**TERRY’S TAKES**

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

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**Eleventh Circuit**

Johnson v. NPAS Solutions LLC—This was a denial of a motion for rehearing en banc. Chief Judge William Pryor, and Judges Newsom, Branch, Grant, Luck, Lagoa, and Brasher all denied rehearing en banc. Judge Newsom wrote a paragraph to explain that he declined to write the customary “concurral” to defend the panel opinion because the panel opinion was issued in September 2020, that that was long enough already, and that the panel opinion could speak for itself. Judge Jill Pryor authored a 31-page DISSENT from the denial of rehearing en banc, joined by Judges Wilson, Jordan, and Rosenbaum. To briefly summarize, the panel decision in this case held that **two Supreme Court cases decided in the 1880s prohibit district courts from approving, under any circumstances, incentive or service awards for class representatives in class action settlement agreements**. According to the panel opinion, these two cases dictated that such awards—despite the parties having agreed to them and district courts having approved them as reasonable and fair to the entire class under Federal Rule of Civil Procedure 23—are simply barred. The dissent opined that by holding that incentive awards are unlawful *per se*, the majority opinion broke with decisions from the Eleventh and every other circuit allowing these awards when properly approved under the strictures of Rule 23. Judge Pryor wrote, “The panel majority’s reading of *Greenough*—which applied federal common law and equitable principles in the absence of any authority like Rule 23—as banning incentive awards placed this circuit at odds with more than 50 years of class action law and decisions from every other federal court in the country. And this is not some esoteric disagreement. The opinion has already begun to eliminate incentive awards, and although it is too early to measure, I expect that it will have a very real and detrimental impact on class actions in this circuit, an impact that will be felt not least by the most vulnerable plaintiffs such as consumers and small businesses.” Judge Pryor writes that “by denying rehearing en banc, our court has struck a lasting blow to class actions as a device for righting wrongs in this circuit. Given our failure to act, it will be up to the Supreme Court to overrule or clarify *Greenough* and *Pettus* to undo this problem of our making. If the Supreme Court does not act, then I urge either the Advisory Committee on Civil Rules to amend Rule 23 or Congress to enact a statute that explicitly authorizes incentive awards.”

President of Velvet Lifestyles v. JLFL Concepts, LCC—J. Jordan. The Eleventh Circuit reversed denial of the defense’s summary judgment motion against 32 plaintiffs on their claims of false advertising and false endorsement under the Lanham Act. The defendants were the managers and managing company of a Miami swingers club that hosted group sex gatherings. The swingers club used images of models and similar contractors in advertisements for Miami Velvet, the club, in a way that implied that the models were affiliated with and endorsed the club. The issue in the case was that the individual manager, Mrs. Dorfman, argued that there was no evidence sufficient to pierce the corporate veil and hold her personally liable for damages and that there was a distinction between Velvet Lifestyles and a management company nicknamed “Yorkies.” The verdict should be solely against the business entities. Rather than making the necessary showing in their motion for summary judgment, the plaintiffs simply treated Velvet Lifestyles, Yorkies, and Mrs. Dorfman as one and the same. The district court did the same. Because the plaintiffs never argued or established that the entities should be treated as one or that Mrs. Dorfman was individually involved, they did not meet their summary judgment burden. The judgment against Mrs. Dorfman and Yorkies was reversed and remanded for further proceedings, while the judgment against Velvet Lifestyles had not been challenged.

S.S. v. Cobb County School District—J. Luck. The 11th Circuit held that it lacked appellate jurisdiction to review a district court’s order remanding an Individuals with Disabilities Education Act claim for a school child with cerebral palsy back to a Georgia state administrative agency for a due process hearing. The order was not an appealable final order under 28 U.S.C. 1291. The district court had determined that the parties had submitted competing evidence as to whether S.S.’s individualized education plan was reasonable and appropriately ambitious, so a summary determination in the school’s favor was improper and the agency had to hold a hearing. On appeal, the Eleventh Circuit distinguished the general rule from appealable remand orders under the Social Security Act because those orders were specifically appealable by statute. The circuit noted that its decision was in line with most circuits, though the Tenth Circuit has created a “practical finality” exception to the general rule. The Eleventh Circuit noted that it did not need to create a similar exception to the rule but that even if it did, the facts in this case would not meet that narrow exception. The Eleventh Circuit clarified that it did not approve of the district court’s remand order and that the district court’s decision appeared incorrect because the summary judgment standard under the IDEA law is a mere preponderance of the evidence standard, not a usual rule 56 standard, but the court held that because it lacked jurisdiction, it could not reach the merits absent a final judgment.

