**TERRY’S TAKES**

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

**Terry P. Roberts**

**Terry@FRTrialLawyers.com**

**Director of Appellate Practice**

**Fischer Redavid PLLC**

**2022 Week 34 (Aug. 15-19, 2022)**

**Eleventh Circuit**

Miguel Alvarado-Linares a.k.a. Joker v. United States of America—J. Brasher. This criminal case is briefly mentioned because the court took the unusual step of putting a criminal defendant’s “a.k.a.” in the case heading—and because the defendant is called Joker. The Joker participated in several shootings as a member of MS-13, a violent gang. The appeal presented a simple question: are murder and attempted murder crimes of violence for purposes of enhanced firearm sentences under 18 U.S.C. § 924(c). A 24-page opinion concluded that the answer to this “simple” question was: yes. This had the effect that after the Joker completes his three concurrent life sentences, he will still have a consecutive 85-year sentence left to serve.

**First DCA**

In Re: Jane Doe 22-B—Per Curiam. This case has absolutely nothing to do with personal injury law. It is summarized only because the case inexplicably hit the national media this week. Like many states, Florida has a parental notification law where minors wishing to obtain an abortion must either notify a parent or, if they wish to proceed without notifying a parent. Florida actually changed the law from mere “notification” to parental “consent” a few years ago. If minor wish to circumvent the parental consent, they must have a hearing in a circuit court where a judge examines the minor and determines, based on statutory factors, whether the minor is mature enough to make this major life decision without consulting parents. The procedure of going before a judge to dispense with parental consent is called “judicial bypass.” Florida’s judicial bypass procedure is found under section 390.01114, Fla. Stat. This week’s case somehow gained attention because people apparently are under the impression that the judicial bypass procedure is the result of the recent Dobbs decision eliminating abortion as a constitutional right. (NOTE: Regardless of how one feels about the concept of parental notification or consent laws—and there are excellent points that if a child is too immature to qualify for judicial bypass, they are too immature to bring a child into the world—such laws were in place under Roe/Casey, and the Florida statute has existed since 2005. Prior judicial bypass statutes were struck down by the Supreme Court of Florida under the Florida Constitution’s privacy clause, but in 2004, a citizen’s initiative explicitly amended the Constitution to authorize the legislature to require parental notification. See Art. X, sec. 22, Fla. Const. They have nothing to do with Dobbs.) In this case, a *per curiam* opinion by Judges Jay and Nordby decided to affirm a trial court’s dismissal of a petition for judicial bypass by a minor, holding that there was no abuse of discretion in the trial court’s finding that the minor had not established by clear and convincing evidence that she was sufficiently mature to decide whether to terminate the pregnancy. That is all the opinion held—no abuse of discretion, so we affirm. That short opinion—one paragraph—has led to national discussion. Judge Makar CONCURRED IN PART AND DISSENTED IN PART, and his longer opinion provides the only insight into the facts. The case arose from Escambia County (the Pensacola areas) and was decided by Judge Jennifer J. Frydrychowicz. Oddly for a parental consent case, the minor is parentless. She lives with a relative, but has an appointed guardian. The guardian apparently consented, but the evidence on that consent was not fleshed out. Judge Makar noted that the minor “inexplicably checked the box indicating she did not request an attorney, which is available by law for free” under a different statute. Judge Makar noted that the judge’s decision was without prejudice for the minor to again seek relief from the court in the coming days. The judge had apparently been concerned that the minor’s evaluation of the benefits and consequences of having an abortion was compromised by the minor’s traumatic emotional reaction to the recent death of a close friend. Judge Makar would have remanded the decision for further consideration within 3 business days under the statute. Ultimately, however, it appears that the trial court may reevaluate its decision even without the remand, as the minor is entitled (and was encouraged by the trial judge) to reapply for judicial bypass. Presumably armed with her guardian’s consent and the held of a free attorney, the minor will prevail in a second petition, but as the minor’s name is confidential, follow-up will be difficult unless the minor comes forward to the press due to the interest in her case.

