**TERRY’S CASE LAW UPDATE**

**FOR FLORIDA PERSONAL INJURY LAWYERS**

**By Terry P. Roberts**

**Director of Appellate Practice**

**Fischer Redavid PLLC**

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**Eleventh Circuit**

AFC Franchising, LLC v. Purugganan—C.J. Newsom. What the heck is a “floating forum-selection clause?” Doctors Express is a Connecticut-based business. Purugganan is a New York resident. A contract between the parties stated that actions arising under their agreement must be commenced “in a state or federal court of competent jurisdiction within such state or judicial district **in which we have our principal place of business at the time the action is commenced**, and you (and each owner) irrevocably submit to the jurisdiction of those courts and waive any objection you (or the owner) might have to either the jurisdiction of or venue in those courts.” Because the location of the principal place of business at a future point in time could change, this is called a “floating” forum-selection clause. After the agreement was entered, Doctor’s Express assigned its rights to AFC Franchising, an Alabama-based LLC. Eventually AFC sued Purugganan in Alabama federal court. Purugganan moved to dismiss for lack of personal jurisdiction and improper venue and moved to transfer the case to Connecticut, and the district court granted his motion. He had argued that the forum selection clause’s language about consenting to jurisdiction and venue in the principal place of business applied to the present principal place of *Doctors Express’s,* which was still in Connecticut. The Eleventh Circuit disagreed. Because the agreement allowed Doctors to assign the agreement without any restriction, AFC stepped into Doctor’s shoes and *AFC’s place of business*, not *Doctor’s* place of business, became the relevant location for the floating forum selection clause. Purugganan failed to show that enforcing the clause would be unfair or unreasonable. Reversed and remanded.

Davis v. Waller—J. Marcus. The facts of this 1983 case are straight out of a Michael Bay movie. A felon, high on meth after shooting his pregnant girlfriend and taking his own grandmother hostage, fled in a truck with the injured girlfriend, eventually threw her from the moving truck, shot at the cops, ditched his truck (which had run out of gas), fled on foot, and came to a logging site. He found a .22 caliber rifle at the logging site and used it to take Davis, a logger, hostage. The felon forced Davis to drive an 84,000,000 pound truck loaded with timber. See? Michael Bay. You can picture the logs falling from the truck and smashing the pursuing cop cars, right? While Davis steered, the felon hid in the footwell, pushing the gas pedal of the truck with his hand. Somehow Davis called 911 and told the police that he was a hostage and that the felon was armed. When Davis was hesitant to drive into the police cars, the felon fired his rifle through the driver’s side window and ordered Davis to do it. Davis then drove into the line of police vehicles that were blocking the road, and the cops opened fire, shooting Davis in the hand, fingers, hip, and shoulder. He was shot nine times, but survived with permanent injuries and psychological injuries. Davis sued the police for violating his 4th and 14th amendment rights, and the officers claimed qualified immunity. In order to receive qualified immunity, the public official must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred. The burden then shifts to the plaintiff to show that qualified immunity is not appropriate. To overcome the defense, the plaintiff must show first, that the defendant violated a constitutional right and, second, that the right was “clearly established.” In an excessive police force case, a plaintiff demonstrates a right is “clearly established” by showing that it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. There are three ways that a plaintiff can prove that a particular constitutional right is clearly established. First, a plaintiff can show that a materially similar case has already been decided. Only materially similar cases drawn from the United States Supreme Court, this Circuit, and/or the highest court of the relevant state can clearly establish the law. Second, a plaintiff can also show that a broader, clearly established principle should control the novel facts of a particular case, but the principle has to be so clear that every reasonable officer facing the circumstances would know that the act would violate federal law. Third, a plaintiff can establish that the case “fits within the exception of conduct which so obviously violates [the] [C]onstitution that prior case law is unnecessary.” The Eleventh Circuit agreed with the District Court that the officers were justified in using deadly force because there was a threat of serious physical harm, they were preventing the escape of a suspect who threatens serious physical harm, and the suspect was armed. No case holds that deadly force may never be used against an innocent victim, no warning is necessary where it is not feasible to warn before shooting due to danger from the armed suspect, there is no constitutional duty to use non-deadly alternatives before using deadly force, and firing at the someone coming out of the truck was not unreasonable. Ultimately, the officers “made the difficult, but altogether reasonable, decision that [the felon] and the logging truck had to be stopped -- and, tragically, that meant stopping Davis, too.” Judge Jill Pryor CONCURRED SPECIALLY, stating that she would analyze the final shot by one officer differently. She viewed the final shot as unreasonable because he shot at an opening door without acquiring a target when he knew that one occupant was a hostage, but Judge Pryor agreed that there was no clearly established right in a prior case, so the plaintiff had to lose the case. (One wonders how one is supposed to win these cases on the ground that there are cases establishing the right if no one ever wins because there is no clearly established right. It’s a bit circular). Notably, the concurrence included two pictures of the logging truck, again demonstrating that appellate courts having suddenly begun incorporation color pictures into opinions.

