennsylvania parent company committed torts in Florida under the "aiding and abetting the breach of fiduciary duty." The breach was alleged to have come from improper transfer of funds from the subsidiary to the parent that adversely impacted the level of care and services at the Tampa facility. (In other words, the Pennsylvania parent sucked all the money out of the subsidiary that should have been used for care). The purpose of the transfers were unjust enrichment of the parent company that injured the decedent, and the contracts between parent and subsidiary were written in a way that would achieve that unjust enrichment at expense of the residents at the nursing home.

The Pennsylvania parent company filed a motion to dismiss, claiming that Florida courts lacked personal jurisdiction over it. After holding a non-evidentiary hearing, the trial court found that the Pennsylvania parent company had sufficient minimum contacts in Florida to justify personal jurisdiction under the long-arm statute.

Concordia appealed, as this is an appealable non-final order. When examining whether Florida has personal jurisdiction over a foreign defendant, courts apply a two-prong test. The first prong is whether the plaintiff has alleged sufficient jurisdictional facts "to bring the action within the ambit of the [long-arm] statute." Longarm jurisdiction can be either specific under section 48.193(1) or general under section 48.193(2). (NOTE: The way to keep the difference straight in your head is whether the foreign defendant has such a presence in Florida that they are "generally" a Floridian or whether the foreign defendant has done something "specific" that triggers jurisdiction). If a plaintiff can satisfy that first prong, then the second prong is whether the defendant has sufficient minimum contacts with Florida to satisfy due process. This can be shown by demonstrating that the defendant's conduct and connection with Florida are such that he should reasonably anticipate being haled into court there.

To challenge personal jurisdiction, the defendant must file a motion to dismiss that is backed up by affidavits or other sworn proof. If they do that, the burden swings back to the plaintiff to prove by affidavit or sworn proof that there is a basis for long-arm jurisdiction.

When is an evidentiary mini-trial required? Well, if the trial court can harmonize the affidavits, it can determine jurisdiction based on undisputed facts (similar to a summary judgment standard). If the affidavits conflict, however, an evidentiary hearing is warranted, and the trial court has to conduct actual factfinding.

Everyone agreed that plaintiff adequately alleged both general and specific jurisdiction. Concordia did file a motion to dismiss that attached affidavits.

The DCA examined general jurisdiction first. General jurisdiction is proven when the defendant has "engaged in substantial and not isolated activity within this state." When looking at a foreign corporation, courts must decide whether that corporation's affiliations with Florida "are so 'continuous and systematic' as to render [it] essentially at home in the forum State." While the PR alleged general jurisdiction, Concordia's affidavit refuted the allegations. And then in its response the motion to dismiss, the PR didn't address general jurisdiction, so that theory was abandoned.

The DCA then turned to specific jurisdiction. There are several ways to prove specific jurisdiction, but the ones relied upon by the PR were that Concordia, while not a citizen or resident of Florida, personally or through an agent does any of the acts enumerated in this subsection thereby submits himself or herself and, if he or she is a natural person, his or her personal representative to the jurisdiction of the courts of this state for any cause of action arising from any of the following acts: 1. Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state; or 2. Committing a tortious act within this state.

In regard to operating a business in Florida, ownership of a resident subsidiary corporation by an out-of-state parent corporation, without more, has been repeatedly deemed insufficient to show specific jurisdiction. The affidavit submitted with Concordia's motion to dismiss asserted that the Pennsylvania parent company owned nursing homes in three states, but that it did not direct the day-to-day operations or the actions of its directors or executives. Concordia did not have any Florida property or office or employees and did not transact regular business in Florida. They have separate accounts and banking relationships from the subsidiary. Concordia did not make clinical decisions for the residents of the Florida subsidiary. The PR failed to contradict this affidavit. Some public records that state that the parent company "now provides care in three states" and "offers the full suite of senior care services through its continuum of care" were not enough to rebut the affidavit because the statements weren't inconsistent with "indirect" ownership.

The PR was more successful on the "committing a tortious act in Florida" claim. The affidavit submitted with the motion to dismiss failed to refute the allegations that the Pennsylvania parent company aided and abetted the breach of a fiduciary duty. The affidavit made legal conclusions, but did not assert, for example, and it did not structure and approve contracts in Florida that they knew or should have known would result in the diversion of revenues necessary to provide the care and services to its residents. Concordia thought that it did not need to contest ultimate issues of fact, but ultimate issues of fact can be the focus of a personal jurisdiction inquiry. So the PR won this stage of the battle.