**Second DCA**

Riggins v. State—J. Kelly. The DCA reversed the denial of a Stand Your Ground motion to dismiss. The trial court dismissed the motion because it was unsworn, but the 2nd DCA held that such motions do not need to be sworn.

**Third DCA**

Annesser v. Innovative Service Technology Management Services, Inc.—J. Bokor. This is an interesting little opinion on entitlement to prevailing party costs. Annesser, a partner and shareholder of the law firm Annesser Armenteros, PLLC, was personally named as a defendant in a lawsuit along with several other defendants. Annesser served two offers of judgment, which were rejected. Annesser moved to dismiss, which the trial court granted without prejudice. When the plaintiff refiled an amended complaint, Annesser was not listed as a defendant. Annesser moved for fees and costs as a prevailing party, but the trial court agreed with the plaintiff that amending the complaint and not listing Annesser as a defendant did not operate as an adjudication on the merits that entitled Annesser to costs or fees. On appeal, the Third DCA agreed with the trial court that costs under section 57.041(1) were unjustified because an involuntary dismissal without prejudice doesn’t constitute a judgment on the merits, and dropping Annesser as a defendant did not constitute a second dismissal under Rule 1.420(a)(1). But the Third DCA disagreed with the trial court that costs could not be recovered under Rule 1.420(d). That rule provides that costs in any action dismissed shall be assessed once the action is concluded as to that party. The action concluded with respect to Annesser, so the attorney was entitled to recover costs. In regard to attorney’s fees, however, the DCA again agreed with the trial court. Fees under section 768.79, the offer of judgment statute, requires that the party either prevail and obtain 25% less than the offer or that the cause is dismissed with prejudice. The dismissal had been without prejudice. (There was no real discussion by the court about whether the recovery of $0 was 25% less than the two offers of judgment). Affirmed in part and reversed in part.

Bravo v. CJM Partners LLC-J. Gordo. Bravo filed a lawsuit, but then apparently did little to prosecute his claims. There was a notice of inactivity (per Rule 1.420(e)) and an order dismissing the case for lack of prosecution, but neither were sent to Bravo. Counsel for Appellees made unsworn representations, but those representations have no evidentiary weight. Bravo moted to vacate the default judgment order under Rule 1.540(b)(4), and the trial court denied the motion. Because there was no evidence that he'd received the notice of inactivity or order dismissing the case, the DCA reversed and remanded the case for further proceedings.

D-I Davit International-Hische GMBH v. Carpio—J. Bokor. This case involves claims of product liability (strict liability) and breach of implied warranty of fitness for merchantability and fitness for a particular purpose. The determinative issue, however, was personal jurisdiction of a corporation. The case was brought by the surviving wife of Mr. Carpio, a seaman employed by NCL (Bahamas) Ltd. He was working in navigable waters around Bermuda on board a ship called the Norwegian Breakaway. He was assigned to participate in several lifeboat/rescue boat drills. While inside a rescue boat suspended six stories above the water, a wire snapped, and he fell onto seamen below and died from his injuries. D-I Davit is the USA subsidiary of a German corporation that manufactures and sells the offending wires. D-I Davit is registered to do business in Florida. The complaint alleged that the parent company manufactured and/or sold the wires and the Florida subsidiary provided aftersale customer support. It was that aftersale support that the complaint alleged as a basis for personal jurisdiction over D-I Davit, the parent corporation in Germany. As a reminder, general jurisdiction over a non-resident requires substantial and not isolated activity within Florida. A plaintiff must show continuous and systematic business contact with the state. Undoubtedly, the USA subsidiary operates in Florida, but while the plaintiff alleged that the German corporation was doing business in Florida through its agent, the USA subsidiary, the presence of a subsidiary corporation within Florida **is not enough, without more, to subject a non-Florida parent corporation to long-arm jurisdiction within Florida.** To trigger general jurisdiction over the non-resident parent corporation, the plaintiff has to show that the parent corporation exerts such extensive operational control over a subsidiary that the subsidiary is no more than an agent existing to serve only the parent’s needs. Sharing some officers and directors, having a unified or “global” strategy and goals, cross-selling in promotional materials, and performing services for one another is not sufficient to satisfy this test. The plaintiff did not allege sufficient facts to show that the USA subsidiary was, essentially, a puppet of the German parent company. The plaintiff also failed to demonstrate specific jurisdiction. Specific jurisdiction requires “claim-specific” analysis by showing that the defendant does one of the enumerated acts in Florida under the long-arm statute, and that the plaintiff’s cause of action arises from one of those acts occurring in Florida. You can see where this is going. The death happened near Bermuda. The complaint accurately alleged the three elements for strict liability product liability—(1) that a defect was present in the product; (2) that it caused the injuries complained of; and (3) that it existed at the time the retailer or supplier parted possession with the product—but there was “no connexity between the tort and Florida.” The wires were manufactured and installed in Germany, inspected in New York, and they malfunctioned in Bermuda. Plaintiff tried to allege that she was a third-party beneficiary of the inspection contract entered in Florida, but the “connexity” has to relate to the actual tort, and this tort was for manufacture and installation in Germany, not a faulty inspection in New York, and not anything tortious that happened in Florida. The cause of action for breach of warranty suffered from the same jurisdictional defects. Reversed and remanded for dismissal of counts VI and VII of the complaint (which were the only subject of the appeal).