MSPA Claims 1, LLC v. Tower Holl Prime Insurance Co.—J. Newsom. This was an 18-page opinion on MSPA’s attempt to recover a reimbursable payment under the Medicare Secondary Payer Act, which the court called “notoriously complex.” The court gave a “remedial course on the Act’s operation,” which one should go read if one is so inclined. Hands? No? Me, either. The holding was that MSPA’s cause of action accrued in 2012 when MSPA’s assignor, Florida Healthcare, paid an insured’s medical bills and became entitled to reimbursement through the Medicare Secondary Payer Act. Because MSPA brought suit more than four years later, the claim was not timely under 28 U.S.C. section 1658(a).

**First DCA**

Gradia v. Baptist Hospital—J. Osterhaus. This is a medical malpractice case where the plaintiff suffered brain damage and disability after treatment in an ER. The trial court granted summary judgment to a hospital, holding that it could not be held vicariously liable because the ER was operated by an independent contractor and that company employed the treating physician. The trial court also granted summary judgment to the hospital on claims of actual agency, apparent agency, and nondelegable duty claims. On appeal, however, the First DCA held that factual issues about whether the treating physician acted as the hospital’s agent precluded summary judgment. The DCA cited the Supreme Court of Florida for the proposition that a physician’s contracted status as an independent contractor does not preclude a finding of agency. The contract gave the hospital ultimate control over emergency department personnel and the methods and practices employed by ER physicians. Several provisions granted the hospital rights in policy matters, and the hospital had final physician-hiring authority or to refuse membership admission to a physician. In regard to apparent agency, the representations of the principal or their subjective beliefs is not what matters; their action is what matters. On the nondelegable duty issue, the court affirmed, finding that liability for medical negligence can be delegated to independent contractors.

**Third DCA**

Alvarez v. Florida Department of Health, Board of Medicine—J. Logue. Future Medical Malpractice Alert! Seven board certified plastic surgeons living in Miami-Dade county and a humorously titled non-profit called “Surgeons for Safety, Inc.” that represents plastic surgeons in Florida challenged the board of medicine’s emergency rule requiring gluteal fat grafting (moving fat from one body part to another to do things like a “Brazilian Butt Lift”), which was causing more deaths than *any other aesthetic surgical procedure*, must have additional safety measures. The deaths were being caused by in-office procedures where fat was accidentally injected below the superficial gluteal fascia. The emergency rule requires an ultrasound to guide the fat injection to prevent crossing the fascia while injecting fat, and the rule limits doctors to performing three of the procedures per day because they take three hours and one hour of turnaround time. Immediate review of such rules is authorized by section 120.68(1)(b), Florida Statutes. Such review is limited to the four corners of the emergency rule. The doctors maintained that the number of dead patients wasn’t enough of an emergency in the grand scheme of things given how many of these procedures are done, but the DCA declined to second-guess the board of medicine on the “number of acceptable deaths involved in purely elective cosmetic surgeries.”

Cini v. Cabezas—J. Miller. A reminder: the proper procedure for appellate review of the validity of a motion to disqualify a judge is a petition for a writ of prohibition. The standard for obtaining such a writ to show that the facts, if assumed to be true, would cause the movant to have a well-founded fear that he or she will not receive a fair trial at the hands of that judge. The test is objective. The DCA addressed what it called a “recurring” issue of whether attorneys contributing to judge’s campaigns presents enough conflict of interest that disqualification was warranted. The DCA observed that while Florida chooses to elect judges rather than appoint them, some collection and expenditure of money had to be tolerated. A “permissible contribution to a judicial campaign” is “insufficient to warrant disqualification.” More extensive involvement, however, in a contested, ongoing, or recent re-election campaign may constitute legally sufficient grounds for disqualification. The case collects several examples of involvement or contributing to campaigns that triggers or does not trigger disqualification. In this case, the respondent law firm was one of 16 firms that hosted a single event for the judge’s reelection several months before the judge issued adverse orders against petitioner. This was not enough to warrant disqualification. The court did drop a footnote that one of the issues involved a refusal to accommodate the lawyer’s preplanned out-of-state vacation, and the DCA cautioned courts to be reasonable in such matters.

