**TERRY’S TAKES**

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

**Terry P. Roberts**

**Terry@FRTrialLawyers.com**

**Director of Appellate Practice**

**Fischer Redavid PLLC**

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**Eleventh Circuit**

Carson v. Monsanto Company—(J. Tjoflat; 11th Cir.; 10/28/22). This case was summarized during the week of July 11-15, 2022, so it will not be re-summarized. The court withdrew its prior opinion and substituted a new one in its place. They still hold that Plaintiff’s claim under Georgia state law for failure to warn is not preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) or the Environmental Protection Agency’s (“EPA”) actions pursuant to it. The failure to warn claim related to Plaintiff’s regular use—for 30 years—of Roundup on his lawn, which he believes caused his malignant fibrous histiocytoma due to the ingredient glyphosate. The new opinion was apparently issued in light of Monsanto’s motion for rehearing, where they pointed to various EPA documents to suggest that the EPA had acted with the force of law such that Monsanto could not label Roundup as a carcinogen without consequences from the EPA. None of the committee reports or letters cited by Monsanto have the “indicia of formality” necessary to pass the Mead test.

<https://media.ca11.uscourts.gov/opinions/pub/files/202110994.op2.pdf>

Christmas v. Harris County, Georgia et al—(J. Altman; 11th Cir.; 10/28/22). Christmas was raped by a Georgia police officer who was convicted and sentenced to eight years. Christmas sued the sheriff in both his official and individual capacities, alleging that he failed to prevent the officer from assaulting her. (While the county was also initially sued, the case against the county was dismissed and the court only considered matters relating to the sheriff). The sheriff immediately fired the officer after the complaint, and an investigation reached out to women he had pulled over in the preceding months and uncovered that he had a history of demanding oral sex during traffic stops or following women to their homes after pulling them over. After the conviction, Christmas sued. Only her § 1983 claim survived dismissal. Her claim was based on a theory of “supervisory liability,” including allegations that the sheriff knew that the officer would act unlawfully, but he refused to stop him from doing so and he had a policy of failing to track officers after complaints. The sheriff moved for summary judgment, arguing that Christmas failed to show a case for supervisory liability and that even if she had, he was entitled to summary judgment under the qualified immunity doctrine. The lower court found qualified immunity applied, and Christmas appealed. “Qualified immunity offers complete protection for government officials sued in their individual capacities if their conduct ‘does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” To qualify for the immunity, the official “must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred.” This is usually the easy part in police cases, and that’s true here. The sheriff was acting as a sheriff. If the official satisfies the first part of the test, the burden shifts to the plaintiff to show that qualified immunity is not appropriate.” “To overcome a qualified immunity defense, the plaintiff must make two showings.” First, “the plaintiff must establish that the defendant violated a constitutional right.” Second, “the plaintiff must show that the violation was clearly established.” Courts are “permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first.” The Eleventh Circuit chose to analyze the “clearly established” prong before the “constitutional right” prong, because the Court found that Christmas never made a serious argument that the sheriff violated any clearly established law. The brief dedicated a sentence or two to the issue, and the Eleventh Circuit found that Christmas essentially waived that issue. Though there was no reason to go on, the Eleventh Circuit then found that Christmas also failed the first prong because “supervisory officials are not liable under § 1983 for the unconstitutional acts of their subordinates on the basis of respondeat superior or vicarious liability.” Supervisory liability under § 1983 only occurs when the supervisor personally participates or there is a causal connection between the actions of the supervising official and the alleged constitutional deprivation. Yes, the “causal connection” can be demonstrated by proving that the supervisor had notice of the abuse and failed to act or that the supervisor was deliberately indifferent to constitutional rights or when the supervisor directed the subordinate to act unlawfully or knew they would and did not stop them. A causal connection could also be shown that a failure to train officers may constitute a policy giving rise to governmental liability. The Court held that Christmas failed all of these tests, however. The court cited precedent for the proposition that only pervasive and flagrant violations, not isolated occurrences, could give rise to notice, and “isolated occurrences are all we have in this case.” The sheriff was only aware of two prior allegations against the officer—one after a person died in his custody, and one when the officer’s ex-wife reported that that he followed her in his police cruiser—but neither of those involved a sexual assault or provided notice to the sheriff of the officer’s “proclivity for sexually assaulting people in his custody.” The allegation about policies of considering only formal, written complaints, etc, were not “policies” because “policies” must be formally adopted. The Eleventh Circuit stated that these were only “customs,” not policies. Also, the sheriff did report both Christmas’s allegations and the officer’s ex-wife’s allegations based on informal complaints. As far as training goes, no training is needed to inform officers that it’s not okay to sexually assault people in custody. The court condemned the rapist, but held that the sheriff had “nothing to do with that misconduct,” had no notice it would occur, and “cannot be held responsible for the unpredictable acts of his subordinate.”

