**TERRY’S TAKES**

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

**Terry P. Roberts**

[**Terry@FRTrialLawyers.com**](mailto:Terry@FRTrialLawyers.com)

**Director of Appellate Practice**

**Fischer Redavid PLLC**

**2022 Week 30 (July 18-22, 2022)**

**Eleventh Circuit**

Coleman v. Hillsborough County—J. Carnes. Applying Florida law, the Eleventh Circuit noted that an order denying a motion for summary judgment on sovereign immunity grounds in a police excessive force case was immediately appealable. Generally, an order denying a motion for summary judgment is not an appealable final order. But there is a small class of interlocutory orders, referred to as **collateral orders** which are immediately appealable without regard to the posture of the underlying case. Under the **collateral order doctrine**, an order denying summary judgement based on state sovereign immunity is immediately appealable if state law defines the immunity at issue to provide immunity from suit rather than just a defense to liability. In Florida, sovereign immunity is both an immunity from liability and an immunity from suit. The sovereign immunity statute at issue, section 768.28(9)(a), states that an “officer, employee, or agent of the state or of any of its subdivisions may not be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious

purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.” Fla. Stat. § 768.28(9)(a). The first two exceptions, “in bad faith” and “with malicious purpose,” are “synonymous with each other under Florida law.” Another way to put it is that Florida courts have equated bad faith with “the actual malice standard.” The “actual malice” and “malicious purpose” exceptions apply when the conduct was committed with “ill will, hatred, spite, or an evil intent.” The third category of conduct that will strip officers of their state sovereign immunity is “wanton and willful disregard of human rights or safety,” which is “conduct that is worse than gross negligence.” Wanton means “with a conscious and intentional indifference to consequences and with the knowledge that damage is likely to be done to persons or property.” Willful means “intentionally, knowingly and purposely.” Together those terms describe “conduct much more reprehensible and unacceptable than mere intentional conduct.” This is different from legal malice, which requires only “proof of an intentional act performed without legal justification or excuse” and “does not require proof of evil intent or motive.” Actual malice does require proof of “the subjective intent to do wrong.” The mere absence of probable cause did not, by itself, prove actual malice for purposes of plaintiff’s false arrest/false imprisonment claim. Claims that the police were out to get him were based on speculation, not any evidence. The court chastised plaintiff’s appellate counsel for making a statement that there was additional evidence in the record to support denial of summary judgment, stating that it was the lawyer’s job, not the court’s, to dig through the record in search of facts to support or oppose summary judgment. The court also concluded, without a great deal of analysis, that the force used during arrest was not malicious. Thus, rather than remanding for further proceedings, the Eleventh Circuit reversed and remanded with instructions to grant the officers summary judgment.