Lopez v. Miami-Dade County—J. Gordo. Plaintiff lost control of his car and struck a guardrail after driving over a pothole covered with water. Two years later, he sued Miami-Dade County and the Florida Department of Transportation for negligence in badly maintaining the road. He later added as defendants the two owners of the properties abutting the portion of the road in question, alleging that the second of those property owners negligently failed to maintain the proper elevation of the swale area in violation of county codes. (A swale is a ditch used to carry off water). That property owner moved to dismiss with prejudice, and the court granted the motion on the basis that the property owner did not owe the plaintiff a duty. While the city code did require property owners to maintain proper elevation within the swale, the DCA and circuit court agreed that that did not create a duty by property owners to private individuals for violations or injuries caused by violations of the code because the code did not automatically impose liability; it provided that the county had to give notice of the violation, allow time to comply, and then the county had the option to enforce the code against the property owner). The plaintiff also failed to allege that water accumulating due to the poorly-maintained swale caused the defect in the road, that the accident occurred in the swale area, that the property owners had a duty to maintain the road, or that they had knowledge of the defect in the road. He also did not allege that his injury was foreseeable due to improper maintenance of the swale. Florida law does not hold residential and commercial landowners accountable for injuries resulting from defects to areas or roadways owned by the city or county. Thus, that property owner is off the hook. Affirmed.

The Shir Law Group, P.A. v. Carnevale—This *per curiam* opinion reversed a $17,000 award of attorney’s fees imposed as a sanction by a trial court because there was no notice or evidentiary hearing. The Shir Law group moved for sanctions, alleging that Carnevale’s attorney, Lopez, disclosed confidential settlement agreements in violation of a court order. Two years later, Carnevale filed a cross-motion for sanctions against Shir’s attorney for “litigation misconduct” and asked that the court refer the attorney to the Florida Bar for discipline. The trial court then held a hearing and denied both motions, stating that the Shir lawyers had publicly disclosed the settlement details *before* Lopez had, that there was no court order violated by the disclosure, and that everyone owed each other more respect as fellow human beings. The court then orally found that Shir’s motion was not supported by facts or law, so Shir’s clients had to pay Lopez attorney’s fees in connection with defense of the motion to the tune of 10 hours at $675 an hour for Lopez’s time and 14 hours at $550 for another attorney’s time. The time and hourly rates were based solely on Lopez telling the court his hourly fee and taking his word for how many hours he was seeking. The later written order then stated that the Shir Defendants violated a 2015 order in disclosing the confidentiality order and had then filed a motion for sanctions against Lopez for disclosing information they had already disclosed. On appeal, the DCA found that the lack of notice and opportunity to call witnesses was fatal to the order, so the court found that it did not need to reach the issue of sufficiency of the findings or calculation of the award. (NOTE: While the DCA did not reach the appropriateness of the award, the law is clear that self-proof of reasonable hours and rates is forbidden, and fees must be supported by expert testimony, as was discussed in the summary of Mitchell v. Flatt, a Second DCA case from last week).

Sunshine Rehab & Medical Inc. v. Allstate Fire and Casualty Insurance—J. Miller. Two medical service providers appealed orders granting summary judgment in Allstate’s favor. The medical service providers challenged reimbursements made by Allstate under person injury protection (PIP) no-fault insurance policies. The policies provided legally sufficient notice that the insurance company would only reimburse medical services at the fee schedule identified in section 627.736(5)(a)-(f), Fla. Stat. Apparently the medical provides (as assignees of the insured) found the payment amounts to be insufficient, but the contract incorporated statutorily reasonable rates, and Allstate paid the correct amounts under the statute. Affirmed. The court adopted similar opinions in several consolidated cases, but in several others, the court was constrained to reverse in part because the record was devoid of the summary judgment evidence showing that Allstate actually made the payments, so in those cases, the court remanded. Language in the opinion appears to imply that the motion is ”lost” because of the lack of the evidence, and Allstate would be prohibited from coming forward with the evidence on remand. Because the opinion affirmed in part, reversed in part, and remanded for further proceedings, whether Allstate can have a second bite at the summary judgment apple in the opinions that noted the lack of record evidence should be an interesting fight unless the parties obtain further clarification from the DCA.

