**TERRY’S TAKES**

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

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**2022 Week 40 (Sept. 26-30, 2022)**

**Supreme Court**

Here we go! This Monday (the first Monday in October) starts the new session for the Supreme Court.

**Eleventh Circuit**

Chance v. Cook—(J. Tjoflat; 11th Cir.; 9/28/22). Tracey Chance (“Chance”) worked for the Wakulla County building department (Wakulla isn’t too far from Tallahassee in case you were wondering). She brought a case against the county for sexual harassment. She was suspended and demoted. She sued in the Northern District of Florida for alleged violations Title VII of the Civil Rights Act of 1964 and Florida’s Civil Rights Act. Lawyers from two different firms represented Wakulla County. Because the building was subject to audio and video recording, Chance began recording conversations at her place of employment in anticipation of litigation. During discovery, the county’s attorneys asked for and obtained the recordings. One of the defense attorneys then claimed that the recordings violated section 934.03, Fla. Stat., a privacy law, and she contacted law enforcement. The police obtained a warrant and searched Chance’s home. Ultimately, the assistant state attorney with authority over the case decided that the recordings did not violate the law and that Chance would not be prosecuted. Chance then sued the defense attorneys under 42 U.S.C. § 1985(2) for a conspiracy to deter her from testifying in the sexual harassment case, and she sued their firms for failing to prevent the conspiracy. The defense attorneys moved to dismiss under Rule 12(b)(6), Fed. R. Civ. P., and the district court dismissed the complaint with prejudice. Chance appealed. The Eleventh Circuit affirmed. The relevant portion of the U.S. code forbids two or more persons from conspiring to deter a person from testifying in court by using force, intimidation, or threat. Since 2003, the Eleventh Circuit has held that when the defendant in such a case is an attorney, as long as the attorney’s conduct falls within the scope of representation of his client, such conduct is immune from allegation of a 1985 conspiracy. The rule was created because civil litigation is adversarial, and any other rule would chill zealous advocacy. (NOTE: One may wonder if the line separating the “scope of representation” should be an action taken in the case such as filing a motion *in limine* or a motion for sanctions or taking some other action in court rather than calling the police. But that is not the line that the court draws here.) The Eleventh Circuit saw no need to decide if force, threat, or intimidation were used here because Chance had not adequately alleged that the attorneys acted outside the scope of their representation. Rather than holding that this was a defense or affirmative defense that could be explored at summary judgment, the court held that it was Chance’s burden to allege facts that established that the attorneys acted outside the scope of their employment and that the case could be dismissed for failure to allege sufficient facts of actions outside the scope of employment. In a prior case, the Eleventh Circuit held that making threats to have a plaintiff’s family members fired and filing frivolous lawsuits against a plaintiff’s family members fell within the scope of representation. Judge Tjoflat then asked, “If we held that it was within the scope of representation for a defense attorney to make threats and file frivolous lawsuits on behalf of his client, then is it also within the scope of representation for a group of defense attorneys to report discovery material that they believe might be a violation of state law? We say yes.” Chance *had* alleged that the attorneys acted outside the scope of their representation, but even though the case was at the motion to dismiss stage, the Eleventh Circuit found that the additional allegation that the defense attorneys took the action for the sole benefit of their client, not personal benefit, meant that the actions were not outside the scope of employment. Thus, the argument was “without substantiating plausible allegations.” Rule 12(b)(6) requires the court to eliminate allegations that state “merely legal conclusions” instead of “well-pled factual allegations.” An additional allegation that the timing of the police report—months after they learned of the recordings but right after learning that she planned to testify about the recordings and present them in evidence—missed the mark because—get this—***it was not enough to allege that the attorneys were “trying to intimidate Chance” to keep her from testifying without somehow showing that they were not acting outside the scope of their representation***. The opinion does not discuss why the Complaint would be dismissed with prejudice as opposed to without prejudice with opportunity to amend. The order dismissing the case was affirmed.