Moving to the due process/minimum contacts prong, committing a tort in Florida satisfies the due process prong. Thus, the order denying the motion to dismiss was affirmed.
https://supremecourt.flcourts.gov/content/download/865258/opinion/222641_DC05_04052023_092542_i.pdf

Third DCA

Amaya Lighting & Plastering, LLC v. Isla

3d DCA
45/23, Per Curiam (Miller, Gordo, and Lobree)

Topics: Sanctions

This citation PCA reminds us that trial courts don't have unlimited discretion to impose sanctions under section 57.105. Where there is any arguable basis in law and fact for a party's claim, the court cannot sanction the party for asserting it. Losing a case on the merits, without more, is not a basis for a 57.105 fee.
https://supremecourt.flcourts.gov/content/download/865279/opinion/221933_DC05_04052023_095942_i.pdf

Campbell v. Charles

3d DCA
4/5/23, (Per Curiam Logue, Lindsey, and Lobree).
Topics: Offer of Judgment

This citation PCA reminds us that if an Offer of Judgment is made at a point in time in which it appears, from the facts of the individual case, that the Offer of Judgment is not directed to the current trial period, but, rather, is intended for the next, as yet, unscheduled trial period, then in that situation, and in that situation only, the Offer of Judgment is not a nullity and is considered timely.
https://supremecourt.flcourts.gov/content/download/865278/opinion/221770_DC05_04052023_095757_i.pdf

Design Neuroscience Centers, P.L. v. Preston J. Fields, P.A.

3d DCA
4/5/23, Judge Lobree
Topics: Amendment of Pleadings; Summary Judgment Standard

Fields sued for breach of a lease. He moved for summary judgment against DNC, arguing that he had uncontrovertibly established a breach of contract. DNC responded that Fields did not address the defense's affirmative defenses or counterclaim in the summary judgment motion. In a reply to that response, Fields did attack the affirmative defenses and counterclaim. That reply was filed the Friday before a Monday summary judgment hearing. DNC moved to strike the reply as untimely because it was filed less than 20 days before the hearing and because it was addressing the affirmative defenses and counterclaim for the first time.

The trial court considered the reply and held for Fields, granting summary judgment. DNC moved for reconsideration, arguing that it was denied due process when the court considered the untimely reply. The trial court denied the argument. DNC also moved to allow it to amend the counterclaim, but the trial court denied that motion. DNC appealed.

The DCA noted that Rule 1.510 requires summary judgment motions to make particular arguments, and the rule is designed to prevent **ambush** against the nonmovant. Because the reply raised new matters not argued in the initial motion, DNC had insufficient notice that they would be argued at the hearing. In effect, the "reply" was a new motion for summary judgment served one business day before the hearing.

The DCA also reversed the denial of the motion to allow an amended counterclaim. The same rule applies to counterclaims as applies to amending complaints. The trial court should grant a motion

to amend unless amendment would be futile, there has been abuse of the privilege to amend, or the amendment would prejudice the other party. The trial court's order did find "prejudice," but the DCA reversed that finding, holding that trial courts cannot find prejudice based solely on the length of time a case has been pending.

JUDGE LOGUE DISSENTED without opinion.
https://supremecourt.flcourts.gov/content/download/865284/opinion/201048_DC08_04052023_100238_i.pdf

Woolems, Inc. v. Catalina Caststone Creations, Inc.

3d DCA
4/5/23, Judge Hendon
Topics: Amendment of Pleadings

This is a construction lien case, so the substance of the case is of little interest to personal injury practitioners. The case has important discussion of the relation-back doctrine, however. Stone House 1, LLC, owns a property that required construction. It contracted with Woolems, a general contractor. Woolems then subcontracted with Catalina to do exterior stonework on the Stone House property. Woolems refused to pay, however, alleging late and shoddy work by Catalina. Catalina filed a construction lien against Stone House and Woolems. Woolems sued for discharge of the lien again alleging late and shoddy work that caused damages. Woolems invoked a statutory right to transfer the lien bond and remove the lien from Stone House's property by depositing the amount in controversy. From there, the tangled web of construction law gets pretty thick, and we simply don't need to know the specifics.