Jacob v. Mentor Worldwide, LLC—J. Brasher. This opinion shows how to survive a claim of preemption for torts involving a medical device manufacturing defect. One of a patient’s breast implants ruptured. She sued Mentor, the manufacturer, for negligence and negligence per se, strict liability failure to warn, and strict liability manufacturing defect under Florida law. The trial court held the claims were preempted under the Medical Device Amendments to the Federal Food, Drug, and Cosmetic Act, which “provide for the safety and effectiveness of medical devices intended for human use.” The Amendments establish three classes of medical devices—Class I, Class II, and Class III—based on the level of oversight required to ensure their safety. Class III devices like the breast implant in the case involve the most risk and require general regulatory controls and pre-market approval before being sold to consumers. The breast implants were deemed safe and effective via the FDA’s pre-market approval process. Once approved, the Amendments forbid unauthorized changes to “design specifications, manufacturing processes, labeling, or any other attribute, that would affect safety or effectiveness.” After the first complaint was dismissed, the plaintiff filed an amended complaint alleging violation of the FDA’s pre-market approval (Count I), breach of implied warranty (Count II), and lack of informed consent—failure to warn (Count III). Interestingly, while the amended complaint omitted the product liability claim that had been dismissed, Jacob still argued that the claim was improperly dismissed on appeal, Mentor argued that she had waived that claim when she amended the complaint and did not reallege the dismissed claim, and the Eleventh Circuit agreed with the plaintiff that when a claim is dismissed and it would be futile to replead it, the party can raise the dismissed claim in the appeal even after filing an amended complaint that does not reallege the dismissed claim. In regard to the merits of the preemption issue, the plaintiff had no avoid a finding of both express and implied preemption. To avoid express preemption, plaintiff had to show that her state-law claims were not premised on state law that was different from or in addition to the federal requirements relating to safety or effectiveness of the device. Preemption language in the act states that it does **not** prevent a state-law claims premised on a violation of FDA regulations” provided that “the state duties in such a case ‘parallel,’ rather than add to, federal requirements.” The implied preemption argument revolved around the fact that the act states that only the United States can bring actions to enforce the act; private actors cannot. **The Eleventh Circuit has explained that express and implied preemption leave a “narrow gap” through which a plaintiff’s claim must pass to survive: “a plaintiff has to sue for conduct that violates a federal requirement (avoiding express preemption) but cannot sue only because the conduct violated that federal requirement (avoiding implied preemption).” In other words, when a plaintiff’s claim implicates the safety or effectiveness of a federally regulated medical device, her claim survives preemption “so long as she claims the ‘breach of a well-recognized duty owed to her under state law’ and so ‘long as she can show that she was harmed by a violation of applicable federal law**.’” The plaintiff successfully threaded this needle. Florida law recognizes common law negligence claims based on a manufacturing defect theory of liability. Florida law also recognizes that a manufacturer “may be held strictly liable for an injury to the user of its product.” Florida’s law does not impose new requirements on the medical device, but “Florida law allows the violation of a federal requirement to serve as prima facie evidence of negligence.” Jacob specifically alleges that Mentor violated “a duty under Federal law, and a parallel duty under Florida law, to exercise reasonable care…to ensure that [the implant] was safe and further that it was made in conformity with the manufacturing and design specifications mandated by the FDA as part of Mentor’s [pre-market approval].” Her state-law claims are based on allegations that Mentor: (1) manufactured implants that differed from the specifications agreed to by the FDA; (2) failed to properly meet the applicable standard of care by not complying with applicable federal regulations and failing to adhere to the manufacturing protocols approved by the FDA; and (3) failed to use the components and/or materials approved by the FDA. The heart of her claim is that because Mentor failed to follow FDA specifications, her implants were defective. Thus, the claims were not preempted.

Kassa v. Fulton County, Georgia—J. Pryor. Kassa was an Atlanta cabbie who was the victim of an attempted robbery. The would-be robber was prosecuted, and the prosecutor issued a material witness warrant for Kassa to appear as the victim at the robber’s trial. Kassa appeared willingly, but the prosecutor failed to inform the trial judge that the material witness warrant needed to be recalled or canceled. A few months later, Kassa was arrested by an officer who performed a warrant search and saw that there was an outstanding warrant. Everything was sorted out and Kassa was eventually released, but he was understandably angry and he sued the county and the prosecutor under section 1983. The prosecutor asserted that she was entitled to absolute immunity, and the district court agreed. The Eleventh Court disagreed, finding the prosecutor is not immune. Professional judgment played no role in the failure to ask the judge to cancel the warrant. The case concluded and the need for testimony had ended. The prosecutor’s failure to ask for the warrant to be canceled was not intimately associated with the judicial process.

Rojas v. City of Ocala, Florida—J. Carnes. When the City of Ocala held a prayer vigil for children killed in Ocala by a mass shooting, Art Rojas and Lucinda Hale attended but sued because they are atheists or humanists who objected to an official town prayer under the Establishment Clause of the First Amendment (applicable to the city government under the Fourteenth Amendment). The Eleventh Circuit found that the plaintiffs had standing because they wanted to mourn the deaths with the town, but the city held an event that only allowed for participation through Christian prayer. In regard to the merits, Judge Carnes noted that while Lemon v. Kurtzman, 403 U.S. 602 (1971) had been criticized for years, the case still appeared to be “shuffling about,” and the district court applied the Lemon test for Establishment Clause violations. In this year’s praying-coach case, decided after the appeal in this case was filed, the