<https://media.ca11.uscourts.gov/opinions/pub/files/202111187.pdf>

**Supreme Court of Florida**

State of Florida v. Garcia—(J. Couriel; FLSC; 10/27/22). While this is not a personal injury opinion, it is significant enough that every lawyer will be interested in the holding. The FLSC took the case to answer a question certified by the Fifth DCA about whether requiring a criminal defendant to disclose the passcode to his smartphone violates his constitutional right against self-incrimination under the Fifth Amendment. (NOTE: It is not a Fourth Amendment search and seizure case; it’s a Fifth Amendment right to silence case). The court dodged the merits, but the opinion leaves little doubt what its opinion on the merits would be. The court held that the Fifth DCA should not have granted a petition for certiorari in the case because being ordered to disclose the passcode of a smartphone does not cause irreparable harm that cannot be corrected on appeal. The court conceded that disclosing the passcode could hurt the defendant at trial because it could provide evidence that the phone belonged to him (something he refused to concede) and the phone found at the scene of the crime might be used to tie him to the crime, but he could remedy any violation of his rights via a postjudgment appeal. The Court declined to hold that there was irreparable harm, however, because it did not know what evidence the unlocked smartphone would yield, whether it would be admitted by the trial court, or whether it would be rebutted by Garcia. (NOTE: This would seem to be true for *every* case where discovery is ordered but a DCA quashes the order after a party files for a petition for certiorari. Those opinions rarely conduct a microanalysis of what the actual evidence would show or whether it would ultimately be admitted at trial. Such opinions usually just note that the discovery constitutes something like work product or privileged information, so disclosure is harmful. The compelled information here is either relevant and admissible or irrelevant and inadmissible. If any relevant and admissible information gleaned from the phone would violate the constitutional right against self-incrimination—something that seems at least as important as work product or attorney-client privilege—the matter seems suitably ripe for addressing the merits via cert. Ultimately, it’s hard to see how this isn’t possibly a case of courts applying one standard of “irreparable harm” for civil disclosures and one more rigorous rule for criminal defendants even though the danger of irreparable harm would seem to always be greater in a criminal case than in a civil case.) The court held that there was not a violation of clearly established law because the matter appeared to be one of first impression, which the parties admitted. (NOTE: This is the terrifying Catch-22 of the cert standard. While some courts might view a provision of the Bill of Rights as clearly established, the Supreme Court of Florida decided to look at the narrow question of the bill of rights as applied to smartphone passwords and conclude that because there is no Florida case regarding smartphone password on point yet, the right against self-incrimination is not clearly established. In other words, you can’t win because someone just like you did not already win on this sub-issue yet. But it all comes down to how specific the court is willing to view the question being presented and how willing they are to distinguish clearly established law from the facts in a case. Different courts come to different conclusions.) The Supreme Court of Florida held that because different courts have made different holdings regarding whether smartphone passcodes are “testimonial,” there is no clearly established right at play. The appeal was unanimous, but Judges Grosshans recused herself, and the newest justice, Francis, did not participate, likely because she was not present for the oral argument.

<https://www.floridasupremecourt.org/content/download/851656/opinion/sc20-1419.pdf>

**First DCA**

Maddox v. State of Florida—(Per Curiam; 1DCA; 10/26/22). This short opinion reminds us that if a county judge denies a motion regarding disqualification, the way to challenge that is via a petition for a writ of prohibition in the district court of appeal. Maddox filed a writ of prohibition in the circuit court, and the circuit court denied the petition. Maddox then filed what he thought was a petition for certiorari seeking second-tier review in the First DCA. The First DCA noted that the circuit court had lacked jurisdiction to entertain the petition for a writ of prohibition, and the First DCA kindly decided to treat Maddox’s petition for second-tier cert review as an original proceeding seeking a writ of prohibition. That’s where the kindness ended, however, because the DCA held that the motion was legally insufficient on its face, so the DCA denied it on its merits.