The important part is that Catalina filed an amended counterclaim against Woolems outside the limitations period applicable to the case. The trial court ruled that the relation-back doctrine applied to make the amended counterclaim timely because did not introduce a new party; the real parties, interests, and essential elements of controversy remained the same as when Stone House was named as defendant in Catalina's original complaint and in its amended third-party complaint. Caduceus Props., LLC v. Graney, 137 So. 3d 987, 993 (Fla. 2014)(holding an amended pleading does not actually introduce a new defendant when it merely adjusts the status of an existing party) (citing I. Epstein & Bro. v. First Nat'l Bank of Tampa, 92 Fla. 796, 110 So. 354, 355–56 (1926)(holding that an amendment filed after the expiration of the statute of limitations period, seeking to change the status of one defendant from a representative capacity to an individual capacity and dismissing the other defendant, was not time-barred because it was merely a change in the status of the parties before the court and did not introduce a new party or cause of action)).

Generally, "the relation-back doctrine does not apply when an amendment seeks to bring in an entirely new party defendant to the suit after the statute of limitations period has expired." Id. at 994. That is not the case here. See also Palafrugell Holdings, Inc. v. Cassel, 825 So. 2d 937, 940 (Fla. 3d DCA 2001)(holding that, although "the original complaint sought a different form of relief than that requested in the amended complaints," amendments would relate back where "the alleged facts which underlie the complaint and its amended versions are fundamentally the same"). This comports with Florida's liberal policy regarding motions to amend. Drish v. Bos, 298 So. 3d 722, 724 (Fla. 2d DCA 2020). Further, "all doubts should be resolved in favor of allowing the amendment and refusal to do so generally constitutes an abuse of discretion unless it clearly appears that 1) allowing the

amendment would prejudice the opposing party, 2) the privilege to amend has been abused, or 3) amendment would be futile."

The trial court's order was affirmed, and Catalina's counterclaim can go forward. https://supremecourt.flcourts.gov/content/download/865289/opinion/220770_DC05_04052023_101138_i.pdf

Fourth DCA

Marder v. Mueller

4th DCA
4/5/23, (Per Curiam Klingensmith, May, and Conner)
Topics: Amendment of Pleadings; Medical Malpractice, Punitive Damages

Roberta Mueller's had a lesion on her hand, and a doctor sent a sample for biopsy. That unnamed doctor determined that the biopsy showed that the lesion was a squamous cell carcinoma. After that Mueller Report, Roberta was referred to Dr. Marder, the defendant in this medical malpractice case.

Dr. Marder discussed various treatment options with Mueller, and she opted for radiation treatment even though Dr. Marder told her that radiation treatment would likely impact her ability to maintain her current lifestyle as an avid golfer.

Dr. Marder treated the lesion with twice-daily radiation with some of the treatments being only 45 minutes apart.

At some point, Mueller became convinced that her lesion was never cancerous to begin with. She sued Dr. Marder. (No word on why she did not sue the doctor who allegedly misdiagnosed the biopsy).

Mueller then sought to amend her complaint to assert a claim for punitive damages on two separate grounds. First, she asserted that Dr. Marder's radiation treatments were too aggressive and done solely for financial gain. She asserted that the aggressive nature of the treatments were recognized as unacceptable in the medical community and they increased her risk for cancer in the future. She maintained that the Doctor's actions amounted to more than mere negligence and instead constituted truly culpable behavior reflecting a conscious disregard for her life and safety. In her proffer for punitive damages, she also included three items of evidence she feels are relevant: 1) an attestation by her expert stating Doctor's treatment fell "way outside" the standard of care; 2) Doctor's deposition; and 3) documents related to two federal cases involving Doctor that included allegations of Medicare fraud and obstruction of a criminal health care investigation.

The trial court allowed the amendment, agreeing that there was a reasonable basis to conclude that the frequency and intensity of the treatments were basically quackery done for financial profit.

Dr. Marder appealed. Adding a claim of punitive damages is one of the increasing number of issues that can result in an interlocutory appeal.

On appeal, the DCA noted that a plaintiff must make a "reasonable showing" that there is a "reasonable basis" for punitive damages under section 768.72, Fla. Stat. The trier of fact must find "clear and convincing evidence" that the "defendant was personally guilty of intentional misconduct or gross negligence."

"Intentional conduct" occurs when the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage would result, but they still pursued the course of conduct and the injury was indeed suffered.

"Gross negligence" occurs when the defendant was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

Punitive damages are appropriate when a defendant engages in conduct that is fraudulent, malicious, deliberately violent or oppressive, or committed with such gross negligence as to indicate wanton disregard for the safety of others. The conduct must be so outrageous in character and extreme in degree that an average member of the community would feel resentment and exclaim, "Outrageous!"

