**Terry’s Takes Monthly Roundup**

**October 2022**

**First District Court of Appeal**

1. Gjokhila v. Seymour—(J. Jay; 1DCA; 10/6/22). In this family law appeal, a mother attempted to challenge the trial court’s adoption of a mediated agreement between the parties when her earnings did not measure up to what she had anticipated that they would be back at the mediation. She challenged the court’s imputation of future income under the relevant statute (despite agreeing to it at mediation) by filing a Rule 1.540(b)(1) motion. That rule allows a party to challenge an order entered due to “mistake, inadvertence, or surprise.” The rule is materially identical to Rule 12.540(b)(1) under the Family Law rules. There are two important aspects for all civil practitioners here. First, Florida Supreme Court precedent holds that a court’s legal errors such as a mistaken view of the law cannot be corrected under the rule. That would make the rule a substitute for the appellate process. The court, however, noted that the United States Supreme Court in a 2022 decision called Kemp just made the opposite holding for the federal rule of procedure, Rule 60(b)(1). In federal court, a “mistake” can include a judge’s error of law. The First DCA noted that there was great textual overlap between federal rule 60(b)(1) and Florida Rule 1.540(b)(1). The court openly noted that Kemp could result in Florida changing its rule and allowing arguments about a judge’s mistake of law via a 1.540(b)(1) motion. In the family law case before it, however, it simply did not matter because the court made no mistake of law *or* fact; it simply adopted a consent judgment created by the parties themselves. Even if it had been error, it would be invited error induced by the Mother asking the court to adopt the consent judgment. (NOTE: This should be an open invitation to being arguing that Rule 1.540(b)(1) motions should be granted if there was an error of law).

<https://www.floridasupremecourt.org/content/download/850538/opinion/211613_DC05_10062022_101052_i.pdf>

**Second District Court of Appeal**

1. Marvel Martin and Jeffrey Martin v. City of Tampa and Columbia Food Service Co., Inc.—(J. Atkison; 2DCA; 10/19/22). This is a slip-and-fall case. Marvel Martin had lunch with her sister at the Columbia Restaurant in Tampa. (NOTE: As a native of Tampa, I feel compelled to share that the Columbia Restaurant in the Ybor (ee-bore) City section of Tampa, is the oldest continuously operated restaurant in Florida, and the oldest Spanish restaurant in the USA and the largest Spanish restaurant in the world. It has 15 dining rooms with 1,700 seats. It was founded in 1903. They have seven locations. It’s one of my dad’s favorite places to go.) Anyway, as Mrs. Martin was leaving the restaurant, she tripped on an “uneven hexagonal paver located directly beneath the awning that Columbia owns and maintains.