Vericker v. Powell—J. Scales. DCA CONFLICT ALERT! Following the Fourth DCA and certifying conflict with contrary cases from the Second DCA, the Third DCA has declined to find certiorari jurisdiction to review the denial of a motion for summary judgment where the petitioner alleges that he was entitled to summary judgment under Florida’s anti-SLAPP statute. Section 768.295 of the Florida Statutes, titled “Strategic Lawsuits Against Public Participation (SLAPP) prohibited” and commonly known as Florida’s Anti-SLAPP statute, prohibits lawsuits that “are inconsistent with the right of persons to exercise such constitutional rights of free speech in connection with public issues.” § 768.295(1), Fla. Stat. (2021). Specifically, the statute prevents the filing of “any lawsuit, cause of action, claim, cross-claim, or counterclaim against another person or entity without merit and primarily because such person or entity has exercised the constitutional right of free speech in connection with a public issue, or right to peacefully assemble, to instruct representatives of government, or to petition for redress of grievances before the various governmental entities of this state, as protected by the First Amendment to the United States Constitution and s. 5, Art. I of the State Constitution.” § 768.295(3), Fla. Stat. (2021). The DCA admitted that there were strong policy arguments for exercising cert and that such a result might be commendable, but felt that an amendment to the rule was required before the court would have jurisdiction to review the summary judgment order by interlocutory appeal. The court expressly referred the issue to the Florida Bar’s appellate rules committee to consider adding orders determining motions under the Anti-SLAPP statute to the list of appealable non-final orders under Rule 9.130.

**Fourth DCA**

Comisar v. Heritage Property & Casualty Insurance Company—C.J. Klingensmith. The merits of this homeowner’s insurance coverage dispute are not summarized. The opinion does provide a good refresher, however, for declaratory actions in Florida. Parties may seek declaratory relief from courts as a matter of law. § 86.101, Fla. Stat. (2021). A party that is in doubt about its rights under a contract or other instrument may seek a judicial declaration to determine those rights. Questions of fact and disagreements concerning coverage under insurance policies are proper subjects for a declaratory judgment if necessary to a construction of legal rights. To survive a motion to dismiss, a party seeking declaratory relief must show: there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interest[s] are all before the court by proper process or class representation and that the relief sought is not merely giving of legal advice by the courts or the answer to questions propounded from curiosity. The test of the sufficiency of a complaint in a declaratory judgment proceeding is not whether the complaint shows that the plaintiff will succeed in getting a declaration of rights in accordance with his theory and contention, but whether he is entitled to a declaration of rights at all. In this case, the trial court erred in dismissing the complaint because the homeowners suffered water damage to the roof and sought declaratory judgment that the damage was covered under their policy. The lower court had been suspicious that the dec action was a breach of contract claim in disguise, but the DCA held that it didn’t matter even if it was. A dec action can overlap with another potential cause of action. The only question is whether it meets the test for a dec action, not whether it could meet the test for some other cause of action.

Hanopole v. State Farm Mutual Automobile Insurance Company—J. Gerber. This was an appeal of a personal injury protection (PIP) action in county court. Hanopole is a chiropractor who claimed to be the assignee of the insured. The doctor, as assignee, sued State Farm for nonpayment of medical bills. State Farm moved to dismiss under Rule 1.130, arguing that the doctor had to attach to the complaint any instruments or documents that give rise to the claim or confer standing. State Farm argued that the rule required the doctor to attach the written assignment of benefit (AOB) document whereby the insured assigned her rights to the doctor. State Farm recognized that section 627.736 allows medical providers to file suit against a carrier for medical services rendered, but State Farm argued that Florida law requires that the provider had to demonstrate a valid assignment of benefits. At the hearing, Hanopole argued that in a motion to dismiss, the court had to take all allegations as true, and because he had alleged that the patient had assigned benefits, it should be considered true and attaching the document was unnecessary. When the judge grilled the attorney, Hanopole’s attorney refused to answer whether he actually had the assignment of benefits, but stated that he would provide it in discovery. He refused to answer the judge’s question, saying he had no obligation to provide the AOB simply to survive a motion to dismiss. The county court agreed with State Farm and dismissed the complaint with prejudice due to the judge finding a lack of candor with respect to the lawyer’s refusal to answer whether he had the AOB document with him. The DCA reversed on three separate grounds. First, the court was wrong to dismiss with prejudice. Failure to attach a document is a remediable offense, and an opportunity to amend had to be given. Second, while section 627.736 requires a presuit demand letter that attaches a copy of the AOB, the statute did not require attaching it to the complaint, and the motion to dismiss was not premised on a lack of proper presuit notice. Third, Rule. 1.130 does not require an AOB to be attached to a complaint as a document giving rise to the claim. The complaint fully apprised State Farm of the nature of the cause of action. The AOB is not the source of the action. For example, the insured could have sued the insurance company. While the doctor had to *allege* an AOB, he did not have to *attach* it to the complaint. The DCA did, however, extensively admonish counsel for saying to the judge, when asked if he had the AOB documents, “I swear, the law is the law, Your Honor. If you want to do whatever you do, fine. All right, thank you, Your Honor.” The Court found a violation of the preamble of Chapter 4 of the rules regulating the Florida Bar (demonstrating respect for the court). The court noted that “trial counsel should have directly answered the county court’s question regarding whether the provider possessed the insured’s alleged written assignment, as the provider had alleged in the complaint. Any direct answer would not have prejudiced the provider. More importantly, after the county court’s ruling, unlike the provider’s trial counsel’s disrespectful statement quoted above, counsel’s only comment should have been ‘Thank you, Your Honor.’” Judge Artau DISSENTED IN PART, CONCURRING with the portion of the opinion finding that opportunity to amend should have been given, but dissenting from the holding that Rule 1.130 did not require attachment of the AOB to the complaint because section 627.736 required demonstration of an AOB and Rule 1.130 required attachment of a document that gives rise to the right to bring the action. Judge Artau thought that this was sufficient to require attachment of the AOB to the complaint.