<https://www.floridasupremecourt.org/content/download/851630/opinion/222834_DC02_10262022_144906_i.pdf>

Wilson v. Florida Commission on Human Relations—(Per Curiam; 1DCA; 10/26/22). (NOTE: The Florida Commission on Human Relations (“FCHR”) is essentially Florida’s state-level version of the Equal Employment Opportunity Commission (“EEOC”), which has an important role in presuit investigations of alleged discrimination in the workplace. Similar to the EEOC on the federal level, Floridians suing employers in state court for alleged discrimination often must obtain a right-to-sue letter from the FCHR as a presuit requirement before filing a Complaint in circuit court.) This short citation PCA evidently arose from Wilson’s dissatisfaction with FCHR’s final agency determination in favor of an employer on her claim under Florida’s Whistleblower Act. The First DCA cited Stanton v. Fla. Dep’t of Health, 129 So. 3d 1083 (Fla. 1st DCA 2013) for the proposition that when a whistleblower complaint does not meet the *prima facie* elements necessary to initiate operation of the Whistleblower’s Act, the FCHR has no authority to proceed with a fact-finding investigation. The court also cited Washington v. Fla. Dep’t of Revenue, 337 So. 3d 502 (Fla. 1st DCA 2022) for the proposition that a protected disclosure must be a written and signed complaint in order to trigger the protections of the Whistleblower’s Act when a complainant has not claimed to have participated in an investigation or to have made a complaint through a hot-line. In other words, the workers’ petition was legally insufficient to trigger any FCHR action. Affirmed.

<https://www.floridasupremecourt.org/content/download/851614/opinion/213417_DC05_10262022_142028_i.pdf>

**Second DCA**

Beck v. Wright—(J. Sleet; 2DCA; 10/28/22). Beck sought leave in the trial court to amend her complaint to add a claim for punitive damages. The trial court denied the motion to amend. Rule 9.130, Fla. R. App. P., was just amended to allow appeals of nonfinal orders that grant or deny motions for leave to amend to assert a claim for punitive damages, but that new rule took effect on April 1, 2022. This appeal arose in February 2022. Prior to the amendment, the order was not appealable. The Court declined to view the case as a petition for a writ of certiorari because while orders ***allowing*** an amendment to ***add*** a punitive damages claim were previously reviewable via cert, orders ***denying*** a motion to amend a complaint to add a punitive damages claim were ***not*** reviewable by cert. Such orders failed the “imminent harm” test because plaintiffs can appeal at the end of the case. Thus, the court dismissed the appeal for lack of jurisdiction.

<https://www.floridasupremecourt.org/content/download/851733/opinion/220527_DA08_10282022_090135_i.pdf>

**Third DCA**

Kapitanov v. Sinnaker Bay at the Waterways Condo. Assoc., Inc.—(Per Curiam; 3DCA; 10/26/22). Further cementing the “three strikes and you’re out rule,” the 3d DCA cited its rule of thumb that it would affirm most dismissals with prejudice after three attempts have been given to state a claim. In this case, the party had been given five chances, and the dismissal with prejudice was affirmed.

Pulwer v. Pearl Brothers, LLC—(Per Curiam; 3DCA; 10/26/22). Pearl Brothers LLC and other plaintiffs sued Pulwer and a fellow co-defendant in a civil case. The defendants filed motions to dismiss to complaint. Before ruling on those motions (which would result either in a dismissal or an instruction that the defendants must file an answer to the complaint), the trial court issued an order setting the case for trial. Rules 1.440, Fla. R. Civ. P., provides that an action is at issue and ready to be set for trial “after any motions directed to the last pleading served have been disposed of or, if no such motions are served, 20 days after service of the last pleading.” Because the motions to dismiss had not been ruled on, setting the matter for trial was premature. The petition for writ of mandamus was granted to quash the order setting the case for trial. Briefly, I want to discuss how this is a strange use of a petition for a writ of mandamus. A writ of mandamus is a writ used to compel an official to perform a ministerial act where there is no discretion and a clear legal duty to do so, but the official has not performed the act. One would think that the proper vehicle for challenging the order setting the case for trial would have been a petition for a writ of certiorari. The DCA expressly cited prior precedent holding, however, that Rule 1.440 is mandatory, that trial courts must strictly adhere to the rule’s requirements, and that the court’s obligation to “hew strictly to the rule’s terms is so well established that it may be enforced by a writ of mandamus compelling the court to strike a noncompliant notice for trial or to remove a case from the trial docket.” The purpose of mandamus is not to review a lower court ruling for prejudicial error; rather, it is meant to enforce the respondent's unqualified obligation to perform a clear legal duty. If the petitioner is entitled to demand performance of the duty, he or she need not preserve the issue beyond making the demand. Further, it is unnecessary for the petitioner to suffer prejudice as a result of the respondent's dereliction. All that must be shown is that (1) the respondent is duty-bound to act under the law, and (2) the respondent has failed or refused to do so. A third and final element is that the petitioner must have no adequate legal remedy for the respondent's failure to carry out its duty. Thus, mandamus may be used to enforce a trial court’s decision to correctly follow rules of procedure that do not involve any discretion.