**Supreme Court of Florida**

**NOTE:** A new Supreme Court of Florida Justice has been appointed. On Friday, August 5, 2022, Gov. DeSantis appointed Renatha Francis two years after her initial appointment to the high court fell through because she did not meet minimum constitutional requirement of being a member of the Florida Bar for 10 years. On September 1, 2022, she will replace Justice Alan Lawson, who is retiring at the end of the month. Renatha Francis is 45 years old. She was born in Jamaica. Before emigrating to the USA, she owned a bar and trucking company and attended college in Jamaica. She attended Florida Coastal Law School. She worked as a staff attorney at the First District Court of Appeal from 2011 to 2017. She served on the Miami-Dade County court from 2017-2019 and on the 15th Circuit bench from 2019 to the present. She will become the second black woman to ever sit on the Florida Supreme Court. She is the second woman to serve on the current court. She is a member of the Federalist Society. Governor DeSantis has now appointed four of the seven justices on the Florida Supreme Court. During a press conference regarding her appointment, she stated that applying laws “as written” are the bedrock of her judicial philosophy, and “essential to preserving liberty.”

**First DCA**

Allen v. Allen—J. Jay. The family law portion of this case is not summarized. Personal Injury practitioners can take note, however, of the portion of the opinion regarding the Former Husband’s challenge to the trial court’s denial of his motion to reopen the evidence so that he could recall a witness who previously testified at trial. The motion was made a week after the trial court entered a Supplemental Final Judgment granting the Former Wife’s motion to modify the prior final judgment in respect to child support and alimony. Former Husband fired his attorney after the trial, hired a new one, and the new attorney is the one who moved to reopen evidence to recall a witness from the trial to offer additional testimony. While the lawyer cited Rule 12.530, which allows courts in bench trials to “open the judgment if one has been entered, take additional testimony, and enter a new judgment,” the DCA expressly noted that Fla. R. Civ. P. 1.530(a) employed the same exact language. Thus, the opinion should be applicable to all cases applying the rules of civil procedure. The trial court must consider **the timeliness, the character of the evidence to be introduced, the effect of the evidence’s admission, and the reasonableness of the excuse justifying reopening**. The trial court has broad discretion to reopen the case, but it **can only reopen the evidence where this can be done without injustice to the other party.** The DCA noted that the reason for reopening the case was a dispute of law, not something that additional testimony would clear up. While the motion was “timely,” it would not have yielded any testimony that could have altered the trial’s result. The DCA also noted that the Former Wife would have been unfairly prejudiced by having to retry a central issue, which would have allowed Former Husband to take a second bite at the proverbial apple to prove an essential element of the case. The DCA found prejudice from a proposed “evidentiary ‘do over.’” Ultimately, however, the holding was that the trial court did not abuse its discretion in denying the motion to reopen the evidence. **AUTHOR’S NOTE: The DCA seems to hold here that the motion to reopen was defective both because it could not make any difference in the result AND because it would prejudice the Former Wife by giving the Former Husband a SECOND CHANCE TO CHANGE THE RESULT. It is difficult to imagine a scenario where at least ONE of these defects would not be true. Either the evidence has a good chance of changing the outcome or it doesn’t. Thus, the opinion should likely be read to mean that the First District is extremely hostile to motions to reopen the evidence.**

Hall v. Cooks—J. Makar. The holding of this case was that various pro-Confederate plaintiffs lacked standing to challenge the vote by the city of Madison (in Madison County, Florida) to remove a confederate statute from a city park. The decision is noteworthy because, perhaps taking a cue from the Supreme Court of the United States, the opinion contains a full-color picture of the monument covering half of one page of the opinion. This is perhaps an indication that Florida courts will welcome inclusion of color photos in appellate briefs.