Supreme Court drove a stake through the heart of the ghoul and told us that the Lemon test is gone, buried for good, never again to sit up in its grave. Finally and unambiguously, the Court has “abandoned Lemon and its endorsement test offshoot.” Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022). In the course of doing so, the Court asserted that it had already done it—“long ago,” id.—which was news to a third of the Court’s Justices, see id. at 2434 (Sotomayor, J., dissenting, joined by Breyer and Kagan, JJ.) (“Today’s decision . . . overrules Lemon . . . .”). Regardless of exactly when the ghastly decision was dispatched for good, the Supreme Court has definitively decided that Lemon is dead—long live historical practices and understandings. See id. at 2428 (majority opinion)(“In place of Lemon and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by reference to historical practices and understandings.”)(quotation marks omitted).

Thus, the Eleventh Circuit remanded the case to the district court to reexamine the facts under the new “historical practices and understandings” test, not the Lemon test.

Sistersong Women of Color Reproductive Justice Collective, et al v. Governor of the State of Georgia—J. Pryor. Various organizations and abortion providers including Planned Parenthood sued a long list of Georgia officials including the governor over 2019 legislative changes that would have violated Roe v. Wade/Casey. The lower court had enjoined the law, but the Supreme Court’s recent holding in Dobbs required a reversal and remand for summary judgment in the State’s favor. Notably, Judge Pryor refers to the appellants as “abortionists” 21 times in the opinion. Georgia’s new prohibitions on abortion survive the new rational basis standard. The new definition of a “natural person”—a human being including unborn human beings at any stage of development—is not unconstitutionally vague. Middle District of Florida Judge Schlesinger and Judge Lagoa joined the opinion.

Stansell v. Revolutionary Armed Forces of Columbia (FARC)—J. Jordan. Can you correct a $200 million dollar mistake? Four plaintiffs sued FARC and related parties under the Anti-Terrorism Act, 18 U.S.C. § 2333. They based their claims on the FARC’s commission of offenses like kidnapping and murder in Colombia. The plaintiffs obtained a default judgment against the defendants in the Middle District of Florida, and based on their submissions, the district court awarded them significant damages. Collectively, the plaintiffs were awarded $106 million in compensatory damages, and that amount was trebled under § 2333 so that the total was $318 million. The final judgment entered by the clerk described the monetary awards to each of the plaintiffs (including the trebled portions) as “compensatory damages.” To satisfy the judgment, plaintiffs attempted to attach assets in the USA and garnish assets of Samark López Bello, a Venezuelan billionaire linked to the FARC, based on the argument that he and his companies are agents or instrumentalities of FARC. Under § 201(a), the “total amount of the execution cannot exceed the amount of compensatory damages.” The plaintiffs asked the trial court to delete the reference to the trebled damages as “compensatory” and correct the judgment under Rule 60(a) as a clerical mistake. The judge denied the motion, stating that he had intended the trebled damages to be compensatory, but even if they were punitive and it was wrong to call them compensatory, he lacked power to correct the judgment because the error was more than a mere clerical error or scrivener’s error. On appeal, the Eleventh Circuit wrestled with the weirdness of treble damages. Statutes providing for treble damages “defy easy categorization as compensatory or punitive in nature. Whether treble damages under a given statute are considered compensatory or punitive is an intensely fact-based inquiry that may vary statute-to-statute.” A “district court’s interpretation of its own [prior] order is properly accorded deference on appeal when [that] interpretation is reasonable.” Here, the district court found that the intent was for the entire $318 million to be deemed compensatory, and the Eleventh Circuit found no abuse of discretion (or clear error) in that regard. Rule 60(a) could not be used to alter substantive rights. Thus, the total amount of execution is limited to $106 million, not $318 million.