<https://www.floridasupremecourt.org/content/download/851574/opinion/221462_DC03_10262022_094837_i.pdf>

Ted & Stan’s Towing Service, Inc. v. Bulk Express Transport, Inc.—(J. Lobree; 3DCA; 10/26/22). Bulk Express sued Ted & Stans for negligence in towing its commercial truck, alleging that the failure to release the truck’s transmission resulted in significant damage during towing. Ted & Stan alleged a different cause for the damage. Bulk Express sought discovery of all documents substantiating that affirmative defense and each document that Ted & Stan’s possessed that referred to towing the vehicle. In response, Ted & Stan filed a privilege log stating that the affirmative defense relied on work product—an incident report prepared by the truck driver in anticipation of litigation—that should be protected from disclosure. The trial court ordered Ted & Stan to produce the report. Ted & Stan filed a petition for a writ of certiorari. Documents prepared by or on behalf of a party in anticipation of litigation constitute protected work product. Under Fla. R. Civ. P. 1.280(b)(4), an opposing party can only obtain such material based upon a showing that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means and had need of the materials in preparation of the case. The need and undue hardship cannot simply be alleged; they must be demonstrated by an affidavit or other sworn testimony. The document was a form prepared by the tow-truck driver for Ted & Stan’s insurer. It constituted work product. Bulk Express’s argument that it needed the report to test the veracity of the tow-truck driver at his deposition “falls entirely short” of meeting the burden for disclosure of work product. The order compelling it was a departure from the essential requirements of law. (NOTE: Again, compare this to State of Florida v. Garcia, summarized above. The opinion here does not determine that there is harmful information in the driver’s report or that the report would be deemed relevant and admissible. The court did not cite prior opinions specifically involving claims that accident reports prepared by employees constituted work product. Instead, they simply note that because it was a report submitted to insurance by an employee, it meets the clearly-established definition for work product and it would constitute irreparable harm for the company to have to disclose it no matter what it says. Again, it seems hard to view this as simply setting out one standard for “irreparable harm” for civil disclosures and one more rigorous rule for criminal defendants.)

<https://www.floridasupremecourt.org/content/download/851595/opinion/220447_DC03_10262022_103927_i.pdf>

**Fourth DCA**

Mendelson v. Howard, et al—(J. Artau; 4DCA; 10/26/22). This is a narrow opinion on attorneys’ fees and costs, but it would be applicable to any cases in which a party attempts to call an expert witness. ***Entitlement*** to fees and costs under section 57.105, Fla. Stat., was stipulated. The *amount* of the fees was contested, however. At the fee hearing, the plaintiff attempted to present testimony from an experienced Florida attorney in regard to whether the requested fee amounts were reasonable. They attorney had never previously testified as an expert, but he was experienced in attorney billing, had previously litigated fee disputes, and was a practicing attorney familiar with the reasonable amounts customarily awarded for similar litigation matters. The trial court excluded his opinions, holding he was not qualified to testify as an expert (apparently solely because he had not testified as an expert before). The court did allow testimony from the defense’s expert attorney witness, and it awarded the amounts solely based on that testimony. The Plaintiff appealed. A trial court’s determination “to exclude expert testimony is reviewed for an abuse of discretion.” Bunin v. Matrixx Initiatives, Inc., 197 So. 3d 1109, 1110 (Fla. 4th DCA 2016). While a trial court has “discretion to determine a witness’s qualifications to express an opinion as an expert,” a trial court’s exclusion of an expert’s opinion will only be upheld “absent a clear showing of error.” Brooks v. State, 762 So. 2d 879, 892 (Fla. 2000). Noting federal rule 702 and the Daubert standard had been incorporated into section 90.702, Fla. Stat., the standard for an expert is simply that “(1) [t]he testimony is based upon sufficient facts or data; (2) [t]he testimony is the product of reliable principles and methods; and (3) [t]he witness has applied the principles and methods reliably to the facts of the case.” Nothing about the test requires that one has testified as an expert in the past. (NOTE: Such a rule would create a Catch-22 and result in no further experts being qualified once the current crop of experts retires.) The court can take the expert’s level of experience into account when deciding how much weight to afford it, but not in deciding to bar the testimony altogether. The fee order was reversed and remanded for a new hearing.

<https://www.floridasupremecourt.org/content/download/851586/opinion/211552_DC08_10262022_095130_i.pdf>