**Second DCA**

Gualtieri v. Bogle—J. Stargel. Bogle sued Gualtieri (as sheriff of Pinellas County) and a deputy, Lyons, for negligence, and the trial court denied a motion to dismiss the case on sovereign immunity grounds. The DCA reviewed the nonfinal order under Rule 9.130(a)(3)(F)(ii) and (iii) and found that the trial court erred in denying immunity. The DCA specifically noted that Rule 9.130 was expanded in 2020 to allow for immediate appellate review of orders denying motions claiming entitlement to sovereign immunity, immunity in federal civil rights claims, or immunity under section 768.28(9), which is the higher bad faith/malice standard for torts claims against for state employees, officers, and agents. Bogle alleged that Deputy Lyons yanked him off of his motorcycle, which caused the bike to fall on his leg, slicing and burning it. The deputy maintained that he had ordered Bogle to get off of the motorcycle, but Bogle had tensed up his arms and braced himself. The complaint for battery against the deputy personally failed to allege that Deputy Lyons acted with bad faith, malicious purpose, or willful and wanton disregard. In fact, it specifically alleged that the act was **without** bad faith or willful and wanton disregard. Thus, it had to be dismissed and the trial court erred in denying the officer’s motion. For the battery count against the sheriff’s office alleging that Deputy Lyons was within the course and scope of his employment, the sheriff was entitled to immunity under section 768.28(9) if the act was done in bad faith or with malicious purpose or with wanton and willful disregard for human rights, safety, or property, and the DCA was a touch critical of Bogle’s creative attempts to avoid using words to that effect in the complaint, but the DCA felt constrained to allow the claim to go to a jury because the deputy’s conduct was not of the type that could *only* occur from bad faith, malicious intent, or willful and wanton disregard. Count Three alleged negligent training. The DCA observed that the State of Florida waived sovereign immunity in tort actions for any act for which a private person under similar circumstances would be held liable and where a common law or statutory duty of care existed. The DCA held that the complaint plausibly alleged a duty of care to train employees not to use excessive force, citing federal cases for that proposition. Despite that, the DCA held that the negligent training count had to be dismissed because “it is barred by the discretionary function exception” that extends sovereign immunity to basic judgmental or discretionary governmental functions as opposed to operational acts. The decision on how to train officers and what subjects to teach was an exercise in governmental discretion. The remedy included instructions to dismiss counts one and three “with prejudice.” Only the second count (battery attributable to the sheriff’s office) survived, and the case was remanded. NOTE: This seems to be the death knell of any tort against a state actor regarding a bad policy.

Mitchell v. Flatt—J. Smith. Mitchell is a defense attorney who committed discovery violations. The trial court imposed fees and costs as a sanction. The expenses under Rule 1.380(d) related to the discovery violation were affirmed. The amount of costs was affirmed. Because Flatt’s attorney failed to present expert testimony to support the reasonableness of the fee, however, the order for attorney’s fees was reversed **without remand** due to “exceptional facts” that the DCA found should bar Flatt from presenting expert testimony on any remand. The sanctionable conduct was that Mitchell advised his client (the former wife in a family law case) to skip her deposition. At the sanctions hearing, Flatt’s attorney testified as to his own hours related to the skipped depo. The attorney had an expert lined up to testify about the reasonableness of the fees, but the expert was unexpectedly unavailable and did not testify. A continuance was discussed, but Flatt’s attorney didn’t pursue it. Instead, he simply introduced the expert’s affidavit, and Mitchell made a hearsay objection, which was sustained. The trial court granted $4,695 in fees, which was the amount Flatt’s attorney had himself billed for time related to the depo. Mitchell argued the failure to introduce evidence of reasonableness of the hours was fatal to the request for fees, but the trial court rejected the argument. On appeal, the DCA held that the law is clear: to support “reasonable” fees, expert testimony is required.
“Self-proof” is insufficient. The DCA held that when fees or costs are appealed and there is no competent, substantial evidence to support the order, the appellate court will generally reverse the award without remand. The court cited 4th DCA precedent that seemed to militate in favor of a remand, but the court recognized disunity in the caselaw and found that the lawyer’s conscious decision to not present expert testimony meant that the case was “on all fours” with a different 4th DCA case denying remand, and the Second DCA held that the attorney should not be entitled to “a second bite at the apple….” The fee order was reversed with no remand. Judge Black concurred. Judge Labrit, however, CONCURRED IN PART AND DISSENTED IN PART, DISSENTING on the decision to disallow remand. Judge Labrit opined that Mitchell did not properly raise the issue of denying a remand. **AUTHOR’S NOTE: From Judge Labrit’s description, it appears the party did raise the issue that the attorney should not be entitled to “a second bite at the apple,” but simply did a bad job of arguing the issue because he cited cases that did not pertain to remand of attorney’s fees specifically.** Judge Labrit was also critical of the majority’s reliance on the attorney’s concession at oral argument that he knew he had to introduce expert testimony as the key material fact, though the majority clearly cited caselaw regarding the binding effect of concessions at oral argument. Finally, the ruling had the effect of validating Flatt’s sanctionable conduct, which Judge Labrit deplored.