Despite the fact that the doctor had been charged with Medicare fraud and obstruction of a criminal health care investigation and was irradiating people too aggressively and frequently without any medical basis for doing so because he wanted to charge extra for the aggressive treatments, the DCA held that the plaintiff did not make a "reasonable showing" of sufficiently outrageous conduct to survive the standard for pleading punitive damages. The DCA pointed to a lack of knowledge on the doctor's part. The DCA held that the doctor's plea to federal charges was "irrelevant to this case" and could not be used to show the doctor's knowledge that what he was doing was wrong. The cases apparently involved overbilling for different procedures, not over-irradiating patients.

Mueller's proffer included unrebutted evidence that Dr. Marder would receive the same Medicare or insurance reimbursements regardless of how many patients were in the radiation treatment protocol. In short, Patient did not provide a link between either Doctor's billing practices with other patients or his interference in an unrelated criminal healthcare investigation with any improper motivation for prescribing radiation treatment for Patient.
https://supremecourt.flcourts.gov/content/download/865303/opinion/221576_DC13_04052023_101857_i.pdf

Fifth DCA

Holland v. James R. Holland, II

5th DCA
4/6/23, Judge Edwards
Topics: Exclusion of Expert Testimony (Daubert)

Yes, this is a family law case. No, we don't normally look at those. Here, one of the issues on appeal, however, was the exclusion of the testimony by the former wife's threating physician about whether she was able to work (which related to imputing income to her). Also, the husband is a personal injury attorney. The former wife is an optometrist who had her own practice but now alleges

that she is disabled. She never worked full time during the 20-year marriage, and she fulfilled many of the parents' parenting responsibilities. Her earnings were typically $50,000 per year, and she closed her practice *during the divorce*. The former husband's income varied but was around $240,000 in 2020.

The wife's doctor testified that she had certain medical conditions that rendered her disabled from practicing full-time as an optometrist. The husband challenged the testimony under Daubert (the case requiring the trial court to gate-keep expert testimony that is lacking in qualifications, reliability, or helpfulness). While the husband did not challenge the doctor's qualifications, he attacked the **reliability** of the testimony (a Daubert prong) because the doctor mistakenly relied in part on an abnormal nerve conduction test performed on some other mystery patient, whereas the wife's NCV was normal. Also, the doctor had not seen surveillance showing the wife's true physical abilities, and he was unaware of the opinions by a surgeon who opined that carpal tunnel surgery on the wife was completely successful and restored her ability to engage in light-duty work consistent with being an optometrist. The doctor was not aware of the wife's vigorous exercise program, and the doctor only conducted a telehealth interview, not an in-person physical exam.

The doctor was not permitted to testify at the Daubert hearing. He did file an affidavit stating that he did not rely on the mystery report in reaching his opinions. The husband filed affidavits from his own experts stating that that doctor's methodology was unreliable given that he relied on the NCV from the wrong patient and that he failed to engage in the accepted practice of making a differential diagnosis (which involves ruling out similar conditions that have similar clinical features to the ultimate diagnosis).

The trial court agreed with the husband and found the doctor's opinions unreliable under Daubert. After a final order was entered, the wife appealed.

On appeal, the DCA held that the trial court erred in excluding the doctor's opinions under Daubert. The alleged defects in his opinion were fodder for cross-examination, "but they do not demonstrate a basis for disqualification under Daubert in this bench trial." Exclusion of the evidence constituted an abuse of discretion. Reversed and remanded.
https://supremecourt.flcourts.gov/content/download/865373/opinion/230036_DC08_04062023_082833_i.pdf

King v. Farah & Farah, P.A.

5th DCA
4/6/23 (Per Curiam MAKAR, EDWARDS and HARRIS).
Topics: Summary Judgment Standard

Wow! The DCA reversed summary judgment in this legal malpractice case related to an underlying negligent security action because the trial court adopted the law firm's proposed order without making any changes.

Terrell King hired Farah and Farah as his lawyers in the negligent security case. (Farah & Farah has locations all over Florida and Georgia and lists over 100 lawyers on its website. https://farahandfarah.com/). After the conclusion of the case, Mr. King sued the Farah firm for alleged legal malpractice.