The awning is attached to the Restaurant and is supported by pillars that are affixed atop the hexagonal pavers.” For those who do not know what “pavers” are, they are the tile-like stones set in to the sidewalk. The paver at issue apparently stuck up about a quarter of an inch. The city owns the sidewalk The restaurant had an encroachment agreement with the City of Tampa to allow them to encroach on the sidewalk. The Columbia Restaurant employees (porters) check the area daily for debris, and the restaurant has the parking lot and sidewalk pressure-washed weekly. The porters were instructed that if they saw anything outside that was “not okay,” they should inform management, and management would inform the City of Tampa. You know where this is headed. While the sidewalk was a city sidewalk, Martin alleged that the Columbia was so involved with the sidewalk that they were responsible for the hazard of the uneven paver. Mrs. Martin and her husband sued both the city and the restaurant, alleging that the two had joint and shared responsibility to maintain the sidewalk free from hazards. The Columbia moved for summary judgment, arguing that it was a city sidewalk, and they had no duty to the customer to keep city sidewalks free of hazards. The circuit court agreed. The Martins appealed. The DCA recited the well-established elements of a negligence claim (duty, breach of duty, causation, and damages) and honed in on the duty element. Notably, the court stated that whether a business owes a duty to a business invitee is a question of law even though the courts must make some inquiry into the factual allegations to determine whether a foreseeable, general zone of risk was created by the defendant’s conduct. The DCA noted that duty may arise from four general sources: (1) legislative enactments or administration regulations; (2) judicial interpretations of such enactments or regulations; (3) other judicial precedent; and (4) a duty arising from the general facts of the case." The DCA held that there was no legislatively-imposed duty of care because a city ordinance provided that it was the city’s job to inform businesses of defective or dangerous sidewalks outside their places of business and that the city was supposed to give the business 15 days to fix the sidewalk and only then would the business be guilty of maintaining a public nuisance and liable for repairs and fines. Presumably under the “other judicial precedents” source of duty, the DCA noted that nonowners may owe a duty of care to their invitees where they are “in actual possession or control” of a piece of property. A party that has the ability to exercise control over the premises owes a duty of care to keep the premises in repair. The DCA noted that just because people had to walk on the sidewalk to enter the restaurant, that did not confer control or mean that the restaurant created risk, but that just mean that they were “adjacent” to the property, not in control of it. (NOTE: There was zero consideration of whether the fact that the ordinance placed the onus on the business to fix the adjoining sidewalk meant that it actual possession or control. In fact, there was no discussion of why adjoining businesses would be responsible for fixing city-owned sidewalks.) The DCA found that there was no difference between a paver directly in front of the restaurant’s door (like the one in this case) and a paver a few feet down or a block away. In order to trigger a duty, the restaurant had to exercise control or undertake activities that create the foreseeable zone of risk in the area of the injury, and the DCA did not think that happened in this case. The DCA was satisfied by evidence submitted by the Columbia that the city, not the restaurant, had control of the pavers. Columbia’s encroachment agreement with the city “permitted Columbia to erect a structure atop the pavers, but it did not permit Columbia to occupy the area below the awning.” A case with the opposite holding was distinguishable because the city allowed that restaurant to have outside dining on the sidewalk and erect signage on the sidewalk, and it required the restaurant to maintain the sidewalk. (NOTE: Again, it’s unclear why the ordinance requiring that the adjacent business, not the city, repair any damage to the sidewalk was not controlling).

<https://www.floridasupremecourt.org/content/download/851205/opinion/210372_DC05_10192022_090634_i.pdf>