**First DCA**

State of Florida v. Planned Parenthood of Southwest and Central Florida—J. Thomas, B.L. This case has enormous implications for standing and automatic injunctions outside just the abortion context. The First District held that the circuit court properly denied relief to Planned Parenthood. Effective July 1, 2022, 390.011 and 390.0111, Fla. Stat., provide that absent certain exceptions for the mother’s health and fatal fetal conditions, Florida law now prohibits abortions after the fetus reaches 15 weeks of age. Planned Parenthood is challenging the law under the Florida Constitution’s right to privacy. The trial court in Tallahassee granted a temporary injunction to prevent the law from going into effect, but when the State of Florida filed its notice of appeal, that activated an automatic stay of the temporary injunction per Rule 9.310(b)(2), Fla. R. App. P., a rule that provides for an automatic stay when the state or a public officer seeks review of a trial court’s order. In essence, the stay stayed the injunction, putting the law back into effect—sort of a double negative. Planned Parenthood moved to vacate the automatic stay, the circuit court denied that motion, and Planned Parenthood appealed that decision. The First DCA found no error, and the opinion bodes ill for Planned Parenthood in the First DCA. To vacate the stay, Planned Parenthood had to show that “(1) the equities are overwhelmingly tilted against maintaining the automatic stay, (2) [Appellees] will suffer irreparable harm if the automatic stay is maintained, and (3) [Appellees are] likely to prevail on the merits of the appeal.” As part of its analysis, the First DCA noted that no pregnant women were part of the suit, that Planned Parenthood was asserting rights of others (not itself), and economic harm to abortion clinics was not an irreparable harm because **“[w]e have unambiguously held that ‘case law is clear that economic harm does not constitute irreparable injury; that is…money damages due to a decrease in patient volume do not suffice to demonstrate irreparable injury.’”** **In a footnote, the majority noted that “any former decision from the United States Supreme Court acknowledging ‘standing’ of a party to advocate on behalf of a person not appearing in the case, regarding that person’s purported irreparable harm is now in question.** The majority declined to certify the case as one requiring immediate resolution by the Supreme Court of Florida. Judge Ray CONURRED in the opinion, but Judge Kelsey DISSENTED with an opinion, citing Florida precedent for the notion that any impact on privacy rights is presumed to be an irreparable injury. Judge Kelsey also cited numerous Florida Supreme Court opinions for the notion that Planned Parenthood has standing to sue regarding its patients’ rights.

**Third DCA**

Auto Club Insurance Company of Florida v. Santee—J. Fernandez. The Auto Club appealed the trial

court’s non-final order granting the insured’s motion to compel appraisal of a claim under a homeowner's insurance policy. Auto Club argued that the homeowners failed in their post-loss obligation to make sworn, written claims of loss within 60 days of the loss. The homeowners waited a year before filing their claim. Because there was an issue of fact as to whether the insured complied with his post-loss obligations, the trial court's failure to conduct an evidentiary hearing on the motion to compel an appraisal constituted error. Before compelling appraisal, the trial court must determine that post loss obligations have been met and that an arbitrable issue exists regarding the amount of the loss.

Navarro v. Varela—J. Logue. An employee’s arbitration clause only covered matters arising from the employment contract. The employee claimed intentional infliction of emotional distress and violations of the Florida Civil Rights Act based on factual allegations in her complaint concerning her high-risk pregnancy and her requests for reasonable accommodations because of her pregnancy. Navarro argued these claims were also subject to arbitration because they arose from the parties’ partnership relationship under the Agreement. The Third DCA held that Varela’s intentional infliction of emotional distress and Florida Civil Rights Act claims do not require reference to or construction of the Agreement and lacked a sufficient nexus to the Agreement, so arbitration was not required.

NexusVC and First Health Solutions, LLC, v. Hieg Partners, LLC—J. Logue. NexusVC sought a customer list for all of Heig’s customers from 2020 and 2021 in discovery. Heig and Nexus are competitors that sell health and life insurance. Nexus sued Heig, alleging that Heig employees who formerly worked for Nexus and had signed covenants not to compete were improperly soliciting Nexus clients. The trial court denied the request for Heig’s customer list on the ground that it improperly sought trade secrets from Heig. Nexus sought a petition for cert to quash the order denying discovery. The Third DCA denied the writ. Before granting a protective order regarding a claimed trade secret, the trial court must engage in a three-part inquiry: “the trial court must determine whether the requested production constitutes a trade secret; if so, the court must require the party seeking production to show reasonable necessity for the requested materials…. If production is then ordered, the court must set forth its findings.” The trial court correctly held that customer lists are protected trade secrets under section 90.506. Nexus alleged no necessity for the discovery. Nexus has a list of its own customers, so it could consult with them to find out if Heig had solicited them. When the trial judge pointed this out, Nexus moved to disqualify the judge because his tone of voice suggested he agreed with Heig. The judge denied the motion, and Nexus sought a writ of prohibition. The Third DCA also denied this writ, stating that trial court’s can discuss the merits of a motion before the court.