The Farah firm moved for summary judgment, and the merits of the case are not summarized or ruled upon in the opinion. After the summary judgment hearing, the Farah firm filed a 40-page proposed order. The trial court adopted the proposed order word for word, and King appealed.

The DCA cited Perlow v. Berg-Perlow, 875 So. 2d 383 (Fla. 2004), wherein the Florida Supreme Court held that the verbatim adoption of one party's twenty-five page proposed final judgment created an appearance that the trial judge did not exercise independent judgment. That case held that appellate courts should examine the length and detail of the proposal, whether the parties were given an opportunity to object to each other's submissions, how long it took for the trial judge to adopt the proposal, and whether the trial judge made findings of fact and conclusions of law on the record to guide the parties' preparation of their respective submissions.

While the judge took six months to enter the order here (which weighed in favor of showing that it took time to consider the order, unlike in Perlow, where the order was entered two hours after it was submitted), other factors outweighed the six-month delay. First, the proposed order cited 'the wrong standard for summary judgment." Second, the order contained "language that could be interpreted as overly harsh and injudicious," which showed that the court did not engage in independent judgment.

More importantly, the judge had a weird instruction for the parties. He told both parties to submit orders, and he instructed them not to show each other their proposed orders. He instructed them not to respond to each other's proposed orders.

As Perlow stated, proposed orders should be a starting point, but when a judge accepts a proposed order verbatim without opportunity for comment or objection by the other party, there is an appearance that the trial judge did not exercise independent judgment. This is especially true when the judge did not make oral findings on the record to guide the party in drafting the proposed order. The judge ran afoul of all of these factors.

The court reversed and remanded with instructions to the judge to engage in further consideration to include a thoughtful and independent analysis of the facts, issues, and law.
https://supremecourt.flcourts.gov/content/download/865371/opinion/230020_DC13_04062023_081854_i.pdf

Regions Bank v. Austin & Laurato, P.A.

5th DCA
4/6/23, Judge Kilbane
Topics: Attorney's Fees; Dismissal

A plaintiff appears to have tried to avoid paying fees or costs of losing a civil suit against Regions Bank by voluntarily dismissing the case.

The underlying case involved a prior action for a homeowners' insurance dispute about a sinkhole. That case resulted in three checks paid by State Farm, one of which was to pay off the plaintiff's line of credit with Regions Bank. The check was made out to Regions, the plaintiff, and the plaintiff's law firm (Austin & Laurato).

The law firm refused to endorse the check over to Regions, contending that the funds should go toward paying the contingency fee arrangement between the firm and the plaintiff. A&L filed a complaint for quasi-contract and asserting an equitable charging lien that had priority over Region's mortgage lien.

The parties both filed summary judgment motions. The trial court ruled in Region's favor that they were entitled to the proceeds of the check, but the court reserved on interest and costs. Then, for some reason, the trial court ordered the parties to attend non-binding arbitration.

The parties attended, but shortly before the arbitrator issued their decision, the firm filed a notice for a trial *de novo* and then filed a dismissal of its complaint "in an attempt to deprive Regions of a final judgment granting it entitlement to the check proceeds, interest, and costs."

Regions filed a motion for relief from the notice of voluntary dismissal under Fla. R. Civ. P. 1.540, asserting that the notice was void because it was filed after adverse summary judgment. The trial court denied the motion, and Regions appealed.

The DCA notes that denial of a Rule 1.540 motion is usually reviewed for abuse of discretion, but "when the underlying judgment is void, the trial court has no discretion; it is obligated to vacate the judgment."

Rule 1.420(a)(1) only permits a plaintiff to file a notice of dismissal

> (A) before trial by serving, or during trial by stating on the record, a notice of dismissal at any time **before a hearing on motion for summary judgment**, or if none is served or if the motion is denied, before retirement of the jury in a case tried before a jury or before submission of a nonjury case to the court for decision, or (B) by filing a stipulation of dismissal signed by all current parties to the action.

Because a summary judgment order was entered in defendant's favor and the notice of "voluntary dismissal" was filed after—not before—the hearing and it was not signed by the defendant, it was a nullity.

The DCA held that the untimely notice of dismissal was void and that Regions properly sought relief because it was deprived of a final judgment entitling it to the check proceeds, interest, and costs. Reversed and remanded with instructions to grant the motion, strike the notice of the voluntary dismissal, and conduct further proceedings.
https://supremecourt.flcourts.gov/content/download/865370/opinion/220567_DC13_04062023_081600_i.pdf