**Supreme Court of Florida**

1. Suarez Trucking FL Corp. et al v. Souders—(Per Curiam; FLSC; 10/20/22). The Supreme Court of Florida has issued a lengthy opinion where Justice Labarga filed a lengthy dissent, Justices Canady and Polston filed a special concurrence, and Chief Justice Muniz and Justices Couriel and Grosshans concurred with the majority without joining the concurrence. Newly-minted Justice Francis did not participate. The opinion deals with offers and acceptances of settlement in tort actions under section 768.79, Fla. Stat., the offer-of-judgment statute. So let’s dive in. Section 768.79(4) gives a party 30 days to file an acceptance of an offer, but an offer can be voided and withdrawn in writing at any time. Rule 1.442(f)(1), Fla. R. Civ. P., provides that no oral communication shall constitute an acceptance, rejection, or counteroffer. “Once a proper acceptance—that is, an unqualified acceptance—is filed as specified in the statute, that’s it: a settlement contract has been entered to resolve the litigation. All that remains is for performance of the settlement terms to be carried out.” Here, Plaintiff made a $500,000 demand conditioned on payment within 10 days. A condition of acceptance would require that Plaintiff enter a dismissal with prejudice. Just prior to 30 days later, the plaintiff filed a notice of acceptance. The acceptance simply cited the statute and the rule and the date of the proposal for settlement, and the Supreme Court of Florida stated that it was “hard to imagine a form of acceptance that could be more clear or effective.” Nevertheless, the trial court denied the Defendant’s motion to enforce the settlement agreement, holding that the written notice of acceptance was not sufficient to form a binding contract and the settlement check was deficient because it included as a payee the carrier that held a worker’s compensation lien in the case. On appeal, the Second District Court of Appeal affirmed. Defendant then invoked the discretionary jurisdiction of the FLSC, arguing that the Second DCA’s opinion expressly and directly conflicted with a Fourth DCA decision that held that a settlement agreement is complete when the offer and acceptance are filed and that performance is not necessary to show formation of the contract. The FLSC took jurisdiction. In discussing the merits, the FLSC stated that the Second DCA was “avoiding…reality” when it found that the acceptance did not create a binding settlement contract. The Second DCA applied common-law rule called the “mirror image” rule that required the acceptance to be identical to the offer. “The Second District denigrates Suarez Trucking’s acceptance as ineffectual ‘boilerplate’ that ‘lacked specificity,’ holding that under the mirror-image rule, Suarez Trucking could only manifest its acceptance of the offer by reciting back the terms of the offer.” The FLSC stated that the Second DCA failed to cite a “single case in which the mirror-image rule has been applied in a similar way.” (NOTE: By the way, if you’re wondering which judges the FLSC was roasting with the harsh language, the Second DCA opinion was written by Judge Sleet and joined by Judge Casanueva over the dissent of Judge Atkinson.) The FLSC did not stop at lambasting Judge Sleet’s opinion. They also take aim at the dissent in agreeing with the majority that the statute and rule fail to specify requirements for formation of settlement agreements. The FLSC took the majority and dissent to task for buying in to the idea that oral communications could affect or alter the terms of the offer and acceptance or that performance was necessary for formation of the contract. The FLSC recognized that in order to have a meeting of the minds and a valid contract, the parties need to agree to the same thing, but the FLSC states that this “is a rule of consistence. It is not—as the Second District would have it—a rule of regurgitation.” The acceptance accepted the settlement demand without any qualification or modification, and that is all that was required for acceptance. The majority was unbothered by “acceptance and payment” being included as terms in the settlement demand. That did not mean that payment was required to show acceptance. It actually distinguishes between acceptance and payment by using different words for both. JUSTICE CANADY CONCURRED SPECIALLY, noting that he did not dissent from the majority’s decision not to get into the issue of whether the Defendant had breached the settlement agreement because it was beyond the scope of the conflict. Despite this statement, Justice Canady decided to lay out why he thought it was “doubtful” that the Defendant breached the settlement agreement. Workers compensation statutes allow an injured worker to accept comp benefits from the employer but also sue a third-party tortfeasor. When that happens, the employee represents him or herself and also the interests of the employer/carrier, and the employer/carrier get lien rights. If it files a written notice of the lien, it can be awarded a share of any judgment or settlement against the tortfeasor. Including the employer/carrier along with the plaintiff and plaintiff’s attorney was standard practice, the Defendant claimed. The law does not permit plaintiffs to settle their third-party claims without involving the employer/carrier if they have filed a notice of lien. Plaintiff was not entitled to a disbursement of funds prior to an agreed or judicially determined resolution of the workers’ comp lien. Justice Canada wrote that it was “hard to see” how this could constitute a material breach of the settlement agreement. Justice Polston joined the concurrence. JUSTICE LABARGA, however, DISSENTED. He agreed with the majority that the Second DCA improperly applied the mirror image rule, but he opined that the majority “glossed over a significant factual component that impeded” the conclusion that the defendant accepted the settlement demand. The dissent found no meeting of the minds because the Defendant contacted the Plaintiff after the offer and before the acceptance and asked that the agreement provide that the workers’ comp lien be paid from the proceeds of the settlement check, and the plaintiff’s attorney refused, but the Defense still named the employer/carrier as a payee on the check. The majority “glossed over” this because of the rule that oral communications cannot alter offer or acceptance, but Justice Labarga cites the Second DCA’s opinion for the proposition that offer-of-judgment statute des not require the trial court to enforce a contract simply because the written acceptance has been filed; the trial court still had to evaluate whether acceptance showed a meeting of the minds. Justice Labarga would have held that Rule 1.442(f)(1) did not preclude a trial judge from considering oral communications in evaluating the enforceability of the agreement. Where there is a disagreement on the identity of the payees, there was no meeting of the minds in Justice Labarga’s view. Allowing the Defendant to decide whom to pay over the plaintiff’s objection was incompatible with a finding of meeting of the minds. If there was no meeting of the minds, there was no contract, and the trial court would not have erred in declining to enforce the settlement agreement.