<https://media.ca11.uscourts.gov/opinions/pub/files/202011699.pdf>

Gundy v. City of Jacksonville—This is an important 1983 claim for violation of a federal constitutional right and was a matter of first impression in this circuit. This case is about legislative prayer—the practice of allowing a person of faith to open the Jacksonville City Council meetings with a prayer that is expressly for the “benefit and blessing of the Council.” A council rule calls for the appointment of a council member as “Chaplain of the Council” to facilitate a prayer or invocation before each meeting. Each council member can invite a speaker from a religious congregation with an established presence in Jacksonville. A council member and candidate for mayor, Anna Broche, invited Reginald L. Gundy to perform the invocation about a week before the local elections. Gundy was a senior pastor of a local Baptist church, and he supported her campaign for mayor. He had hosted a campaign event for her at his church and had donated to her campaign. He started his invocation with “a direct appeal to a higher power,” but then began to criticize the city’s executive and legislative branches. The president of the council interrupted and asked him to make a spiritual prayer, but he essentially kept roasting members of the local government. The president of the council cut off his microphone. Pastor Gundy left the lectern after the Pledge of Allegiance without any incident or outburst. The president of the council, who supported Broche’s opponent in the mayoral race, took to Twitter on the following day to criticize Broche for using something “as sacred as our invocation” to campaign. He called the attack a “sacrilegious attack,” and he stated that it was fortunate that he controlled the microphone. Gundy sued the city and the president of the council. He alleged, under 42 U.S.C. § 1983, that the city and the council president violated his First Amendment rights to Free Exercise and Free Speech. He also sued under the same rights contained in the Florida Constitution. So as not to confuse the reader, suffice it to say that the Eleventh Circuit held that the district court’s analysis and the motion-to-dismiss and summary judgment stages was completely wrong, but it reached the right result. The main question answered is whether this sort of legislative prayer is speech by a private individual or by the government. The Eleventh Circuit held that the legislative prayer is speech by—and for the benefit—of the city council, not the private speech of the person praying or for the benefit of the public. It’s a vehicle through with the city council itself “seeks blessings and guidance in accomplishing its governmental work.” The Eleventh Circuit noted that legislative prayer occupies a unique place in our history and tradition under the Establishment Clause, with the Supreme Court holding in 1983 (the year, not the USC section) in a case called Marsh that legislative prayer was so embedded in our traditions that it did not violate the Establishment Clause where it is not used to proselytize or advance one faith or disparage any faith or belief. In 2014, in Town of Greece v. Galloway, the Supreme Court approved a town opening its monthly board meetings with only Christian prayer for eight straight years, holding that such a practice doesn’t violate the Establishment Clause as long as it follows the “tradition long followed in Congress and the state legislatures,” though the prohibition on proselytizing or advancement of one religion and disparaging any faith or belief survived. Once government invites prayer into the public sphere, the government must permit the person praying to address his or her own God or gods as conscience dictates. Three justices (Kennedy, Alito, and Roberts) had opined in a concurrence that the prayers are really for the legislators, not for the public, so that they could “show who and what they are” and reflect their private religious beliefs without denying the right to dissent by those who disagree. In line with this view, Gundy’s prayer was government speech by the council, not Gundy’s private speech where his private views would attach. The council’s rules tracked the language of the Supreme Court cases, providing that the invocations could not be exploited to proselytize or advance one faith or belief or to disparage any faith or belief, they must not create the impression that the council is affiliated with any particular faith or belief, and individuals are free to pray on their own behalf as their conscience requires. Thus, the individual speaker cannot sue for violations of his own religious or free speech rights. The only kind of attack that could have been brought would be an Establishment Clause claim, but Gundy did not advance such a claim, so the defendants were entitled to prevail as a matter of law. Essentially, if the council wanted to shut him down, it was the council’s own business because he was speaking on their behalf, not his own behalf or for the public. Thus, while most of the holdings of the district court were deemed incorrect, the court affirmed the judgment against Gundy on all of his claims.