Star Casualty Insurance Company v. Gables Insurance Recovery, Inc., a/a/o Ana Maria Correa—J. Bokor. Star Casualty alleged that the trial court erred by granting summary judgment despite genuine issues of material fact concerning whether Correa’s medical bills for diagnostic imaging procedures were medically necessary and related to the underlying accident for purposes of section 627.736, Florida Statutes. Additionally, Star Casualty alleged that the trial court reversibly erred by striking four affirmative defenses from its amended answer that could have exempted it from liability for the claim. The Third DCA agreed and reversed and remanded. There was a motor vehicle accident, Correa’s insurance company paid only $400 (but there were $3,000 in medical bills), the patient’s rights were assigned to Gables, and Gables sued and then moved for summary judgment as to the issues of the reasonableness, relatedness, and medical necessity of the costs. In opposition, Star Casualty proffered an affidavit by a medical doctor opining that the charges were not medically necessary or related to the accident. This affidavit also noted that three of the imaging procedures performed on Correa appeared to have been improperly **upcoded or unbundled** with other procedures. “’Upcoding’” means an action that submits a billing code that would result in payment greater in amount than would be paid using a billing code that accurately describes the services performed.” § 627.732(14), Fla. Stat.

“’Unbundling’” means an action that submits a billing code that is properly billed under one billing code, but that has been separated into two or more billing codes, and would result in payment greater in amount than would be paid using one billing code.” The trial court concluded that the insurance company’s medical affidavit related solely to the reasonableness of the charges and did not create any genuine dispute of material fact as to relatedness and necessity. The trial court granted partial summary

judgment on the relatedness and necessity issues and granted Gables’ motion to strike the affirmative defenses. Star Casualty then stipulated to the remaining issue of reasonableness, and the court entered a final judgment and an award of attorney fees and costs in favor of Gables. Star Casualty’s doctor’s affidavit opined that the images conducted were “not medically necessary and not related to the accident of 1/19/2009” and that “there were no objective findings and documentation to warrant the ordering of the x-rays in this case.” Because the doctor was qualified, the Third DCA held that the doctor’s opinion created a genuine issue of material fact as to relatedness and necessity, and summary judgment had to be reversed and remanded.

United Services Automobile Association v. Less Institute Physicians—J. Fernandez. The “English Rule” has nothing to do with tea. Ms. Gowdy, an insured, was injured in a car accident, and she assigned benefits to some of her medical providers including Less Institute Physicians (“LIP”). LIP billed USAA, USAA requested documentation and determination that the insured suffered an Emergency Medical Condition (“EMC”) that triggered a right to payment, LIP sent the requested documents, USAA overlooked the documents, and USAA failed to send payment. Subsequently, USAA received a claim from the insured—not LIP—for lost wages and PIP transportation related to the same accident. USAA elected to pay the insured’s personal claim. As the result of payment, the full $10,000 of insurance benefits was exhausted. Tired of waiting for payment, LIP filed a breach of contract action against USAA for the unpaid medical bills. During suit, LIP presented the EMC determination it had timely submitted to USAA that USAA had overlooked. Throughout trial, this error by USAA was generally classified as an inadvertent mistake except on summary judgment. Notably, in the pleadings, LIP did not include a claim of bad faith in the breach of contract action, did not amend the complaint to add a claim of bad faith, and did not file a separate claim of bad faith pursuant to section 624.155, Florida Statutes (2020). One of USAA’s defenses is that all $10,000 of the insured’s policy had been paid out, and thus the rights had been “exhausted.” LIP argued bad faith in its summary judgment motion, but still never amended its complaint. The trial court noted the bad faith argument, but didn’t make a finding of bad faith. Instead, the trial court determined that USAA erred in paying the insured’s lost wages and transportation claim out of order, as the insured’s claim was received after LIP submitted its claim. The trial court cited to the English Rule (a sort of first-come/first-served rule adopted by Florida courts) for authority. On this basis, the trial court determined that the payment of insured’s claim was a gratuitous payment that did not count towards exhaustion of benefits because LIP had filed first. Accordingly, the trial court held that the benefits were not exhausted, and USAA was ordered to pay LIP’s claim. On appeal, the Third DCA held that the English Rule only applies to competing claims by assignees (insurance providers), not competing claims of insured versus assignees. Though LIP sought its payment first, the fact that USAA paid out the full $10,000 to the insured meant that the insurance policy limits were exhausted and that it had no legal obligation to pay LIP. Not only was summary judgment for LIP reversed, but the Third DCA reversed denial of USAA’s motion for summary judgment in their favor.