Phil Collins v. Orianne Cevey Collins Mejjati Bates, etc., et al., J. Lindsey. This is the first of three Third DCA cases this week with “Collins” as the name of one of the parties. But this one has the distinction of being the only one of the three to involve Phil Collins. The real Phil Collins. This is the actual Phil Collins that you either love or hate. The famous one. So I’m gonna summarize it regardless of whether it’s a PI case. That’s the rule. If you’re Phil Collins, you’re gonna get your case summarized. The genesis of this lawsuit (awwwwwwwww, yeah…I said it) was Phil’s motion to dismiss for lack of personal jurisdiction. The case involves Phil and his third ex-wife, Orianne, fighting over their Miami Beach residential property. Phil and Orianne married in 1999 around the time Phil was doing the Tarzan soundtrack. Something Happened on the Way to Heaven, and the Two Hearts divorced in 2008. He paid her 25 million British pounds in the divorce, which was the largest divorce settlement in a British history at least at that time. Against All Odds, the two reconciled in 2012, and Orianne says that two entered into an oral cohabitation agreement where she agreed to relinquish her rights to her residence on Sunset Island and live with Phil at a newly acquired residence on North Bay Road. That residence was owned by a Florida LLC that Orianne claims Phil agreed to share with her in equal 50% shares. It is undisputed, however, that Phil is the sole 100% shareholder of the LLC. There must be some Misunderstanding. In 2016, things started to fall apart again, and Phil said, “Hello, I Must Be Going.” In 2020, after the two split up again and started living Separate Lives, Phil moved back to Switzerland where he had lived years earlier. In August 2020, Orianne married a man named Thomas Bates, and Bates moved into the Miami property with Orianne. The LLC filed a complaint to remove the two from the home, and Orianne filed a counterclaim against the LLC and Phil for failing to transfer 50% of the LLC to her or, alternatively, alleging that he fraudulently induced her to give up her ownership in the Sunset Island residence by his oral promise to transfer 50% of the LLC to her, which she took at Face Value. The LLC is a Florida corporation, and it owns the property. But Seriously, at all material times, Phil was living in Florida. His affidavit contesting personal jurisdiction on the basis that he now lives in Switzerland was functionally No Reply At All. The allegations are sufficient to allege personal jurisdiction under Florida’s long-arm statute, section 48.193(2), for engaging in substantial and not isolated activity within Florida. Thus, they’ll be going back to court where the judge can hear Both Sides of the Story and Orianne can Testify. (NOTE: Phil, at the court hearing, No Jacket will be Required, but I recommend you wear one anyway. And You Can Wear My Hat. Okay…That’s All.)