RKHUB Logistics LLC v. Eastern Auto Motor Corp.—J. Kuntz. Noting that the Supreme Court of Florida recently amended the summary judgment rule for Florida, the DCA focused on 1.510(a), Fla. R. Civ. P., which requires the trial court to expressly state the reasons for granting or denying summary judgment on the record. The rule is mandatory. There is no such thing as a valid summary denial (or grant) of summary judgment in Florida. The court also cannot simply make a conclusory statement that there is or is not a genuine dispute of material fact. Instead, the court’s stated reasons must be specific enough to guide the parties and also allow for appellate review if necessary.

Synergy Contracting Group v. Fednat Insurance Company—C.J. Morris. This breach of contract suit was between Synergy as assignee of the homeowner and Fednat, the insurer. Synergy repaired water damage to the home and then sued Fednat because while Fednat paid the claim and admitted to coverage, Synergy felt that more money was owed. Fednat moved to compel an appraisal, the appraisal agreed with Synergy, and Fednat immediately paid the additional amount. Both parties moved for summary judgment (Synergy because it maintained that it had won and was now owed attorney’s fees under sections 627.428, 627.736(8), and 92.231(2), Fla. Stat. (2018), while Fednat maintained that it had paid the full value of the claim and the court could award nothing more, meaning that it had successfully defended the claim because the claim was now moot). The trial court agreed with Fednat and ruled that Synergy was entitled to no further benefits and that Synergy “shall take nothing by this action,” but the trial court reserved on fees and costs. The DCA, citing an earlier opinion in the same case and a 2020 opinion, held that the contract action was not made moot by payment of a postlawsuit appraisal award. Instead, section 628.428 (granting prevailing party fees in insurance cases) is deemed incorporated into every insurance contract. Reversed and remanded to reconsider Synergy’s claim for fees and costs. **AUTHOR’S NOTE: While the assignee won this case under 2018 law, the statute was amended in 2019, 2021, and 2022. Subsection (1) of the statute now provides that in a suit arising under a residential or commercial property insurance policy, the amount of reasonable attorney fees shall be awarded only as provided in s. 57.105 or s. 627.70152, as applicable. The newly-added subsection 4 of the statute critically provides that in a suit arising under a residential or commercial property insurance policy, the right to attorney fees under the statute may not be transferred to, assigned to, or acquired in any other manner by anyone other than a named or omnibus insured or a named beneficiary. Thus, Synergy, as an assignee, would have been denied fees if the claim arose under present law.**