Water Restoration Guys, Inc. v. Citizens Property Insurance Corporation—J. Bokor. This is a fantastic opinion for plaintiffs. Citizens denied the claim of Water Restoration Guys (“WRG”), the assignee of a homeowner who had WRG repair damage from a roof leak. Citizens investigated the claim and denied coverage on the basis of its opinion that the water damage was due to wear, tear, and deterioration. Nowhere does this letter claim that the denial resulted from insufficient information or from a failure to comply with policy terms such as providing information, giving statements under oath, or the like. When WRG sued, Citizens raised an affirmative defense that the insured had failed to submit certain documentation required under the policy, and the circuit court granted summary judgment on that basis. The Third DCA reversed summary judgment, however, because “[w]hen an insurance carrier investigates a claim of loss and denies coverage because it concludes that a covered **loss has not occurred**, the insurance carrier cannot assert the insured's failure to comply with the policy's conditions precedent to filing suit as a basis for summary judgment.” Summary judgment based on a failure to comply with contractual conditions fails for the same reason. Essentially, denial of the claim as based on a non-covered event waives those additional defenses.

**Fifth DCA**

The Kidwell Group, LLC v. Olympus Insurance Company—J. Eisnaugle. Effective July 1, 2019, the legislature created more rigorous requirements for assignment of benefits of property damage insurance claims. Section 627.7152 provides a list of requirements for any agreement that assigns post-loss benefits under a property insurance policy “to or from a person providing services to protect, repair, restore, or replace property or to mitigate against further damage to the property.” Any assignment agreement that fails to comply with these requirements is “invalid and unenforceable.” In this case, the assignee was a business that repaired wind damage to a homeowner’s house. In a situation where the insurance contract was entered **before** July 1, 2019, but the assignment of benefits occurs **after** July 1, 2019, the Middle District of Florida had held that the operative assignment of benefits statute in existence on the date the contract was **entered** was the statute to apply. The Fifth District **disagreed** and sided with a Fourth DCA opinion holding that **the new assignment of benefits statute applies to all assignments of benefits that are entered after July 1, 2019**, regardless of whether the insurance policy predated the statute.

USAA Casualty Insurance Company v. Mikrogiannakis—J. Eisnaugle. Section 627.736(5)(c), Florida Statutes (2014), establishes a 35-day time limitation for the submission of invoices to a Personal Injury Protection (“PIP”) insurer. The insured was hit by a car while riding his bicycle. He sought medical treatment, but when filling out an intake form for the medical provider’s office, he left the form blank where it asked for his PIP provider. Eighteen months later, the medical provider figured out that USAA was the PIP carrier and submitted invoices to them, but USAA denied them as untimely. There is an exception to the 35-day rule when the provider receives erroneous information. The insured filed an action for a declaratory judgment, and both parties filed motions for summary judgment. The trial court sided with the insured, holding that the exception to the 35-day-rule applicable when a provider reasonably relies on erroneous PIP insurance information applied. On appeal, the Fifth DCA ruled that when the insured left the PIP information blank, this did not constitute merely incorrect information that a provider would reasonably rely on. It was just blank. The 35-day rule applied, and the bills were submitted roughly 17 months too late. Summary judgment for insured was reversed and the case was remanded. Judge Cohen CONCURRED in the result only without writing an opinion.