The Collins Condominium Association, Inc. v. Riveiro-Per Curiam. This is an interesting prevailing-party-fee case. Riviero sued his condo association to allow him to “install an effective safety barrier that satisfies local building codes around the perimeter of his outdoor balcony/porch area without time and use restrictions.” Thereafter, the City of Miami Beach initiated some kind of code enforcement proceeding that prompted the condo association to install “pool alarm devices on the sliding glass doors of Riveiro’s units.” Happy with the result and because his lawsuit was now moot, Riveiro dismissed his complaint and then moved for prevailing party fees and costs. The condo association replied that he had dismissed the complaint, so they were actually the prevailing party. The trial court agreed with the plaintiff and awarded him fees and costs. Dismissing a complaint normally results in the defendant being considered the prevailing party, but there is an exception when the voluntary dismissal occurs because the *defendant’s actions* mooted the case. Applying an abuse of discretion standard, the DCA affirmed even though it seemed troubled that the condo association took action because of the city’s enforcement, not because of the complaint. The action of installing the alarms was an action by the defendant that mooted the complaint. Affirmed.

United Automobile Insurance Company v. Chiropractic Clinics of South Florida, PL-J. Hendon. In 2010, Ortiz, an insured, made a claim for Personal Injury Protection (PIP) benefits sustained in an auto accident. United Auto, his insurer, made several payments to his medical providers and to Ortiz. The plaintiff, a chiropractic clinic assigned the insured’s benefits, filed a complaint against United Auto for failure to pay full PIP benefits for medical services to Ortiz. United Auto moved for summary judgment claiming that all benefits had been paid and the policy limits had been exhausted. United Auto relied on the affidavit of its claims adjuster, but the trial court excluded the affidavit as hearsay and did not find that the business records exception to the hearsay rule applied. The records generated before the claims adjuster was assigned to the case were records where the claims adjuster had no personal knowledge about the subjects in the documents such as the payment ledger. The DCA held, on appeal, however, that the trial court erred in excluding the claim adjuster’s affidavit because under section 90.803(6), the business record exception, any records custodian can lay the foundation if the witness can show that (1) the record was made at or near the time of the event; (2) was made by or from information transmitted by a person with knowledge; (3) was kept in the ordinary course of a regularly conducted business activity; and (4) that it was a regular practice of that business to make such a record. No additional foundation is required by the statute, and the DCA rejected the notion that the witness must also detail the basis for his or her familiarity with the relevant business practices of the company or give additional details about those practices as part of the initial foundation. Reversed and remanded.

1906 Collins LLC, etc., et al., vs. Miguel Angel Chibras Romero, et al.-J. Bokor. In this opinion, Judge Bokor put on his amateur novelist cap, beginning this opinion as follows:

The lawsuit before the trial court asserts multiple claims against several defendants and involves a dispute between once-partners, owners, managers, and operators of Bâoli, a popular nightclub in Miami Beach. International partners, holding companies, big business, real estate, allegations of contractual breach and betrayal—the music stopped, the parties soured on each other, and the cold florescent lights of the Dade County Courthouse replaced the velvet ropes, bottle service, and thumping beats of the South Beach nightclub scene. But this appeal addresses none of that intrigue. Here, we just determine who gets to hear it.

As promised, the remainder of the opinion is less intriguing. The trial court compelled arbitration, and the appellants argued that the contract between the parties allowed them to dispense with arbitration and proceed with the lawsuit. The claims were by the club against the former CEO of the nightclub for breach of non-solicitation and non-competition covenants, claims against various other defendants for aiding and abetting the CEO’s alleged breach of contract, tortious interference by the CEO, and common law unfair competition claims. The employment contract at issue had an arbitration clause that expressly exempted certain claims that would result in irreparable harm. The DCA held that the claims fell within the exclusion and, therefore, the DCA reversed the order requiring arbitration.