**Third DCA**

Seven Appeals Involving Attorney Bruce Jacobs—In seven separate cases handled by Attorney Bruce Jacobs (Jacobs Legal PLLC) of Miami, the DCA issued a consolidated order imposing sanctions on Attorney Jacobs for: asserting frivolous arguments in a motion for rehearing en banc; impugning the integrity of the court, opposing counsel, and the Florida Bar; including citations to the record that did not support the claimed facts; including citations to cases that did not support the claimed legal proposition; failure to contain a paginated index, bookmarks, or consecutive pagination in an appendix; including documents outside the appellate record in the appendix; including vacated orders in the appendix without indicating that the orders were vacated; expressing mere disagreement with the ruling in a motion for rehearing; repeated comments about “shadow rulings” of the DCA that allowed banks to commit fraud; arguing in bad faith; and accusing the court and judges of deep-seated corruption and bias. The court noted that it had sanctioned Attorney Jacobs twice in 2018, but that he had continued to engage in a persistent and escalating pattern of similar misconduct. The court referred each matter to the Florida Bar for disciplinary proceedings, imposed reasonable fees not to exceed $5,000 per matter (a total of $35,000) for the post-opinion motions, made Jacobs and his PLLC jointly and severally responsible for the fees, and remanded for determination of the reasonable fees. The opinion was 21 pages in length.

Gering v. State of Florida-A petition for certiorari was dismissed based on authority that states that a departure from the essential requirements of law (the standard for certiorari relief) cannot be established if there is no clearly established principle of law and the issue of law is not yet settled.

Henry v. Reemployment Assistance Appeals Commission—In appealing an unemployment decision by an agency appeals referee, Henry received written notice that she had 20 days to appeal, and her explanation that she thought she had 20 business days, not 20 calendar days, was insufficient to show good cause (under section 443.151(4)(b)(3), Fla. Stat.) why her appeal was filed two days late. Appeal dismissed.

M.M.W. v. J.W.—J. Miller. This case is not summarized in full. It is simply noted that this termination of parental rights case was, in the DCA’s words, “[u]nlike most cases involving termination of parental rights” in that the proceedings were “commenced by way of a private petition filed by the father…on the heels of acrimonious dissolution proceedings.” Section 39.802(1), Fla. Stat., actually allows a TPR petition to be filed “by the [Department of Children and Families], the guardian ad litem, **or any other person who has knowledge of the facts alleged or is informed of them and believes that they are true**,” including a parent.

State of Florida, Department of Revenue v. Trochez—J. Miller. The DCA granted a mother’s petition for certiorari from a non-final order requiring the mother and minor child to submit to genetic testing because the father acknowledged paternity and genetic testing is required only if paternity is at issue.

Suhaag Garden, Inc. v. Certain Underwriters at Lloyd’s London—J. Emas. Policy that insured commercial business for loss of income only covered losses from “direct physical loss of or damage to property” and, thus, did not cover losses due to suspension of operations from the COVID-19 pandemic.

**Fourth DCA**

Buckeye Plumbing, Inc. v. Todd—The DCA declined to quash an order compelling the defense to turn over a surveillance video of an injured plaintiff to the plaintiff’s attorney in discovery. Judges Ciklin and Forst summarily denied the defense’s petition for certiorari without further comment, but Judge Warner wrote a DISSENT indicating that he would have granted the petition and quashed the order requiring the defendant to produce the surveillance tape of the plaintiff because it was protected by work product privilege. The trial court found that the defense waived the privilege by providing the tape to their retained medical expert, and Judge Warner cited a First and Third DCA cases for clearly established law that a party does not waive privilege simply by disclosing privileged content to the party’s own expert. The expert also testified that he did not rely on the tape in forming his opinions, so production would not be required under Rule 1.280(b)(5). The dissent does not make the basis for the majority’s denial of certiorari clear.

Cadavid v. Saporta—J. Levine. This case involved a domestic violence injunction petition that was denied by the trial court. The trial court also imposed bad faith fees and costs on the woman who brought the petition and her attorney, but the DCA reversed the fees and costs. The court noted that section 57.105, Fla. Stat. was amended effective October 1, 2019, to allow for an award of fees in actions for injunctions for protection against repeat, dating, or sexual violence, but the trial court can only award fees where it finds by clear and convincing evidence that the petitioner or respondent knowingly made a false statement, allegation, or falsely asserted a defense with regard to a material matter. Though the court rejected the petitioner’s credibility and found no objective basis for claiming she was in fear of the former boyfriend in light of her continued texts and visits with him, it did not find that she actually made a false statement or allegation, and, thus, fees and costs were reversed.