**Second DCA**

Allstate Insurance Company et al. v. Ray—(J. Stargel; 2DCA; 9/30/22). In 2006, Veilleux was at fault in an accident with Mr. Aloia, who was riding a motorcycle. Mr. Aloia was rendered a paraplegic as a result of the accident. The following year, Veilleux (the driver, not the plaintiff) died from causes unrelated to the accident, and the personal injury lawsuit continued against his estate. Allstate—Veilleux’s insurer—admitted liability, but the parties were unable to reach a settlement on damages, Aloia filed suit, and the jury returned a damages verdict for over $44 million. The estate moved for new trial or remittitur, and the judge allowed Allstate to choose between either a new trial or a remitted verdict, and Allstate chose the latter. The verdict was ultimately entered for just under $22 million. The estate then turned on Allstate, suing for bad faith in failing to reach a settlement and for breaching its duty to defend by not electing to have a new trial. During discovery, the Estate went deep, asking for personnel files of Allstate employees and also asking for documents showing the "goals, strategies, objectives, performance metrics, or business targets" for Allstate's claims department. Allstate objected on grounds including relevance, privacy, attorney-client privilege, and work product. The trial court ordered production, while allowing redaction of social security numbers, telephone numbers, drug test results, employee financial information, and protected health information. The trial court ruled on the relevance objection, but did not address the attorney-client or work product claims. Allstate filed a petition for a writ of certiorari in the DCA, and the DCA granted relief. First, it held that compelling production of the employees’ personnel files violated the employees’ fundamental privacy rights under the Florida Constitution. If you were wondering about standing (Allstate’s ability to raise the privacy concerns of its employees), you win some points here. Allstate was not the only petitioner. Six employees joined in the cert petition at the cert stage. How exactly does that work when they were not a party below? The answer is that a cert petition is not an appeal. Under circumstances where a nonparty does not have adequate remedy for an order via an appeal, the nonparty can file or join in a petition for a writ of certiorari to obtain relief from the trial court’s order. On the merits, the trial court departed from the essential requirements of law in failing to review the personnel files *in camera* to balance relevancy versus privacy. Second, information in two personnel files were allegedly privileged. One employee is in-house counsel, and the other is the adjuster who handled the bad faith claim including recording of mental impressions that constitute work product. The trial court did not even address the privilege claims, which was a departure from the essential requirements of law. An *in camera* inspection is the proper course for those files as well. The Estate complained that Allstate did not submit a privilege log, but the DCA stated that there is no obligation to submit a privilege log until the trial court has determined that the information is discoverable and had ruled on non-privilege objections. (NOTE: The DCA seems to believe that the trial court ordering that the documents be provided did not trigger the need to create a privilege log because the trial court did not expressly rule on the privilege and work product objections.)

<https://www.floridasupremecourt.org/content/download/850252/opinion/212912_DA16_09302022_092043_i.pdf>

Marlette v. Carullo—(J. Villanti; 2DCA; 9/30/22). The facts of this property dispute are unimportant for personal injury practitioners. The case is summarized because Marlette petitioned for a writ of certiorari after the trial court bifurcated legal issues from equitable issues set for trial and set the equitable issues for non-jury trial in advance of the trial on the legal issues. The equitable issues were to be heard at a bench trial, and the legal issues were to be tried before a jury. The order of bifurcation scheduled the bench trial on the equitable issues with the legal issues to be tried at some later date. The reason the trial court bifurcated the legal and equitable issues was out of concern about available trial dates and the “parties’ evident discord affecting their respective access to their properties and to water via the well.” Marlette argued, however, that the legal and equitable issues were inextricably intertwined and that bifurcation could lead to inconsistent verdicts or even preclude the jury from deciding the legal claims. The DCA agreed that where facts and issues of underlying claims are intertwined, the trial court should conduct a single trial. They are intertwined when they are related and necessarily have an “important bearing” on one another. While a desire for efficiency is understandable, unless it is waived, a jury must make findings concerning all facts which are common to the legal and equitable claims before the trial court may consider granting an equitable remedy. The trial court will be bound by the findings of fact by the jury. If the judge made findings of fact that precluded the jury from deciding the legal claims, that would deprive Marlette of the right to a jury trial guaranteed by the Florida constitution. The proper procedure is for the trial court to proceed with the jury trial on the legal issues and then apply the jury’s factual findings to determine whether Marlette has established entitlement to her equitable claims. Thus, there was a departure from the essential requirements of law. The petition was granted and the order of bifurcation was quashed.

<https://www.floridasupremecourt.org/content/download/850260/opinion/220547_DC03_09302022_092203_i.pdf>

**Third DCA**

Borges v. Citizens Property Insurance Company—(Per Curiam; 3DCA 9/30/22). This citation PCA’s parentheticals extend longer than one page. At some point, one wonders if it should have been a PCA. Anyway, the parentheticals remind us that once an insured shows coverage, the burden shifts to the insurer to show that an exception applies. If the insurer succeeds in showing that there is an exclusion that bars coverage, the burden shifts back to the insured to demonstrate the exception to the exclusion. The insured has to offer evidence to support an exception to an exclusion in order to escape summary judgment. An example given was from a 2021 4th DCA case where an insurer showed an exception to coverage for losses due to rain causing water damage to an interior of the home and the insured failed to show that an exception to the exclusion precipitated interior rain damage.