**Fourth DCA**

Liberty Mutual Insurance Company v. Pan Am Diagnostic Services-J. Conner. Well, this one is rough. Look out for a revival of “*de minimis non curat lex*!” If it sounds like a battle cry, maybe that’s because it’s about to be. Pan Am (as the assignee of an insured) was of the opinion that Liberty Mutual owed them 14 cents in statutory interest when Liberty paid an overdue personal injury protection (PIP) benefit. Seeing an opportunity for prevailing party fees and costs, Pan Am sued for the 14 cents. Liberty Mutual answered that all benefits and interest due and owing were paid presuit, that there was also a failure to satisfy a condition precedent for the presuit demand, and that no fees or costs were owed because no benefits, interest, penalties, or postage were due at the time the complaint was filed. Litigation ensued, and both parties moved for summary judgment. The basis for the fees was section 627.428, Fla. Stat.. Liberty Mutual’s argument was that 627.428 provides fees that result in recovery of insurance “benefits,” and that if the 14 cents interest was truly an insurance “benefit,” then a presuit demand letter was required as a condition precedent to filing the complaint. Because there had been no presuit letter, the complaint would have to be dismissed for failure to comply with presuit requirements. And if interest was NOT deemed an insurance benefit, then no presuit demand letter was required, but then Pan Am would be entitled to 14 cents and no award of fees. Pan Am responded that no presuit demand letter was required to seek only interest, not underlying PIP benefits. The trial court awarded the 14 cents and then awarded Pan Am $24, 028.27 in attorney’s fees and costs. Liberty Mutual appealed. On appeal, the DCA examined the fee statute, section 627.428, which provides prevailing party fees for insurance litigation only if the judgement or decree is “under a policy or contract” executed by the insurer. The right to interest doesn’t come from the policy or the contract. Instead, it comes from section 627.736(8). (NOTE: Several Florida cases have held that insurance statutes regarding attorneys’ fees have been deemed to be “incorporated” into every Florida insurance contract, but the argument that the contract automatically incorporates a right to interest was apparently not raised in the appeal and it was not considered by the court). After thoroughly reviewing section 627.730, 627.731, and 627.736(1), 4(d), and (8), the DCA held that

**the statutory entitlement to interest on overdue PIP benefits is not in and of itself a PIP benefit for which attorney’s fees are payable under section 627.736(8).** In other words, a dispute over whether interest is due or paid in the correct amount is not a dispute as to benefits payable for medical, surgical, funeral, and disability insurance benefits. Thus, litigation over the payment of interest due on PIP benefits does not trigger entitlement to attorney’s fees for the claimant.

The costs were still awardable, but the attorney’s fee award was reversed. Chief Judge Klingensmith CONCURRED SPECIALLY, raising additional arguments for reversing that were dismissed by the majority opinion as good points but involved unpreserved arguments that could not be addressed on appeal. Judge Klingensmith complained about the waste of judicial resources involved in litigating a claim for fourteen cents. (NOTE: Of course, it takes two to tango, and one wonders why the insurance company denied the claim instead of paying 14 cents, but Judge Klingensmith included the insurance company’s efforts in defending the claim as wasted time caused by the plaintiff, not the defense). Judge Klingensmith advocated invoking the legal doctrine of “*de minimis non curat lex*,” explaining that this legal maxim means “the law does not care for small things.” Loeffler v. Roe, 69 So. 2d 331, 338 (Fla. 1953), which should have allowed the courts to dismiss the claim. Judge Klingensmith complained that “Florida courts have seen a number of these cases in personal injury protection litigation where litigants go at it, hammer and tongs, over trifling amounts.” The judge pointed out that the only reason for the claim was to obtain attorneys’ fees, not 14 cents. He pointed out that the fee award was more than 171,000 times the amount in controversy. He concluded:

Where a case involves a needless waste of judicial resources, a rejection of an attorney’s fees award is squarely within the court’s inherent powers to keep in proper condition the legal community and the legal system, of which the courts are a leading part. I agree with the reasons contained in the majority opinion justifying reversal of the lower court’s attorney’s fee award, and had the issue of de minimis been raised in the lower court and on appeal, I would have reversed on that ground as well.

Maxwell v. Edwards—J. Forst. Five grandchildren fought over their mother’s third of the grandfather’s trust. Four of them entered into a settlement, but one objected to the settlement. Despite this, the trial court approved the settlement. On appeal, the DCA reversed and remanded for the trial court to vacate its order granting the joint motion to approve the settlement agreement because the trial court had no power to impose a settlement agreement on the fifth grandchild.