Mech v. Brazilian Waxing By Sisters, Inc.—J. Forst. The holding of this case was that while Rule 1.510(a) requires courts to explain their reasons for granting or denying summary judgment, some rules of civil procedure are not necessarily applicable in small claims courts, the rule did not apply, and a summary order under Rule 7.135, Fla. Sm. Cl. R., granting summary judgment without expressing the reasons was not error. (It should be noted that come rules of civil procedure are applicable in all small claims cases, and the parties or the court can request that all of the rules of civil procedure be applied, but that did not happen here).

Perez v. Citizens Property Insurance Corporation—J. Warner. The DCA reversed summary judgment in Citizens’ favor because there was a question of fact as to whether lack of timely notice of the claim prejudiced Citizens. The homeowner policy required “prompt notice” to Citizens and provided that if delay in notice caused prejudice to Citizens, the claim would be denied. Because a tenant occupied the property and performed some self-repair after a hurricane, Citizens argued that they were prejudiced by the insureds not reporting the claim until a substantial amount of time had passed, but the insureds had offered the affidavit of an expert who stated unequivocally that the remaining damage was definitely caused by the hurricane. The insureds failed to establish the date they first became aware of the damage, so they failed to make a showing sufficient to establish prompt notice. There was no error in granting summary judgment on that issue. The other half of the inquiry, however, was prejudice. Interestingly, though the homeowners were the plaintiffs, the court found that the insurer had the burden of proving prejudice from the late notice. The trial court erroneously presumed prejudice, but prejudice is a question of fact, and Citizens presented no evidence of prejudice. Because the expert could determine, even with the delay in notice that Hurricane Irma was definitely the cause of the damages to the property and Citizens did not rebut that determination, it failed to show it was prejudiced.

**Fifth DCA**

At Home Auto Glass, LLC v. Mendota Insurance Company—J. Lambert. A refresher on *forum non conveniens*. (NOTE: An order concerning venue is an appealable nonfinal order under Rule 9.130(a)(3)(A)). The Glass Company was assigned a car owner’s rights for replacing a car windshield, and it sued the car insurance carrier, Mendota, in small claims court in Seminole County for denying the claim. The trial court granted Mendota’s motion to transfer venue from Seminole County to Alachua County based on an argument of *forum non conveniens*. The motion was unsworn. Venue was proper in Seminole County under section 47.051, which allows actions against foreign corporations doing business in Florida in any county where the corporation has an agent or representative, and Mendota had an agent or rep in Seminole County. Mendota argued that under section 47.122, Fla. Stat., it was entitled to move to Alachua County (Gainesville) because it was more convenient. Mendota argued that the insured, a key witness, resided in Alachua, and the windshield was replaced in Alachua and the insured signed the assignment of benefits in Alachua. The court granted the motion on two grounds: convenience of witnesses and the interests of justice in not clogging Seminole dockets with an Alachua case. Under 47.122, a plaintiff’s forum selection is presumed correct and a movant has to overcome that presumption. Similar to a summary judgment motion, pleading that a forum is inconvenient is insufficient. The movant must offer evidence via an affidavit, deposition, or other evidence. The dispute between the parties was about whether the charge was excessive, which would be decided by experts, not the lay testimony. It wasn’t important to produce the insured or hear the case where the windshield was replaced. Without evidence in the form of affidavits, depositions, or live testimony, Mendota could not meet its burden. The DCA declined to answer the question of whether the interest of justice in reducing the clogged docket—without a showing of inconvenience to a party—was sufficient on its own to justify a change in venue. Because this was a bench trial, no Seminole jury would be burdened with the case. The key factor was, however, the lack of evidence to support the motion, and the order granting the motion was reversed.