Metro Dade Firefighters, International Association of Fire Fighters, Local 1403 v. Miami-Dade County—(J. Logue; 3DCA; 9/30/22). This is an appeal concerning the power of arbitrators. The firefighters union (“Union”) and the County had a collective bargaining agreement that required arbitration. The specifics of the claims are unimportant to personal injury practitioners. The arbitrator sided with the Union, requiring that a large chunk of sick leave be paid to a firefighter for the time prior to when his disability qualified him for long term disability benefits. The County filed a motion to vacate the arbitration award on the grounds that that arbitrator exceeded his authority. The circuit court agreed and vacated the arbitration award. The Union appealed. The DCA noted that in reviewing an order vacating an arbitration award, our review “is very limited, with a high degree of conclusiveness attaching to an arbitration award.” “This limited review is necessary to avoid a judicialization of the arbitration process, and to prevent arbitration from becoming merely an added preliminary step to judicial resolution rather than a true alternative.” Section 682.13(1), Florida Statutes, sets forth the only grounds on which an award of an arbitrator must be vacated. Those six grounds are: 1) the award was procured by corruption, fraud, or other undue means; 2) there was evident partiality by an arbitrator appointed as a neutral arbitrator, corruption by an arbitrator, or misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding; 3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to hear evidence material to the controversy, or otherwise conducted the hearing contrary to s. 682.06, so as to prejudice substantially the rights of a party to the arbitration proceeding; 4) an arbitrator exceeded the arbitrator’s powers; 5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under s. 682.06(3) not later than the beginning of the arbitration hearing; or 6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in s. 682.032 so as to prejudice substantially the rights of a party to the arbitration proceeding. And even though the statute speaks in terms of the six grounds being the only ones where a court “must” vacate an arbitration award, there is apparently no middle ground or basis upon which a court “may”—but need not—set aside an arbitration award. (Note: The DCA repeatedly states that there are five grounds, but there are six. They are set forth in subparts a, b, c, d, e, and f of the statute). Instead, in the absence of one of the six factors, neither the circuit court nor this Court has the authority to overturn the arbitration award. Indeed, it is well settled that the award of arbitrators in arbitration proceedings ***cannot be set aside for mere errors of judgment either as to the law or as to the facts***; if the award is within the scope of the submission, and the arbitrators are not guilty of the acts of misconduct set forth in the statute, the award operates as a final and conclusive judgment. The ground alleged by the County in this case was ground #4 (or d), that the arbitrator exceeded his powers. An arbitrator exceeds his authority when he goes beyond the authority granted by the parties or the operative documents and decides an issue not pertinent to the issue submitted to arbitration. Here, the arbitrator interpreted documents that were incorporated by reference into the document at issue, and it was fair game. While the circuit court disagreed with the arbitrator’s interpretation and application of the law, it was not free to vacate the award. **Whether the arbitrator’s decision was legally correct is irrelevant.** **An arbitrator’s award cannot be reversed on the ground that the arbitrator made an error of law.** The order vacating the award was reversed and remanded with instructions to reinstate the award.

[https://www.floridasupremecourt.org/content/download/850291/opinion/211881\_DC13\_09302022\_101855\_i.pdf](https://www.floridasupremecourt.org/content/download/850291/opinion/211881_DC13_09302022_101855_i.pdf\)

N.I. Nitof, Inc. v. Unknown Heirs of Cecile McCartney, deceased—(J. Miller; 3DCA; 9/30/22). This is a short opinion denying a petition for a writ of prohibition. The corporation moved to disqualify the trial judge in foreclosure proceedings, alleging that the trial judge’s adverse rulings showed bias. It is well settled that the laws concerning judicial qualification were not intended to enable a discontented litigant to oust a judge because of adverse rulings. The adverse rulings can be reviewed by appeal. Listing adverse rulings, without more, is legally insufficient to demonstrate bias or prejudice necessary to support disqualification. Thus, the writ was denied.

<https://www.floridasupremecourt.org/content/download/850321/opinion/221387_DC02_09302022_102536_i.pdf>

**Fourth DCA**

Babani v. Broward Automotive—(J. Warner; 4DCA; 9/30/22). The facts of this case are unimportant. It dealt with a customer’s claim for damages for a car dealership’s alleged violation of the Florida Consumer Collection Practices Act, section 559.72, Fla. Stat. The case proceeded in county court under summary rules for small claims. The critical issue in the case was that the lower court entered summary judgment while discovery was still pending, which was error. The DCA stated plainly that where outstanding discovery could create genuine issues of material fact, summary judgment is improper and cannot be considered until discovery is complete. The order granting summary judgment was reversed as premature and the case was remanded for further proceedings.