State of Florida v. Tillman-J. Artau. This criminal case is briefly summarized because it seems controversial. A trial court dismissed misdemeanor charges because the defendant was found incompetent. The court set status hearings at six-month intervals to check if the defendant had been restored to competency. The defendant failed to appear at three separate status conferences where competency might have been reexamined. Rule 3.213(a)(1) requires misdemeanor charges to be dismissed if a defendant remains incompetent for over one year unless the trial court expects the defendant to become competent. The defense attorney explained that the defendant had a stroke that resulted in “neurocognitive disability” and she was living with family in North Carolina. The trial court dismissed the misdemeanors. On appeal, the DCA refused to consider the attorney’s statement as evidence. Instead, the DCA found that Tillman’s failure to appear at the status conferences was “inexplicable.” The DCA essentially held that incompetent people need to show up and participate in the process whereby courts determine if people are incompetent to participate in the judicial proceeding and if they don’t show up and participate in the judicial process, a court can’t hold that they can’t participate in proceedings. Because the defendant “thwarted the trial court’s ability to make the required finding of continuing incompetency” by failing to appear, dismissal of the two misdemeanor charges was reversed and remanded. If evidence of continuing competency was introduced on remand, the trial court was instructed to dismiss without prejudice to the state’s ability to refile the misdemeanor charges should the defendant be declared competent to proceed. There was no discussion of the legal doctrine of “de minimis non curat lex.”

**Fifth DCA**

Dennehy v. Srinagesh-J. Evander. Dennehy brought a *pro se* medical malpractice claim against her eye surgeon and the P.A. and corporation that operated the surgical center. Attempting to comply with the presuit investigation demands, Dennehy filed corroborating medical opinions, but the defense moved to dismiss on the grounds that the corroborating affidavits were insufficient in some respect. Dennehy argued in response that the defense should be deemed to have waived the requirement of presuit corroboration because the defense failed to provide her with copies of her medical records as required under section 766.204. While all this was going on, the statute of limitations ran. After hearing arguments on the motion to dismiss, the trial court agreed that the corroborating affidavits were insufficient under the med mal presuit requirements, granted the dismissal, and noted that the dismissal was with prejudice because the statute of limitations had run. Dennehy finally hired a lawyer, and the attorney moved for rehearing and re-raised the issue of waiver for failure to provide medical records. The rehearing motion also argued that any dismissal should be without prejudice, but the trial court denied the motion without a hearing. On appeal, Dennehy agreed that her presuit affidavits were insufficient. She only argued that it was wrong to dismiss the complaint with prejudice. The DCA agreed, citing caselaw that dismissals should be without prejudice unless the pleading cannot be amended to state a cause of action or where alleging additional facts or support a different legal theory, dismissal with prejudice is an abuse of discretion. The DCA reversed and remanded with directions to permit Dennehy leave to amend her complaint.

Sigma Funding Group, LLC v. Security First Insurance Company—J. Nardella. Sigma is the assignee of homeowner’s rights under a homeowners insurance policy. Security First filed a motion to dismiss, arguing that the assignment of benefits (AOB) was invalid because it did not comply with section 627.7152. The parties agreed that the AOB failed to include some specific information required by the statute, but they disagreed over whether the statute applied. The AOB applies only to assignment agreements for entities who provide services to protect, repair, restore, replace, or mitigate home loss damage. Sigma only provided advance funding of $9,570 to the insureds; they did not actually fix anything or provide services. Neither the complaint nor the attachments actually showed the purpose behind Sigma’s payment or the use of the funds by the insured. Security First speculated that the funds were “likely used to repair the property….” Security First argued that if the funds were used toward repairs, the AOB would be governed by section 627.7152. Without ruling on that argument, the DCA held that speculation about what was done with the funds was outside the four corners of the complaint and could not be considered in a motion to dismiss. Thus, the dismissal was reversed. If Security First is correct about the court being able to look at the use of the funds even if Sigma itself did not conduct repairs, one would think that summary judgment will quickly be granted in Security First’s favor and this issue will again go up to the DCA on whether the use of the funds for repair would trigger section 627.7152 and the AOB was invalid for failing to specify information. Whether Sigma can cure any error by amending the AOB with the specific information was not discussed in the opinion.