<https://www.floridasupremecourt.org/content/download/851316/opinion/sc21-369.pdf>

**Eleventh Circuit Court of Appeals**

1. Kordash v. United States of America—(C.J. Pryor; 11th Cir.; 10/21/22). Daniel Kordash sued the United States of America for actions of federal officers conducting airport security whom he alleged detained him for so long that it amounted to a constitutional violation. Because the officers are federal employees, the proper claim is a “Bivens claim,” a court-created civil cause of action for violations of constitutional rights similar to a 1983 claim (the difference being that 1983 applies to state actors, while Bivens pertains to federal employees). Specifically, he alleged the officers violated his Fourth Amendment search and seizure rights, his First Amendment rights to free association, and his Fifth Amendment right of travel. The Southern District of Florida found that the officers were protected by qualified immunity and dismissed the Complaint. Instead of appealing, Kordash amended his Complaint to alleged violations of the Federal Tort Claims Act for false imprisonment, battery, assault, intentional infliction of emotional distress, and negligence. This Complaint was also dismissed, but for failure to state a claim. This time, Kordash appealed. The USA argued that the first dismissal for qualified immunity collaterally estopped the second claims under the Federal Tort Claims Act because it had adjudicated that the officers acted lawfully and the federal officers were not subject to state-law tort liability in light of the Supremacy Clause. On appeal, the Eleventh Circuit noted that under Rule 12(b)(6), the court had to accept the allegations of the Complaint as true. The Federal Tort Claims Act waives the federal government’s sovereign immunity for state-law tort claims. See 28 U.S.C. §§ 1346(b), 2671. The Supremacy Clause enshrines the basic principle that federal law supersedes state law whenever they conflict. It applies not only to constitutions or statutes, but to suits under state law against federal officials carrying out their executive duties. Liability is barred where state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress. The test for whether the Supremacy Clause bars state-law liability is whether the federal official’s acts have some nexus with furthering federal policy and can reasonable be characterized as complying with the full range of federal law. Customs and Border Protections officer’s actions bear a substantial relation to the valid interest of protecting borders. The order dismissing the Bivens claims concluded that the officers acted lawfully to further federal policy. They were acting in the scope of their discretionary duty for purposes of qualified immunity, which also satisfies the fest for a next between their conduct and furthering a federal policy. Thus, the tort claims were barred under the Supremacy Clause. (NOTE: The court did not square its holding that the Supremacy Clause barred the claim with Congress expressly waiving tort immunity under the Federal Tort Claims Act). For reasons that are unclear, after finding that the claims were barred under the Supremacy Clause, the Eleventh Circuit then conducted analysis of whether the claims were also barred under the doctrine of collateral estoppel. To show collateral estoppel, the defendant must demonstrate that : (1) the issue at stake is identical to the one involved in the prior litigation; (2) the issue was actually litigated in the prior suit; (3) the determination of the issue in the prior litigation was a critical and necessary part of the judgment in that action; and (4) the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the issue in the earlier proceeding. Again, the Eleventh Circuit found that the test for a nexus between the actions and furthering federal policy was interchangeable with the holding in the order dismissing the Bivens claim finding that the officers were acting within their discretionary authority and that their actions complied with federal law. The issues were actually litigated because they were raised, submitted for determination, and determined by an order dismissing with prejudice. The determination of the legality of the officer’s actions was critical and necessary for evaluating the Bivens claim. Kordash had a full and fair opportunity to litigate the issue because he brought the claims. Thus, the court held that he was barred from relitigating the issues under the doctrine of collateral estoppel. The order dismissing the claims was affirmed. <https://media.ca11.uscourts.gov/opinions/pub/files/202112151.pdf>